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## Free Expression on Campus: Mitigating the Costs of Contentious Speakers

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# FREE EXPRESSION ON CAMPUS: MITIGATING THE COSTS OF CONTENTIOUS SPEAKERS

SUZANNE B. GOLDBERG\*

"If you're afraid to offend, you can't be honest."

"If you offend me, I can't hear what you're trying to tell me."

— overheard on campus

The debate over how colleges and universities should respond to contentious guest speakers on campus is not a new one. A quick look back to the early 1990s, among other times, shows commentators squaring off much as they do today about the tensions between protecting free expression and ensuring meaningful equality.<sup>1</sup>

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\* Herbert and Doris Wechsler Clinical Professor of Law, Columbia Law School. With thanks to Vince Blasi, Lou Kelley, Henry Monaghan, and David Pozen for many thoughtful suggestions. Thanks, too, for research assistance to Sammy Rosh, Nicole Walsh, Jordan Weatherwax, and Karis Yi and to the organizers of the National Federalist Society Symposium for their invitation to participate. This essay, which draws from my remarks at the symposium, incorporates insights from my role as Executive Vice President for University Life at Columbia University, which has included responsibility for administering Columbia's rules governing protests at the University. However, this essay expresses my views in my personal capacity only and does not comment on Columbia's policies or express views for or on behalf of the University.

1. As Mark Graber summarized the debate at the time with respect to public forums more generally:

Contemporary progressives who oppose restrictions on bigoted expression insist that government respects all citizens equally when all citizens are allowed to express their beliefs. Contemporary progressives who favor some restrictions on bigoted expression insist that government respects all persons equally when officials forbid speech that states or clearly denies that some citizens are not worthy of equal concern or respect.

Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 VAND. L. REV. 349, 353 (1995). He also described similarities with decades-earlier debates about the costs and benefits of unfettered expression in a variety of settings. *Id.* at 372. Cf. Chris Quintana, *Even in Fascism's Heyday, Anti-Fascists on Campus Were Controversial*, CHRON. HIGHER EDUC. (Apr. 12, 2017),

Perhaps not surprisingly, the issues that contested speakers address are also much the same as they have been for several decades—government action and inaction on various issues, the rights and social status of identity-based groups, and conflicts within political territories and regimes, among others. And, I would predict, questions about how institutional leaders

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<http://www.chronicle.com/article/even-in-fascism-s-heyday/239761> [<https://perma.cc/44C9-XA98>] (discussing student protests of speakers during the 1930s).

During the early 1990s, debate focused especially on codes that sought to regulate “hate speech” on campuses. *See, e.g.*, ROBERT M. O’NEIL, *FREE SPEECH IN THE COLLEGE COMMUNITY* 3 (1997); J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991); Arthur L. Coleman & Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campus*, 23 J.C. & U.L. 91, 96 (1996); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 434; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989); Evan G.S. Siegel, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1398 (1990).

More recently, commentators have engaged questions about the relationship between free speech and equality with a focus on issues other than formal speech codes. *See, e.g.*, GREG LUKIANOFF, *UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE* (2012); Nina Burleigh, *The Battle Against ‘Hate Speech’ on College Campuses Gives Rise to a Generation that Hates Speech*, NEWSWEEK (May 26, 2016), <http://www.newsweek.com/2016/06/03/college-campus-free-speech-thought-police-463536.html> [<https://perma.cc/HP4Z-XKG9>]; Jonathan R. Cole, *The Chilling Effect of Fear at America’s Colleges*, ATLANTIC (June 9, 2016), <https://www.theatlantic.com/education/archive/2016/06/the-chilling-effect-of-fear/486338/> [<https://perma.cc/8B5Z-AAAZ>]; *see also Free Expression on Campus: A Survey of U.S. College Students and U.S. Allies*, KNIGHT FOUND. 4 (2016), [https://www.knightfoundation.org/media/uploads/publication\\_pdfs/FreeSpeech\\_campus.pdf](https://www.knightfoundation.org/media/uploads/publication_pdfs/FreeSpeech_campus.pdf) [<https://perma.cc/2SWN-4CHA>] (noting that many students “believe colleges should be allowed to establish policies restricting language and behavior that are intentionally offensive to certain groups, but not the expression of political views that may upset or offend certain members of groups”). Several new books, published after this article was written, also take up some of the issues discussed here. *See, e.g.*, ERWIN CHERMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* (2017); JOHN PALFREY, *SAFE SPACES, BRAVE SPACES: DIVERSITY AND FREE EXPRESSION IN EDUCATION* (2017).

Beyond the campus context, the government’s role in regulating hate speech both domestically and globally has long been debated, with a generally greater willingness to tolerate government regulation outside the United States than within. *See generally* ALAN BROWNSTEIN & LESLIE GIELOW JACOBS, *GLOBAL ISSUES IN FREEDOM OF SPEECH AND RELIGION* (2009) (reviewing various countries’ free-expression law and doctrine); JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012) (arguing that Americans should give greater consideration to the harm caused by hate speech).

should respond to these speakers will still be quite pressing twenty or thirty years from now.

My aim in this brief essay is not to rehash the familiar debates but rather to consider whether and how schools ought to mitigate harms that may occur as a result of these speakers presenting their views on campus. That is, I start from the premise that, for both non-consequentialist and pragmatic reasons, colleges and universities should allow invited speakers to give their remarks on campus and should undertake serious efforts to minimize and prevent disruption.<sup>2</sup> I also begin with the premise that some of these talks may come with real costs for individuals and groups within the community, for the school community as a whole, and for those who encounter these speakers and their views in non-campus settings.<sup>3</sup>

My point is that it is both unhelpful and inaccurate to characterize these premises as being in zero-sum tension—as though free expression must supersede any concerns about harm and that harms, if any, can be remedied only by more speech. Instead I argue that institutions can and should recognize the costs that can accompany unfettered speech by guest speakers and take steps to recognize and mitigate those costs.

I begin by discussing the reasons underlying the premise that schools must allow invited speakers to give their talks. I then review the legal and policy landscape that reinforces the need

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2. As I will elaborate below in Part II.A, this premise anticipates that schools can and should impose reasonable time, place, and manner restrictions on any speaker who comes to campus. On heckling, see *infra* note 13 and accompanying text.

Although a full discussion of incitement of violence is beyond the scope here, I do not intend to argue that the “all speakers” policy extends to those whose speech lacks protection under the First Amendment. Cf. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (excluding from First Amendment protection speech that is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); see also *infra* note 26.

Another important question, also beyond the scope of this brief essay, concerns the steps a school might appropriately take to reduce the likelihood that invitations will be extended to speakers whose message is of little educational value.

3. By “costs,” I mean to encompass a wide range of potential costs, including the diminishment of learning or participation that students might experience if they sense themselves or their communities to be the targets of negative or hostile remarks as well as the demands on institutional resources that might otherwise be expended elsewhere and the enhancement of a speaker’s reputation or ideas that may result from addressing a college or university community. See *infra* Part III for detailed discussion.

for schools to take steps to address the costs that may arise from this commitment. With these points in hand, I turn to the central inquiry here and offer a tentative pairing of costs and potential mitigation strategies.

#### I. A STARTING PREMISE: THE SPEAKER MUST GO ON

My inclination has not always been to embrace an “allow all invited speakers to speak” rule. To the contrary, perhaps because my work has focused on barriers to equality,<sup>4</sup> I have frequently been moved by concerns about the costs to individuals and groups who might be negatively affected by the speaker’s remarks. Yet I have come to embrace the rule as the much better alternative to a rule that would allow speakers to be barred from college and university campuses based on the reputation or role of speaker<sup>5</sup> or the content of their planned remarks.<sup>6</sup> Although the arguments for each position are familiar, a quick review of some of the central justifications for a content-neutral rule may be helpful background for the discussion below.<sup>7</sup>

First, as a normative matter, higher education institutions are the quintessential site for contestation of ideas. 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

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44. See, e.g., Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004); Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087 (2014).

5. By “role,” I mean the individual’s service as an elected official, dignitary, or representative of a government or organization.

6. It bears repeating here that this position does not encompass speakers invited to incite violence or otherwise express messages unprotected by the First Amendment. See *supra* note 2.

7. In addition to the normative and consequentialist arguments here, First Amendment viewpoint discrimination doctrine also constrains public colleges and universities from making viewpoint-based decisions about speakers. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (stressing the value of “wide exposure to [a] robust exchange of ideas”). See generally Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 169 (1996).

For the purposes of this Article, I will explore the arguments that apply to all schools, including those that are not bound by or have not voluntarily accepted First Amendment constraints.

to their own.<sup>8</sup> Even apart from times of political polarization, debates about society's received wisdom have played an important role in moving ideas from the periphery to the mainstream and in transforming the ways we understand ourselves and our surroundings.<sup>9</sup>

Although college and university campuses are hardly the only forums where vigorous debate can take place, they remain among the few locations in American society today where those debates occur in person.<sup>10</sup> Importantly, too, campuses are

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8. See *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> [https://perma.cc/T7NR-XLWP] (noting that "Republicans and Democrats are more divided along ideological lines—and partisan antipathy is deeper and more extensive—than at any point in the last two decades"); see also Catherine Rampbell, *Political polarization among college freshmen is at a record high, as is the share identifying as "far left,"* WASH. POST (May 2, 2017), <https://www.washingtonpost.com/news/rampage/wp/2017/05/02/political-polarization-among-college-freshmen-is-at-a-record-high-as-is-the-share-identifying-as-far-left> [https://perma.cc/PBM4-UG7X].

9. For discussion of how various civil rights debates have enabled changes in American society over time, see William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006). Contestation of mainstream ideas has similarly produced changes in understandings and acceptance of facts, policy, and theory regarding the environment, the economy, education, and innumerable other arenas. See, e.g., STEVEN L. ROBINS, *FROM REVOLUTION TO RIGHTS IN SOUTH AFRICA: SOCIAL MOVEMENTS, NGOS & POPULAR POLITICS AFTER APARTHEID* (2008); Jedediah S. Purdy, *The Long Environmental Justice Movement*, ECOLOGY L.Q. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2778776](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778776) [https://perma.cc/UB7A-ZN2U]; James Ryan, *Strategic Activism, Educational Leadership and Social Justice*, 19 INT'L J. LEADERSHIP EDUC. 87 (2016); Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, Nobel Prize Lecture (Dec. 8, 2001), [http://www.nobelprize.org/nobel\\_prizes/economic-sciences/laureates/2001/stiglitz-lecture.pdf](http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2001/stiglitz-lecture.pdf) [https://perma.cc/HUS3-S5FY].

10. Constructive engagement on controversial political issues has become rarer in other forums, such as social media. See Keith Hampton et al., *Social Media and the "Spiral of Silence,"* PEW RES. CTR. (Aug. 26, 2014), <http://www.pewinternet.org/2014/08/26/social-media-and-the-spiral-of-silence/> [https://perma.cc/D43Q-F2SA]. Although there has been active engagement by constituents at congressional town halls in recent years, that has in large part been confrontational rather than a deliberative exchange of ideas. See Patrik Jonsson, *Tea Party, Reversed? How GOP Town Halls Look from the Inside*, CHRISTIAN SCI. MONITOR (Feb. 15, 2017), <https://www.csmonitor.com/USA/Politics/2017/0215/Tea-party-reversed-How-GOP-town-halls-look-from-the-inside> [https://perma.cc/RC9G-ZM7C] (noting that both Democrats and Republicans have faced hostility at town halls in recent years); Susan Milligan, *Trouble in the Town Hall*, U.S. NEWS (Apr. 17, 2017), <https://www.usnews.com>

uniquely situated to protect speakers' ability to get their point across even if someone else in the room is louder or has more supporters nearby.<sup>11</sup>

Further, since the typical contentious speaker on campus aims to present to students rather than to a faculty workshop, it bears noting that allowing speakers to share their ideas fits directly within the mission of higher education to expand students' knowledge of the world and their critical thinking skills. This is not to say that all speakers are equally educational—indeed, some of the most contentious debates have occurred regarding invitations to speakers for whom provocation may be an end in itself.<sup>12</sup>

Yet even for deliberately provocative speakers, there is value in maintaining frameworks that require students to express disagreement with a speaker's views by means other than shouting over or otherwise disrupting a speaker who is in the midst of addressing an audience.<sup>13</sup> In part, there is educational benefit to students having to formulate questions or comments that express their points of disagreement, which is a different

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com/news/the-report/articles/2017-04-17/lawmakers-lose-when-it-comes-to-town-hall-meetings [https://perma.cc/EEH9-U6A5].

11. Many congressional town halls, for example, have faced interruptions by protestors. Trip Gabriel et al., *At Town Halls, Doses of Fury and a Bottle of Tums*, N.Y. TIMES (Feb. 21, 2017), <https://www.nytimes.com/2017/02/21/us/politics/town-hall-protests-obamacare.html> [https://perma.cc/B595-NU54]; Alex Isenstadt, *Town halls gone wild*, POLITICO (July 31, 2009, 4:30 AM), <http://www.politico.com/story/2009/07/town-halls-gone-wild-025646> [https://perma.cc/K8X8-KMRZ]. While disruption occasionally happens on college campuses as well, see e.g., *infra* notes 54 and 55 and accompanying text, schools often have greater capacity to control the location where a speaker is presenting, see *infra* notes 24 and 25.

12. See, e.g., Alex Arriaga, *White Supremacists Target College Campuses With Unprecedented Effort*, CHRON. HIGHER EDUC. (Mar. 6, 2017), <http://www.chronicle.com/blogs/ticker/white-supremacists-target-college-campuses-with-unprecedented-effort/117191> [https://perma.cc/AQ2E-KE8L]; Thomas Fuller & Christopher Mele, *Berkeley Cancels Milo Yiannopoulos Speech, and Donald Trump Tweets Outrage*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/us/uc-berkeley-milo-yiannopoulos-protest.html> [https://perma.cc/V7FM-SUEG]; Katherine Mangan, *A White Supremacist Incites a Crowd at Texas A&M*, CHRON. HIGHER EDUC. (Dec. 7, 2016), <http://www.chronicle.com/article/A-White-Supremacist-Incites-a/238589> [https://perma.cc/U5AL-GFP9].

13. See Thomas Healy, *Who's Afraid of Free Speech?*, ATLANTIC (June 18, 2017), <https://www.theatlantic.com/politics/archive/2017/06/whos-afraid-of-free-speech/530094/> [https://perma.cc/2BY9-7PYM] (“[H]eckling that is so loud and continuous a speaker literally cannot be heard is little different from putting a hand over a speaker's mouth and should be viewed as antithetical to the values free speech.”).

exercise from shouting or chanting with the intent to disrupt or end an event.<sup>14</sup> And in part, there are audience members seeking to hear the speakers' ideas, whether to learn, support or dispute. If protesters can shout over speakers without consequence, institutions find themselves in the awkward and infeasible position of having to determine which disruptions should be penalized and which not. (More on the challenges of this line-drawing in a moment.) Also, while protesting can be valuable training for post-graduation civic engagement, so too can posing hard questions to speakers who hold extreme views. If protest results in disruption, however, that opportunity may be foreclosed.

Along these lines and as a practical matter, a strict content-neutral rule also poses fewer risks of misuse than a rule that authorizes an individual or group to exclude or disinvite speakers because of those speakers' views. To be sure, for someone like me who is concerned about the negative impact certain speakers can have on students and other community members, it might be desirable in theory to exclude speakers whose views rest on disproven data or long-rejected ideological preferences. At the same time, the response to this position is powerful—that it is not workable (also in my view) to draw those lines in a setting that is committed to questioning and debating ideas. To do so, one would need to determine which data and ideas should never be questioned or debated—and also to determine that it is better for the campus community to be protected from hearing challenges to those inviolable data and ideas than to be pressed to defend them and to gain in understanding from that challenging encounter.<sup>15</sup>

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14. *Cf. Discord at Middlebury: Students on the Anti-Murray Protests*, N.Y. TIMES (Mar. 7, 2017), <https://www.nytimes.com/2017/03/07/opinion/discord-at-middlebury-students-on-the-anti-murray-protests.html> [<https://perma.cc/6CB8-G8WN>] (featuring diverse perspectives from students who attended the disrupted speaking engagement by Charles Murray at Middlebury College with the intent to listen, ask questions, or participate in protest).

15. There is also the perennially difficult question of sorting out which remarks are intended seriously and which might better be considered comedic or satirical and, perhaps, less troubling. *Cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (relying on the First Amendment to reject emotional distress claim for parody considered offensive and expressing skepticism about the possibility of identifying a principled standard to separate traditionally protected political cartoons from their "distant cousin[s]").



There is also the related practical point that excluding or dis-inviting speakers almost inevitably draws more attention to those speakers than allowing them to speak. Instead of the debate focusing on the value of the speaker's ideas, the exclusion from campus can have the unintended effect of reinforcing those ideas by suggesting that the campus community will be unduly influenced by their power.<sup>16</sup> The excluded speaker can then amplify this point via social media channels, leaving the school to appear to have engaged in this line-drawing out of fear rather than for whatever good reasons the school might have had in mind.<sup>17</sup>

## II. INSTITUTIONAL CONSIDERATIONS AND RESPONSIBILITIES

Having a clear commitment to free expression and exchange of ideas, including ideas that have been widely rebuffed or have offended some community members, is not the end of the conversation, however. When speakers come to campus, they can have a significant impact on those who attend and sometimes on others in and outside of the community as well. Indeed, the impact on campus community members, especially students, through the addition of new perspectives and ideas to the community's cultural and intellectual life is among the chief rationales for inviting outside speakers into higher-education settings.

Consequently, a question arises as to what responsibilities colleges and universities have, if any, to address the costs to community members and others on and off campus that can arise from the presence and comments of outside speakers. I will explore these costs, along with potential responsive strate-

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16. See Catherine Rampell, *What Milo Yiannopoulos and Elizabeth Warren have in common*, WASH. POST (Feb. 9, 2017), [https://www.washingtonpost.com/opinions/what-milo-yiannopoulos-and-elizabeth-warran-have-in-common/2017/02/09/ee5da942-ef0e-11e6-9662-6eedf1627882\\_story.html](https://www.washingtonpost.com/opinions/what-milo-yiannopoulos-and-elizabeth-warran-have-in-common/2017/02/09/ee5da942-ef0e-11e6-9662-6eedf1627882_story.html) [https://perma.cc/WAY9-5CRG] (noting that "suppression of speech," such as the cancellation of Milo Yiannopoulos' speech at the University of California at Berkeley, "not only generates more public interest, as bystanders scramble to learn what all the fuss is about; it can also win the speaker sympathy and the moral high ground").

17. See Jeremy W. Peters, *In Ann Coulter's Speech Battle, Signs That Conservatives Are Emboldened*, N.Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/us/politics/ann-coulter-university-of-california-berkeley.html> [https://perma.cc/ZWM3-ARLD].

gies, in the next section. For now, I note simply that by costs, I do not mean to include the anxieties that can result from having one's ideas challenged but I do mean to take seriously the sense of intimidation or alienation that some experience when a speaker condemns or demeans aspects of their identity. I also want to take seriously concerns expressed about speakers who advance ideas that, in some observers' views, promote genocide, endanger the planet, or heighten the risk of other grave dangers to students, their families or the world.<sup>18</sup>

While it is beyond the scope here to explore the legal landscape in depth, this section will flag several sources of law and policy that may bear on schools' choices about responding to these costs.

First, to be clear, there is no law—at least none I am aware of—that would require a college or university to ban a speaker based on the potential costs associated with the person's ideas. To the contrary, for public institutions and for private institutions committed to First Amendment values, constitutional doctrine would be a steadfast barrier to doing so.<sup>19</sup>

#### A. *Discretion in Fulfilling the Educational Mission*

Still, colleges and universities are entitled to substantial discretion in determining how to fulfill their educational mission.<sup>20</sup> Against that backdrop, courts have occasionally held that schools can impose certain restrictions on outside speakers

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18. See *Free Speech, Not Hate Speech*, HARV. CRIMSON (Feb. 6, 2017), <http://www.thecrimson.com/article/2017/2/6/berkeley-free-speech/> [<https://perma.cc/7ABQ-KGTY>] (arguing that speakers should not be invited to campus when doing so “only serves to further legitimize their untenable, hateful claims and poses a threat to fellow classmates”).

19. See, e.g., *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (“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.” (footnote omitted)); see also Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1265–67 (1995). For more on evaluating costs, see *infra* note 52 and accompanying text.

20. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2214 (2016) (“Considerable deference is owed to a university in defining those intangible characteristics . . . that are central to its identity and educational mission.”); see also *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) (rejecting a medical student’s procedural due process claim that she was entitled to a hearing for her dismissal on academic grounds).

based on the recognition that their focus and function is distinct from many other civic forums.<sup>21</sup> As the Eleventh Circuit observed, “the purpose of a university is strikingly different from that of a public park.”<sup>22</sup> The court added: “Its 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.”<sup>23</sup>

Courts have similarly recognized that some restrictions on speakers may be tolerated in the interest of “ensuring public safety, minimizing the disruption of the educational setting, and coordinating the use of limited space by multiple entities.”<sup>24</sup> In addition, schools can reasonably justify limiting access to speakers “during discrete times of the academic year when an abundance of speakers would likely interfere with the educational mission.”<sup>25</sup> And of course, schools can prohibit speech that is otherwise unprotected by the First Amendment, including speech that incites violence.<sup>26</sup>

Still, courts have not held that educators’ discretion extends to excluding invited speakers based on the views those speakers might express, even when those views are experienced as

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21. By contrast, campus speech codes have, almost invariably, been invalidated. See Heidi Kitrosser, *Free Speech, Higher Education and the PC Narrative*, 101 MINN. L. REV. 1987, 1990 n.14 (2017) (“[V]irtually all codes challenged in courts have been struck down.”).

22. *Bloedorn v. Grube*, 631 F.3d 1218, 1233–34 (11th Cir. 2011).

23. *Id.* at 1234.

24. *Bowman v. White*, 444 F.3d 967, 981 (8th Cir. 2006); see also *Bloedorn*, 631 F.3d at 1238 (“The University also has a significant interest in ensuring safety and order on campus, especially where the Free Speech Area is sited at a highly trafficked area of the campus, and the University employs a limited security force.”); cf. *McGlone v. Bell*, 681 F.3d 718, 735 (6th Cir. 2012) (observing that the university had not explained how the policy at issue “maintain[ed] order or prevent[ed] interruption of its educational mission”).

25. *Bowman*, 444 F.3d at 983.

26. See *supra* note 2; see also *United States v. Stevens*, 559 U.S. 460, 468 (noting that the First Amendment permits content-based limitations on certain speech, including obscenity, defamation, incitement, and speech integral to criminal conduct); Kathleen Ann Ruane, *Freedom of Speech and Press: Exceptions to the First Amendment*, CONG. RES. SERV. (Sept. 8, 2014), <https://fas.org/sgp/crs/misc/95-815.pdf> [<https://perma.cc/M442-5CQ9>].

harmful by some in the community.<sup>27</sup> While the Supreme Court has upheld measures that, in seeking to prevent crime and protect public safety, resulted in certain speech being restricted,<sup>28</sup> those restrictions were not prompted by “the direct impact of speech on its audience.”<sup>29</sup> As Justice O’Connor observed, “[l]isteners’ reactions to speech are not the type of ‘secondary effects’” the Court has recognized as potentially permissible bases for regulation.<sup>30</sup>

B. *The Influence of Antidiscrimination Law*

At the same time, federal law provides that individuals may not be discriminated against or “denied the benefits of” educational programs or activities that receive federal financial assistance based on race, sex, color or national origin.<sup>31</sup> While individual actions against schools are limited to situations

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27. For cases rejecting other types of speech restrictions on high school and college campuses based on concerns about offense or disruption, see, for example, *Healy v. James*, 408 U.S. 169, 187–88 (1972) (rejecting university’s refusal to recognize a student organization and observing that “disagreement . . . with the group’s philosophy” or a view that a group’s views are “repugnant” or “abhorrent,” “the mere expression of them would not justify the denial of First Amendment rights”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (rejecting a state law requiring university employees to disclose whether they had ever advocated, or been a member of a group that advocated, the overthrow of the U.S. government and observing “[t]eachers 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” (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957))); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1032 (9th Cir. 1998) (rejecting Title VI claim for injunctive relief that sought to remove *The Adventures of Huckleberry Finn* from high school syllabus because the author’s use of a racist slur allegedly created hostile educational environment).

28. See, e.g., *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289–91 (2000) (plurality opinion) (upholding restrictions on nude dancing, notwithstanding the Court’s recognition that such dancing is “expressive conduct,” due to potential adverse effects on public health, safety and welfare).

29. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality opinion).

30. *Id.*; see also *id.* at 334 (Brennan, J., concurring) (“Whatever ‘secondary effects’ means, I agree that it cannot include listeners’ reactions to speech.”).

31. 42 U.S.C. § 2000d (2012); 20 U.S.C. § 1681 (2012). Because federal financial assistance includes financial aid to students, these laws apply to nearly all higher-education institutions in the United States. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 22 (2014).

involving intentional discrimination,<sup>32</sup> the Office of Civil Rights within the federal Department of Education has authority to enforce Title VI and Title IX by terminating federal financial assistance to schools found in violation.<sup>33</sup> In addition to regulating a school's conduct, under both statutes a school can be held accountable for hostile environments created by others.<sup>34</sup>

To be clear, there is no case law suggesting that the presence or comments of an outside speaker would, without more, give rise to a cognizable claim under either Title VI or Title IX. Instead, as the Supreme Court has recognized in the context of peer harassment litigation, school administrators require flexibility in their work and will face liability only where their response to harassment "is clearly unreasonable in light of the known circumstances."<sup>35</sup> Even further, federal regulations and guidance limit harassment claims to those where the "conduct" is "sufficiently severe, pervasive or persistent."<sup>36</sup>

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32. See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) ("Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce [disparate impact] regulations promulgated under § 602. We therefore hold that no such right of action exists.").

33. 42 U.S.C. § 2000d-1 (2012); 20 U.S.C. § 1682 (2012).

34. See *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). Although *Davis* applied Title IX rather than Title VI, the Supreme Court has recognized repeatedly that interpretations of one should be applied to the other. See, e.g., *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) ("Congress modeled Title IX after Title VI of the Civil Rights Act of 1964 and passed Title IX with the explicit understanding that it would be interpreted as Title VI was." (citations omitted)); *Sandoval*, 532 U.S. at 280 ("Title IX . . . was patterned after Title VI of the Civil Rights Act of 1964."); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696 (1979) ("The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.").

35. See *Davis*, 526 U.S. at 648. The Court added that to be clearly unreasonable, funding recipients would have to respond (or fail to respond) in a manner that was "deliberately indifferent" to the harassment. *Id.*

36. See U.S. Dep't of Educ., *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,448, 11,449 (Mar. 10, 1994); U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE, HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), <https://www.ed.gov/about/offices/list/ocr/docs/shguide.html> [<https://perma.cc/NRL2-TVFT>]. For a recent discussion of the relationship between Title VI and the First Amendment in relation to campus speech, see, for example, Yaman Salahi & Nasrina Bargzie, *Talking Israel and Palestine on Campus: How the U.S. Department of Education Can Uphold the Civil Rights Act and the First Amendment*, 12 HASTINGS RACE & POVERTY L.J. 155, 156 (2015) (arguing against the premise "that students suffer from a hostile educational environ-

C. *Institutional Commitments to Teaching, Research, and Service*

In addition to First Amendment and nondiscrimination law and values, the shared goals of most higher-education institutions also bear on how schools ought to engage with divisive or controversial outside speakers. Most basically, these include, in varying degrees depending on the school, commitments to teaching, research, and service to society.<sup>37</sup> While each is the subject of its own vast literature and debates,<sup>38</sup> I will flag a few of the most significant ways in which these goals are relevant to the discussion here.

Notably, while each can and should inform our thinking about these issues, none provides specific guidance. With respect to teaching, for example, it is axiomatic that there is value in students learning to engage with ideas different from their own. Indeed, the very point of education, both at the college and university level and elsewhere, is for students to engage with new ideas and information. We might conclude, then, that there is nothing but upside in having outside speakers bring their views onto campus. On the other hand, both common sense and empirical literature remind us that students are less

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ment in violation of their civil rights when a particular country or government with which they may identify is subjected to vigorous critique or academic scrutiny"). *See also* *Shana v. Rutgers*, No. A-5575-08T3, 2010 WL 4117268, at \*15 (N.J. Super. Ct. App. Div. Oct. 12, 2010) (dismissing a student's claim that a faculty member's "blunt, insensitive or even rude" speech against him constituted unlawful discrimination, as "mere utterance of an . . . epithet which engenders offensive feelings" is insufficient to support a discrimination claim (quoting *Taylor v. Metzger*, 706 A.2d 685, 690 (N.J. 1998))).

37. *See, e.g.*, Jonathan R. Cole, *The Great American University: Its Rise to Preeminence, Its Indispensable National Role, Why It Must Be Protected* (2009); *Colleges and Universities as Citizens* (Robert G. Bringle, Richard Games & Edward A. Malloy eds., 1999).

38. *See generally* COLLEGES AND UNIVERSITIES AS CITIZENS, *supra* note 37. Although there is significant debate regarding the role of higher-education institutions in preparing students for the job market, *see, e.g.*, Jeffrey J. Selingo, *What's the purpose of college: A job or an education?*, WASH. POST (Feb. 2, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/02/02/whats-the-purpose-of-college-a-job-or-an-education/> [<https://perma.cc/N6X5-YVCE>]; Jessica Weinkle, *Universities Do More than Just Prepare Students for Jobs*, BOULDER DAILY CAMERA (Apr. 13, 2014), [http://www.dailycamera.com/guest-opinions/ci\\_25547232/universities-do-more-than-just-prepare-students-jobs](http://www.dailycamera.com/guest-opinions/ci_25547232/universities-do-more-than-just-prepare-students-jobs) [<https://perma.cc/4FGF-WSP5>], that seems less relevant to how schools respond to contentious outside speakers than the other issues discussed above.

likely to take in information if they experience their surroundings as hostile to their presence.<sup>39</sup>

Likewise, with respect to research (as well as teaching), one might argue that institutional aims are enhanced by bringing in speakers who challenge conventional wisdom and accepted academic methodologies. At the same time, as debates about “alternative facts” suggest, there is a serious question whether the research mission may be harmed rather than strengthened by the unfettered presence of speakers relating demonstrably false information or flawed methodologies to the campus community.<sup>40</sup> Even further, outside speakers who tout their campus tours to enhance their legitimacy by association with higher education may gain further attention for their ideas and, in turn, diminish the public’s acceptance of contrary knowledge that is produced in an academic setting.

And third, with respect to service to society, it might also follow that enabling free exchange with invited speakers will be citizenship-enhancing, in addition to educational, by strengthening students’ ability to engage in civil discourse on contentious issues. The service mission might also be fulfilled by providing a forum in which demonstrably false or dangerous ideas can be contested, particularly where general public forums might not support or enable thoughtful challenges to the speakers’ ideas. Yet, as just mentioned, speaking on a college or university campus can also lend a patina of legitimacy and

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39. See, e.g., Richard Delgado & Jean Stefancic, *Four Ironies of Campus Climate*, 101 MINN. L. REV. 1919, 1922 (2017) (“[M]any campus administrators are committed to the goal of educating students for roles in a multicultural and multiracial world, and if the campus is cold or hostile, this goal will be difficult to achieve.” (footnote omitted)); Lawrence, *supra* note 1, at 435–36, 458–61, 472–76 (describing the negative effects of hostile speech on students from marginalized social groups); Matsuda, *supra* note 1, at 2321–23, 2336–41, 2370–73, 2375–78 (same).

40. See, e.g., Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65, 66 (2014) (discussing research showing that “balanced, objective information” does not necessarily result in “corrections of falsehoods”); S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PA. L. REV. ONLINE 137, 138 (2017) (discussing empirical research showing that “[e]xposure to accurate information may not be enough” to counteract individual or institutional adherence to alternative facts” (alteration in original) (quoting Brendan Nyhan & Jason Reifler, *The Roles of Information Deficits and Identity Threat in the Prevalence of Misperceptions* 3 (Nov. 11, 2016) (unpublished manuscript), <http://www.dartmouth.edu/~nyhan/openingpolitical-mind.pdf> [<https://perma.cc/T36Q-HG59>])).

amplify attention to individuals and ideas that are otherwise widely rejected as illegitimate. One might ask whether higher-education institutions would provide a greater service by making judgments that certain speakers, even if very few, are simply not engaged in reasoned discourse. To the extent that speakers use their platform to hurl gratuitous insults at students or others,<sup>41</sup> one might also argue that allowing these speakers models or reinforces a type of behavior that is desirable neither on campus nor in civil society.

Still, on the view that excluding speakers is infeasible for both normative and instrumental reasons,<sup>42</sup> the legal and policy landscape just discussed suggest that neutrality or invocation of a free-expression commitment when provocative speakers are on campus may also be an insufficient response.

### III. A MENU OF INSTITUTIONAL RESPONSES

In this section, I take up the central question of how colleges and universities might respond to costs that can occur as a result of an invited speaker's presence or remarks on campus. Again, I recognize that there is consensus neither on whether it is possible for a speaker to cause all of the costs discussed here nor on the nature of any that might occur. Still, even a skeptic who rejects the possibility of harm might find it useful to take seriously the views of others who contend that harms do occur

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41. See Karen Herzog, *Breitbart writer targets transgender UWM student*, MILWAUKEE J. SENTINEL (Dec. 14, 2016), <http://www.jsonline.com/story/news/education/2016/12/14/breitbart-writer-targets-transgender-uwm-student/95420206/> [https://perma.cc/B68V-DKS4] ("Yiannopoulos singled out a transgender student [in an on-campus speech] who had protested against a new [University of Wisconsin-Madison] policy created for its recreation center's locker rooms.").

42. See *supra* Part I. See also Kitrosser, *supra* note 21, at 2038 ("The very same societal failings reflected in the marketplace, after all, presumably will inhere in those persons and institutions empowered to restrict speech. This brings us back to the worry that those who create and enforce content-based speech restrictions will do so incompetently or abusively. Even putting aside such failings, 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. Furthermore, fights over speech restrictions themselves are bound to become a part of the discourse consumed in the deeply imperfect speech marketplace. This returns us to the concern that restrictions will prove counterproductive.").



as well as the costs, financial and otherwise, that may arise when a contentious speaker comes to campus.

Drawing from the discussion above, I offer here a non-comprehensive catalogue of potential costs and institutional responses:

A. *Diminished Student Learning or Well-Being*

Individuals and groups may indicate that a speaker's comments target them for their identity or their beliefs and, consequently, they feel intimidated, afraid or alienated in ways that inhibit their participation in academic and other activities on campus, either around the time of the speech or in the longer-term because the speaker contributes to what they experience as an environment that is unwelcoming or even hostile to their presence.<sup>43</sup> This is especially likely to occur when a speaker comes to campus and singles out particular groups of people as less worthy or able.<sup>44</sup> This may also be more likely when a significant protest occurs and, while offering a counter-narrative, also amplifies the speaker's message. Although many well-

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43. See *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011) (recognizing that “[s]peech is powerful” and can “inflict great pain”); cf. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (acknowledging that protected speech “may embarrass others”); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (similar acknowledgment that “society may find offensive” speech that is protected).

For discussion of the ways in which speech experienced as hostile may have negative consequences for individuals affected by the speech, see, for example, DONALD A. DOWNS, *NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT* (1985) (analyzing interviews of and data regarding Holocaust survivors in Skokie, Illinois about the harm they faced from the threat of Nazi-supporters’ proposed march there and concluding that “[t]he major harmful consequence at Skokie was the infliction of mental trauma on the survivors” and that “their trauma appears to have involved both personal and communitarian dimensions”). See also Lisa Feldman Barrett, *When Is Speech Violence?*, N.Y. TIMES (July 14, 2017), <https://www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html> [<https://perma.cc/LS3A-94RA>] (citing studies showing negative physical effects of verbal abuse and other similar adversity). But cf. PHILIPPA STRUM, *WHEN THE NAZIS CAME TO SKOKIE: FREEDOM FOR THE SPEECH WE HATE* 147–48 (1999) (arguing that Skokie residents benefited from challenging the attempted march).

44. Cf. Andrew Altman, *Liberalism and Campus Hate Speech: A Philosophical Examination*, 103 ETHICS 302, 310 (1993) (arguing that “the language of racist, sexist, and homophobic slurs and epithets provides wholly conventional ways of treating people as moral subordinates” and that such terms “are used not only to express hatred or contempt for people but also to ‘put them in their place,’ that is, to treat them as having inferior moral standing”).

publicized incidents involving recent speakers concern comments about gender, race or sexual orientation, in my experience students who are religiously observant or who hold conservative views also sometimes report feeling targeted in ways that negatively affect their sense of well-being on campus.

As a general matter, many schools make significant efforts to enable all students to thrive and engage fully in educational and other opportunities. With respect to negative consequences that may flow from invited speakers, schools might consider inviting, or supporting invitations to, other speakers who offer a different perspective.<sup>45</sup> Schools might also choose to have certain events introduced or moderated by a respected institutional leader or faculty member who is positioned to pose challenging questions and, if appropriate, to reiterate the institution's core values. Many schools can also make choices about where to locate the speaker so that, whatever the message, students can, if they choose, minimize their interaction with both the speaker and any related protests. And of course, institutional leaders can choose to express their own views on the issues being discussed, though at institutions with an active roster of invited speakers, this may prove to be as difficult as having campus leaders respond to the near-constant flow of world events that also impact their students.<sup>46</sup>

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45. For discussion of this and numerous additional ways schools might support students, see Office of the VP for Student Life, *Building Community in Challenging Times*, U. WASH., <http://dsl.uw.edu/building-community-in-challenging-times/> [<https://perma.cc/DQ96-7RC2>].

46. For examples of schools' engagement with speakers in this way, see, for example, *Q&A for Richard Spencer 10/19 Event*, U. OF FLA., <https://freespeech.ufl.edu/qa-for-1019-event/> [<https://perma.cc/5ML7-DFRF>] ("UF has been clear and consistent in its denunciation of all hate speech and racism and in particular of the racist speech and white nationalist values of Richard Spencer."); Office of University Life, *FAQ about CU College Republicans Event with Mike Cernovich on 10/30/17*, COLUM. U. (Oct. 30, 2017), <https://universitylife.columbia.edu/faq-mike-cernovich> [<https://perma.cc/49H2-QBCF>] ("Does the University agree with Mike Cernovich's messages? No, the University does not agree with Mike Cernovich's messages about male power over women, racial superiority, hostility toward religious minorities including Muslims, and other comments along these lines.").

In addressing conflicts between institutional values and invited speakers' messages, consideration must also be given to communicating in ways that do not foreclose discussion and debate on campus. See generally Steve Kolowich, *An Internet Troll is Invited to Speak: What's a College President to Do?*, CHRON. HIGHER

This is also an area where faculty can have a particular impact by hosting or participating on panels, by publishing their views in student newspapers or open statements<sup>47</sup> and, if relevant, by providing opportunities for nuanced class discussion of issues that, as a result of an invited speaker's presence, may be roiling the campus.<sup>48</sup> Faculty and student affairs staff might also educate on and work with interested students regarding protest strategies and options.<sup>49</sup>

### B. Heightened Risk of Hostility and Harassment on Campus

Even without inciting violence, a speaker's expressed views might encourage or legitimate hostility toward a particular group on campus. To be sure, this concern is not limited to invited speakers. During the contentious presidential campaign season, for example, some students reported a heightened

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EDUC. (Feb. 10, 2017), <http://www.chronicle.com/article/An-Internet-Troll-Is-Invited/239170> [<https://perma.cc/FWY3-V9YR>].

47. See, e.g., Todd Gitlin et al., *An open letter about Charles Murray and his right to speak on campus*, COLUM. SPECTATOR (Mar. 20, 2017) <http://columbiaspectator.com/opinion/2017/03/21/an-open-letter-about-charles-murray-and-his-right-to-speak-on-campus/> [<https://perma.cc/JU5R-CFFA>]; Katherine Franke et al., *Faculty Statement on Charles Murray Lecture*, COLUM. L. SCH. (Mar. 20, 2017), <http://www.law.columbia.edu/open-university-project/academic-freedom/faculty-murray-statement> [<https://perma.cc/Q99B-MNPK>].

48. Because this essay is focused on institutional responses to invited speakers, I do not address the many and significant ways in which students are often at the forefront of protesting viewpoints with which they disagree and providing counternarratives to the ideas being advanced by speakers. For more on student engagement with controversial speakers, see, for example, Ellis Arnold, *CU Boulder to Support Alternative Event to Milo Yiannopoulos Talk*, CU INDEP. (Dec. 15, 2016), <https://cuindependent.com/2016/12/15/cu-alternative-event-milo-yiannopoulos> [<https://perma.cc/9JMY-WKFM>] (discussing student petition for university to support alternative event to Yiannopoulos talk); Lisa Rathke, *College Students Protest Speaker Branded White Nationalist*, U.S. NEWS (Mar. 2, 2017) <https://www.usnews.com/news/best-states/vermont/articles/2017-03-02/controversial-speaker-sparks-criticism-at-middlebury-college> [<https://perma.cc/9P4N-H3HN>] (discussing student protest against white nationalist speaker); Claire Tully, *Auburn Unites Concert, march protest Richard Spencer appearance*, PLAINSMAN (Apr. 18, 2017), <http://www.theplainsman.com/article/2017/04/auburn-unites-concert-march-protests-richard-spencer-appearance> [<https://perma.cc/F3U9-UECV>] (discussing student-organized concert protesting Richard Spencer's appearance at Auburn University).

49. See, e.g., Division of Student Affairs, *How to Protest Safely*, U.C. BERKELEY, <http://sa.berkeley.edu/protest-safely> [<https://perma.cc/V7CU-3KE8>] (last visited Nov. 13, 2017).

sense of vulnerability because of Donald Trump's comments about women, Muslims, undocumented immigrants, and others,<sup>50</sup> and others expressed vulnerability because they supported a candidate who was deeply unpopular among their peers.<sup>51</sup>

A school's response to this risk of increased hostility and possible harassment, whatever the source, is likely to be most effective with clear communication of institutional values, including through a well-known policy that prohibits harassment, vandalism and similar misconduct, and through meaningful enforcement of that policy. An effective policy will also be clear that speakers may not incite violence. At the same time, it is important for schools to be clear, consistent with free expression values discussed earlier, that being offended is not the same as being harassed.<sup>52</sup>

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50. See, e.g., *The Trump Effect: The Impact of the Presidential Campaign on our Nation's Schools*, S. POVERTY L. CTR. (Apr. 13, 2016), <https://www.splcenter.org/20160413/trump-effect-impact-presidential-campaign-our-nations-schools> [<https://perma.cc/WPG4-57WN>].

51. See, e.g., Clare Foran, *Trump-Supporting Republicans Face a Backlash on College Campuses*, ATLANTIC (Oct. 31, 2016) <https://www.theatlantic.com/politics/archive/2016/10/republians-trump-racism-sexism/505697/> [<https://perma.cc/6Y6H-8C8L>].

52. Columbia University's rules governing protests offers a useful model. *University Regulations (Including Rules of Conduct)*, COLUM. U. (Oct. 2015), <http://www.essential-policies.columbia.edu/university-regulations-including-rules-conduct#conduct> [<https://perma.cc/ZMV6-NSR3>]. The Rules begin with an affirmative statement setting out the values of free expression and then makes clear that "the University cannot and will not rule any subject or form of expression out of order on the ground that it is objectionable, offensive, immoral, or untrue." *Id.* The Rules also recognize:

Viewpoints will inevitably conflict, and members of the University community will disagree with and may even take offense at both the opinions expressed by others and the manner in which they are expressed. But the role of the University is not to shield individuals from positions that they find unwelcome.

*Id.* At the same time, the Rules expressly recognize that "the University may restrict expression that constitutes a genuine threat of harassment, that unjustifiably invades an individual's privacy, or that falsely defames a specific individual." *Id.* They explain:

These forms of expression stand apart because they do little if anything to advance the University's truth-seeking function and they impair the ability of individuals at the University to participate in that function. The University has an obligation to assure members of its community that they can continue in their academic pursuits without fear for their personal security or other serious intrusions on their ability to teach and to study.

*Id.*

C. *Amplification of Pseudoscience and Debunked Methodologies Within the Campus Community*

A third potential cost is that speakers may be accorded greater legitimacy as a result of speaking at an academic institution, even when academics, including at the school the speaker is addressing, have disproved their contentions or demonstrated fundamental flaws in their analyses. Put another way, 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. This is not to say that schools should exclude speakers on the ground that their work would receive a failing grade in any class on campus; as discussed above, the overarching costs associated with excluding speakers almost invariably outweigh the potential benefits. But the question remains whether schools ought to do something to minimize the risk of appearing to endorse a speaker who addresses the campus community.

Here, communication about why schools allow speakers to come to campus may be the best strategy. Many students on campus, especially in their early years, may not know why, for example, a school whose faculty engage in research and teaching on climate change will permit an invited speaker to deny climate change or to advocate for energy policy that may pose direct environmental risks. And those speakers, in turn, may gain legitimacy off campus by highlighting their “campus tour.”

By explaining simply and repeatedly that allowing someone to speak on campus does not mean that the school has endorsed the speaker’s views, colleges and universities can push back against some of the legitimating effect that may be imput-

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For more general discussion of the relationship between speech and harassment, see generally Bridget Hart, *A Balancing Act for American Universities: Anti-harassment Policy v. Freedom of Speech*, 25 J.L. & POL’Y 399 (2016) (discussing whether university regulation of hate speech is constitutional); Thomas A. Schweitzer, *Hate Speech on Campus and the First Amendment: Can They be Reconciled?*, 27 CONN. L. REV. 493 (1995) (same); Alexander Tsesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863 (2017) (same).

ed to a speaker by virtue of being on campus.<sup>53</sup> Likewise, schools might want to require that event hosts, including student organizations, permit some form of questions by audience members at all events to help ensure opportunities for contestation of speakers' ideas. And, in some instances, school leaders or faculty members might want to take additional initiative to educate the general public about the reasons for allowing speakers on campus to push back against the legitimization some speakers claim by their association with a campus-based event. While these points might seem obvious to many in the academy, they are not the norm in a world where employers, journalists, and even governments regularly screen and make choices among those who are invited to speak at their venues.

#### D. Institutional Resource Allocation

High-conflict speakers may also cause schools to allocate resources, both financial and attention, from other areas to handle the disruption on campus. Although these costs can be managed to a limited extent with clear and effective policies for permitting protests and protecting community safety, they are nonetheless substantial.<sup>54</sup> Indeed, mitigation of the resource reallocation needed to manage a campus event involving a highly contentious speaker presents a difficult challenge. Perhaps the best strategy for both institutional leaders and faculty members is to use the situation as an opportunity to educate students and others both about modes of disagreement in civil society and about the issues that have galvanized attention. If research or other efforts taking place at the school that address the speaker's topic, there may also be opportunities to high-

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53. For illustrations of one possible approach, see *supra* note 46.

54. The University of Florida indicated, for example, that it, along with other agencies, would spend "[m]ore than \$500,000 . . . to enhance security on our campus and in the city of Gainesville" for an event featuring a white nationalist speaker. See *Q&A for Richard Spencer 10/19 Event*, *supra* note 46.

For recent consideration of cost issues in the context of contentious speakers on campuses and in communities, see Frederick Schauer, *The Hostile Audience Revisited*, KNIGHT FIRST AMEND. INST. (Nov. 2017), <https://knightcolumbia.org/content/hostile-audience-revisited> [<https://perma.cc/W4ZA-SQSR>]. See also Suzanne B. Goldberg, *Costing Out Campus Speaker Restrictions*, KNIGHT FIRST AMEND. INST., <https://knightcolumbia.org/content/costing-out-campus-speaker-restrictions> [<https://perma.cc/S44S-3LQ6>] (last visited Nov. 13, 2017).

light those initiatives and, if relevant, promote ways that concerned students might get involved in addition to any protests they might choose to lead or join.

*E. Increased Law-Enforcement Presence*

Where there is concern about safety risks related to a speaker's presence, another potential cost may be the heightened presence of law enforcement on campus. Especially for students and others who may have concerns about interactions with law enforcement based on race, religion, or other aspects of identity, increased police or public safety presence can further escalate campus tensions. As with the resource-allocation point just discussed, clear and effective protocols governing the interactions of law enforcement with students and guests on campus can help mitigate these costs somewhat. It may also be helpful to have deliberate communication that police or public safety presence is intended not to endorse any given speaker but rather to enable events to take place safely for all and consistent with school policies that allow for speakers to present their views.

*F. Physical Safety Concerns and Property-Damage Risks*

In addition to the costs of law enforcement presence, there may be real risks to physical safety and property when a high-conflict speaker comes to campus. One need only read about the property damage and disruption at UC Berkeley in connection with one speaker<sup>55</sup> or the injuries to a faculty member at Middlebury at another outside speaker event<sup>56</sup> to recognize that these, too, may be associated with a policy that allows all speakers onto campus. These safety risks can, in turn, generate other costs including for students whose classes are moved or canceled, for community members who avoid parts of campus

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55. Michael Bodley, *At Berkeley Yiannopoulos protest, \$100,000 in damage, 1 arrest*, S.F. GATE (Feb. 2, 2017), <http://www.sfgate.com/crime/article/At-Berkeley-Yiannopoulos-protest-100-000-in-10905217.php> [https://perma.cc/98JJ-3BMU]; Gretchen Kell, *Campus investigates, assesses damage from Feb. 1 violence*, BERKELEY NEWS (Feb. 2, 2017), <http://news.berkeley.edu/2017/02/02/campus-investigates-assesses-damage-from-feb-1-violence/> [https://perma.cc/E96Y-QK2M].

56. Conor Friedersdorf, *Middlebury Reckons with a Protest Gone Wrong*, ATLANTIC (Mar. 6, 2016), <https://www.theatlantic.com/politics/archive/2017/03/middleburys-liberals-respond-to-an-protest-gone-wrong/518652/> [https://perma.cc/F6TH-669P].

out of concern for their safety, and for the school's reputation with prospective students, among others.

Mitigation can be achieved, to some extent, with great clarity around policy and careful planning including choices about where, when and how to hold events to minimize the risks of harm and allow for quick action if conflicts escalate in ways that threaten physical safety or property damage. Further, by taking clear action against those who destroy property or engage in physical conflict in connection with an event, the school can communicate a message that may reduce the risk of similar disruptions in the future.

#### *G. Enhancing a Speaker's Legitimacy Off Campus*

Finally, there may be a real-world cost from allowing speakers to convey ideas that promote grave harms outside of the campus environment, such as assault, hate crimes, environmental degradation, and genocide. Even for those who maintain, as I have here, that institutions should not bar invited speakers based on these or other risks, the question remains whether institutions can or should take steps to counter these risks. Here, again, there are a number of steps a school might take, depending on the circumstances, including nearly all that have been discussed above: communicating the reasons for allowing speakers on campus, supporting opportunities for other speakers to offer counternarratives, and, most fundamentally, teaching in ways that support critical analysis and conducting research that seeks to understand and perhaps to solve domestic and world problems rather than to exacerbate them.<sup>57</sup>

### IV. CONCLUSION

One might respond to the challenges posed by contentious speakers on campus by concluding that the only obligation of colleges and universities is to ensure that the speaker is able to present remarks safely and without interruption, in keeping with First Amendment values and institutional commitments

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57. The point here is not that there will or should be consensus about either dangers or solutions but rather that, on a wide range of issues, some will have concerns that a speaker's views may seek improperly to minimize, justify, or exacerbate harms in ways that will have a real-world impact.



to considering and contesting all ideas and viewpoints.<sup>58</sup> But if we take into account the foundational interests of higher-education institutions in teaching all students as well as producing research and serving the broader society, we can begin to recognize that the “no speakers barred” policy may negatively affect a school’s ability to serve those interests, particularly when speakers demean certain groups on or off campus or advocate views that rest on falsified facts or debunked methodologies.

The answer, as I suggest above, is not to establish a process for excluding those speakers from campus. For a variety of normative and instrumental reasons, such a process would neither be feasible nor effective in eliminating those negative effects (nor permissible for schools bound by the First Amendment), at least not without great costs to the exchange of ideas.

Consequently, if we accept that all invited speakers must be permitted to speak and that their presence and remarks may give rise to a variety of costs for the campus community and beyond, the question then becomes how institutions might engage with speakers and otherwise respond to the potential costs to their educational, research, and service mission. The typology of potential costs and responses I offer in this essay is intended as a prompt for further questions and conversation. And while it is not the sort of destabilizing conversation that provocative speakers seek, it is precisely the sort of conversation that will be increasingly important to the extent that the polarization in much of American society also begins to pervade the institutions responsible for educating the next generation of our nation’s thinkers and leaders.

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58. *Cf.* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (describing a school’s role in “educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes”); *id.* at 642 (stating that the purpose of education is not to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion”).