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Courts versus Campuses: The Struggle to Protect Free Speech

George R. La Noue

There was an era in which academic freedom was considered best protected when universities, even if public, had maximum autonomy. The threat to free speech was thought to come mainly from outside interventions. Now campuses often commit themselves to political and ideological causes and house activist groups that stifle dissent.[1] It is no longer true that maximum autonomy leads to greater intellectual diversity and free speech. The earlier consensus of academics and jurists about the importance of free speech and its legal boundaries has broken down. After recent litigation, the future is far from clear.[2]

The Era of Consensus

In 1940, the American Association of University Professors, working in conjunction with the Association of American Colleges, issued its famous "Statement of Principles on Academic Freedom and Tenure" which has been endorsed by more than 250 scholarly and education groups.[3] The Principles state that the purpose of academic freedom is not just to protect individuals or institutions, but that it is essential for the common good which depends on free speech in the search for truth. Consequently, there should be full freedom to conduct research and to publish results. Faculty also should have

1 George R. La Noue, "Time to Challenge Compelled Speech?" *Law and Liberty,* March 29, 2022.

2 This essay focuses on the evolution of the conflict over free speech rights as it has played out on campuses and in courtrooms. The National Association of Scholars makes important distinctions between free speech and academic freedom, which is a concept voluntarily adopted by many colleges and dealing most directly with faculty research and teaching, though it has been extended, with qualifications, to "extra-mural speech." Any serious evaluation of the debate over academic freedom would require a much longer treatment.

3 American Association of University Professors, "1940 Statement of Principles on Academic Freedom and Tenure," www. aaup.org.

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freedom in the classroom to discuss their subject, though they should not "introduce into their teaching controversial matter which has no relation to their subject."

In 1967, the University of Chicago formed the faculty-dominated Kalven Committee to prepare "a statement on the University's role in political and social action." The Committee found that:

> The mission of the university is the discovery, improvement, and dissemination of knowledge. . . . Since the university is a community only for these limited and distinctive purposes, it is a community that cannot take collective actions on the issues of the day. . . . without inhibiting that full freedom of dissent on which it thrives.[4]

Currently, however, academic professional associations, university administrators, faculty senates, and student groups commonly demand commitments to various political causes which leave those who dissent in perilous positions.

In 1974, after concern expressed by some Yale administrators and New Haven's mayor about particular speakers invited to campus, President Kingman Brewster appointed a predominately faculty committee led by the distinguished historian C. Van Woodward to construct a speech policy. In the classic Yale Woodward report, worth recounting at some length, the Committee reached a consensus that:

> The primary function of a university is to discover and disseminate knowledge by means of research and teaching. . . . It follows that the university must do everything possible to ensure within the fullest degree of intellectual freedom. The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whomever [*sic*]

4 "Report on the University's Role in Political and Social Action," https://provost.uchicago.edu/reports/reports.

> deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views. . . .
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> Without sacrificing its central purpose, it cannot make its primary and dominant value the fostering of friendship, solidarity, harmony, civility, or mutual respect. To be sure, these are important values: other institutions may properly assign them the highest, and not merely a subordinate priority, and a good university will seek and may in some significant measure attain these ends. But it will never let these values, important as they are, override its central purpose. We value freedom of expression precisely because it provides a forum for the new, the provocative, the disturbing, and the unorthodox. Free speech is the barrier to the tyranny of authoritarian or even majority opinion as to rightness or wrongness of particular doctrines or thoughts.[5]

Federal courts also have been similarly concerned to protect an open intellectual atmosphere on campus. When Paul Sweezy, an economist at the University of New Hampshire, refused to answer questions by that state's attorney general about his lectures and political beliefs, he was found in contempt. Sweezy then appealed to the Supreme Court which in 1957 articulated a vigorous defense of academic freedom from outside intervention:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is

5 Report of the Committee on Freedom of Expression at Yale, December 22, 1974.

> that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die. [6]

A decade later, the Supreme Court overturned an anti-communist loyalty oath requirement for faculty and again quoted the *Sweezy* principles.[7] During that period, it is unlikely that any campus administrator would have more vigorously or eloquently framed the argument for academic freedom than did the justices.

Divergence and Dissension about Campus Speech

Then the nature of free speech threats began to change. While in the abstract campus free speech movements in the Sixties were consistent with First Amendment principles, sometimes the Vietnam War and civil right issues created passions that led to occupation of campus buildings and even violence.[8]

Only a few cases involving these issues reached the high court, but again the justices affirmed free speech and assembly. In 1972, the Supreme Court unanimously struck down a decision by Central Connecticut State College not to certify a student chapter of Students for a Democratic Society for use of campus spaces, ostensibly on the grounds that their national organization might engage in violence. Justice Powell wrote:

> Yet the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite the contrary. [T]he vigilant protection of constitutional freedom is nowhere more vital than in the community of American

6 *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).
7 *Keyishian et al v. Board of Regents of the University of the State of New York et al.* 385 U.S. 589, 603 (1967).
8 See the collection of essays in "The Universities," *The Public Interest* no. 13 (Fall, 1968).

> schools. The college classroom, with its surrounding environs, is peculiarly the *"marketplace of ideas," and we break no new constitutional ground in affirming the Nation's dedication to safeguarding academic freedom.* (Emphasis in the original)[9]

A priori suppression of student speech and organizations would not be judicially permitted, even if campus authorities mandated it.

In 1995 in *Rosenberger v. University of Virginia*, the Court began to develop a doctrine of viewpoint neutrality in public universities at least in regard to the allocation of student activity fees. In protecting the rights of students to distribute a religious publication, it once again asserted the importance of campus free speech.

> The quality and creative power of student intellectual life to this day remain a measure of a school's influence and attainment. For the University [of Virginia], by its regulations to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers of the Nation's intellectual life, its college and university campuses.[10]

Nevertheless, after about 2010, many campuses began to adopt rules limiting free speech to small geographical zones or sanctioning otherwise legal speech thought to contain cultural misappropriations and microagressions. Well-publicized incidents where students, instead of avoiding controversial speakers or waiting to ask tough questions, prevented the speech altogether or heckled the speaker into silence. Administrators equivocated about these tactics even when they clearly violated campus rules. They began to avoid inviting controversial speakers or to discourage them by placing heavy security fees on sponsoring groups.[11]

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9 *Healy v. James*, 408 U.S.169, 180 (1972).
10 515 U.S. 819, 835-836 (1995).
11 Alex Morey, "Universities avoid politically controversial commencement speakers after student protests," *USA Today*, June 29, 2018; Katherine Long, "UW to pay $122,000 in legal fees in a settlement with College Republicans," *The Seattle Times*, June 18, 2020.

A new genre of campus bureaucrats was created. Officers who would enforce, but not carefully define, Diversity, Equity, and Inclusion (DEI), now control de facto speech policy on many campuses. The DEI tidal wave has flooded much of higher education. The Heritage Foundation completed a survey of DEI officials in sixty-five universities in the "power five" athletic conference universities which serve 2.2 million students.[12] The survey found there were about 3,000 persons with DEI responsibilities in these institutions. The average was 45.1 DEI officers per campus and many campuses had more DEI officers than history professors.

DEI bureaucrats generally do not teach or advise students or conduct research. Their mission and their duties depend on monitoring the hiring and evaluation of employees and the admission and discipline of students by using concepts and procedures that rarely have careful boundaries.[13] They are rather like political commissars who do not produce anything, but are ideologically empowered to oversee the speech and behavior of those who do.[14] If there was ever a finding that a campus no longer had a DEI problem, they would no longer have a job. So the search for DEI violations is never ending.

Despite its benign sounding name, DEI raises many questions about free speech, free assembly, and equal protection on campuses. For example, does inclusion permit suppression of speech that "disturbs the peace and/or comfort" of some members of the campus community? Does inclusion mean that student organizations are forbidden from excluding some persons from membership or leadership? Does inclusion permit preferences in admissions or hiring persons from underrepresented groups? Courts have begun to consider all these issues.

12 Jay P. Greene and James D. Paul, "Diversity University: DEI Bloat in the Academy," Center for Education Policy," July 27, 2021, https:// www.heritage.org/sites/default/files/2021-07/BG3641-o. pdf.

13 For a penetrating discussion of the perverse incentives for administrators to avoid making clear distinctions between protected conduct and speech from unprotected campus activities, see John Hasnas, "Free Speech on Campus: Countering the Climate of Fear," *Georgetown Journal of Law & Public Policy* (forthcoming)

14 Sometimes there are partisan implications of DEI initiatives. In 2022, when Thomas Jefferson High School parents made an emergency appeal to the Supreme Court to protect the school's merit admissions system against changes to create more diversity, they were supported by sixteen state Republican attorneys general, but no Democrats. George R. La Noue, "Making Sense of Diversity in Our High Schools," *Law & Liberty*, May 21, 2022, https://www.lawliberty.org/dei-comes-to-high-school/.

The *Rosenberger* viewpoint neutrality concept has been used to protect the right of student religious organizations to select their leaders. In 2018, the University of Iowa deregistered a small campus group called Business Leaders in Christ (BLinC) which intends "to create a community of followers of Christ . . . to share wisdom on how to practice business that is both Biblical and founded on God's truth." Deregistration meant that BlinC could not participate in on-campus recruitment fairs, access university facilities or receive funding and benefits available to other student groups. The conflict occurred when a gay student sought a leadership position in the group but was rejected because he stated that he opposed BlinC's religious beliefs and affirmed he would not follow them.

In the District Court's decision, Judge Stephanie Rose found that the university had not followed its human rights policy consistently and had permitted other groups to limit membership and therefore was not viewpoint neutral. She also ruled, however, that University officials had qualified immunity and could not be forced to pay damages. The Eighth Circuit disagreed with that part of her decision and sent the case back for a determination of damages.[15] So now a Circuit Court had not only ruled against campus autonomy in regulating the structure of its student groups, but was entertaining the possibility of enforcing damages against an offending university.

Requiring academic institutions to pay damages for breeches of First Amendment rights was a long way from the earlier court and campus concurrence about such issues. In 2021, however, affirmation of potential campus financial liability came from the Supreme Court in *Uzuegbunam v. Preczewski,* with Chief Justice Roberts the lone dissenter. Georgia Gwinnett College had a speech zone policy which forced students who wished to make a public speech to request a specific time in a tiny campus designated space. Uzuegbunam, a Christian convert, registered to make a proselytizing speech, but due to a student complaint, the College determined that his speech "disturbs the peace and/or comfort" of students or faculty. Shortly after the Alliance Defending Freedom (ADF) sued, the College changed its

15 Ryan J, Foley, "Court: U of Iowa officials can be held liable for targeting Business Leaders in Christ," *Des Moines Register* March 21, 2021.

policy and Uzuegbunam had graduated, thus possibly mooting the case. ADF argued, however, that the plaintiff was entitled to nominal damages. The Eleventh Circuit disagreed, however, creating a split in the Circuits which enabled the Supreme Court decision. Justice Thomas writing for the Court declared: "Because 'every violation [of a right] imports damage,' nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms."[16] When the University System of Georgia and ADF finally settled the case, the "nominal damages" turned out to be $800,000.[17]

So far most litigation conflicts over DEI rules have been resolved in favor of free speech. In a 2010 case, *David Rodriguez et al. v Maricopa County Community College*, Hispanic plaintiffs sued the College for failing to discipline a mathematics professor who criticized La Raza, immigration, and multiculturalism, while lauding Western Civilization and Columbus Day. A Ninth Circuit panel, including retired Supreme Court Associate Justice Sandra Day O'Connor sitting by special designation, ruled the College could not discipline the professor, even though his remarks were inconsistent with its diversity policy. In Chief Judge Alex Kozinski's words:

> The Constitution embraces such a heated exchange of views, even (perhaps especially) when they concern sensitive topics like race, where the risk of conflict and insult is high. Without the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most unquieting and orthodoxy is most entrenched. The right to provoke, offend and shock lies at the core of the First Amendment.
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> This is particularly so on college campuses. Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas

16 592 U.S ____ 2021.

17 Eric Stirgus, "Former Georgia Gwinnett students agree to $800,000 lawsuit settlement," *The Atlanta Journal Constitution*, June 22, 2022.

> survive because they are correct, not because they are popular. Colleges and universities—sheltered from currents of popular opinion by tradition, geography, tenure and monetary endowments—have historically fostered that exchange. But universities may not be able to survive in that role if certain points of view may be declared beyond the pale.[18]

The most frequent conflict between DEI policies and free expression have occurred in litigation challenging the role of campus bias reporting systems or Bias Report Teams (BRT). Such administrative regulations and offices are now commonplace in higher education according to a 2022 report by the Speech First organization.[19] In a survey of 821 campuses of all types, the report found that 46 percent of the private and 66 percent of public campuses examined had codified systems for reporting and sanctioning student speech. No wonder then that surveys by Brookings, CATO, FIRE, Gallup, Heterodox Academy, and Pew show increasing student reluctance to express political opinions.

While some judges were reluctant to interfere with campus internal speech policies that may not be rigorously enforced, the weight of opinions have been overwhelmingly supportive of the necessity of free speech.[20] Speech First has successfully sued the University of Michigan,[21] the University of Texas,[22] the University of Illinois at Urbana-Champaign,[23] and Iowa State University.[24]

The organization's most recent victory was a unanimous Eleventh Circuit opinion criticizing in very strong terms a speech code at the University of Central Florida. (UCF).[25] The Court described UCF's policy in this way:

18 605 F.3d 703, 708 (2010)

19 "Free Speech in the Crosshairs: Bias Reporting on College Campuses," April 25, 2022.

20 George R. La Noue, "Bias Response Teams Silence Civic Debate," *Law and Liberty*, March 3, 2020. See also, Greg Lukianoff and Talia Barnes, "Some Lessons from the Sorry History of Campus Speech Codes," *Persuasion*, May 2, 2022.

21 *Speech First, Inc. v. Schlissel*, 939 F.3 756 (6th Cir, 2019).

22 *Speech First, v. Fenves*, 979 F.3d 319 (5th Cir. 2020).

23 *Speech First, Inc. v. Killeen*, 968 F.3d. 628 (7th Cir. 2020).

24 Case settled when the University ended its speech prohibiting policy and agreed not to reinstate it. Tyler J Davis, "Free-speech nonprofit drops lawsuit vs. Iowa State after school adjusts chalking, email policy," *Des Moines Register*, March 18, 2020.

25 *Speech First, Inc. v Cartwright*, Opinion 12-12583 (11th Cir, 2022),

> The bias–related-incidents-policy creates a mechanism by which a UCF student can be anonymously accused of an act of "hate" or bias, i.e an "offensive act," even if "legal" and "unintentional," that is directed toward another based on any number of characteristics. . . . [UCF] monitors and tracks bias related incidents, coordinates university resources, marshals a comprehensive response and where necessary coordinates "interventions among affected parties."

The identities UCF thought needed protection were race, national origin, religion or non-religion, genetic information, sex or political affiliation. In a 55,000 student university that mission could create a lot of work for its DEI bureaucracy.

In, perhaps, the key exchange in oral argument, UCF's attorney was asked from the bench whether particular statements would violate the University's discrimination-harassment policy. (1) "abortion is immoral;" (2) "unbridled open immigration is a danger to America on a variety of levels;" and (3) "the Palestinian movement is anti-Semitic." The lawyer replied that he didn't think the statements would be proscribed, but he couldn't say for sure because "the university would consider all the facts and circumstances there."

The Court responded: "If UCF's own attorney—as one intimately familiar with the University speech policies can't tell whether a particular statement would violate the policy, it seems eminently fair to conclude that the school's students can't either." In concurring, Judge Stanley Marcus wrote that UCF's policy:

> touches on every conceivable topic that may come up on a college campus. . . .The specter of punishment for expressing unorthodox views on these topics stifles rigorous intellectual debate. The harm is not limited to professors and students while they are on campus. Our future civic and scientific leaders surely will take these values with them after graduation.

The Judge concluded with a sentence likely to be quoted for some time. "A university that turns itself into an asylum from controversy has ceased to be a university; it has just become an asylum."

The Circuit then found Speech First had standing to bring the case and that the UCF policy was "staggeringly overbroad," committed "viewpoint discrimination," and had a "chilling effect" on protected speech. The case was remanded back to the district court for disposition in accord with its ruling.

The now discredited UCF speech policies affected faculty speech as well. After UCF tenured Professor Charles Negy tweeted in 2020 an oversimplified criticism of affirmative action policies, a Change.org petition urging he be sanctioned attracted 30,000 signatures, a Twitter hashtag #UCFFireHim was created, and the campus president participated in student protests against him. UCF realized that it could not fire Negy for protected speech, so it then launched an eight-month investigation against him and terminated his contract. UCF faculty has a union, however, and an arbitrator after a lengthy consideration, found that UCF never had "Just Cause" for termination. Samantha Harris, Negy's lawyer, wrote after the decision

> The arbitrator's decision is a powerful blow to the "Show me the man and I'll find you a crime" so often given to professors, like Dr. Negy, who express opinions out of step with today's sacred campus orthodoxies. It is a victory for accountability and reminder that due process matters. Nothing can give Dr. Negy the last two years of his life back or take away the pain and humiliation he has endured at the hands of UCF administrators, but today is a good day.[26]

Future Judicial Overview of Campus Speech Regulation

The old concurrence of academic leadership and the judiciary about protecting speech has broken down. Some campuses ignore or do not sanction incidences of speech suppression for invited speakers

26 Michael Levinson, "University Must Reinstate Professor Who Tweeted About 'Black Privilege'," *New York Times,* May 20, 2020. For another perspective in more detail see, William A. Jacobson. "U. Central Florida Prof. Charles Negy, Fired After Tweeting 'Black Privilege is Real,' Ordered Reinstated with Tenure and Back Pay," *Legal Insurrection*, May 12, 2022.

and few sponsor lively debates or forums where public policy issues are openly debated.[27] Universities are disinclined now to accept the Yale Woodward report that the vigorous pursuit of truth is more important than being "a fellowship, a club, a circle of friends." University presidents often view students as customers who are members of a community that differs from that of ordinary citizens and who must be protected from insensitive speech.[28] Courts have disagreed, but judges do not have to manage the bad publicity or the enduring tensions controversial speech can create. On the other hand, academic leadership knows it cannot survive the hostility of activist groups and often placates them with funding and special programming.

However, while courts have been and remain deeply divided about the role of the equal protection clause in campus admissions policies, they have consistently defended First Amendment speech and association principles, even when the higher education establishment wanted exemptions. Will that judicial defense remain or will it fade as a new generation of law school graduates take over the courts?

Recently, the American Bar Association, which accredits law schools, created a Member Diversity, Equity Inclusion Plan along with new mandates for law school curricula. Many schools responded by creating required courses on racial disparities based on critical race theory which challenge the constitutional requirement of equal protection for persons of all racial backgrounds. In 2022, incidents at prestigious law schools such as Georgetown, Yale, and UC Hastings, where students demanded that persons and speeches be canceled, leave the future of speech protections in higher education in doubt.[29]

Even if the new generation of judges follow precedents protecting campus speech, litigation is expensive, time consuming, and unpredictable. Campus leaders often prefer to wait out lawsuits because that satisfies internal constituencies and the monetary damages invoked for losing a case have been miniscule. Unless courts and campuses renew their concurrence about the importance of free speech, its protection will be uneven and uncertain for both students and faculty.

27 George R. La Noue "Silenced Stages: The Loss of Academic Freedom and Campus Policy Debates" (Carolina Academic Press 2019).

28 George R. La Noue, "Campuses as Faux Nations," *Academic Questions*" (Fall 2021).

29 Aaron Sibarium, "The Takeover of America's Legal System," *Common Sense*, March 21, 2022.