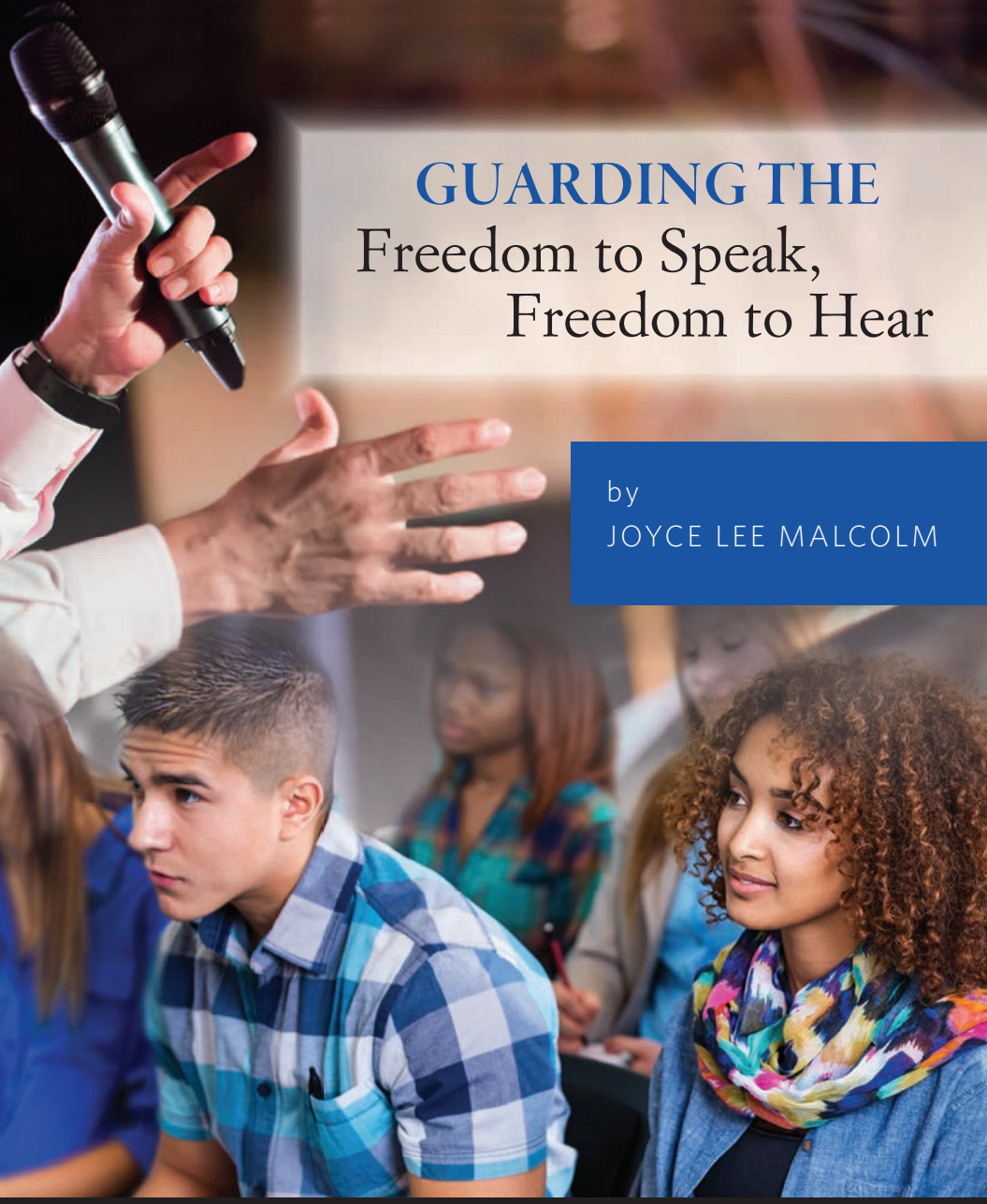

GUARDING THE
Freedom to Speak, Freedom to Hear

by
JOYCE LEE MALCOLM

A Guide for Higher Education Trustees

American Council of Trustees and Alumni | Institute for Effective Governance®

ACTA
American Council of Trustees and Alumni

ACTA
American Council of Trustees and Alumni

The **American Council of Trustees and Alumni** (ACTA) is an independent, nonprofit organization committed to academic freedom, academic excellence, and accountability at America's colleges and universities. Founded in 1995, ACTA is the only national organization dedicated to working with alumni, donors, trustees, and education leaders across the United States to support liberal arts education, uphold high academic standards, safeguard the free exchange of ideas on campus, and ensure that the next generation receives an intellectually rich, high-quality education at an affordable price. Our network consists of alumni and trustees from nearly 1,300 colleges and universities, including over 23,000 current board members. Our quarterly newsletter, *Inside Academe*, reaches more than 13,000 readers.

ACTA's **Institute for Effective Governance®** (IEG), founded in 2003 by college and university trustees for trustees, is devoted to enhancing boards' effectiveness and helping trustees to fulfill their fiduciary responsibilities. IEG offers a range of services tailored to the specific needs of individual boards and focuses on academic quality, academic freedom, and accountability.

Through its **Perspectives on Higher Education** essays, the Institute for Effective Governance® seeks to stimulate discussion of key issues affecting America's colleges and universities.

GUARDING THE
Freedom to Speak, Freedom to Hear

A Guide for Higher Education Trustees

by Joyce Lee Malcolm

American Council of Trustees and Alumni
Institute for Effective Governance®

October 2018

About the Author

Joyce Lee Malcolm is the Patrick Henry Professor of Constitutional Law and the Second Amendment at the Antonin Scalia Law School of George Mason University. Professor Malcolm is an historian and constitutional scholar active in the area of constitutional history, focusing on the development of individual rights in Great Britain and America. She has been an engaged supporter of ACTA through her years of service on our Council of Scholars, a distinguished group of academics who advise ACTA on academic policy matters. Professor Malcolm has previously taught at Princeton University, Bentley College, Boston University, Northeastern University, and Cambridge University. She has written many books and peer-reviewed articles on British constitutional and criminal law, U.S. constitutional law, individual rights, and the Second Amendment. Professor Malcolm's essays have appeared in a wide range of national publications, including the *Wall Street Journal*, the *Financial Times*, and *USA Today*. She is a fellow of the Royal Historical Society. Her 2009 book, *Peter's War: A New England Slave Boy and the American Revolution,* was nominated for a Pulitzer Prize in 2010. Her newest book is *The Tragedy of Benedict Arnold: An American Life*.

GUARDING THE
Freedom to Speak, Freedom to Hear

To suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker.[1]

—Frederick Douglass

[T]he 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 to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[2]

—U.S. Supreme Court, Healy v. James (1972). Unanimous opinion.

Introduction

Freedom of speech, protected by our Constitution, has long been a vital component of political, social, and intellectual life in our country. The American Council of Trustees and Alumni (ACTA) has dedicated itself for more than 23 years to working with trustees to ensure that our nation's colleges and universities preserve this essential freedom on campus.

But this freedom is under attack on a disturbingly large number of our nation's campuses. The "heckler's veto," by which loud and sometimes violent protests prevent a speaker from delivering a lecture or participating on a panel, is one particularly obnoxious form of silencing free speech. Equally damaging and dangerous are the campaigns to discourage an invited speaker from coming to campus or to coerce a "disinvitation" of the invited

guest. By understanding how and why these disruptions happen, as well as recognizing their potential to occur on virtually any campus, boards of trustees can develop policies to mitigate the risk of incidents that could readily bring physical damage and very negative public attention to their institutions.

ACTA has long emphasized how essential boards of trustees are in establishing the principles and upholding the laws protecting free speech and free assembly at colleges and universities. In *Governance for a New Era: A Blueprint for Higher Education Trustees*, Benno Schmidt, chairman of the Governance for a New Era® project and Yale University president emeritus, stated: "Academic freedom is the single most important value informing the academic enterprise, and governance for a new era requires trustees to protect it. . . . At the same time, trustees should adopt policies that maintain institutional neutrality and distance from political fashion and pressure."[3]

If our guarantee of free speech is to be more than a "parchment barrier," all of us, particularly those in positions of authority, must have the courage to allow speakers whose ideas are unpopular to be heard.

If our guarantee of free speech is to be more than a "parchment barrier," all of us, particularly those in positions of authority, must have the courage to allow speakers whose ideas are unpopular to be heard.

This brochure and its accompanying wallet-size card, "Protecting Free Speech on Campus: 10 Questions Trustees Should Ask," are the work of Professor Joyce Lee Malcolm in collaboration with ACTA. Dr. Malcolm is the Patrick Henry Professor of Constitutional Law and the Second Amendment at the Antonin Scalia Law School of George Mason University, and a member of ACTA's Council of Scholars. ACTA has designed these brief texts for boards of trustees with three primary aims: 1) To educate trustees about the legal and ethical norms that make the practices of the "heckler's veto" and disinvitations inherently problematic; 2) To prompt

self-scrutiny and preparedness by outlining key questions boards of trustees and others should be asking; and 3) To offer practical and clear guidelines to help trustees cultivate a campus climate where free speech can flourish.

The Heckler's Veto

Those who fear the free and open exchange of ideas that challenge their own have found many ways to impose their will and ideology on college campuses. One tool that is often employed today is the "heckler's veto," a term first coined by University of Chicago professor of law Harry Kalven. When looking at the history of our courts, Professor Kalven saw a "genuine puzzle" being addressed over time: Do we value law and order, or individual freedom? He noted that when government actors are given the power to silence speakers in the name of order, then "the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not approve."[4]

In a strictly legal sense, a heckler's veto is defined as the curtailing of a speaker's freedom of speech and expression by state actors in order to prevent a violent or disorderly reaction. Beyond this narrow legal understanding, common parlance has seen the definition of the heckler's veto expand to include **both the actions taken by authority figures to halt a speaker, as well as the methods used by hostile crowds to disrupt speakers**. Professor Kalven recognized that institutions of higher education "by design and effect [create] discontent with the existing social arrangements and [propose] new ones," so law and order cannot be their primary aim.[5] Thus, the effect of the heckler's veto is to threaten directly the ability of a college or university to serve its community.

Trustees should note that these disruptions are not limited to mere heckling, or even to shouting down speakers. Tactics commonly used by protesters to disrupt events and suppress free speech include occupying campus property in ways that interfere with the normal course of business, damaging campus property, and physically assaulting or threatening speakers and faculty. No matter the methods used, the intent of these

disturbances is always the same: cause enough of a breakdown of order to prevent the speaker from being heard, or coerce campus officials to step in and suppress the speaker themselves.

It is in this last case that campus administrators will especially benefit from clear guidance and support from trustees, as **any reactionary attempt to restrict a speaker or the speaker's event on the basis of how an audience may react to its content is in fact a form of the heckler's veto that the U.S. Supreme Court has time and time again found to be unconstitutional**. This includes restricting free speech to small, remote areas of a campus, banning the distribution of literature, physically removing speakers from a venue over a threat of impending violence, or even unilaterally canceling legally scheduled events due to perceived threats. This last topic has become a particular flashpoint, and bears further examination.

The Damage of Disinvitations

There has been a growing, highly-damaging trend of campus protests in which invited speakers—through student and faculty pressure, or sometimes even administrative fiat—are discouraged or barred from coming to campus. The refusal to listen to a challenging viewpoint long ago occasioned the critique of John Stuart Mill in his 1859 essay, *On Liberty*: "He who knows only his own side of the case, knows little of that."[6] There are few behaviors more devastating to intellectual progress than these so-called "disinvitations."

Institutions that fail to uphold—or allow members of their community to fail to uphold—their commitments to invited speakers risk public embarrassment for neglecting such a core academic tradition as the open exchange of ideas. In 2016, President Barack Obama rebuked the Rutgers University students and faculty whose vociferous protests dissuaded former Secretary of State Condoleezza Rice from delivering a commencement address, stating that while he did "disagree with many of the foreign policies

of Dr. Rice and the previous administration," it was "misguided" to believe that "this community or the country would be better served by not hearing . . . what she had to say." Rather than disinvite speakers one disagrees with, President Obama advised the Rutgers students to

> "[B]ring them in and ask them tough questions. Hold their feet to the fire. Make them defend their positions. If somebody has got a bad or offensive idea, prove it wrong. Engage it. Debate it. Stand up for what you believe in. Don't be scared to take somebody on. Don't feel like you['ve] got to shut your ears off because you're too fragile and somebody might offend your sensibilities. Go at them if they're not making any sense."[7]

This concern articulated by President Obama is not limited to public schools, as private institutions have likewise seen their reputations damaged by disinviting or discouraging invited speakers. In 2014, Brandeis University was the object of harsh criticism in the press for rescinding its offer of an honorary degree to Somali women's rights activist Ayaan Hirsi Ali. That same year, Haverford College protesters induced former University of California–Berkeley Chancellor Robert Birgeneau to withdraw as commencement speaker. His replacement, the late William Bowen, former president of Princeton, harshly and publicly rebuked the students as immature and arrogant.[8]

Trustees and administrators need to be aware that such incidents are not isolated. The Foundation for Individual Rights in Education (FIRE) has produced a comprehensive list of disinvitations and attempted disinvitations on its website, noting over 370 incidents since 2000.[9] In a study published in 2014, FIRE noted that the number of disinvitation incidents has risen dramatically over the last 15 years.[10] In the study, FIRE also identifies the following trends:

- "Speakers are much more likely to be targeted for disinvitation for holding or expressing viewpoints perceived as conservative by faculty or students."

- "The number of 'successful' disinvitations where a speaker ultimately does not speak as a result of a concerted effort to prevent them from doing so has increased as well."
- "Disinvitation incidents occur with nearly equal frequency among public, private, and sectarian schools, demonstrating that disinvitations are not isolated to any particular type of university."
- "Institutions that have seen the highest number of disinvitation incidents also maintain severely speech-restrictive policies."[11]

FIRE's research demonstrates that "disinvitation on campus is a two-fold problem: Students and faculty are demanding the exclusion of opinions with which they disagree, and campus administrators and invited speakers are increasingly willing to give in to these demands."[12] **This is precisely why board leadership is necessary, as disinvitations threaten the intellectual integrity of the institution itself**.

Comprehending the issues at the heart of these disruptions is no mere theoretical exercise. Those that put themselves on the wrong side of the Constitution do so at their own peril.

These incidents represent an overt threat to the freedom of expression, and with it, the quality of higher education. Perhaps of yet greater concern is the fact that this culture has become so ingrained in higher education that it threatens to become the norm. A recent poll by Gallup and the Knight Foundation surveyed more than 3,014 U.S. college students and found that 69% agreed that it is acceptable to cancel a speech because of potential violent protests, 28% agreed that disinviting speakers they disagreed with is acceptable, 37% agreed it is acceptable to shout down a speaker, and 10% agreed that students could use violence to prevent a speaker from being heard.[13] Comprehending the issues at the heart of these disruptions is no mere theoretical exercise. Those that put themselves on the wrong side of the Constitution do so at their own peril. As the public becomes more aware

of the failure of higher education institutions to protect free speech, institutions may find themselves facing backlash from their alumni, donors, state legislators, courts, the media, and the public. Failure to respond appropriately to campus incidents which obstruct free expression can have devastating results.

The 2015 failure by school officials at the University of Missouri's Columbia campus to protect the First Amendment rights of their students shocked the nation and drew near universal condemnation. This controversy—culminating with an infamous video of then-professor Melissa Click calling for "some muscle" to stop a student journalist from recording an ongoing protest—contributed to a decline in freshman enrollment, which dropped by more than 35% over the next two years.[14] In the three months after the disturbance, new pledges and donations to the University decreased by $7.4 million when compared to the same period in the previous year.[15] In 2017, a similar scene occurred at Evergreen State College when the school failed to protect then-professor Bret Weinstein's right to dissent to a policy urging a "day of absence" instructing white people to vacate the campus. Protests of Weinstein's reasoned criticism quickly devolved into vandalism and violent threats. The costs were staggering, as the college's projected full-time enrollment dropped by 17% a year later, and its undergraduate retention rate (which measures how many first-time, first-year students remain at the school through the end of the school year) declined by 8% to its lowest point in over a decade.[16] Events such as these are markedly expensive—both monetarily and in terms of reputation—yet eminently preventable. Recognition of the legal and ethical tradition at the heart of the court's understanding of the First Amendment will help trustees and administrators make clear, decisive, and informed decisions to reduce significantly the possibility of these disruptions.

The Heckler's Veto, Disinvitations, and the Law

In his examination of the history of First Amendment jurisprudence, Professor Harry Kalven noted that the courts tended to reflect divisions

within our own society. He saw the courts engaged in a "sort of Socratic dialogue" with tradition, whereby judges sometimes serve to articulate and clarify values which are held by society and "carry a compulsion and inspiration that [go] beyond" individual court cases.[17] For Kalven, "the tradition of freedom of speech, press, and political action" is so fundamental to our democratic society that it can be understood as nothing less than "the worthiest tradition in American law."[18] At the heart of this tradition lies a tension between the inherent value of speech that is radical, libelous, or seditious, and a common-sense recognition that speech which is likely to cause imminent violence should be restricted.

In case after case, the Supreme Court has struck down overreaching limitations on speech and assembly, and has affirmed the necessity of zealously safeguarding a speaker's rights.

Our nation's early legal tradition drew from the English tradition of the common law, and assigned to the states the power to maintain public order as they saw fit. Consequently, it was not uncommon for unpopular and minority opinions to be banished from public places for the sake of maintaining order. Religious groups, socialists, advocates for ethnic and racial minorities, anti-war protesters, organized labor groups, and communists were prosecuted alongside Nazis and racists under statutes meant to maintain "order" and "public decency."

This began to change when, throughout the 20th century, the U.S. Supreme Court faced multiple cases that challenged state statues which imposed broad and often ill-defined limits on free speech, free expression, and free assembly. The court's rulings on these cases tried to lay down clear guidelines for how to deal with controversial speakers. It is important to have a clear understanding of the court's rationale behind each case, as they provide the foundation for the democratic values that all college graduates—whether from a public or private institution—should be prepared to uphold.

In case after case, the Supreme Court has struck down overreaching limitations on speech and assembly, and has affirmed the necessity of zealously safeguarding a speaker's rights. In *Terminiello v. Chicago*, a 1949 case, the court explicitly acknowledged the potential danger of disorder that speech might provoke, but responded clearly that we cannot allow such a fear to define our actions. The court understood just how dangerous this fear is, and urged Americans to rise to the challenge in *Tinker v. Des Moines* (1969), drawing from the Terminiello decision and stating that:

> "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."[19]

Brandenburg v. Ohio (1969) sharply limited the ability of government actors to restrict speech based on its content. In fact, the principles laid out by this case remain, to this day, the standard by which speech is measured to determine whether or not it is protected by the First Amendment. "The Brandenburg Test," as it has come to be known, declares that speech can only be prohibited if it is "***directed* to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action**."[20] (emphasis added) This decision marked the legal death of the heckler's veto, as now only true threats by a speaker could be considered adequate grounds for halting a speech.

In *Forsyth County v. Nationalist Movement* (1992), the court established another precedent when it struck down a local ordinance which allowed

county administrators to charge variable fees to different groups seeking to hold events on public grounds. This ordinance permitted "unbridled discretion" in determining who would be charged what amount, a practice which the court deemed unconstitutional. The court then established three standards which all statutes attempting to restrict speech in public forums must respect:

- Such standards must have "**narrowly drawn, reasonable, and definite standards**" by which these fees can be assessed.
- These standards cannot take into account "the estimated cost of maintaining public order," **which would depend entirely on the audience's reaction to the speaker**. This is not a "**content-neutral basis for regulation**" which the law requires, and would allow for de jure censorship at an administrator's discretion.
- The court recognized that "**speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob**."[21]

The court took great pains to emphasize that these standards apply to speech that is unpopular or offensive, noting that "[t]hose wishing to express views unpopular with bottle-throwers" ought not to be charged more simply because of a crowd's violent reaction.[22]

The Cost on Campus

A proper understanding of these cases is vital for any trustee, as well as college or university administrator, looking to avoid frequent trips to their local courthouse. In *College Republicans v. Ana Mari Cauce* (2018), the University of Washington (UW) was sued on the grounds that their "Security Fee Policy" was unconstitutional. In the decision, Judge Marsha Pechman agreed, citing *Forsyth County v. Nationalist Movement*

in her declaration that "the Security Fee Policy is neither reasonable nor viewpoint neutral," as "[university] administrators are 'not required to rely on any objective factors,' and 'need not provide any explanation for [their] decision[s].'"[23] Judge Pechman fully understood the challenges the University of Washington was facing, but came down clearly on the side of the students, remarking:

> "The Court recognizes the difficult position faced by UW and other public universities across the country, many of which have recently expended millions of dollars in public funds to ensure safety and security at campus events featuring controversial or provocative speakers. At the same time, the Court observes that college and university campuses are where many students encounter, for the first time, viewpoints that are diverse and different from their own. For this reason, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' Allowing the UW to enforce its Security Fee Policy would infringe not only the rights of the College Republicans, but also the rights of others—including supporters and protesters—who wish to attend [events]. This cannot be condoned, as preventing violation of constitutional rights is 'always in the public interest.'"[24] (Internal citations omitted)

The University of Washington eventually settled the lawsuit, agreeing to pay $122,500 in legal fees and amend their policies regarding security fees.

Bill Ayers v. University of Wyoming (2010) demonstrated that a university cannot ban an invited speaker from campus simply because of security concerns. Mr. Ayers—a founder of Weather Underground and admitted participant in the bombings of the New York City Police Department, the U.S. Capitol Building, and the Pentagon in the early 1970s—was clearly invited as a way to shock and offend, and that strategy was successful; he elicited an outpouring of threats levied by the community against the university. Here, the University of Wyoming was given a choice: stand

firm and support their students' right to hear controversial and unpopular speakers, or yield to a heckler's veto and threats of violence. When the university chose the latter, Mr. Ayers took them to court, eventually forcing them to settle and pay $86,000 in legal fees. Judge William Downes remarked that

> "When the Weather Underground was bombing the Capitol of the United States in 1971, I served in the uniform of my country. . . . [E]ven to this day, when I hear the name of that organization, I can scarcely swallow the bile of my contempt for it. The fact remains Mr. Ayers is a citizen of the United States who wishes to speak. He need not offer any more justification than that. . . . The Bill of Rights is a document for all seasons. We don't just display it when the weather is fair and put it away when the storm is tempest. To be a free people, we must have the courage to exercise our constitutional rights. To be a prudent people, we have to protect the rights of others, recognizing that that is the best guarantor of our own rights."[25]

It is worth noting that when Ayers eventually spoke on campus, the event drew "about ten" protesters, and no violence.[26]

The case of *Center for Bio-Ethical Reform v. Dennis R. Black* (2013) shows the perils of failing to honor and enforce regulations such as a student code of conduct equitably and impartially. Here, the State University of New York–Buffalo had granted a request for a pro-life group to set up a display on a portion of the campus that functioned as a public forum. During the demonstration, protesters formed a barricade around the display, restricting access to the area and obscuring the pro-life group's posters with "signs, umbrellas, and bed sheets."[27] When a member of the pro-life demonstrators asked campus police to separate the protesters, they refused. This refusal directly violated university regulations regarding expressive rights and responsibilities, which state that the university "supported the right of its students, faculty, and staff to peaceful protest" yet

that "demonstrators will not interfere with or violate the rights of others."[28] **The court found that the failure to enforce this official code of conduct equally among all student groups would have represented a violation of the equal-protection clause of the Fourteenth Amendment**. The university settled the lawsuit after agreeing to pay $30,000 in attorneys' fees.

Notwithstanding institutions' obligation to prepare graduates for responsible civic leadership, the Constitution may not have the same binding force—in terms of legal liability—for private colleges. **However, the official policy statements of an institution, especially faculty and student codes of conduct, impose contractual constraints on the extent to which an institution can restrict free speech or controversial speakers on campus**. Failure to rigorously apply these policies equally may open an institution to litigation under contract law.

Solutions

Each institution needs to articulate clearly its commitment to the free exchange of ideas and its willingness to enforce that commitment by adopting clear policies regarding demonstrations and invited speakers, and imposing sanctions when these policies are breached. **Only then can campuses build a climate that fosters and enhances robust dialogue and debate**. Here are some key principles to follow:

1. Starting with student orientation and beginning-of-term faculty meetings, administrators should emphasize that the freedom to speak, listen, inquire, and debate are key to campus life and will be protected. Purdue University offers an outstanding model to follow (see footnote).[29]

2. Provide clear guidance and support to the administrative leadership team so that they understand their obligation to protect the free exchange of ideas, and work with them to establish procedures to ensure this obligation is met. One possibility is assessing this duty as part of the performance evaluation of administrators.

3. Develop transparent, consistent, and content-neutral procedures for approving and scheduling campus events.

4. Be certain that the faculty handbook and student code of conduct articulate the institution's policies protecting freedom of speech.

5. Make clear in student and faculty handbooks that the penalty for intentionally, materially, and substantially disrupting an officially scheduled event may be severe, and could include suspension or expulsion for students and termination for faculty.[30]

6. Deter future disruptions by informing the campus community when sanctions have been imposed, while still maintaining the privacy rights of any students involved.[31]

7. Obtain training for campus security personnel so that they can take effective precautions and respond appropriately to issues surrounding campus speakers.

8. If there is reason to believe that there will be a disruption, take the needed steps to minimize its impact, including providing police protection or limiting attendance to campus members.

9. Adopt the University of Chicago's Principles on freedom of expression or a similar policy statement as "an essential element of the University's culture."

10. Protect the freedom of expression of those who wish to oppose the views of a speaker with whom they disagree or whom they find offensive. Administrators should meet in advance of the scheduled event with those planning protests to set forth how they may proceed in a reasonable manner and place to express their viewpoints.

The stakes for the freedom of our country could not be higher. Institutions of higher learning are meant to be places were viewpoint diversity is celebrated; where commitments to our fundamental freedoms of speech, expression, and assembly serve to secure and enrich our pursuit of truth. We must not let these freedoms be honored only theoretically through broad proclamations and disingenuous commitments, but instead actively by taking clear and practical action to build a culture conducive to free inquiry. If we shirk from this duty, we fail both our system of higher education, and more importantly, every subsequent generation of students. This is a price a free country cannot afford to pay.

NOTES

1. Frederick Douglass, "A Plea for Free Speech in Boston," 1860, ThisNation.com: American Government and Politics Online, http://www.thisnation.com/library/douglassplea.html.
2. Healy et al. v. James et al., 408 U.S. 169 (1972), Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/supremecourt/text/408/169.
3. Benno C. Schmidt, *Governance for a New Era: A Blueprint for Higher Education Trustees*, (Washington, DC: American Council of Trustees and Alumni, 2014), 7–8, https://www.goacta.org/publications/governance_for_a_new_era.
4. Harry Kalven, *The Negro and the First Amendment* (Columbus: Ohio State University Press, 1965), 140.
5. Kalven Committee: Report on the University's Role in Political and Social Action, University of Chicago, Record, Vol. I, No. 1, November 11, 1967, http://www-news.uchicago.edu/releases/07/pdf/kalverpt.pdf.
6. John Stuart Mill, *On Liberty*, 1859 (Ontario: Batoche Books, 2001), 35, https://eet.pixel-online.org/files/etranslation/original/Mill,%20On%20Liberty.pdf.
7. "Remarks by the President at Commencement Address at Rutgers, the State University of New Jersey," May 15, 2016, National Archives and Records Administration, https://obamawhitehouse.archives.gov/the-press-office/2016/05/15/remarks-president-commencement-address-rutgers-state-university-new.
8. Avi Snyder, "Haverford Protesters Get Well-Deserved Rebuke at Commencement," *National Review*, May 19, 2014, https://www.nationalreview.com/phi-beta-cons/haverford-protesters-get-well-deserved-rebuke-commencement-avi-snyder/.
9. Foundation for Individual Rights in Education (FIRE), "Disinvitation Attempts," 2018, https://www.thefire.org/resources/disinvitation-database/.
10. FIRE, *Disinvitation Report 2014: A Disturbing 15-Year Trend*, May 28, 2014, https://www.thefire.org/disinvitation-season-report-2014/.
11. Ibid.
12. Ibid.
13. Knight Foundation/Gallup First Amendment Survey, Final Topline, 2017, Gallup, Inc., https://kf-site-production.s3.amazonaws.com/media_elements/files/000/000/148/original/2017_Knight_Foundation_First_Amendment_Survey_Topline_1_.pdf.

14. Anemona Hartocollis, "Long After Protests, Students Shun the University of Missouri," *New York Times*, July 9, 2017, https://www.nytimes.com/2017/07/09/us/university-of-missouri-enrollment-protests-fallout.html.

15. Rudi Keller, "University of Missouri fundraising takes $6 million hit in December as donors hold back funds," *Columbia Tribune*, February 21, 2016, http://www.columbiatribune.com/ed7cfd5b-3b3e-5b18-95d9-f2945ac51172.html.

16. Jillian Kay Melchior, "Rough Social Justice at Evergreen State," *Wall Street Journal*, May 22, 2018, https://www.wsj.com/articles/rough-social-justice-at-evergreen-state-1527029193.

17. Harry Kalven and Jamie Kalven, *A Worthy Tradition: Freedom of Speech in America* (New York, NY: Harper & Row, 1988), xv, xviii. Drawing from Kalven, "Tradition in Law," in *Great Ideas Today*, edited by R. Hutchins and M. Adler (Chicago: Encyclopedia Britannica, 1974), 31–33.

18. Ibid, 33.

19. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) citing Terminiello v. Chicago, 337 U.S. 1 (1949).

20. Brandenburg v. Ohio, 395 U.S. 444 (1969), Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/supremecourt/text/395/444.

21. Forsyth County, Georgia, Petitioner v. The Nationalist Movement, 505 U.S. 123 (1992), Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/supremecourt/text/505/123.

22. Ibid.

23. College Republicans of the University of Washington v. Ana Mari Cauce, Case No. C18-189-MJP (2018), Leagle, https://www.leagle.com/decision/infdco20180212a23.

24. Ibid.

25. Ayers v. University of Wyoming, *Wyoming Lawyer*, http://digitaleditions.walsworthprintgroup.com/publication/?i=49169&article_id=519596&view=articleBrowser&ver=html5#{%22issue_id%22:49169,%22page%22:%2228%22}.

26. Michael Roberts, "William Ayers speech University of Wyoming tried to ban: A photo gallery," *Westword*, April 29, 2010, https://www.westword.com/news/william-ayers-speech-university-of-wyoming-tried-to-ban-a-photo-gallery-5909030.

27. Center for Bio-Ethical Reform et al. v. Dennis R. Black et al., United States District Court Western District of New York, Case No. 13-CV-581-A.

28. State University of New York–Buffalo, "Student Code of Conduct University Standards and Administrative Regulations," 2017, 18, http://www.buffalo.edu/content/dam/www/studentlife/units/uls/student-conduct/ub-student-code-of-conduct.pdf.
29. For more about how Purdue University's student orientation program takes into account the institution's culture of free speech and expression, see Alex Morey, "Free Speech Orientation Program Keeps Conversation Going at Purdue," FIRE, December 5, 2016, https://www.thefire.org/free-speech-orientation-program-keeps-conversation-going-at-purdue/.
30. This language of "intentionally, materially, and substantially" was carefully chosen after consulting with the Foundation for Individual Rights in Education (FIRE) to ensure that this recommendation could not be misconstrued to allow for the restriction of constitutionally protected speech. FIRE defines an act which materially and substantially disrupts as that which, an act which materially and substantially disrupts is that which "significantly hinders another person's or group's expressive activity, prevents the communication of the message, or prevents the transaction of the business of a lawful meeting, gathering or procession by: engaging in fighting, violent, or seriously disruptive behavior; or physically blocking or significantly hindering any person from attending, listening to, viewing, or otherwise participating in an expressive activity."
31. For more on the necessity of publicizing sanctions, see the Report of the Committee on Freedom of Expression at Yale penned by C. Vann Woodward, found here, http://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale; and more on the necessity of protecting the privacy rights of students, as seen in the Family Educational Rights and Privacy Act (FERPA), is available here, https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html.

"All stakeholders in the academy have a role to play in advancing open inquiry on our nation's campuses. With this report, ACTA offers sensible, concrete actions trustees can take to help administrators, faculty, and students reap the rewards of constructive engagement across lines of difference."

—**Debra Mashek**, PhD, Executive Director
Heterodox Academy

"Governing a modern university is complicated, but core principles for handling controversial speakers and volatile protests are firm and well established—and trustees play an essential part in upholding them. Joyce Lee Malcolm's lucid legal analysis and sensible recommendations should be the starting point when universities need to make hard choices about free speech."

—**Jonathan Rauch**, Senior Fellow–
Governance Studies, Brookings Institution

"I am proud that the University of Colorado Regents recently made significant changes to their Laws and Policies in an effort to protect and support freedom of speech and inquiry on CU campuses. We can be grateful to ACTA for giving guidance to higher education nationwide concerning ways to safeguard these core values, when—as happens too often—they are threatened by those who seek to silence diverging viewpoints and ideas."

—**Heidi Ganahl**
University of Colorado Board of Regents

ACTA
American Council of Trustees and Alumni

American Council of Trustees and Alumni
1730 M Street NW, Suite 600
Washington, DC 20036
P: 202.467.6787 • F: 202.467.6784
info@GoACTA.org • www.GoACTA.org