

THE FUTURE OF HIGHER EDUCATION:

RECONCILING FREEDOM OF EXPRESSION WITH  
TRAUMA-INFORMED PRACTICES AND RELATIONSHIP-  
BUILDING

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INTRODUCTION

Our nation's universities face significant challenges, including providing greater access and affordability, managing a business model heavily dependent on tuition revenue in an era of shifting demographics and declining enrollment, integrating technology and artificial intelligence, and mitigating serious enterprise risks.<sup>1</sup>

Each of these challenges implicate higher education's value proposition. The confidence of Americans in universities has fallen to 36 percent, down from 57 percent in 2015 and from 48 percent in 2018.<sup>2</sup> In this environment, how can universities make a persuasive

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<sup>1</sup> See Matthew Lynch, *The 20 Biggest Challenges Facing Higher Education in 2023*, THE EDVOCATE (April 14, 2023), <https://www.theedadvocate.org/the-20-biggest-challenges-facing-higher-education-in-2023/>; Chris Burt, *College 2030, Part II: The 5 Challenges Higher Ed Leaders Must Address*, UNIVERSITY BUSINESS (June 28, 2022), <https://universitybusiness.com/college-2030-part-ii-the-5-challenges-higher-ed-leaders-must-address/>; *Top Challenges Facing U.S. Higher Education*, WILEY UNIV. SERVICES (Nov. 2, 2021), <https://universityservices.wiley.com/top-higher-education-challenges/>.

<sup>2</sup> Megan Brenan, *Americans' Confidence in Higher Education Down Sharply*, GALLOP (July 11, 2023),

case for the value of the education they are offering—the economic value as well as the social value?

The case for the economic value of a college degree, a graduate degree, and a professional degree remains strong.<sup>3</sup> Yet, building the value proposition for higher education also requires that a strong case be made for the social value of earning a degree. That case is often framed in terms of the necessary role that education plays in forming citizens with the knowledge, skills, and values necessary for a strong democracy. In his work, *What Universities Owe Democracies*,<sup>4</sup> Ronald Daniels contends that institutions of higher

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<https://news.gallup.com/poll/508352/americans-confidence-higher-education-down-sharply.aspx>.

<sup>3</sup> Recipients of college degrees generally earn:

about \$1.2 million over a lifetime—about \$600,000 more than the average high school diploma holder and about \$300,000 more than the average associate’s degree holder. At the 95th percentile of the earnings distribution, the earnings advantage is even higher; bachelor’s degree holders have lifetime earnings of \$3.4 million—\$1.8 million more than high school diploma holders and \$1.3 million more than associate’s degree holders.

Recipients of a master’s degree earn approximately \$40,000 more per year, and \$1.5 million over the course of a career, more than those who do not hold that degree. Legal education also carries a healthy return on investment. Ninety-three percent of law school programs have positive returns and twenty-four percent have an ROI above \$1 million. See Diane Whitmore Schanzenbach, Lauren Bauer & Audrey Breitwieser, *Eight Economic Facts on Higher Education*, BROOKINGS (Apr. 26, 2017), <https://www.brookings.edu/articles/eight-economic-facts-on-higher-education/>; Becton Loveless, *The Value of a College or University Degree*, EDUCATION CORNER, <https://www.educationcorner.com/value-of-a-college-degree.html#:~:text=The%20Economic%20Value%20of%20Higher%20Education&text=The%20U.S.%20Census%20Bureau%20has,million%20dollars%20during%20their%20careers> (last visited Sept. 7, 2023); Cara Lombardo, *On Wall Street, Lawyers Make More Than Bankers Now*, THE WALL STREET J. (June 22, 2023), <https://www.wsj.com/articles/on-wall-street-lawyers-make-more-than-bankers-now-ae8070a7>; Preston Cooper, *Is Grad School Worth It? A Comprehensive Return on Investment Analysis*, MEDIUM (Feb. 24, 2022), <https://freopp.org/is-graduate-school-worth-it-a-comprehensive-return-on-investment-analysis-a84644f29f9>.

<sup>4</sup> RONALD J. DANIELS, GRANT SHREVE, & PHILLIP SPECTOR, *WHAT UNIVERSITIES OWE DEMOCRACY* (Johns Hopkins University Press eds., 1st ed.

learning are indispensable to the maintenance of a healthy liberal democracy, but only to the extent that they provide social mobility, citizenship education, the stewardship of facts, and the cultivation of pluralistic, diverse communities.<sup>5</sup>

The Supreme Court of the United States similarly has extolled the virtues of higher education in preparing citizens to participate in a representative democracy.<sup>6</sup> Justice Breyer, in *Mahanoy Area School District v. B.L.*, specifically declares that our schools must be “nurseries of democracy” in justifying the value of freedom of expression within those schools.<sup>7</sup> He goes on to explain that:

[o]ur representative democracy only works if we protect the [“]marketplace of ideas.[”]<sup>8</sup> This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People’s will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection.<sup>9</sup>

Yet, as Daniels suggests, a nursery of democracy must cultivate a deep respect for the full range of diverse life experiences and viewpoints, from which the free expression of all ideas—popular and unpopular—can flourish.<sup>10</sup> A democracy cannot grow in an atmosphere where novel, challenging, and discomforting expressions of valuable ideas are censored or chilled. As Frederick Douglass famously declared, the right to free speech is the “dread of tyrants.”<sup>11</sup> But neither can a democracy develop in an environment

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2021). See also Paul Tough, *Saying No To College*, THE NEW YORK TIMES MAGAZINE, Sept. 10, 2023, at 32 (In the past decade, “Americans’ feelings about higher education have turned sharply negative.”).

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038 (2021); *Tinker v. Des Moines Indep. Cmtys. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>7</sup> *Mahanoy*, 141 S. Ct. at 2046.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> DANIELS, SHREVE & SPECTOR, *supra* note 4, at 9.

<sup>11</sup> Fredrick Douglass, A Plea for Free Speech in Boston (Dec. 14, 1860), in American Constitutionalism Volume II: Right and Liberties (Oxford Univ. Press 3d ed. Supp. 2020).

in which expression is so disruptive to discourse or causes such harm to the potential proponents of different ideas that those proponents are effectively prevented from engaging in the discourse.

Another significant challenge confronting educational institutions, therefore, is to balance the value of democracy-serving freedom of expression with the value of preventing disruptive or harmful expression that is contrary to an institution's educational mission and disserves democracy.<sup>12</sup> That challenge has become particularly acute in the context of recent controversies over "the boundaries for permissible expression" by speakers at universities and law schools.<sup>13</sup>

This article will suggest that all universities can advance their value proposition by creating a true nursery of democracy in which freedom of speech is an integral part of building relationships, and through which democratic skills are nurtured, and knowledge is constructed. Universities should, in particular, develop a freedom of expression policy that: (1) uses reasonable time, place, and manner restrictions on expression to encourage collaboration and relationship-building among students who bring diverse experiences and viewpoints; and (2) discourages expression that is disruptive or made with conscious disregard for the likelihood that it will cause or aggravate the objectively measurable harm of trauma in others.

This kind of speaker policy will foster a learning environment in which freedom of expression will realize its authentic social value as an instrument of democracy. Such a policy will also help to build a university of the future, in which knowledge and well-being are

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<sup>12</sup> As used in this article, the term "educational mission" means a particular university's understanding of both its ultimate mission as an institution of higher learning (that is, to pursue truth or to achieve social justice) and its policies, which reflect its understanding of educational best practices for the construction of learning and knowledge.

<sup>13</sup> Norman I. Silber, *Introduction: Freedom of Expression at American Law Schools*, 51 HOFSTRA L. REV. 389, 389-90 (2023) (recounting controversies at Stanford Law School, Georgetown Law School, and the University of Pennsylvania). See David French, *The Moral Center Is Fighting Back on Elite College Campuses*, THE N. Y. TIMES (Apr. 16, 2023), <https://www.nytimes.com/2023/04/16/opinion/free-speech-campus-universities-promising-news.html?searchResultPosition=1>.

constructed not through adversarial transactions, but through meaningful relationships.

Section II of this article will show that the First Amendment is not an insurmountable barrier to a university's ability to exercise its discretion to establish a speaker policy aligned with its educational mission. Section III of this article demonstrates that the First Amendment does not preclude a university from establishing a speaker policy that: (a) encourages relationship-building by creating a pre-event meet and confer period of relational dialogue between members of different student groups, and (b) curtails expression that is not merely offensive or discomforting, but is disruptive or made with conscious disregard for the likelihood that it will cause or aggravate the objectively measurable harm of trauma in others.

Finally, Section IV shows that all universities—even those which proclaim that they prioritize the value of unbridled free speech on campus—can, and should, encourage relational expression through trauma informed practices to create learning environments for the future, in which knowledge is constructed and democracy is nurtured.

## I. THE FIRST AMENDMENT IS NOT AN INSURMOUNTABLE BARRIER TO A UNIVERSITY'S DISCRETION TO ESTABLISH A SPEAKER POLICY ALIGNED WITH ITS EDUCATIONAL MISSION

### *A. The First Amendment Does Not Directly Govern Private Universities*

The First Amendment protections for freedom of expression only apply directly to public educational institutions.<sup>14</sup> As such, the more than 1,700 private nonprofit colleges and universities<sup>15</sup>—including nearly 1,000 faith-based institutions<sup>16</sup>—are not prohibited by the First Amendment from enacting speaker policies that are fully aligned with their missions and values.

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<sup>14</sup> See, e.g., ROBERT O'NEIL, FREE SPEECH IN THE COLLEGE COMMUNITY 225 (1997).

<sup>15</sup> Table 105.50, NAT'L CTR. FOR EDUC. STAT. (2022), [https://nces.ed.gov/programs/digest/d19/tables/dt19\\_105.50.asp](https://nces.ed.gov/programs/digest/d19/tables/dt19_105.50.asp).

<sup>16</sup> *Id.*

Private educational institutions may have to balance those values against their accreditation standards or separate state law requirements that impose protections for academic freedom and freedom of expression. For example, the Higher Learning Commission has promulgated a statement supporting free speech on campus.<sup>17</sup> Similarly, the Association of American Law Schools requires that law school demonstrate their commitment to core values such as academic freedom and a diversity of perspectives as a condition to membership.<sup>18</sup> In addition, California has enacted the “Leonard Law,” which prohibits private universities from disciplining students for speech that would be protected by the First Amendment if made off campus.<sup>19</sup> Specifically, [Californial] Education Code section 94367, subdivision (a) provides that,

no private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.<sup>20</sup>

But that California state prohibition contains two carve outs. First, the Leonard Law “does not apply to a private postsecondary educational institution that is controlled by a religious organization, to the extent that the [law’s] application . . . would not be consistent with the religious tenets of the organization.”<sup>21</sup> Second, the law “does not prohibit an institution from adopting rules and regulations that are designed to prevent hate violence . . . from being directed at

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<sup>17</sup> *Free and Open Academic Inquiry and Debate on Our Campuses is Essential to Our Democracy and National Well-being*, AM. COUNCIL ON EDUC. (March 3, 2022), <https://www.acenet.edu/Documents/Community-Statement-on-Free-and-Open-Academic-Inquiry-030322.pdf>; *Bylaws*, THE ASS’N. OF AM. L. SCHS. (Jan. 2022), <https://www.aals.org/about/handbook/bylaws>.

<sup>18</sup> THE ASS’N. OF AM. L. SCHS., *supra* note 17.

<sup>19</sup> CAL. EDUC. CODE § 94367 (West 2009).

<sup>20</sup> *Antebi v. Occidental Coll.*, 47 Cal. Rptr. 3d 277, 279 (Cal. Ct. App. 2006).

<sup>21</sup> EDUC. § 94367.

students in a manner that denies them their full participation in the educational process, so long as the rules and regulations conform to standards established by the First Amendment to the United States Constitution and Section 2 of Article I of the California Constitution for citizens generally.”<sup>22</sup>

Accordingly, private, faith-based institutions in California may uphold their religious values within their speaker policies, even if they are otherwise inconsistent with the First Amendment’s free speech protections. All private institutions in other states are free to design speaker policies that balance their own values against their accreditation standards, without direct First Amendment prohibitions.

#### *B. The First Amendment’s Prohibitions Are Not Absolute*

Even where the First Amendment’s protections for freedom of expression dictate, directly or indirectly, a university’s policies, those protections are not an insurmountable barrier to the development of a speaker policy that comports with a university’s values and educational best practices. The First Amendment “right of free speech is not absolute at all times and under all circumstances.”<sup>23</sup>

##### 1. Constitutional Limitations on the Time, Place, and Manner of Expression

First, universities may regulate the time, place, and manner of speech. The Supreme Court of the United States’ has “ma[de] clear . . . that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open

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<sup>22</sup> *Id.*

<sup>23</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

ample alternative channels for communication of the information.’<sup>24</sup>

Speech thus may be restricted based on its time, place, or manner so long as the restriction is content-neutral. Even speech that is protected under the First Amendment may be regulated, ‘provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’<sup>25</sup> For example, a city-owned music venue was able to regulate the sound equipment and volume of its performers, even though music is protected speech, because the restrictions applied to all musicians regardless of the genre or instrument as the restrictions were content-neutral.<sup>26</sup>

## 2. Constitutional Limitations on Expression That is Disruptive or Made With Conscious Disregard for the Likelihood of Causing Harm

Second, the Supreme Court of the United States has upheld restrictions on speech where its social benefit is outweighed by stronger governmental interests, particularly in the context of schools. As the Court recently recognized in *Counterman v. Colorado*, “[f]rom 1791 to the present . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas.”<sup>27</sup> The Court explained that “[t]hese ‘historic and traditional categories [are] long familiar to the bar’ ” and perhaps, too, the general public.<sup>28</sup> “This Court has often described [those]

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<sup>24</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *see Heffron v. Int'l. Soc'y. for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981) (quoting *Via. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

<sup>25</sup> *Ward*, 491 U.S. at 791; *See* Erwin Chemerinsky, *President's Message: Law Schools and Freedom of Speech*, THE ASS'N OF AM. L. SCHS. (Aug. 22, 2023, 2:30 PM), <https://www.aals.org/about/publications/newsletters/aals-news-spring-2022/chemerinsky-law-schools-and-freedom-of-speech/>.

<sup>26</sup> *Ward*, 491 U.S. at 791.

<sup>27</sup> *United States v. Stevens*, 559 U. S. 460, 468 (2010).

<sup>28</sup> *Id.*

historically unprotected categories of speech as being ‘of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest’ ” in their proscription.<sup>29</sup> In each case, the Court weighs the exposition of ideas with countervailing governmental or social interests. Speech is not protected when it is “of such slight social value . . . that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.”<sup>30</sup>

For example, speech has been deemed “unprotected” when it:

- Incites violence;<sup>31</sup>
- Is libelous or defamatory against individuals or groups;<sup>32</sup> or
- Constitutes a true threat of physical harm<sup>33</sup> and the speaker consciously disregards a substantial risk that the speech would be viewed as threatening.<sup>34</sup>

The First Amendment does not protect expression that defames private individuals or groups because it harms “our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”<sup>35</sup>

In *Beauharnais v. Illinois*, 343 U.S. 250 (1952), the Supreme Court of the United States upheld a criminal statute that prohibited group defamation, defined as expression which “exposes the citizens of any race, color, creed, or religion to contempt, derision, or obloquy [strong public criticism or verbal abuse] which is

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<sup>29</sup> *Id.* at 470 (internal quotation marks omitted) (emphasis omitted).

<sup>30</sup> *Beauharnais v. Illinois* 343 U.S. 250, 257 (1952).

<sup>31</sup> See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

<sup>32</sup> See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

<sup>33</sup> *Virginia v. Black*, 538 U.S. 343, 399-400 (2003).

<sup>34</sup> *Counterman v. Colorado*, 143 S. Ct. 2106, 2111-12 (2023).

<sup>35</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966)); See also *Counterman*, 143 S. Ct. at 2117 (explaining that another is defamation—false statements of fact harming another’s reputation).

productive of breach of the peace or riots.”<sup>36</sup> Justice Frankfurter reasoned that “willful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community.”<sup>37</sup> Defamation leads to violence; it undermines the values of our communities, and it violates the rights of its targets.<sup>38</sup> Despite questions about the continuing validity of the holding of *Beauharnais*, the case remains controlling law.<sup>39</sup>

In *Counterman*, the Court also indicated that a statute criminalizing true threats in the form of recklessly uttered expressions that cause serious emotional harm to others would not run afoul of the First Amendment.<sup>40</sup> There, Colorado charged Counterman under a statute making it unlawful to “[r]epeatedly . . . make[] any form of communication with another person’ in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress.”<sup>41</sup>

The Court declared that expression that constitutes a true threat is outside the bounds of First Amendment protection and punishable as a crime as long as the state is required to show that the defendant acted recklessly.<sup>42</sup> To act recklessly, the defendant must have “consciously disregarded a substantial risk that his communications would be viewed as threatening violence.”<sup>43</sup> The State need not prove any more demanding form of subjective intent to threaten another.<sup>44</sup> Accordingly, the First Amendment does not prevent the government from criminalizing expressions made with conscious

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<sup>36</sup> *Beauharnais*, 343 U.S. at 251.

<sup>37</sup> *Id.* at 259.

<sup>38</sup> *Id.* at 259-62.

<sup>39</sup> See Steven A. Ramirez, *Race in America in 2021: A Time to Embrace Beauharnais v. Illinois*, 52 LOY. U. CHI. L. J. 1001, 1016, n. 104 (2021) (arguing brilliantly and persuasively that *Beauharnais* is still good law and collecting scholarship supporting that view).

<sup>40</sup> *Counterman v. Colorado*, 143 S. Ct. 2106, 2111 (2023).

<sup>41</sup> *Id.* at 2112 (quoting COLO. REV. STAT. ANN. §18-3-602(1)(c) (2014)).

<sup>42</sup> *Counterman*, 143 S. Ct. at 2111-12.

<sup>43</sup> *Id.* at 2112.

<sup>44</sup> *Counterman*, 143 S. Ct. at 2112; See *Borden v. United States*, 141 S. Ct. 1817, 1827 (2021) (plurality opinion).

disregard for the risk that the expression would be viewed as threatening harm of serious emotional distress.

*A fortiori*, a university may adopt a policy preventing or disciplining such threatening expressions. The Supreme Court of the United States has consistently recognized that schools must have “special leeway” to regulate speech that occurs under their supervision and have upheld limitations on the right to freedom of expression in the educational environment that would not be upheld in the public square.<sup>45</sup> Restrictions on speech are particularly important in the context of education, which requires “appropriate regard for school administrators’ judgment” in preserving a university’s educational mission and values.<sup>46</sup>

Although students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate[,]” the Supreme Court of the United States, in *Mahanoy Area School District v. B.L.*, made clear that educational institutions may curtail speech when it interferes with the school’s educational mission.<sup>47</sup> The value of free speech in schools must be weighed against the value of maintaining an environment in which schools can achieve their mission of educating all students. An educational institution, for instance, may regulate expression when it:

- Could be misconstrued as carrying the authority of the school’s own speech or curriculum<sup>48</sup>;
- Is lewd, vulgar, or obscene;<sup>49</sup>
- Or promotes illicit drug use.<sup>50</sup>

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<sup>45</sup> See *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2050 (2021) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260,266 (1988)).

<sup>46</sup> *Christian Legal Soc’y. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 685, 687 (2010).

<sup>47</sup> *Mahanoy*, 141 S. Ct. at 2052 (quoting *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

<sup>48</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>49</sup> See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

<sup>50</sup> See *Morse v. Frederick*, 551 U.S. 393 (2007).

Furthermore, schools have a constitutionally compelling regulatory interest in preventing or disciplining expression, on or off campus, that constitutes “serious or severe bullying or harassment targeting particular individuals[,]” or “threats aimed at teachers or other students” that interfere with a student’s ability to learn.<sup>51</sup>

Significantly, the Supreme Court in *Mahanoy* reaffirmed that educational institutions may also prevent or discipline speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”<sup>52</sup> Accordingly, there is no question that a university may prohibit expression that is disruptive of the educational environment, including expression that makes it difficult to hear or understand the expression of others.<sup>53</sup>

Nor is there any serious doubt that a university could adopt a speaker policy that prohibits expression where the university can reasonably forecast that the expression would cause substantial disruption.<sup>54</sup> Although peaceful, nondisruptive protests are protected by the First Amendment, the Constitution does not require schools to give hecklers at their events a veto power.<sup>55</sup> The principles and requirements underlying free speech on campus do “not include a right to shout down others so they cannot be heard.”<sup>56</sup>

## II. THE FIRST AMENDMENT DOES NOT PRECLUDE A UNIVERSITY FROM ESTABLISHING A SPEAKER POLICY THAT ENCOURAGES RELATIONSHIP-BUILDING AND DISCOURAGES EXPRESSION THAT IS MADE WITH CONSCIOUS DISREGARD FOR THE LIKELIHOOD THAT IT

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<sup>51</sup> *Mahanoy*, 141 S. Ct. at 2040.

<sup>52</sup> See *Mahanoy*, 141 S. Ct. at 2040 (quoting *Tinker*, 393 U.S. at 513).

<sup>53</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>54</sup> *Id.*

<sup>55</sup> Erwin Chemerinsky & Howard Gillman, *Free Speech Doesn’t Mean Hecklers Get to Shut Down Campus Debate*, WASH. POST (Mar. 24, 2022), <https://www.washingtonpost.com/opinions/2022/03/24/free-speech-doesnt-mean-hecklers-get-shut-down-campus-debate/>.

<sup>56</sup> *Id.*

**WILL CAUSE OR AGGRAVATE THE OBJECTIVELY  
MEASURABLE HARM OF TRAUMA IN OTHERS**

*A. The First Amendment Does Not Preclude Universities  
From Enacting a Speaker Policy Which Establishes a Pre-Speech  
Meet and Confer Period of Dialogue Between Student Groups*

Even in those situations in which the strongest First Amendment protections for freedom of expression dictate university policies, there is no question that the university may enact reasonable time, place, and manner restrictions on campus speech. One such reasonable restriction would be a university policy which requires student organizations wishing to invite an outside speaker to campus to provide advance notice to the administration and to other student groups, and to give those student groups an opportunity to meet and confer before the event.

For example, a university could require that all law student organizations who wish to have any external speaker address the campus community, regardless of the content of the expression or the speaker's viewpoint, must inform the administration and all law student organizations of the proposed event at least two weeks prior to the proposed event date. Moreover, the university could require the law student organization seeking to invite the outside speaker to make a good faith effort to "meet and confer" with any other law student organization desiring to do so within that two-week period.<sup>57</sup>

During that two-week meet and confer period, law student organizations representing students who bring a diversity of viewpoints would have a vehicle for serious and sincere dialogue about the proposed speaker. There would be absolutely no power by the administration or a student group to veto or prohibit the proposed event based on its content or viewpoint. But in the course of respectful dialogue among members of different student groups, the students would be able to discuss both ministerial and

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<sup>57</sup> This "meet and confer" requirement is a familiar one in the law. Federal Rule of Civil Procedure 26(f), for example, requires that the parties meet and confer to discuss a discovery plan in litigation. FED. R. CIV. P. 26(f). Similarly, California Code of Civil Procedure Section 2016.040 requires that the parties meet and confer in a reasonable, good faith effort to resolve their disputes before presenting a motion to the court. CAL. CIV. PROC. CODE § 2016.040.

substantive matters about the event. For instance, they could agree to adjust the time of the event to attract greater attendance and to avoid competing events, to add speakers or panelists to a forum to present a balanced view, to share publicity costs for the event, and to consolidate similar events that had otherwise been planned separately and would have divided the audience.

The students might also learn from each other about the harm that a particular speaker might create, including the harm of aggravating trauma in other students. The student group wishing to invite the speaker may proceed with the event as planned, despite the dialogue. Alternatively, the student group might learn from the conversation and decide to make any adjustments to the event that it deems best, including, perhaps, selecting a different speaker who will present the same viewpoint, but in a manner that is not sophistical or does not cause harm to others and is therefore more persuasive on the merits to more audience members.

This dialogue period would provide a campus climate for relationship-building in two ways. First, the various student groups would be encouraged to talk and listen to each other within the meet and confer period, as they try to reconcile their different perspectives, needs, and interests. Second, the ultimate event that emerges from this student dialogue would be more likely to be attended by students from across different groups, rather than only those students from the group that originally proposed the event.

The shared experience by students who bring different perspectives would be exactly the kind of expressive activity that generates relational learning. It would replace the all-too-common campus occurrence of student-sponsored events that are attended only by students with the same preexisting viewpoint—a viewpoint that is reinforced in an echo-chamber rather than challenged by the chosen speaker.

This dialogue-promoting policy would be compatible with the First Amendment because it is content-neutral and is narrowly tailored to serve an important governmental interest. “The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of

disagreement with the message it conveys.”<sup>58</sup> “[T]he requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’ ”<sup>59</sup>

The proposed speaker policy is content-neutral because the university’s agreement or disagreement with the speaker’s content is irrelevant to whether the policy applies. All proposed speakers, regardless of viewpoint or ideology, must undergo the proposed process before being invited to campus. The proposed speaker policy is also narrowly tailored to achieve the important governmental interest of preserving and strengthening the kind of relationships that foster learning and democratic values.

*B. The First Amendment Does Not Preclude Universities From Adopting a Speaker Policy That Prevents Expression That Is Disruptive or Made With Conscious Disregard for the Likelihood That It Will Cause or Aggravate the Objectively Measurable Harm of Trauma in Others*

1. Expression That Causes or Aggravates Trauma Carries a Substantial Risk of Causing Objectively Measurable Physical Harm

Trauma is not drama. “Trauma results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or threatening and that has lasting adverse effects on the individual’s functioning and physical, social, emotional, or spiritual well-being.”<sup>60</sup> Traumatic events vary widely, and include being involved in a deadly car accident, sexual violence, and racial discrimination.<sup>61</sup>

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<sup>58</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984)).

<sup>59</sup> *Ward*, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

<sup>60</sup> SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., CENTER FOR SUBSTANCE ABUSE TREATMENT, TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES 7 (Trauma Informed Protocol 57, 2014).

<sup>61</sup> *Id.*

But the resulting traumatic stress and physical symptoms are often similar regardless of the nature of the traumatic event.<sup>62</sup> The measurable physical manifestations of re-traumatization or trauma-aggravation include “higher rates than the general population of a wide range of serious and life-threatening illnesses including cardiovascular disease, diabetes, gastrointestinal disorders, and cancer.”<sup>63</sup>

Traumatic stress impacts victims’ brains as well as their nervous, endocrine, cardiovascular, respiratory, and muscular systems.<sup>64</sup> The body’s hormonal responses to stress and perceived danger are altered and result in uncontrollable hyperarousal and anxiety.<sup>65</sup> Trauma and re-traumatization, in fact, “dysregulate the hypothalamic-pituitary-adrenal axis and sympathetic nervous system.”<sup>66</sup> “[T]raumatic life events [also] can lead to health problems through dysregulation of . . . the inflammatory response system.”<sup>67</sup> Prior “trauma ‘primes’ the inflammatory response system so that it reacts more rapidly to subsequent life stressors.”<sup>68</sup> Elevated inflammation has an etiologic role in many chronic illnesses.<sup>69</sup>

Measurable physical harm also results from racial trauma.<sup>70</sup> Race-based or racial trauma is a traumatic response to an

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<sup>62</sup> Kathryn M. Magruder, Katie A. McLaughlin & Diane L. Elmore Borbon, *Trauma is a Public Health Issue*, TAYLOR & FRANCIS ONLINE (June 7, 2017) <https://www.tandfonline.com/doi/full/10.1080/20008198.2017.1375338?src=recsys>.

<sup>63</sup> K. Kendall-Tackett, *Psychological Trauma and Physical Health: A Psychoneuroimmunology Approach to Etiology of Negative Health Effects and Possible Interventions*, APA PSYCHNET (2009), <https://psycnet.apa.org/record/2009-03747-004>.

<sup>64</sup> Eldra P. Solomon & Kathleen M. Heide, *The Biology of Trauma: Implications for Treatment*, 20 J. OF INTERPERSONAL VIOLENCE 51, 52 (2005).

<sup>65</sup> *Id.*

<sup>66</sup> Kendall-Tackett, *supra* note 63.

<sup>67</sup> Kendall-Tackett, *supra* note 63.

<sup>68</sup> Kendall-Tackett, *supra* note 63.

<sup>69</sup> Kendall-Tackett, *supra* note 63.

<sup>70</sup> Monnica T. Williams, Destiny M.B. Printz & Ryan C.T. DeLapp, *Assessing Racial Trauma With the Trauma Symptoms of Discrimination Scale*, 8 PSYCH. OF VIOLENCE 735, 735 (2018) (“Racial trauma, or race-based trauma, can be defined as a traumatic response to an accumulation of negative race-related

accumulation of negative race-related experiences.<sup>71</sup> When minoritized students who have experienced racial trauma are faced with expression that libels or defames them as a racial group, they manifest physical symptoms of re-traumatization.<sup>72</sup> The expression causes measurable harm. There is also “an accumulating amount of evidence of an enduring effect of trauma exposure to be passed to transgenerational offspring via the epigenetic inheritance mechanism of DNA methylation alterations and has the capacity to change the expression of genes and the metabolome.”<sup>73</sup>

As such, recent medical research has validated the logic and reasoning of the Supreme Court of the United States’ *Beauharnais v. Illinois* Opinion. In his Opinion for the Court, Justice Frankfurter was correct that expression which “exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy . . . is productive of breach of the peace or riots.”<sup>74</sup> His latest scientific research confirms his statement that “willful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community.”<sup>75</sup>

## 2. The Physical Harm Resulting from Re-traumatization Interferes with Learning and Meaningful Contributions to the Marketplace of Ideas

The physical harm resulting from expression that causes re-traumatization interferes with the ability to learn.<sup>76</sup> In her

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experiences (Bryant-Davis & Ocampo, 2006; Comas-Díaz, 2016). As race is a social construct, these experiences are always linked to racism (as opposed to a natural disaster or random violence), where racism can be defined as prejudice, discrimination, and violence against a subordinate racial group based on attitudes of superiority by the dominant group.”).

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> Nagy A. Youssef et al., *The Effects of Trauma, with or without PTSD, on the Transgenerational DNA Methylation Alterations in Human Offsprings*, 8 J. BRAIN SCI. 1, 1 (2018).

<sup>74</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 251 (1952).

<sup>75</sup> *Id.* at 258-59.

<sup>76</sup> HELEN COLLINS SITLER, TEACHING WITH AWARENESS: THE HIDDEN EFFECTS OF TRAUMA ON LEARNING, THE CLEARING HOUSE: A JOURNAL OF EDUCATIONAL STRATEGIES, ISSUES, AND IDEAS, 82:3, 119-24 (Aug. 7, 2010).

pathbreaking work, *The Trauma-sensitive Classroom*,<sup>77</sup> Patricia A. Jennings documents the wealth of research demonstrating that trauma and re-traumatization cause biochemical reactions in the body that interfere with “critical learning processes such as concentration, language development, emotion regulation, socialization, and memory.”<sup>78</sup> As neuroscientist Daniel Siegel explains, “For someone with a history of trauma, the priming of the threat-state of alarm can temporarily shut down the openness to take chances and to engage with others that are needed for an optimal learning process to unfold.”<sup>79</sup>

The physical responses to retraumatizing speech may be helpful to survival and resiliency, but they also interfere with the ability to respond to the speech in any way that is conducive to a reflective, free, and open exchange of ideas. The interlocutor who is retraumatized frequently experiences attention lapses, difficulty organizing material sequentially, and deficits in both receptive and expressive language.<sup>80</sup> Trauma fractures one’s sense of control, connection, and meaning.<sup>81</sup> The harm caused by retraumatizing speech makes it physiologically unlikely or difficult to respond to the speech that caused the harm.

Accordingly, the premise that free speech is necessary to produce a marketplace of ideas in which stronger ideas prevail over weaker ideas is undercut by the research establishing that retraumatizing speech will go unanswered because the impact of that speech is so harmful as to shut down any competing speech or

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<sup>77</sup> PATRICIA A. JENNINGS, THE TRAUMA-SENSITIVE CLASSROOM: BUILDING RESILIENCE WITH COMPASSIONATE TEACHING 15 (W.W. Norton & Company, 2019).

<sup>78</sup> *Id.*

<sup>79</sup> Daniel S. Siegel, *Foreword* to THE TRAUMA-SENSITIVE CLASSROOM: BUILDING RESILIENCE WITH COMPASSIONATE TEACHING (W.W. NORTON & COMPANY 2019).

<sup>80</sup> Jennings, *supra* note 77, at 33-35.

<sup>81</sup> JUDITH L. HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE – FROM DOMESTIC ABUSE TO POLITICAL TERROR 33 (Basic Books, 1997); JENNY HORSMAN, TOO SCARED TO LEARN: WOMEN, VIOLENCE, AND EDUCATION 33 (2000).

ideas.<sup>82</sup> Retraumatizing speech survives in the adversarial exchange of ideas not based on its merit, but because it silences any competing ideas. Even those universities devoted to the free exchange of ideas in an open marketplace as a means toward truth would have an incentive to curtail expressive activity that has the intent—or at least the foreseeable impact—of silencing speech. And every university would have an interest in curtailing expressive activity which prevents learning.

### 3. Universities May Prevent Expression Where There is a Substantial Risk that the Expression will Cause or Aggravate Trauma

In their brilliant, lucid, and foundational book, *Free Speech on Campus*, Erwin Chemerinsky and Howard Gillman explain that the First Amendment does not protect expression that constitutes a “true threat.”<sup>83</sup> They distinguish true threats of *physical* harm, which are not protected by the First Amendment, from true threats of *emotional* harm which are protected by the First Amendment.<sup>84</sup> They find this distinction “essential” because there would be no way to allow suppression of expression that causes emotional harm without also allowing restrictions on ideas and views.<sup>85</sup>

In *Counterman*, the statute at issue criminalized communications that were made in “a manner that would cause a reasonable person to suffer serious emotional distress.”<sup>86</sup> The Supreme Court concluded that the statute violated the First Amendment’s protections for freedom of expression, to the extent that it does not require proof that the communicator acted recklessly.<sup>87</sup> But the Court assumed that a prohibition on expression that causes *emotional* harm would be constitutional, so long as the

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<sup>82</sup> Eldra P. Solomon & Kathleen M. Heide, *The Biology of Trauma: Implications for Treatment*, 20 J. OF INTERPERSONAL VIOLENCE 51, 52-55 (2005).

<sup>83</sup> ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 96 (Yale Univ. Press, 2018).

<sup>84</sup> *Id.* at 117.

<sup>85</sup> *Id.*

<sup>86</sup> *Counterman v. Colorado*, 143 S. Ct. 2106, 2109 (2023).

<sup>87</sup> *Id.* at 2111-12.

prohibition requires the requisite state of mind of recklessness.<sup>88</sup> The Court thereby indicates that the First Amendment does not protect a true threat of causing emotional harm.

But even assuming that a university would be precluded by the First Amendment from curtailing speech that causes emotional harm, it may still prevent expression that aggravates trauma because the resulting harm is serious *physical* distress. The physical manifestations of trauma are such that trauma-inducing and trauma-aggravating speech constitute a threat of physical harm. That threat is real, objective, and measurable.<sup>89</sup> As the *Counterman* case reaffirms, the First Amendment does not protect expression that is made with conscious disregard for the likelihood that it would cause that kind of physical harm.<sup>90</sup> Accordingly, universities are not precluded by the First Amendment from curtailing speech that is likely to cause physical harm resulting from re-traumatization.

Nor should universities truly devoted to a robust marketplace of ideas be concerned that a speaker policy that curtails retraumatizing speech might chill this robust exchange of ideas. As detailed above, the evidence indicates that the harm of re-traumatization makes it difficult, if not impossible, for the survivor to learn from the expression that caused the harm.<sup>91</sup> And the survivor certainly cannot fully respond to the expression that caused that harm in any way that would serve a true marketplace of ideas.<sup>92</sup> Accordingly, universities that are truly dedicated to a full and free exchange of competing ideas as a means to generate and disseminate knowledge would be well served by a relational, trauma-informed speaker policy.

#### 4. Educational Institutions Can Distinguish Between Tolerable Offensive Speech and Preventable Retraumatizing Expression

Although it may require some diligence, universities can fairly distinguish between the expression of ideas that may offend others

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<sup>88</sup> *Id.*

<sup>89</sup> See Solomon & Heide, *supra* note 64.

<sup>90</sup> *Counterman*, 143 S. Ct. at 2119.

<sup>91</sup> See Solomon & Heide, *supra* note 64, at 52-56.

<sup>92</sup> See Solomon & Heide, *supra* note 64, at 52-56.

(which can attract responsive ideas and must be allowed), and the expression of ideas made with reckless disregard for the likelihood that it will retraumatize others (which will not attract responsive speech and can be curtailed).

For example, suppose a student organization invites a prominent judge with a record of controversial opinions to give a talk on the rights of gun owners.<sup>93</sup> In accordance with the “meet and confer” period proposed in this Article, the sponsoring student organization would have notified all other student groups at least two weeks in advance, and all interested members of all other student groups would have the opportunity to engage in respectful, relational conversations about the event, including its date, location, and whether other speakers might be added to the program. No member of any student group would have a veto right over the event, and none would be entitled to disrupt the event, but all students might learn from the dialogue, and the event may be more meaningful as a result. The university would have no cause to prohibit the talk because, although the judge’s statements about controversial judicial opinions may be offensive to some in the audience, they are not likely to aggravate foreseeable forms of trauma. The audience would benefit by being able to assess and respond to the merits of the ideas presented in the talk.

Now, suppose instead that this particular speaker had spoken at many other events in the recent past, and as part of the speaker’s presentation declares that “mass killing is a small price to pay for preserving the Second Amendment right to bear arms.” In the “meet and confer period” before this speaker appears on campus, members of student groups might remind the members of the sponsoring student group that (in this hypothetical) the neighborhood next to the university had recently experienced a horrific mass shooting and that many students in the school were traumatized by the shooting.

If, assuming that their university was dedicated to best educational practices, the students had learned about trauma and

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<sup>93</sup> This example is loosely based on the incident at Stanford Law school which sparked great controversy. See Scott Jaschik, *Stanford Apologizes after Students Heckle Judge*, INSIDE HIGHER ED. (March 20, 2023), <https://www.insidehighered.com/news/2023/03/13/stanford-apologizes-after-students-heckle-judge>.

trauma-informed practices on campus, they would hopefully understand that potential audience members who survived the mass killing are suffering from the physical harm of trauma. Those traumatized students might be very interested in the arguments supporting the right to bear arms but would likely experience the physical harm of re-traumatization by the gratuitous incendiary statement about “mass killing.” They may well be unable to contribute meaningfully to a conversation about the merits of those arguments made at the time of the event. The students from across different groups might well decide to invite a different speaker—one who presents compelling arguments supporting the merits of the right to bear arms but who does not feel the need to pepper those arguments with trauma-aggravating statements.

If the sponsoring group decides to proceed with the original speaker as planned, the university may then decide that, in the context of this community at this time, the speaker’s statement is likely to cause the physical harm of re-traumatization in others. In proceeding with the speech, the speaker would be acting recklessly—in conscious disregard for the likelihood that the expressive activity would cause harm. Accordingly, the university may curtail the speech.

The university’s decision to prevent the speaker from giving that particular speech would be both constitutional and prudent. It would be constitutional because even educational institutions governed by the First Amendment may curtail speech made with conscious disregard of its likelihood to cause physical harm, such as re-traumatization, in others. It is prudent because even educational institutions fiercely dedicated to protecting the marketplace of ideas have little interest in supporting forums where otherwise interested interlocutors are physically unable to participate in a meaningful exchange.

Further, the university’s decision to prevent this retraumatizing speech would not be based on the viewpoint of the expression or the content of the ideas. For example, imagine that another student group proposes a speaker on the opposite side of the issue—a renowned advocate for gun control. But the speaker has a record of including the following statement in the speaker’s presentation: “Only mass killers are opposed to gun control.” A trauma-informed speaker policy would result in curtailing this

expression as well—regardless of its content or viewpoint.

The “meet and confer” period may again result in the students agreeing on a different speaker who presents the same viewpoint, but without the trauma-aggravating statement. If not, the university may decide not to allow this pro-gun control speaker to be invited to campus. It would do so for the same viewpoint-neutral reason that it would decide not to allow the previous anti-gun control speaker to be invited to campus. In both cases, the university would not be acting to chill different viewpoints and ideas, but only to avoid the substantial risk that the speaker would cause physical harm because of re-traumatization. The university’s decision to prevent this particular gun control advocate from speaking on campus would also advance its educational mission. A campus forum that includes trauma-aggravating speech would not be a full and free marketplace of ideas because some traumatized interlocutors who might otherwise seek to be involved in a fruitful conversation of the merits of gun control would be physically unable to engage in the dialogue.

In a similar vein, suppose that a student group seeks to invite a speaker to campus to deliver a presentation summarizing his latest book. In the book’s foreword, the speaker proudly proclaims that he is the leader of a white supremacist group and that his book is designed “to halt the invasion of Black people into white neighborhoods.” This message, of course, is very similar to the one printed on Joseph Beauharnais’ leaflets, which he distributed on the streets of Chicago.<sup>94</sup> Beauharnais was successfully prosecuted under an Illinois statute criminalizing group libel, which the Supreme Court found to be constitutional.<sup>95</sup>

A university thus could likely preclude an invited speaker from delivering that same message on the ground that it constitutes group libel.<sup>96</sup> But it could also do so on the ground that this expression will be delivered in conscious disregard for the risk that it will cause physical harm—the measurable harm of retraumatizing Black audience members, who carry with them the intergenerational

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<sup>94</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 252 (1952); *See also People v. Beauharnais*, 97 N.E. 2d 343, 344-45 (Ill. 1951), *aff’d*, 343 U.S. 250 (1952).

<sup>95</sup> *Beauharnais*, 343 U.S. at 251-52.

<sup>96</sup> *See Ramirez, supra* note 39, at 1016.

trauma of racial violence, subjugation, and oppression.<sup>97</sup> Moreover, the message will not advance the mission of the university to educate students and construct knowledge because its impact is to injure interlocutors who might otherwise have a strong interest in responding to the message.

On the other hand, suppose a different student group proposes a speaker who has a public record of advocacy to “halt the invasion of white people into Black neighborhoods.” The university may hope that student groups, as part of their meet and confer obligation, would discuss this speaker’s message and decide to present a balanced forum on the history of white supremacy, colonization, and oppression. But ultimately, the university could not censor this message because it does not carry a substantial risk of retraumatizing white audience members, who are not likely to suffer the physiological harm of retraumatized and intergenerational racial trauma.

The distinction between the constitutionality of the university’s discretion to curtail the first message (advocating resistance to the movement of Black people into predominantly white areas) but not the second message (advocating resistance to the movement of white people into predominantly Black areas) seems to be improperly based on the viewpoint expressed. But it is not. It is based on the degree of likelihood that the message will cause physical harm.

In the context of this nation’s enduring history of racial and intergenerational racial trauma suffered by Black people (a historical reality of anti-Black racial terror vitally important to Justice Frankfurter’s reasoning in *Beauharnais*), a speech advocating resistance to Black people moving into predominantly white neighborhoods is substantially more likely to cause the physical harm of retraumatizing audience members than a speech

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<sup>97</sup> *Beauharnais*, 343 U.S. at 259; see also Stuart Stevenson, *Working with the Trauma of Racism in Groups in a Time of White Supremacy – Erasure, Psychic Ghettoization, or Bearing Witness*, 55 GRP. ANALYSIS 213, 216-18 (2021).

advocating resistance to white people moving into predominantly Black neighborhoods.<sup>98</sup>

### III. UNIVERSITIES SEEKING TO BUILD A LEARNING ENVIRONMENT BASED ON EDUCATIONAL BEST PRACTICES MAY ADOPT A RELATIONAL, TRAUMA-INFORMED SPEAKER POLICY

#### 1. Universities Have Adopted a Range of Speaker Policies Aligned With Their Distinctive Educational Missions

In their mission statements or defining documents, universities typically include an articulation of their core objective to educate students and generate knowledge.<sup>99</sup> A university's policy regarding freedom of expression on campus may well be aligned with the priorities established in its mission statement and with that university's particular understanding of the ways in which knowledge is best generated and education is best delivered.<sup>100</sup> As a result, institutions of higher learning have adopted a range of freedom of expression policies—from a transactional approach to a relational approach—that is traceable to their educational mission.

##### (a) *The Transactional Approach to Freedom of Expression*

At one end of the continuum are schools that have adopted an approach to free speech based on their presumption that truth emerges from a transactional exchange of ideas in an open marketplace. In 1974, for example, the University of Chicago adopted the “Chicago Principles,” which reflect “the long-standing

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<sup>98</sup> Justice Frankfurter specifically relied upon the history of racial violence targeting Black people to support his conclusion that the particular expression on Beauharnais's leaflets constituted racial libel that would likely cause destruction, violence, and injury to the “dignity” and “educational opportunities” of Black people. *Beauharnais*, 343 U.S. at 258-59, 263.

<sup>99</sup> Christopher C. Morpew & Matthew Hartley, *Mission Statements: A Thematic Analysis of Rhetoric Across Institutional Type*, 77 J. HIGHER EDUC. 456, 458 (2006).

<sup>100</sup> Joshua Cohen, *Freedom of Expression*, 22 PHIL. & PUB. AFF. 207, 209 (1993).

and distinctive values” of the University.<sup>101</sup> Many other universities have since adopted these principles.<sup>102</sup>

Because fostering free and open “debate and deliberation” is an “essential part of the University’s educational mission[,]” the University of Chicago “guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn.”<sup>103</sup> The University believes that its educational mission is advanced in an environment in which “ideas of different members of the University community will often and quite naturally conflict” and in which those members learn and construct knowledge by “vigorously contesting the ideas that they oppose.”<sup>104</sup>

In keeping with its presumption that knowledge and learning are constructed through a transactional process of vigorous conflict, contest, and opposition, the University has chosen not to curtail, or take a position on, “unwelcome, disagreeable, or even deeply offensive” expression and not to suppress the exchange of ideas, even if the ideas are “offensive, unwise, immoral, or wrong-headed.”<sup>105</sup> As a logical consequence of its commitment to unregulated transactions of expressive activity as an essential part of its educational mission, the University declares that “concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.”<sup>106</sup>

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<sup>101</sup> Geoffrey R. Stone et al., *Report of the Committee on Freedom of Expression*, UNIV. OF CHI. 1, 1 (July 2014), <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>.

<sup>102</sup> *Chicago Statement: University and Faculty Body Support*, FIRE (2023), <https://www.thefire.org/research-learn/chicago-statement-university-and-faculty-body-support>.

<sup>103</sup> Stone et al., *supra* note 101, at 2.

<sup>104</sup> Stone et al., *supra* note 101, at 2.

<sup>105</sup> Stone et al., *supra* note 101, at 2.

<sup>106</sup> Stone et al., *supra* note 101, at 2.

(b) *The Relational Approach to Freedom of Expression*

By contrast to the Chicago Principles, other educational institutions have adopted a relational approach to freedom of expression, rooted in their assumption that knowledge and learning are constructed not through adversarial exchanges, but through meaningful relationships. For example, Widener University's mission statement recognizes that the university must be a "community of learners" that values "respect[,] in which all of its members "care for and honor the dignity of all in our community."<sup>107</sup>

In alignment with the University's educational mission to empower learning through respect and care for the dignity of all, Widener Law's speaker policy provides: values of civility "may deny any speaker permission to speak on campus . . . [if the] law school would not be able to ensure . . . safety[,] . . . [t]he proposed speaker or event advocates violence, hatred, harassment, discrimination, or other action that is incompatible with the professional obligations of lawyers, . . . would unreasonably disrupt the law school's regular academic environment, or . . . in the discretion of the dean, would not contribute to the university's mission."<sup>108</sup> Widener Law's speaker policy actualizes the University's foundational principle that knowledge is constructed socially in expressive activities between all members of the community. This policy recognizes that knowledge is not really constructed in an environment that values expressive conflict over security, respect, civility, and dignity for all.

Similarly, faith-based universities recognize that unbridled oppositional speech may frustrate their educational missions. Some Jesuit universities, for example, "seek[] to create an environment in which all members are treated with dignity and . . . prohibit harassment or expressions of bias or hate that 'intimidate, mock,

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<sup>107</sup> *Strategy, Mission & History*, WIDENER UNIV., <https://www.widener.edu/about/strategy-mission-history> (2023).

<sup>108</sup> *Student Handbook: Academic Year 2022-2023*, WIDENER UNIV. COMMW. L. SCH. 1, 126, <https://commonwealthlaw.widener.edu/files/resources/2022-2023-wlc-student-handbook-final.pdf> (last visited Sept. 4, 2023).

degrade, or threaten’ members of [its] community.”<sup>109</sup> To advance its Jesuit mission of creating a “community that is animated by commitments to the pursuit of truth and the service of humanity[,]” St. Louis University “embrace[s] freedom of thought, expression, and speech” so long as it is “grounded in a mutual commitment to civil discourse.”<sup>110</sup> The University’s relational speaker policy is tied to its “commitment to its members, no matter their race, ethnicity, religion, gender, gender expression or sexual orientation, and it seeks to create an environment in which all members are treated with dignity and encouraged to participate fully in the life of the University.”<sup>111</sup>

Fordham University also has adopted a speaker policy aligned with its Jesuit mission.<sup>112</sup> Fordham recognizes the “dignity and uniqueness of each person” and that “education is based on close collaboration among students, faculty and staff.”<sup>113</sup> In accordance with its appreciation for the notion that knowledge is constructed through “close collaboration,” Fordham’s speaker policy requires pre-event consultation and prohibits “expression that is indecent or is grossly obscene or grossly offensive on matters such as race, ethnicity, religion, gender, gender identity, or sexual orientation . . .”<sup>114</sup> This Jesuit approach, which is shared at law schools like Widener, is based on the recognition that knowledge is best constructed through relationships, in which all interlocutors are free to express ideas because they do not fear intimidation, degradation, or other harm.

In this challenging era for institutions of higher learning, it may benefit both institutions and students when universities develop

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<sup>109</sup> *Statement on Speech, Expression and Civility*, SAINT LOUIS UNIV. 1, 1 <https://www.slu.edu/speech-expression-civility/statement-of-philosophy.php> (last visited Sept. 4, 2023).

<sup>110</sup> *Id.* at 2.

<sup>111</sup> *Id.* at 1.

<sup>112</sup> *Mission Statement*, FORDHAM UNIV. (Apr. 28, 2005), <https://www.fordham.edu/about/mission-statement/>.

<sup>113</sup> *Id.*

<sup>114</sup> *Student Handbook: Speakers Policy*, FORDHAM UNIV., <https://www.fordham.edu/student-life/deans-of-students-and-student-life/student-handbook/university-regulations/a---z-listing/speakers-policy/#:~:text=Any%20speaker%20contract%20must%20contain,University%20facilities%20to%20the%20event> (last visited Sept. 12, 2023).

distinctive educational missions and strengths. As discussed in Section II, the First Amendment, rightly understood, does not bar universities from adopting speaker policies aligned with their particular mission and strengths—within the broad range of transactional to relational.<sup>115</sup>

Accordingly, some universities may continue to decide that their distinctive educational mission calls them to allow unregulated campus speech that is harmful and trauma-aggravating. But they cannot justifiably claim that the First Amendment requires them to do so. On the other hand, universities that choose to adopt a relational speaker policy based upon the latest research about the way in which students actually learn, and how knowledge is actually constructed, can justifiably claim that the First Amendment does not prevent them from doing so.

## 2. Recent Scientific Discoveries from Diverse Disciplines Revealed that Learning and Knowledge are Constructed Through Relational, not Transactional Expression

The legitimacy of the concept of the marketplace of ideas as a controlling justification for freedom of expression has been seriously challenged for myriad reasons. For example, strong arguments have been made showing that the marketplace of ideas rationale:

- Is based on the mistaken view that the Framers intended the First Amendment to protect the unbridled, adversarial exchange of ideas;
- Overreads John Stuart Mill’s liberty principle to prohibit regulation of speech, even if it harms others;
- Is rooted in the flawed premise that knowledge is equivalent to power;
- Fails to account for proven market imperfections that would preclude the triumph of the best ideas, including

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<sup>115</sup> O’Neil, *supra* note 14.

barriers to entry for minoritized voices and other market imperfections, and

- Is obsolete in the internet era characterized by artificial intelligence, knowledge curation, and the flow of information.<sup>116</sup>

Even if the concept of the marketplace of ideas survives each of these criticisms and continues to provide a rationale for free speech on campus, however, universities truly dedicated to creating an environment in which knowledge is constructed would adopt policies that support a relational approach to freedom of expression.

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<sup>116</sup> See, e.g., Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223 (2020); See Jill Gordon, *John Stuart Mill and the 'Marketplace of Ideas.'* 23 SOC. THEORY & PRACT. 235–49 (1997); Michael Rectenwald, *John Stuart Mill and "the Marketplace of Ideas," and Minority Opinion*, MISESINSTITUTE (June 22, 2021), <https://mises.org/wire/john-stuart-mill-marketplace-ideas-and-minority-opinion>.

Although he has been credited with the notion of the marketplace of ideas, Mill did not coin the phrase. It was likely introduced by the US Supreme Court justice Oliver Wendell Holmes Jr. in *Abrams v. United States* (1919). What's more, there is little evidence that *On Liberty* advocated an unhampered marketplace of ideas, where ideas and expression vie in an agora of free and open competition. In fact, there is evidence to the contrary—that Mill preferred a kind of ‘affirmative action for unconventional opinions,’ and an artificial preference bestowed on “minority” views.

Claudio Lombardi, *The Illusion of a “Marketplace of Ideas” and the Right to Truth*, 3 AM. AFFAIRS. 198–209 (Spring 2019); Alvin I. Goldman, *Speech Regulation and the Marketplace of Ideas*, OXFORD ACAD., 189–218 (1999); Dan McGee, *The ‘Marketplace of Ideas’ is a Failed Market*, MEDIUM (Feb. 13, 2017), <https://medium.com/@danmcgee/the-marketplace-of-ideas-is-a-failed-market-5d1a7c106fb8>; Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160 (2015); Morgan Weiland, *First Amendment Metaphors: The Death of the ‘Marketplace of Ideas’ and the Rise of the Post-Truth ‘Free Flow of Information’*, 33 YALE J. L. & HUMANITIES 366 (2022).

Recent findings from the disparate fields of neuroscience, neuropsychology, cognitive psychology, educational psychology, and behavioral economics all call into question the presumption that the adversarial and competitive exchange of ideas is the route toward truth, democracy, and human flourishing.<sup>117</sup>

Relying on sophisticated research techniques, including brain imaging, the world's foremost neuroscientists have discovered that humans are not hard-wired to consume or compete; rather, they are hard-wired to pursue meaningful relationships, which are critical to the continued growth of their appreciation for divergent ideas and their cognitive functioning.<sup>118</sup>

In his path-breaking brain research, renowned psychiatrist Dr. Bruce Perry has found dramatic evidence that human beings are in fact predisposed to building relationships.<sup>119</sup> Based on his brain imaging and clinical research, Dr. Perry concludes that human beings have a distinct biological make-up and survival instinct that compels them to form meaningful relationships.<sup>120</sup> He demonstrates that: "Humankind would not have endured and cannot continue without the capacity to form rewarding, nurturing, and enduring relationships."<sup>121</sup>

As neuropsychiatrist Daniel Siegel also has found, "[w]e come into the world wired to make connections with one another, and the subsequent neural shaping of our brain, the very foundation of our

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<sup>117</sup> This section has been influenced by, and expanded on, the influential work of *The Pre-K Home Companion* authored by Sherelyn R. Kaufman, Michael J. Kaufman, and Elizabeth C. Nelson. 2017. *See also* Michael Kaufman, *Social Justice and the American Law School Today: Since We Are Made for Love*, 40 SEATTLE UNIV. L. REV. 1187,1195 (2017).

<sup>118</sup> See V. S. RAMACHANDRAN, THE TELL-TALE BRAIN: A NEUROSCIENTIST'S QUEST FOR WHAT MAKES US HUMAN 22 (2012) (noting the role of mirror neurons in empathy); Cf. CHARLES DARWIN, THE DESCENT OF MAN, 98 (1871). "When two tribes of primeval man, living in the same country, came into competition, if the one tribe included (other circumstances being equal) a greater number of courageous, sympathetic, and faithful members, who were always ready to warn each other of danger, to aid and defend each other, this tribe would without doubt succeed best and conquer the other."

<sup>119</sup> See generally MAIA SZALAVITZ & BRUCE D. PERRY, BORN FOR LOVE: WHY EMPATHY IS ESSENTIAL – AND ENDANGERED (2010).

<sup>120</sup> See *id.* at 4, 30.

<sup>121</sup> *Id.* at 4.

sense of self, is built upon” relational, not adversarial exchanges.<sup>122</sup> According to Siegel, meaningful relationships develop the prefrontal cortex in the brain, thereby integrating the cognitive processes that are essential to learning, success, and well-being.<sup>123</sup> In his book, *Mind: A Journey to the Heart of Being Human*, Siegel finds that the human mind is “an embodied and relational, self-organizing emergent process that regulates the flow of energy and information both within and between.”<sup>124</sup> He declares that “the mind is not just within us—it is also between us.”<sup>125</sup> Accordingly, Siegel concludes that all human “[e]nergy and information flow happens in relationships as energy and information is shared.”<sup>126</sup>

The human urge to develop relationships is also indispensable to well-being. In *A Survey Method for Characterizing Daily Experience: The Day Reconstruction Method*, Nobel Prize-winning psychologist and founder of behavioral economics, Daniel Kahneman, presents his transformative research regarding the determinants of happiness and well-being.<sup>127</sup> The evidence indicates that individuals experience the greatest degree of happiness from their social relationships.<sup>128</sup> As Professor Kahneman’s research confirms, the most significant determinant of happiness—whether measured as momentary feelings, reflective thoughts, or life satisfaction—is the quality of a person’s relationships.<sup>129</sup> People who have developed the ability to form and maintain meaningful relationships are “significantly happier and healthier than their peers who do not have such meaningful relationships.”<sup>130</sup> Moreover, those . . . who have formed meaningful

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<sup>122</sup> DANIEL J. SIEGEL, MINDSIGHT: THE NEW SCIENCE OF PERSONAL TRANSFORMATION 167-68 (2011).

<sup>123</sup> *Id.* at 4.

<sup>124</sup> DANIEL J. SIEGEL, MIND A JOURNEY TO THE HEART OF BEING HUMAN 37 (2016).

<sup>125</sup> *Id.* at 167.

<sup>126</sup> *Id.* at 53.

<sup>127</sup> Daniel Kahneman et al., *A Survey Method for Characterizing Daily Life Experience: The Day Reconstruction Method*, 306 SCI. MAG. 1776, 1776-80 (2004).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1777-78.

<sup>130</sup> SHERELYN R. KAUFMAN ET AL., THE PRE-K HOME COMPANION (2016) [hereinafter KAUFMAN ET AL., THE PRE-K HOME COMPANION].

relationships are even happier and healthier than their wealthier peers who have not formed those relationships.”<sup>131</sup> “The quality of relationships also is connected to physical well-being, health, and wellness.”<sup>132</sup>

Significantly, meaningful relationships within an educational environment help produce executive function, which is critical to the ability to learn from ideas and to respond effectively to divergent points of view.<sup>133</sup> The concept of executive function has been recognized as part of recent scholarship about the importance of “grit” or “growth mindset” to learning.<sup>134</sup> Education programs that enable students to develop meaningful, positive relationships are particularly effective in supporting the growth of executive function which is also vital to the kind of expressive activities that support learning.<sup>135</sup> Accordingly, institutions of higher learning dedicated to achieving their core educational mission would create learning environments that support the development of relationship-building and relational expression competencies.

In particular, relational expression competencies are critical to the development of the five habits of mind, which according to Howard Gardner, are indispensable for the future success and well-being of graduates from college.<sup>136</sup>

Gardner—one of the world’s most influential educational psychologists—concludes that education must be directed toward creating habits of mind that will be valuable in the

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<sup>131</sup> *Id.* at 41.

<sup>132</sup> *Id.*

<sup>133</sup> Nat’l F. on Early Childhood Pol’y and Programs, Ctr. on the Developing Child at Harvard Univ., *Building the Brain’s “Air Traffic Control” System: How Early Experiences Shape the Development of Executive Functions* 6-7 (Ctr. on the Developing Child at Harvard Univ., Working Paper No. 11, 2011) [hereinafter *Building the Brain’s “Air Traffic Control” System*], <https://perma.cc/DX8UWF4F>.

<sup>134</sup> See generally PAUL TOUGH, *HOW CHILDREN SUCCEED: GRIT, CURIOSITY, AND THE HIDDEN POWER OF CHARACTER* (2012).

<sup>135</sup> See *Building the Brain’s “Air Traffic Control” System*, *supra* note 133, at 10. See also W. Steven Barnett et al., *Educational Effects of the Tools of the Mind Curriculum: A Randomized Trial*, 23 EARLY CHILDHOOD RSCH. Q. 299, 299-313 (2008).

<sup>136</sup> See HOWARD GARDNER, *FIVE MINDS FOR THE FUTURE* 5-9 (2006).

future, [including:] a disciplined mind—the ability to become an expert in at least one area[;] a synthesizing mind—the ability to gather information from many sources, to organize the information in helpful ways and to communicate the information to others[;] a creating mind—the ability of adults to keep alive in themselves the mind and sensibility of a young child, including an insatiable curiosity about other people and the environment, an openness to untested paths, a willingness to struggle, and a desire and capacity to learn from failure[;] a respectful mind—the ability to understand the perspectives and motivations of others, particularly those who appear to be different[; and] an ethical mind—the ability to appreciate one's social or professional role and to act in accordance with shared standards for that role.<sup>137</sup>

It is these habits of mind that significantly increase the chance that a student will grow to experience life-long success and well-being. Gardner warns institutions of higher learning that,

these five minds are likely to be crucial in a world marked by the hegemony of science and technology, global transmission of huge amounts of information, handling of routine tasks by computers and robots, and ever increasing contacts of all sorts between diverse populations. Those who succeed in cultivating the pentad of minds are most likely to thrive.<sup>138</sup>

Those educational institutions that cultivate these five habits of mind needed for the future are the most likely to thrive.

Yet, in order to cultivate these five habits of mind, educational institutions “must begin by creating a respectful atmosphere toward others. In the absence of civility, other educational goals prove infinitely harder to achieve.”<sup>139</sup> According to Gardner, universities

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<sup>137</sup> KAUFMAN ET AL., THE PRE-K HOME COMPANION, *supra* note 130, at 33-34 (citing GARDNER, *supra* note 136, at 3, 5-9).

<sup>138</sup> GARDNER, *supra* note 136, at 163.

<sup>139</sup> *Id.* at 161.

hoping to survive into the future must “actively” discourage instances of disrespect, and practitioners within the university who exhibit a lack of respect must be “ostracized.”<sup>140</sup>

He suggests that a speaker policy that enables interlocutors to engage in expression that lacks civility and respect (and certainly a policy that permits expression that causes harm to other interlocutors) is based on an obsolete understanding that knowledge is constructed through the unbridled exchange of atomistic and oppositional expression.<sup>141</sup> Universities hoping to enhance their value proposition as a source of useful education for the future will develop policies that encourage respectful and relational dialogue, and actively discourage and ostracize the purveyors of disrespectful and harmful expressive activities.

Furthermore, universities that cultivate each of the five habits of mind strengthen their value proposition as institutions that generate useful knowledge: they design human centered approaches to solving the world’s most complex problems. To the extent that universities build their value propositions based on their contribution to solving complex problems, they will increasingly do so through the art of collaborative design thinking. Design thinking is a problem-solving approach which requires a truth-seeking process based on the following: empathy, targeted research, ideation, prototyping, testing, and iteration.<sup>142</sup> The ideas that emerge are human centered because they are tested by the people served by the ideas and then modified to meet their needs.<sup>143</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See, e.g., TOM KELLY & DAVID KELLY, CREATIVE CONFIDENCE: UNLEASHING THE CREATIVE POTENTIAL WITHIN US ALL (2013); TIM BROWN, CHANGE BY DESIGN: HOW DESIGN THINKING TRANSFORMS ORGANIZATIONS AND INSPIRES INNOVATION (2009); NIGEL CROSS, DESIGN THINKING: UNDERSTANDING HOW DESIGNERS THINK AND WORK (2011); *Designs on the Law: The Arrival of Design Thinking in the Legal Profession*, CTR. ON THE LEGAL PRO.: HARV. L. SCH.: THE PRACTICE (JAN./FEB. 2019), <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/adaptive-innovation/designs-on-the-law/>.

<sup>143</sup> Anne K. Bates, *Design Thinking: The Collaborative, Creative, and Human-Centered Approach to Problem-Solving*, 3 J. OF TRANSFORMATIVE INNOVATION 1, 1-2 (2018).

The design thinking process depends on an open exchange of ideas, but it is a far cry from a competitive, adversarial, or transactional marketplace. Rather, the ideas emerge freely from collaborative relationships in which solutions are constructed through trial and error with real people.<sup>144</sup> This collaborative, human-centered research leads to effective solutions to real problems. The universities which create environments in which design thinking—relational knowledge creation—is encouraged will demonstrate their social value through the resulting solutions that they create.

### 3. Educational Institutions That Foster Relational Expression Are Nurseries of Democracy

The social value of universities as nurseries of democracy is linked to their capacity to inspire fulsome expression in a marketplace of ideas. Yet, the democracy envisioned by the Framers of the Constitution depends for its sustenance upon the development in institutions of higher learning of relational expression.

Although they understood that human beings were prone to being overcome by their individual self-interest and passions, the Framers of the Constitution promulgated a subtle conception of human nature. The United States regime depends upon a view of human nature that drives individuals to develop meaningful relationships through which they achieve well-being and find fulfillment in the social construction of knowledge. The Framers believed that human beings have the capacity both to govern and to be governed because they possess the innate ability to take on different roles and points of view—to understand another person's perspectives, feelings, and intentions. The constitutional structure of self-governance depends on the belief that individuals have a natural desire for the freedom to construct and to spread knowledge through meaningful relationships. The unbridled transactional model of freedom of expression, as a means to create and

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<sup>144</sup> *Id.*

disseminate knowledge, cannot be fairly justified by any claim that they are aligned with our founding documents or principles.<sup>145</sup>

The structure of the American regime also presumes that the construction of knowledge requires cooperation. The First Amendment's free speech and free press clauses depend upon the belief that human interactions—in dialogue and in myriad forms of “expression”—are imperative to human advancement. Knowledge is built and spread in the public sphere.

Indeed, the Supreme Court of the United States has recognized that the First Amendment's protections of the freedom to construct knowledge, form beliefs, and express oneself are dependent upon the freedom to form associations—to develop meaningful relationships in which knowledge is shaped, belief is formed, and expression is respected:

It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.<sup>146</sup>

The U.S. Constitution's explicit promotion of scientific progress and the arts also reflects the Framers' appreciation of the importance of collaborative associations to the construction and

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<sup>145</sup> See Michael Kaufman, *Social Justice and the American Law School Today: Since We Are Made for Love*, 40 SEATTLE UNIV. L. REV. 1187, 1206 (2017).

<sup>146</sup> NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958) (citation omitted); *See generally id.* at 461, 463; NAACP v. Button, 371 U.S. 415, 429-30 (1963); Cousins v. Wigoda, 419 U.S. 477, 487 (1975); *In re Primus*, 436 U.S. 412, 426 (1978); Democratic Party of United States v. Wisconsin, 450 U.S. 107, 121 (1981).

dissemination of knowledge.<sup>147</sup> Article I, Section 8, Clause 8 of the Constitution grants to Congress the power to promote “the Progress of Science and the useful Arts” by giving to “Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>148</sup>

Although the Constitution recognizes that scientific progress requires the creativity of individual inventors, those individual inventors are given control over their inventions only for “limited Times.”<sup>149</sup> The Constitution’s time limit on an individual creator’s exclusivity reflects the recognition that at some point an individual’s act of creativity will benefit from its entry into the public domain.<sup>150</sup> The diffusion of knowledge into the public sphere not only benefits the public, but also allows other inventors to collaborate in building on that knowledge. The Framers recognized that the public domain includes other authors and inventors who can mix their creative talent with another’s prior invention and further refine that invention.<sup>151</sup> Indeed, the Constitution’s use of the plural “Authors and Inventors” itself signals the Framer’s appreciation for the fact that works of creative expression and invention are not isolated individual acts; rather, they are the result of collaboration.

Thomas Jefferson powerfully captured the reality that knowledge is constructed socially when he wrote: “If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea . . . .”<sup>152</sup> “According to Jefferson, when a person divulges an idea, ‘it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it.’ ”<sup>153</sup> Jefferson argues that “ideas should freely spread from one to another over the globe, for the moral and

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<sup>147</sup> MICHAEL J. KAUFMAN ET AL., LEARNING TOGETHER: THE LAW, POLITICS, ECONOMICS, PEDAGOGY, AND NEUROSCIENCE OF EARLY CHILDHOOD EDUCATION 24 (2014) [hereinafter KAUFMAN ET AL., LEARNING TOGETHER] (citing U.S. CONST. art. 1, § 8, cl. 8).

<sup>148</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>149</sup> KAUFMAN ET AL., LEARNING TOGETHER, *supra* note 147, at 24 (citing U.S. CONST. art. I § 8, cl. 8).

<sup>150</sup> *Id.* at 25; *See Generally*, Eldred v. Ashcroft 537 U.S. 186 (2003).

<sup>151</sup> KAUFMAN ET AL., LEARNING TOGETHER, *supra* note 147, at 25.

<sup>152</sup> *Id.* (quoting Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON 326, 333 (Albert Ellery Bergh ed. 1907)).

<sup>153</sup> Kaufman et al., *supra* note 123, at 25.

mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature . . .”<sup>154</sup> He constructs the image of the light spread from a candle to show the social construction and spread of knowledge.<sup>155</sup> Jefferson writes: “He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.”<sup>156</sup>

Jefferson’s image of the candle is an apt metaphor for the most recent brain research. Like Jefferson, neuroscientists appreciate that knowledge cannot be delivered or captured by isolated individuals. “Rather, knowledge is constructed when ideas are ‘spread from one to another’ through meaningful relationships.”<sup>157</sup>

In *Democracy in America*, Alexis de Tocqueville also captures the tendency of Americans to learn and flourish through associations: “Americans of all ages, all conditions, all minds constantly unite . . . [a]s soon as several of the inhabitants of the United States have conceived of a sentiment or an idea that they want to produce in the world, they seek each other out; and when they have found each other, they unite.”<sup>158</sup>

In a democratic regime like the United States, de Tocqueville argues, “the art of associating must be developed.”<sup>159</sup> In fact, associations are essential to human progress: “In democratic countries[,] the science of associations is the mother science; the progress of all the others depends on the progress of that one.”<sup>160</sup> De Tocqueville further argues that “the art of associating must be developed and perfected among” Americans in order to “remain civilized.”<sup>161</sup> The United States regime depends upon the development of meaningful relationships through which knowledge is constructed and democracy is strengthened.

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<sup>154</sup> *Id* at 26.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 48992 (H. Mansfield & D. Winthrop eds. & trans., 2000).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

As de Tocqueville suggested, universities in America are incredibly important associations, which can perform their vital role as constructors of knowledge and nurseries of democracy, but only to the extent that they foster those relationships. Accordingly, the transactional model of knowledge-creation cannot be fully justified by any claim that it is required by our founding documents or principles. To the contrary, the democracy envisioned by the Framers and studied by de Tocqueville depends on the development of meaningful relationships from which knowledge is constructed, curated, and spread. A university which nurtures the skill of relationship-building by, among other things, adopting a relational speaker policy, will become a genuine nursery of democracy.

#### IV. CONCLUSION

To the extent that a university wishes to strengthen its value proposition as a community in which knowledge is constructed and democracy is nurtured, it should seriously consider adopting a relational and trauma-informed speaker policy. Even universities that extol the virtues of unregulated expression in a marketplace of ideas have a strong interest in promulgating relational and trauma-informed speaker policies.

First, the time, place, and manner restriction requiring students to meet and confer in pre-event dialogue with each other incentivizes them to engage in serious debate and deliberation. Indeed, it helps to teach them the art of persuasive argument and exposes them to the value of relationship-building by listening, respecting, and responding to the thoughts, feelings, and intentions of others.

Second, because expression that aggravates trauma constitutes a genuine threat to the physical safety of others and interferes with the learning process, universities that legitimate such expression undermine their core educational mission.

Third, universities dedicated to the construction of knowledge should be acutely aware that the latest scientific discoveries have cast great doubt on the efficacy of the atomistic, transactional, and oppositional marketplace approach to constructing and disseminating knowledge. Rather, universities that prioritize the

pursuit of truth should recognize that knowledge is only constructed and curated socially, through meaningful relationships.

Accordingly, a speaker policy that encourages students to build relationships and engage in relational speech that does not enable retraumatizing expressive activity would advance the university's mission to be a place where truth is pursued. That policy would also support the development of relationship-building skills that are vital to the maintenance of a healthy liberal democracy. A university in which all members are encouraged to build meaningful relationships through which knowledge is constructed and democratic skills and values are nurtured would strengthen its value proposition, thereby helping to overcome the challenges facing institutions of higher learning.