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On February 1, 2017, Milo Yiannopoulos was scheduled to speak on the University of California, Berkeley campus. The Chancellor, Nicholas Dirks, worried that there might be disruptions. He asked for all of the other U.C. campuses to send additional police. He asked the Berkeley Police Force to help out.

Notwithstanding all of the plans with respect to security, Antifa came and created great disruption on campus, breaking windows, throwing Molotov cocktails. The vandalism cost the campus over $100,000. Chancellor Dirks believed that there was no way to allow Yiannopoulos to speak and be able to protect the safety of those on campus. He canceled Yiannopoulos' appearance.

Chancellor Dirks was widely criticized for doing so. It was said that he had suppressed free speech. In fact, two days later on Friday morning, President Donald Trump tweeted that unless U.C. Berkeley was willing to protect free speech, it should lose all federal funds.[1]

On Thursday, September 21, 2017, Ben Shapiro spoke on the U.C. Berkeley campus. The Chancellor, Carol Christ, took extensive precautions to ensure security. The campus spent $600,000 to make sure that Shapiro could speak without violent disruption.

It was successful. Shapiro spoke in Zellerbach Hall. There were no incidents. Three days later, on Sunday, September 24th, Milo Yiannopoulos again spoke on campus. This time his appearance was less than fifteen minutes, though once more, it cost the campus several hundred thousand dollars in order to allow Yiannopoulos to speak without disruption. It now is estimated that the campus spent over

* Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law. Remarks delivered as the Tobriner Memorial Lecture at University of California, Hastings College of the Law, November 1, 2017.

1. Donald Trump (@realDonaldTrump), TWITTER (Feb. 2, 2017, 3:13 AM), https://twitter.com/realdonaldtrump/status/827112633224544256?lang=en.

almost $4 million so as to secure free speech while also protecting the safety of students, staff, and faculty.

Issues of free speech on campus are nothing new. They have been around as long as there have been colleges and universities. In fact, the U.C. Berkeley has played a key role with regard to the development of free speech principles on campus. It was the free speech movement there, in the mid-1960s, that established the ability of students to use campuses as the place for expressing views not just with regard what is going on in the university, but with regard to political issues as well.

And yet, things seem different in some ways from what was going on in the free speech movement in the 1960s. Now, it is often outside speakers who want to use the campus as their platform: Milo Yiannopoulos, Ann Coulter, Ben Shapiro. It is often outside groups, like Antifa, that want to disrupt the speech. There are other differences as well. The attitude of students with regard to free speech seems different now than it was in the 1960s.

I do not want to overgeneralize. There is certainly a divergence of opinion amongst students, but there are more students and more faculty now who want to suppress hateful speech than we might have seen fifty years ago. I have many examples to illustrate this. The last two years I taught an undergraduate class at the University of California, Irvine, on free speech on campus. I did this together with the Chancellor, Howard Gillman.

We began each topic by posing for our students a problem, most always based on a real event, and then polling our students as to how they would come out on the matter. We began the first class with an incident that occurred at the University of Oklahoma, in March of 2015.

You might have read about it. You might have even watched the video. It was a group of fraternity members on a bus going to a formal event. Only fraternity members were on the bus and they were all dressed in formal wear. Two members of the fraternity led the others on the bus in a deeply offensive racist chant. The chant even spoke of lynching in a positive way. A member of the fraternity on the bus used his cell phone to take a video of it. The video quickly went viral. When the president of the University of Oklahoma, David Boren, saw the video, he immediately expelled the two students from the university. He suspended the fraternity from operating on campus.

We asked our students if the two expelled individuals had sued President Boren and the University of Oklahoma, who should win: the students based on free speech or the University of Oklahoma? Not one student among ours, two years in a row, was willing to take the free speech position. Both years, all of the students said the university should

be able to punish the speech. Now, in reality, had the expelled students sued, I have no doubt that they would have won.

In early September 2017, Chancellor Christ held a faculty panel with a large audience at U.C. Berkeley in anticipation of the so-called "scheduled free speech week." The auditorium was packed.

One of the members of the faculty panel said that the Chancellor should not allow speakers like Milo Yiannopoulos or others expressing hate to come onto campus. There was huge applause from the audience. During the question and answer period, a number of students said that it did not matter what the law said, or what the First Amendment required, Chancellor Christ should not allow hateful speakers on campus. Again, there was resounding applause.

I was a panel member and near the end of the program I spoke up as a lawyer and as a law professor, and I said:

> Be clear. If Chancellor Christ would try to keep Milo Yiannopoulos or a hateful speaker off campus, she would get sued, she would lose. When Auburn tried to exclude white supremacist, Richard Spencer, he sued and he won. The excluded speaker would get an injunction to secure the ability to come and speak on campus.

I explained: "the campus would have to pay the excluded speaker's attorney's fees, maybe even Chancellor Christ would have to pay money damages because she is violating clearly established law." I said, "the excluded speaker would then be portrayed in the media as a victim, as a martyr, and absolutely nothing would be gained. The speaker still would be able to appear." No one applauded when I said that.

The Pew Research Institute did a survey, this was two years ago, of college undergraduates and over forty percent expressed the view that colleges should be able to exclude and punish speech that they regard as offensive or hateful.[2]

There is another thing that has changed over the last year. I have the sense that just over the last year, a rock has been turned over and things that previously would not have been said in public are now being expressed. I can give a couple of examples. Did you read some of the signs that were held up in Charlottesville? For example, one of the signs said, and I am quoting verbatim, "[k]ikes belong in the oven." I am sixty-four years old, and I do not remember ever seeing a sign saying that held up in public. In September 2017, Harvard Law Professor Alan Dershowitz came and spoke at Berkeley Law. He spoke without incident; it was tense, and hard questions were asked of him, but it was a completely appropriate academic discussion.

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2. Jacob Poushter, *40% of Millennials OK with Limiting Speech Offensive to Minorities*, PEW RES. CTR. (Nov. 20, 2015), http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities.

Afterwards, that afternoon, someone drew a swastika on a poster of Dershowitz that was on a bulletin board in the law school. I have been a law professor for thirty-eight years, but I have never taught in a building where somebody put a swastika on the wall. This is part of the context when talking about free speech on campus.

It is important in discussing free speech on campus to separate what the current law is and what the law should be. Both are important conversations to have, but I want to especially focus on the former. I will articulate what I see as the three governing principles for free speech on campus, and then apply those principles to the cutting-edge issues that are coming up now.

First, all ideas and views can be expressed on a college campus, period. Now obviously here I'm focusing on public universities because that's where the First Amendment applies. I would make the argument that private universities should be just as committed to freedom of speech, even though the Constitution does not require it. An academic institution exists for the advancement of ideas and that requires that all ideas can be articulated and discussed. That is the core principle of academic freedom and it is just as important at private universities as at public ones.

When it comes to the First Amendment, the Supreme Court has said above all it means that the government never can prevent speech or punish speech based on the idea or the view expressed. Viewpoint discrimination, as the Supreme Court sometimes describes it, is never allowed under the First Amendment.

This is true even when the view or idea is offensive, including deeply offensive. To illustrate this, consider a Supreme Court case from earlier this decade, *Snyder v. Phelps*.[3] *Snyder* involves a small church out of Topeka, Kansas, the Westboro Baptist church. The church's members make a practice of going to funerals of those who died in military service and using the funerals as occasions for expressing a very vile, anti-gay, anti-lesbian message.

Matthew Snyder died while in military service as a marine in Iraq. The members of the Westboro Baptist church traveled from Kansas to Maryland, where the funeral was being held. Before the funeral, the members of the church asked the police officers where they could lawfully stand. The officers pointed to an area about a thousand feet away from where the funeral ceremony was going to take place. Before the funeral, the members of the church chanted and sang. During the funeral, they were silent but held up signs.

3. Snyder v. Phelps, 562 U.S. 443, 458 (2011).

That night, Matthew's father, Albert, watched the news and read those signs. He was deeply offended. He sued the members of the Westboro Baptist Church for intentional infliction of emotional distress and invasion of privacy. A jury awarded Albert over $10 million in damages.[4] The United States Supreme Court, eight to one, ruled that the members of the Westboro Baptist Church could not be held liable. Chief Justice Roberts wrote the opinion for the Court. Above all, he stressed that the government never can punish speech or hold speakers liable on the grounds that the speech is offensive, even if it is deeply offensive. Second, free speech is not absolute; indeed, there are categories of unprotected speech. The idea that free speech is not absolute is familiar to all of us. Long ago, Justice Oliver Wendell Holmes famously said, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[5] At least since 1942, in *Chaplinsky v. New Hampshire*, the Supreme Court said that there are categories of unprotected speech.[6] For instance, child pornography is a category of unprotected speech. The government can prohibit its sale and distribution and even punish private possession in the home. False and deceptive advertising is another category of unprotected speech.

There are three categories of unprotected speech that are relevant to the conversation about free speech on campus.

The first is incitement of illegal activity. The test under current law with respect to incitement of illegal activity, comes from *Brandenburg v. Ohio*, in 1969.[7] There, the Supreme Court said that the government can punish advocacy if there is a substantial likelihood of imminent illegal activity and if the speech is directed at causing imminent illegal activity. Imagine an angry group on campus. Imagine a speaker says to them, "[l]et's go break windows. Let's commit acts of vandalism to express our message." I think in that context, a judge or a jury could reasonably find that meets the test for incitement and the speech can be punished.

But it cannot be punished as incitement when an audience reacts against the speaker. Incitement, as defined by the Supreme Court, has always been when the speaker exhorts the audience to commit acts of violence.[8] If the audience reacts against the speaker, that is not enough to constitute incitement. I have heard many people say that Milo

4. Westboro Baptist Church was held liable for 2.9 million dollars in compensatory damages and 8 million dollars in punitive damages, but the punitive damages award was subsequently remitted to 2.1 million dollars. *Id.*

5. Schenck v. United States, 249 U.S. 47, 52 (1919).

6. 315 U.S. 568, 571–72 (1942).

7. 395 U.S. 444, 447 (1969).

8. *Id.* at 448.

Yiannopoulos should not be protected by the First Amendment because he is a provocateur. He wants the audience to react against him.

But I then point out that Dr. Martin Luther King Jr. was a provocateur also. He very much wanted the police and crowds to react against the civil rights demonstrators. In fact, he was disappointed when there was no reaction against him because it would not get media attention. The civil rights demonstrations often put children at the very front so when the police came with the billy clubs and firehouses that is what would be shown on the nightly news.

We cannot say that because somebody is labeled a provocateur, they lose First Amendment protection. The definition of incitement as a matter of law is therefore, as with all these categories, different from the colloquial use of the phrase.

A second category of unprotected speech is what the Supreme Court has called "true threats." The phrase "true threats," comes from the Supreme Court in the 1960's case *Watts v. United States*.

The case involved a federal law that makes it a federal crime to threaten the President of the United States.[9] The Supreme Court said if it is a true threat, then that is not speech protected by the First Amendment. But the Court stressed that it is important to distinguish a true threat from mere hyperbole. On other occasions, the Court has reaffirmed that speech that rises to the level of a true threat is not protected by the First Amendment.

The Court has done very little to clarify the definition of true threat. There is a split among the federal circuits as to whether it should be an objective test. Would a reasonable person fear imminent danger to physical safety? Or should there be a subjective requirement, that the speaker desired to cause somebody to fear imminent danger to physical safety? I personally would prefer the Court take the objective approach. I do not think there should be a First Amendment right to cause a person to reasonably fear danger to his or her physical safety. But it is an unsettled area of law.

Imagine that a student is walking across a campus and an angry group surrounds that student and yells at the student in a way that makes the student reasonably fear a threat to his or her physical safety. I do not think that is speech that should be protected by the First Amendment.

A third category of speech that is unprotected, relevant to free speech on campus, is harassment. There is very little law regarding when speech on a campus rises to the level of harassment so that it can be punished. But there is a good deal of law with respect to harassment in the workplace. The Supreme Court has held for decades that sexual

9. Watts v. United States, 394 U.S. 705, 705 (1969) (per curiam).

harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964.[10] Likewise, courts have held, that harassment on the basis of race violates federal employment discrimination laws. There are similar cases here in California regarding California statutes that prohibit discrimination.

In the context of employment, courts have said is that in order to constitute harassment beyond the quid pro quo context, speech has to create a hostile or intimidating work environment.[11] The courts have said that it has to be directed at a [particular] person or so pervasive as to materially interfere with employment opportunities on the basis of a characteristic like race, sex, religion, or sexual orientation.[12] We are now starting to see the first cases applying this definition in the campus context.

Of course, what the cases show is that there is a difference between the colloquial use of the term harassment and the legal definition of harassment. I heard students on the U.C. Berkeley campus say that they felt harassed just by the mere presence on the campus of speakers like Milo Yiannopoulos and Ann Coulter. That cannot be enough to meet the test for harassment. I think with respect to speech, as with employment, the speech has to either be directed at somebody or so pervasive as to materially interfere with educational opportunities on the basis of a protected category like race, sex, religion, or sexual orientation.

To contrast some examples, there was an incident at U.C. San Diego, in which somebody put over a tree branch what appeared to be a noose. I do not think that, by itself, would meet the definition of harassment. Compare that, however, to somebody tacking on the dormitory door of an African American student what would appear to be a noose. I think that would be harassment that could be punished. But as with what is a true threat, the law has not developed sufficiently as to exactly when speech crosses the line to harassment that can be punished.

I have described the main categories of unprotected speech that the Supreme Court has identified that are relevant to the discussion of campuses: incitement, true threats, and harassment. You will notice what I did not list a category of unprotected speech: hate speech. The Supreme Court has been clear that hate speech generally is protected under the First Amendment.[13]

I have so often in the last two months been asked by reporters, and by students, what is the distinction between free speech and hate speech?

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10. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).
11. *Id.* at 65.
12. *Id.*
13. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391 (1992).

The answer is, under current law, there is no distinction. Hate speech is protected as a form of free speech. You might remember that in the late 1970s and the early 1980s, the Nazi Party wanted to march in Skokie, Illinois.[14] Skokie is a suburb of Chicago, which, at the time, was a predominantly Jewish suburb and had a large number of Holocaust survivors.

The Nazi party obviously intentionally chose Skokie as the place for their demonstration. Skokie tried everything it could to keep the Nazi Party from being able to march there. But every court, including the Supreme Court, held that the Nazis had the right to march even though their message was violent and hateful.[15]

Another example of the protection of hate speech is the Supreme Court's decision in 1992, *R.A.V. v. City of St. Paul.* St. Paul, Minnesota adopted an ordinance that prohibited painting a swastika or burning a cross, both vile symbols of hate, in a manner likely to "anger, alarm, or cause resentment."[16] The Supreme Court unanimously declared that ordinance unconstitutional, clearly indicating that these symbols of hate are protected by the First Amendment.[17]

Another example was a case in 2003, *Virginia v. Black*. It involved a Virginia statute that essentially prohibited cross burning.[18] The Supreme Court ruled, eight to one, that cross burning, despite its vile history, is speech protected by the First Amendment unless it rises to the level of, what I mentioned earlier, a true threat.

In saying that hate speech is protected by the First Amendment, I do not, in any way, discount the harms of such expression. Scholars such as Mari Matsuda, Charles Lawrence, and Richard Delgado have eloquently described the adverse effects of hate speech and how it causes students who have traditionally been underrepresented on campuses to feel unwelcome. These scholars have spoken eloquently about the psychological harms of hate speech.

And yet I think it is easy to understand why the Supreme Court has consistently said that hate speech is protected by the First Amendment. Some of it is the problem with defining what is hate speech in a manner that is not unduly vague or overbroad. Any government regulation of speech, including by a public university, has to be clear about what is prohibited and what is allowed. It cannot be vague. It cannot be overbroad and regulate substantially more speech than the Constitution

14. *See* Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977) (per curiam).
15. *Id.* at 44.
16. *See R.A.V.*, 505 U.S. at 379.
17. *Id.* at 381.
18. Virginia v. Black, 538 U.S. 347, 348 (2003).

allows to be regulated. Yet it has proven impossible to try to define what is hate speech in a way that is not impermissibly vague and overbroad.

In the early 1990s, over 350 colleges and universities adopted so-called "hate speech" codes. Each one challenged in court was declared unconstitutional, without exception.[19] They were almost always declared unconstitutional on vagueness and overbreadth grounds. One of the most famous involved the University of Michigan. There were a number of ugly racist incidents on the Michigan campus. Out of the most laudable motives, the campus adopted a hate speech code. It prohibited speech that stigmatized or demeaned on the basis of race, sex, or religion.

But what does it mean for speech to stigmatize or demean? A sociobiology graduate student brought a challenge and said that he was doing research about whether there were inherent differences between men and women. He was worried that his research might be found to stigmatize or demean on the basis of sex.

Almost every European country has a hate speech law, and I do not think there is a single one of them that could withstand a vagueness or overbreadth challenge in the United States. Most of them use language like the Michigan code, prohibiting speech that stigmatizes or demeans based on race sex, religion, or sexual orientation.

In fact, experience under the hate speech codes and the hate speech laws in Europe should give us pause about wanting such laws and codes in the United States. Most frequently, such codes and laws have been used against the very groups they are meant to protect. After the University of Michigan adopted its hate speech code, before it was struck down in *Doe v. University of Michigan*, every single enforcement action sought under it was against African-American and Latino students. When England adopted its hate speech law, the initial prosecution under it was against the Zionist group. The prosecutor argued that Zionism was a form of racism under a United Nation's resolution. France has a very strict hate speech law. One of the most frequently prosecuted individuals under it is the actress Brigitte Bardot, for her animal rights activism.

But maybe most of all, the Supreme Court and the lower courts have said that hate speech is protected by the First Amendment because it expresses an idea. All ideas and views are protected by the First Amendment, no matter how vile or offensive. Justice John Marshall Harlan said, in *Cohen v. California*, that to censor words is to censor ideas; we cannot cleanse the English language to please "the most squeamish among us."[20]

19. *See, e.g.*, 721 F. Supp. 852 (E.D. Mich. 1989).
20. 403 U.S. 15, 25 (1971).

Third, campuses can have time, place, and manner restrictions, so long as they leave open adequate alternative places for communication. Even when there is a right to use government property for speech, it does not mean that it has to be there at all times for speech, or every part of it has to be there, for all manners of expression.

For example, there is a right to use public streets for speech, but there is no First Amendment right to hold a demonstration down the middle of a freeway at rush hour. The idea of time, place, and manner restrictions is well established in First Amendment jurisprudence. Campuses can use time, place, and manner restrictions so as to prevent disruption of campus activities and to protect safety. For instance, a campus can say, there cannot be major demonstrations in or near classroom buildings during the time that classes are in session.

Campuses can have free speech zones so long as they leave adequate alternative places for communication. I was asked by a Vice Chancellor at U.C. Berkeley, "couldn't the campus just have all the speech activities on the Lawrence campus several miles away?" I said, "No, I don't think any court would uphold that as leaving adequate alternative places for communication."

I think it is also important to emphasize that campuses can have time, place, and manner restrictions so as to ensure safety. Campuses have the legal as well as the ethical duty to ensure the safety of students, staff, and faculty. When Chancellor Christ asked my advice with regard to what the campus should do, I said, "have the most controversial speakers in an auditorium, rather than in an open area of campus." If the speech is an auditorium, the campus can require tickets or ID, can have metal detectors to detect people having weapons, and can have police there to avert disruption by securing the perimeter. If the speech is in the open on campus, none of that is possible. I think having a speaker in a large auditorium, rather than an open area, is a permissible time, place, manner restriction. When Ben Shapiro came and spoke on campus, it was not down Sproul Plaza in the middle of campus; it was in the Zellerbach Auditorium, the largest auditorium on campus. That is a permissible time, place, manner restriction.

I think one of the hard issues that the law does not provide guidance on is: how much money does a campus have to spend in order to secure a controversial speakers' ability to appear? There is certainly some law in terms of what the government can do with respect to charges imposed on speakers. The government, for example, cannot have discretion in setting the amount of the fee. In *Nationalist Movement v. Forsyth County*, the Court said that the government cannot, through its officials, have

discretion in setting amount of a permit fee.[21] The fear then is that with such discretion government will charge a high fee if it does not like the speaker, and a lower fee if it likes the speaker. Such discretion involves too great a risk of viewpoint discrimination.

Also, the charges cannot be so large so as to effectively keep the speaker from appearing. Skokie tried to require the Nazis to post a large insurance bond to be able to speak.[22] The courts declared that unconstitutional. U.C. Berkeley could not have said to Ben Shapiro, "you're welcome to come speak but you'll have to pay $600,000 for security." That would have kept him from speaking.

There can be a point in which a campus can say "we can't safely allow this speaker to appear; therefore, we need to cancel the appearance." It should always be a last resort. It can never be based on a viewpoint. But there is a paramount obligation to protect the safety of students, staff, and faculty. Chancellor Christ asked me the question of, "how much does the campus have to spend in order to protect speech?"

I said the law is unclear on this. I said that if I were your lawyer, I would say that the campus has to spend a reasonable amount in order to protect speech. But the law is unclear on defining what is reasonable or the point at which a campus can refuse to allow a speaker because it cannot afford the costs of security. I said to Chancellor Christ that I thought she needed to focus on two questions. First, what is your stomach for litigation? If the campus excludes a speaker saying, "we can't afford the security," the campus is going to get sued. Does the campus want to litigate? If it loses, it will have to pay attorneys' fees and maybe even damages. Second, what do you want your public message to be?

Now, Chancellor Christ decided she wanted the public message to be that U.C. Berkeley is a free speech campus and decided to spend almost $4 million. But what if Milo Yiannopoulos said, not that this is going to be a free speech week, but it is going to be a free speech semester? Every week there are going to be speakers like him and Ann Coulter and Ben Shapiro. What if the cost was $60 million rather than $4 million? At what point can the campus say, we just cannot afford it anymore? The law does not provide an answer.

These are the three principles that I think have to guide analysis with respect to speech on campus.

I want to apply them to some of the cutting-edge issues that are arising. Let me quickly talk about five: disruption of speakers, safe spaces, trigger warnings, microaggressions, and the Internet.

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21. 505 U.S. 123, 137 (1992).
22. Vill. of Skokie v. Nat'l Socialist Party, 373 N. E. 2d 21 (Ill. 1965).

With regard to disruption of speakers, one of the things that we are increasingly seeing is those who dislike a speaker are reacting against the speaker by engaging in disruptive activity. In the fall of 2017, President Michael Schill of the University of Oregon attempted to give an address on the state of the campus and student protesters disrupted so loudly that President Schill could not deliver his remarks. The week before that, an attorney for the ACLU (American Civil Liberties Union) was speaking at William and Mary Law School and protesters came and disrupted her and chanted so loudly that she could not be heard.

Several years ago, at U.C. Irvine, Israeli Ambassador Michael Oren was scheduled to speak and a student stood up and yelled so he could not be heard. That student was escorted out and then another student stood up and yelled so he could not be heard. Altogether eleven students did this though, ultimately Ambassador Oren was able to speak.

Each time this occurs, I hear people say, "well those who engage in such disruptive activity are themselves just speaking, and so what they're doing is protected by the First Amendment." I think that is wrong. I do not think the First Amendment provides the right to use speech to interfere with an invited speaker's ability to deliver a message. There is no right for somebody to come in as I was delivering this address and yell so I could not be heard. There is no right to come into my class and scream so I cannot teach. There is no right to go into any of these activities and disrupt. Otherwise, somebody would be able to speak only if there was not an audience that cared enough to disrupt the speech activity. Otherwise, there would always be a heckler's veto.

The week that the Ambassador Oren incident happened, I wrote an op-ed in the *LA Times* saying that the disrupters were not protected by the First Amendment in what they were doing.[23] Now I think the punishment for such activity should fit the offense. I think it should be university discipline. I do not favor criminal prosecution, unless there is a threat to safety or a threat to physical property, but I do not think it is speech that is protected by the First Amendment.

There is now a movement that says that campuses should be a platform for hateful speakers. You might have even heard this phrase, "no platform." This is effectuated by denying a platform by disrupting the speakers. But the disrupters, even though what they are doing is just speech, are not protected by the First Amendment.

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23. *See* Erwin Chemerinsky, Opinion, *UC Irvine's Free Speech Debate: Students and Others Who Disrupted an Address by the Israeli Ambassador to the U.S. Can't Claim 1st Amendment Rights*, L.A. TIMES (Feb. 18, 2010), http://articles.latimes.com/2010/feb/18/opinion/la-oe-chemerinsky18-2010feb18.

The second concept I wanted to talk about is "safe spaces." This phrase is so much in vogue now. I heard it all the time on the U.C. Berkeley campus in September 2017 with students saying campuses have to be safe spaces. I think it is very important to be clear about what we mean by safe spaces. Some uses of the phrase are not only not objectionable, they are laudable. Some I think are objectionable. Safe spaces might mean the obligation of the campus to protect the physical safety of students, staff, and faculty. As I have already said, I believe campuses have the legal and the ethical duty to do so.

Safe spaces might mean a place of repose. We all need a place to go where we can get away from it all. In *Frisby v. Schultz*, the Supreme Court said the government can protect peoples' homes as a place of repose.[24] I think dormitories for college students are a place of repose. I think campuses can create much greater restrictions on speech in dormitories than in public areas of the campus, so long as the restrictions are viewpoint neutral.

Safe spaces might refer to the obligation of a professor to make sure that a classroom is a place where students feel safe and comfortable expressing views. I always want my classroom to be a place where students feel comfortable expressing any idea and know that they will be treated with respect by me and by the fellow students.

But there is another meaning of safe spaces that I find objectionable, and that is the idea that students should be protected on campus from ideas and views that they find objectionable. I have heard many students at U.C. Berkeley in the last two months say that the campuses should not host hateful speakers because it makes them feel unsafe. That cannot be a basis for campus punishing or preventing speech. Part of being on a college campus is being exposed to ideas that might make us feel uncomfortable, even offend us.

A third concept that I want to talk about is "trigger warnings." Trigger warnings are where a professor warns students before material is to be covered that it might be offensive. I was giving trigger warnings long before I heard this phrase. When Chancellor Gilman and I read to our students the racist chant from the bus at the University of Oklahoma, before doing so, we told our students that it was deeply offensive and racist. As long as I have been teaching First Amendment law, I have always played for my students the George Carlin monologue on the seven dirty words in teaching the Supreme Court case about it, *FCC v. Pacifica*.[25] I do not think you can understand the case without hearing the monologue. But I have always warned my students that it is about five

24. 487 U.S. 474, 485 (1988).
25. *See* 558 U.S. 310 (1978).

minutes, it is filled with profanities and sexual innuendo, and they were free to leave for the next five minutes if they wanted to. No one actually has gotten up and left, but I have done a trigger warning. I have no problem with professors giving trigger warnings.

My objection is if a college or university were to require faculty to give trigger warnings. There have been proposals at U.C. Santa Barbara and at Oberlin College to require that faculty give trigger warnings before covering material that might be offensive to students. I think a key part of the First Amendment is academic freedom. I think that professors have a right to choose how to best teach the material in their courses. A professor may think that a trigger warning is the best way to approach the material, but a professor also might think the students are better off covering it without a trigger warning. That has to be up to the individual professor.

A fourth concept that's much discussed is microaggressions. Microaggressions are things that are said to a person that are offensive, but without the intent to offend. It is saying something to a person that causes offense on the basis of race, or sex, or religion, or sexual orientation, but the speaker is usually unaware that it is going to cause the offense.

I think that colleges and universities have the obligation to educate their students about what others might find to be microaggressions. I think it is important at orientation sessions and other kinds of programs for colleges or universities to help their students understand what might offend others. Now, when I have said this in other contexts, I have been accused of favoring political correctness. I strongly disagree with that criticism. We all learn from a young age that there are certain things you do not say in public, certain things you do not say to other people. I think educating students with regard to what others might find to be microaggressions is just about that.

A fifth area concerns the internet. I think that the law has least kept up with the problems of the Internet with regard to campuses. I believe that in the years ahead the hardest questions with regard to free speech on campus are going to involve the Internet. Traditionally, the focus about free speech in education—whether it is at the high school level or the college level—has been about expression at the school or on the campus. But the Internet is different: it is a student in an apartment at home, any place, on a smartphone, on the Internet and the student (or professor) might be saying things that are harmful, harassing, to other students.

I think that the internet is the most powerful medium for communication to be developed since the printing press. It has tremendously democratized the ability to reach a mass audience. It used

to be that to reach a mass audience a person had to be rich enough to own a newspaper or get a broadcast license. Now, anybody who has a smartphone, even just access to a modem in a public library, can reach a mass audience. But that then raises unprecedented ability to use speech for harm.

What we see now, on some campuses, is a practice that has been called "doxing." Previously, the law would refer to doxing as public disclosure of private facts: where very private information is put on the internet about somebody, such as the fact that a person is undocumented or transgender. The traditional answer of the law is that the person whose privacy has been invaded can sue for money damages for the tort of public disclosure of private facts.

That seems so inadequate. The person whose privacy is invaded does not want to bring a lawsuit and does not want to call more attention to this. What can campuses do in this regard particularly if it is other students, but also if it is outside speakers? We now know so many incidents on campus, of the Internet being used to harass particular students. Studies have shown that the students who are harassed are much more likely to be women, much more likely to be students of color. How do we deal with this in terms of how campuses can regulate or punish speech?

I have tried to describe for you the law of the First Amendment. I have tried to talk about how it can be applied to some of these cutting-edge issues, but so much when we talk about free speech, should not be about the law at all. At the beginning of the semester, I sent a note out to the entire law school community at U.C. Berkeley, talking about the importance of speech and the importance of tolerance, but I also said that just because the First Amendment protects a right to say something does not mean that it should be said. Also, when hateful incidents occur on campus, one of the most important things that college or university administrators can do is respond with more speech.[26]

I think Justice Brandeis got it exactly right when he said, the best remedy for the speech we don't like is "more speech, not enforced silence." When I say this I know that more speech cannot cure the pain of hateful speech. But more speech in the context of a college or university can proclaim the principles of community that we aspire to live by. The morning after the swastika was drawn over Alan Dershowitz's picture, I sent a note to everybody in the law school community strongly condemning such hate speech, trying to explain why it is inconsistent with the community we are and that we aspire to be.

26. Whitney v. California, 274 U.S. 357, 377 (1927) (concurring opinion).

Not long ago, I heard the general counsel of the University of Mississippi speaking out: whenever there is a hateful incident on that campus, given its history, the president always responds with more speech. The general counsel simply believed that it is really quite important for the nature of that university, given its history, and the community that it seeks to be.

Ultimately, for free speech on campus and in society, it is important to remember that we do not need free speech for the speech we like, we would naturally allow that to occur. We need free speech for the speech that we detest.

It is about the faith that the only way that our speech will be free tomorrow is to safeguard speech that we do not like today. It is based on the faith that ultimately, good ideas will triumph over bad ones, and the most horrible things espoused will not come to reality. I usually have that faith, but I certainly have moments of doubt too. Free speech poses many problems, but I believe that giving campus officials the power to punish expression would be much worse.