

TRIGGER WARNINGS, SAFE SPACES, AND FREE SPEECH: LESSONS FROM THE UNITED STATES

CHARLES J. RUSSO, J.D., ED.D.[†]
UNIVERSITY OF DAYTON, USA

This essay examines trigger warnings and safe spaces, constructs used in colleges and universities in the United States as an object lesson for educational leaders and their lawyers in Australia, New Zealand, and other nations. Responding to these phenomena, officials at the University of Chicago created a firestorm of controversy in August 2016 when they published a letter announcing their unwillingness to support trigger warnings or the creation of campus safe spaces. Trigger warnings are notices proponents call for about the content of classes or talks by guest speakers and on written materials, whether in hard copies or on line, advising students and others they may encounter ideas with which they disagree and/or which they might find offensive. The related construct, safe spaces, are locations on campuses, whether residence halls or designated other areas, where students can gather to be free from hearing about ideas with which they disagree or to discuss their reactions to materials they consider offensive. This essay explores the relationships between and among freedom of speech, academic freedom, and trigger warnings-safe spaces as they intersect with the rights of faculty members and students in higher education, suggesting they should have no place on contemporary higher education.

I INTRODUCTION

*“I Disapprove of What You Say, But I Will
Defend to the Death Your Right to Say It”¹*

Students on college and university campuses in the United States (US) increasingly ignore the often-used aphorism about protecting the speech rights of those with whom they disagree. This attitude is evident in the growing number of situations in which student groups have shouted down or sought to prevent those with whose ideas they disagreed from speaking.

One has only to peruse the headlines of newspapers from the US to read of how disrespectfully students have increasingly treated speakers with whom they disagreed. Among the speakers who have been shouted down and/or disinvited to campuses are “conservative pundit Milo Yiannopoulos, Christine Lagarde, International Monetary Fund Chief, and Condoleezza Rice, former secretary of state,”² sociologist Charles Murray and Somali refugee Ayaan Hirsi Ali,³ and conservative commentator Ben Shapiro⁴ to name but a few. After they were criticized for originally disinviting him, Shapiro accepted officials’ invitation to speak at Grand Canyon University in Phoenix, Arizona.⁵

At the same time, “[s]tudents studying archeology at University College London were ... given permission to leave class if they encounter ‘historical events that may be disturbing, even

[†]*Address for correspondence:* Charles J. Russo, University of Dayton, 651A Fitz Hall, Dayton, Ohio, 45469-2963 USA. He is also a Visiting Professor at Capital Normal University in Beijing and Notre Dame University of Australia, Sydney Campus. Email crusso1@udayton.edu.

traumatizing.”⁶ Further, “at the University of NSW [New South Wales, Australia] a well-meaning lecturer teaching a class on 20th-century European history told his students he felt obliged to issue a trigger warning about material they would cover.”⁷ Not long thereafter,

“Monash University [became] the first in Australia to implement a policy of “trigger warnings.”⁸

Amid controversies over whether faculty members or invited speakers can broach topics with which students take exception, policies have emerged calling for trigger warnings and safe spaces. Trigger warnings is a term of art borrowed from the literature on mental health associated with the diagnosis of post-traumatic stress syndrome.⁹ The purpose of trigger warnings, when used in educational contexts, the focus of this essay, which can be verbal, written, or virtual, as in online, is “to alert students to the possibility that they might be affected or even harmed by potentially traumatic material”¹⁰ with which they might disagree or find offensive.

The related constructs, safe spaces, are locations on campuses, whether residence halls or other designated areas, where students can gather to avoid exposure to ideas with which they disagree and/or to discuss their reactions to materials they consider offensive. In what may be an extreme, the safe space at Brown University “included cookies, coloring books, bubbles, Play-Doh, calming music, pillows, blankets, a video of playful puppies and trained professionals to deal with the traumatized.”¹¹ Campus officials at Brown created the safe space in response to student need after an on-campus debate over whether a rape culture exists in the United States.

Incidents of shouting speakers down notwithstanding, a recent survey reported that “[w]hen asked which civil right or liberty is the most important, the largest proportion of students (30 percent) think that freedom of speech is the most important civil right or liberty.”¹² The study further reported that while “[most students (89 percent) think it is important that their college or university encourages students to have a public voice and share their ideas openly, [T]hree-quarters ... (75 percent) think students should have the right to free speech on campus, even if what is being said offends others.”¹³ The study also found that “[m]ore than half of students (57 percent) think colleges and universities should be able to restrict student expression of political views that are hurtful or offensive to certain students [while] a majority ... (70 percent) think students should be excluded from extracurricular activities if they publicly express intolerant, hurtful, or offensive viewpoints.”¹⁴

A great irony is that when students seek to restrict free speech by calling for trigger warnings and safe spaces, these constructs are often used to prevent dialogue with politically incorrect speakers with whom audiences disagree, ignoring the very free speech rights they claim to regard so highly. Creating trigger warnings and safe spaces to limit the free, robust exchange of ideas on campuses attacks the very heart of unfettered inquiry integral to modern higher education,¹⁵ resulting in a contemporary version of “the closing of the American mind.”¹⁶

As controversies proliferate over whether trigger warnings and safe spaces belong on college and university campuses, one must ask whether this is what higher education is becoming. One must ask this difficult question about what is happening on campuses to the free exchange of ideas even if it is sometimes vociferous because these constructs run counter to the aims of higher education.

A stark example of the value of free speech and having ideas placed in the open where they can be tested and rejected, or accepted, albeit not in an educational context, occurred in 1977. As odious as the marchers’ views were, and remain, the American Civil Liberties Union defended the free speech rights of Neo-Nazis to march in Skokie, Illinois, a suburb of Chicago, inhabited

mostly by members of the Jewish faith, where one in six persons was a Holocaust survivor;¹⁷ the march eventually took place in Chicago.¹⁸ It seems that officials in college and universities have now gone so far as to not wish to expose students to ideas with which they disagree, refusing to allow reality, as unpleasant as it sometimes is, from intruding on their sheltered lives on campuses.

Responding to these phenomena, officials at the University of Chicago created a firestorm of controversy in August 2016 when they published a letter announcing their refusal to support trigger warnings or the creation of campus safe spaces.¹⁹ Further, by a margin of 28-4, the Faculty Council at the University of North Carolina Chapel Hill “adopted the ‘Chicago principles,’ a well-known statement of commitment to free expression, in part to combat what faculty say is a perceived problem with free speech on campus.”²⁰ Even so, other institutions have taken the path of least resistance by adopting policies instituting trigger warnings and creating safe spaces.²¹

Perhaps the greatest irony associated with trigger warnings and safe spaces is that intolerance to ideas with which students disagree is usually led by “many on the political left . . . [who] have taken to calling themselves and their causes ‘progressive,’”²² purportedly operating under the banner of openness to all. Yet, many self-proclaimed “progressives” adamantly oppose views with do not comport with the prevailing politically correct flavors of the day. Concomitantly, supporters of trigger warnings and safe spaces espouse support for diversity, welcoming those with different demographic characteristics such as race, ethnicity, sexual orientation, and/or gender, but are increasingly intolerant of ideological or intellectual diversity.²³ These so-called progressives undercut the diversity they supposedly seek by “casting a pall of orthodoxy”²⁴ on campuses by banning views, typically of conservatives, with which they disagree.

Nicholas Kristof, *New York Times* columnist, self-identifying as a liberal, highlighted a caveat over free speech on campuses in relation to trigger warnings and safe spaces. Addressing those he identified as liberals, particularly in the world of higher education, Kristof wrote that “[w]e champion tolerance, except for conservatives and evangelical Christians. We want to be inclusive of people who don’t look like us — so long as they think like us.”²⁵

Against this background, the remainder of this essay, which focuses on developments in the US due to the significant numbers of incidents on American campuses, is divided into three parts in the hope of offering lessons about trigger warnings and safe spaces to leaders in tertiary education and their attorneys in Australia,²⁶ New Zealand, and other Nations. Because trigger warnings and safe spaces limit free speech, the first substantive part examines key litigation addressing free speech, not all of which occurred in educational settings. The paper then reflects on the status and value of academic freedom. The third section muses about trigger warnings and safe spaces, suggesting that they should have no place on contemporary campuses. The essay rounds out with a brief conclusion.

II SPEECH RELATED LITIGATION

A Generally

As noted, freedom of speech ranks highly as perhaps the most cherished rights of all Americans because it is crucial for citizens to be able to express their views in an open, democratic society. Not surprisingly, then, as described in this section, the US Supreme Court has reviewed a wide range of disputes in, and outside, of education relating to free speech, often protecting unpopular expression, the type that comes to the fore when addressing trigger warnings and safe spaces.

In *Schenck v. United States* (*Schenck*), a seminal dispute about national security in the wake of World War I, the Supreme Court ruled that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”²⁷ In their rationale, the Justices enunciated the clear and present danger test, noting that “[t]he question . . . is whether the words used are in such circumstances and are of such a nature as to create a clear and present danger. . . .”²⁸ Under this test, the mere possibility of disruption is insufficient for the government to limit free speech. Rather, public officials cannot limit speech absent an explicit concern it may harm the public welfare.

Chaplinsky v. New Hampshire involved the arrest of a street preacher who denounced organized religion as a “racket.”²⁹ In their judgment, the Justices conceded that “the right of free speech is not absolute at all times and under all circumstances.”³⁰ Upholding the preacher’s arrest, the Court ruled that speech can be prohibited if language includes “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”³¹

In *R.A.V. v. City of St. Paul*,³² the Supreme Court invalidated an ordinance making it a misdemeanor to display a symbol which one knows or has reason to know “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender.”³³ The Court struck down the ordinance as facially invalid because it imposed special prohibitions on speakers who expressed views on topics related to race, color, creed, religion, and/or gender. The Court vitiated the ordinance because it imposed special prohibitions on speakers who expressed views on the disfavored subjects it identified. Even so, the ordinance permitted displays containing abusive invective if they were unrelated to the forbidden topics. The Court concluded that the ordinance was unacceptable because while city officials sought to communicate to minority groups that they did not condone the “group hatred” of bias-motivated speech, the ordinance did not justify their selectively silencing speech due to its content.³⁴

More recently, in *Snyder v. Phelps* (*Snyder*),³⁵ the Supreme Court demonstrated its willingness to defend speech that Justice Alito’s dissent described as “outrageous conduct [that] caused [the father] great injury”³⁶ when a religious organization picketed at the funeral of his Marine son who was killed in Iraq. The group protested based on its allegation that the government tolerated what it described as homosexuality, particularly in the U.S. military. The Justices affirmed a lower court’s refusal to impose tort liability for intentional infliction of emotional distress on the picketers because they viewed the speech as a matter of public concern. The Court observed that insofar as the underlying focus of the protest was “a subject of general interest and of value and concern to the public,”³⁷ the speech was entitled to special protection under the First Amendment.

The *Snyder* Court also rejected the father’s claim under the captive audience doctrine that safeguards unwilling listeners from speech that is protected by the First Amendment. The Court denied the father’s claim because the picketers stayed well away from the funeral, he could see no more than the tops of picketers’ signs when driving to his son’s funeral, and there was no indication the picketing interfered at all with the funeral service.³⁸

B Educational Litigation

During the tempestuous days of the social upheaval of the late 1960s, the Supreme Court handed down the first two of what would be a steady stream its judgments addressing the free speech rights of teachers, as well as public employees, and students. This chronological review of key case law highlights the fact that even as the American judiciary offered far-reaching protection

for free speech, there were times when it placed limits on speech in educational contexts if it incited violence, was disruptive, and/or was vulgar, but has been unwilling to restrict speech simply because it is unpopular or even distasteful.

In *Pickering v. Board of Education of Township High School District 205 (Pickering)*,³⁹ the Supreme Court handed down its first order in a series of helping clarify the parameters of the free speech rights of teachers and other public employees. *Pickering* concerned a school board's attempt to dismiss a teacher for writing a letter to a local newspaper criticizing it over a bond issue and the use of financial resources for its athletic programs. Along with recognizing that the teacher had the right to speak out on a legitimate matter of public concern as a private citizen, the Court explained that he did not have a close working relationship with those he criticized, his letter did not have a detrimental impact on the district's administration, and it did not negatively affect his regular duties.⁴⁰

Turning to a review of key litigation on the free speech rights of students, this section focuses largely on disputes from K-12 settings. Even though most of these cases are set in K-12 schools, they are relevant because courts frequently cite them in disputes arising in higher education. Acknowledging the inappropriateness of *Schenck's* clear and present danger test for educational settings, the Supreme Court created a different measure for schools. In *Tinker v. Des Moines Independent School District (Tinker)*,⁴¹ the Justices held that educators can limit student free speech only if reasonable forecasts of material and substantial disruptions exist in schools.

Prior to *Tinker*, courts deferred to the authority of school officials to control disruptive student expressive activity. In an early case, for example, an appellate court in California upheld a student's expulsion for refusing to apologize after he made critical statements about an educational facility during a speech at a school gathering.⁴²

At issue in *Tinker* was whether students could wear black armbands to school to protest American involvement in Vietnam. In its analysis, the Court observed that because "First Amendment rights, applied in light of the special characteristics of the school environment,... [i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁴³ The Court offered far-reaching protection to student speech, pointing out that "[c]ertainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."⁴⁴

Three years later the Supreme Court resolved a dispute viewed as the higher education equivalent of *Tinker*, *Healy v. James (Healy)*,⁴⁵ *Healy* arose when authorities at Central Connecticut State College University refused to grant official recognition to a chapter of the Students for Democratic Society (SDS). Because the SDS was a militant organization that promoted both civil disobedience and violent disruptions on campuses, officials refused to grant it official recognition. Applying *Tinker*, the Court ruled that officials could not bar SDS from campus absent proof that its members would have created a material and substantial disruption at the university. The Court emphasized that administrators could not deny SDS access to campus based on the mere unsupported fear of disruption, explaining that officials need to have had proof of what might have occurred before they could impose prior restraint on the SDS.

On the other hand, the Supreme Court limited expressive activity in *Bethel School District No. 403 v. Fraser*.⁴⁶ The Justices allowed officials to restrict a vulgar, lewd nominating speech a student gave to a captive audience at his high school. At issue in *Hazelwood School District*

*v. Kuhlmeier*⁴⁷ was the content of a school-sponsored newspaper students prepared as part of a journalism class. The Court held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”⁴⁸ Finally, in *Morse v. Frederick*,⁴⁹ the Court upheld a principal’s authority to order a student stop displaying a sign at a school-supervised activity because its message could reasonably have been interpreted as supporting the use of illegal drugs.

Rounding out this section, the words of a federal trial court in Missouri retroactively invalidating a student’s suspension for posting critical remarks about educators at his school on the personal online homepage are prescient. According to the court,

it is provocative and challenging speech, ... which is most in need of the protections of the First Amendment. Popular speech is not likely to provoke censure. It is unpopular speech that invites censure. It is unpopular speech which needs the protection of the First Amendment. The First Amendment was designed for this very purpose.⁵⁰

In sum, while the American judiciary, led by the Supreme Court, whether in educational settings or the open marketplace of ideas, has upheld limitations on speech that may cause fights or lead to violence. Yet, the courts are unwilling to ban speech simply because some disagree with speakers, their messages, and/or consider what they have to say offensive. As such, it seems that if challenged, courts would likely invalidate trigger warnings and safe spaces as impermissible restrictions on the First Amendment rights to speech and association⁵¹ because they would prevent like-minded people from gathering to hear speakers and to exchange ideas. Consequently, the next section of this essay examines the potential impact of safe spaces and trigger warnings on matter on campuses.

III ACADEMIC FREEDOM

As an initial matter, Justice Marshall’s dissent in a dispute wherein the Supreme Court upheld the actions of university officials who denied to a Marxist academic from Belgium the opportunity to speak at Stanford sets the tone for this part of the paper. Justice Marshall’s offered a pithy analysis on the relationship between speaking and hearing, activities that occur in classrooms: “[t]he freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion.”⁵²

The *Statement of Principles on Academic Freedom and Tenure* (*Statement*) promulgated by the American Association of University Professors (AAUP) in 1940, traces its origins to an organizational meeting giving birth to the original proclamation of its *1915 Declaration of Principles*.⁵³ Declaring that “[t]he common good depends upon the free search for truth and its free exposition,”⁵⁴ the *Statement* examines academic freedom in the context of research and service along with the place of tenure.

In its most relevant provision on academic freedom, the *Statement* stipulates:

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties;
2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject....

College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.⁵⁵

Of course, the US Constitution does not explicitly identify academic freedom as a form of protected speech. Yet, academic freedom relies on the First Amendment because its goal is to liberate faculty members to pursue the truth⁵⁶ in their writing and teaching as forms of free speech and expression⁵⁷ within the boundaries of their disciplines, free from outside interference.⁵⁸ Justice Frankfurter's concurrence in *Sweazy v. New Hampshire*, highlighted the essence of academic freedom:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.⁵⁹

Ten years later, as author of the Supreme Court's judgment in *Keyishian v. Board of*

Regents, Justice Brennan observed that:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.⁶⁰

Efforts to limit the academic freedom rights of faculty members because students or others disagree in light of the politically correct orthodoxies of the day would indeed cast a pall of orthodoxy on the academy. Such artificial limits could cause inestimable damage to the "marketplace of ideas"⁶¹ as protected by academic freedom, the rights of faculty members, and the ability of students to learn and/or to exercise their rights to freedom of speech because they would necessarily limit the free exchange of ideas. Accordingly, the final substantive section of this essay reflects on whether such trigger warnings and safe spaces should exist on campuses.

IV REFLECTIONS ON TRIGGER WARNINGS AND SAFE SPACES?

According to Nietzsche, that "[a] young man can be most surely corrupted when he is taught to value the like-minded more highly than the differently minded."⁶² Aware of this dictum and the need to challenge students to expand their intellectual horizons, this section reflects on the potential impact of trigger warnings and safe spaces on the free exchange of ideas, even unpopular ones, on campuses.

This essay thus suggests that given judicial deference to free speech, often affording greater protection to unpopular speech, coupled with the centrality of academic freedom in higher education, US courts are likely to invalidate trigger warnings and safe spaces as harmful to the free exchange of ideas on campuses. Courts are likely to be unreceptive to trigger warnings and

safe spaces because they intend to stifle unpopular or minority viewpoints that the judiciary has emphasized may be entitled to greater protection than popular speech.

Trigger warnings and safe spaces are, in effect, two sides of the same coin. More specifically, on receiving trigger warnings, students may make their way to safe spaces to avoid contact with what they may deem unpleasant or disagreeable subject matter, an option unlikely to be unavailable when they graduate and enter “the real world” outside of campus.⁶³

Critics reject trigger warnings and safe spaces as limiting the academic freedom of faculty members and invited speakers, a growing number of whom have had appearances cancelled at US institutions due to protest by opponents of their views.⁶⁴ Critics also voice concern about how students can obtain liberal, in the classical sense of wide-ranging, educations if they cannot deal with ideas with which they disagree.⁶⁵ Finally, critics fear trigger warnings and safe spaces as threats intended to suppress freedom of speech for unpopular or politically incorrect views while eliminating the open exchange of ideas in higher education.⁶⁶

In light of the threat trigger warnings and safe spaces pose, the American Association of University Professors addressed their status in a recent report.⁶⁷ The report acknowledged that “[a] current threat to academic freedom in the classroom comes from a demand that teachers provide warnings in advance if assigned material contains anything that might trigger difficult emotional responses for students.”⁶⁸ The report went on to point out that “[i]nstitutional requirements or even suggestions that faculty use trigger warnings interfere with faculty academic freedom in the choice of course materials and teaching methods.”⁶⁹

If the purpose of higher education is truly to teach students, then there must be open and vigorous debate. While different opinions may clash, Supreme Court Justice Louis Brandeis offered sound advice about getting all ideas into the open: “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman.”⁷⁰ Put another way, as applied to the Nazis who wished to march in Skokie,⁷¹ even unwise or unsound ideas should be put to the test of public scrutiny where they can be accepted or rejected on their merits without regard to whether potentially controversial subject matter meets the politically correct standards of the day.

Faculty members may wish to warn particularly sensitive students about highly graphic photos or materials on such unpleasant topics as rape, murder, suicide, pornography, and/or violence. However, faculty members would be unwise to extend such constructs to ideas simply because students may disagree with what is under discussion. Moreover, when dealing with graphic material or unpopular ideas, regardless of how upsetting they may be to some, rather than shy away from such real world topics, faculty members should use treat these materials as a “teachable moments” challenging students’ preconceived notions while opening their minds to new and different ideas.

Instead of chilling the free exchange of ideas by the draconian use of trigger warnings and safe spaces, it is incumbent on educators to teach students to learn to demonstrate respect for ideas with which they disagree and which they may encounter in life, acknowledging that respectful disagreement or silence does not equate to their assent to these ideas.⁷² In this way, students must recognize that diversity of opinion can help to provide a variety of perspective on issues. However, due to the lack of diversity of ideological perspective on many of the leading campuses in the US, it is not surprising that students reject perspectives other than their own.⁷³ To this end, insofar as diversity is regarded so highly on campuses, faculty members must help teach students to move beyond such personal characteristics as race, ethnicity, gender, and sexual orientation to embrace intellectual diversity instead of demonizing “the other.”

Another valuable lesson for students to learn is that while individuals can disagree, they need not be disagreeable, cognizant of the importance of keeping their minds open when confronted by ideas different from their own. Of course, this is not to suggest that students should necessarily change their own opinions on being exposed to ideas with which they disagree. Rather, it is to suggest that students should keep open minds, demonstrating the willingness to hear out other points of view because doing so can help them to grow, and learn, by having a better understanding of their own beliefs. Further, even in the midst of what can be vigorous, even raucous, debate, it is of paramount importance for students not to personalize differences in a way that harms learning environments and/or interpersonal relationships.

V CONCLUSION

In 2015, public intellectual Richard Dawkins, an English ethologist and evolutionary biologist,⁷⁴ in what is a sign of the times, tweeted a memorable post about safe spaces. Dawkins tweeted that “A university is not a ‘safe space.’ If you need a safe space, leave, go home, hug your teddy & suck your thumb until ready for university.”⁷⁵ As such, when confronted with the prospect of shutting down debate over topics that are either politically correct, and/or controversial, even if conversations become raucous, educational leaders and their attorneys should avoid the temptation of yielding to the mob mentality. Moreover, when facing the threat of violence, while not wishing for anyone to be harmed, and aware of the need for safety,⁷⁶ officials must stand up for the idea of a university as a place for the robust exchange of ideas and not yield to those who would disrupt the learning process.

By standing up to the mob to defend the free exchange of ideas and avoiding the mistakes some of their counterparts in the US are making, educational leaders and their attorneys in Australia, New Zealand, and other Nations will be safeguarding free speech, academic freedom, and the transmission of knowledge, if not wisdom. In addition, these leaders will be helping to preserve the truest ideals of higher education, exposing students to new knowledge.⁷⁷ By teaching their charges that there is usually more than one point of view on most topics, educators and their attorneys will thus be providing their students the greatest lessons of their lives.

VI POSTSCRIPT

In the latest development in the battle over free speech on campuses, on May 4, 2019, President Donald J. Trump signed an Executive Order, Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities. The Order is designed to “encourage institutions to foster environments that promote open, intellectually engaging, and diverse debate, including through compliance with the First Amendment for public institutions and compliance with stated institutional policies regarding freedom of speech for private institutions.”⁷⁸

This Executive Order is intended “to ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable Federal laws, regulations, and policies.”⁷⁹ In an important clarification, the Order adds that “‘Federal research or education grants’ for purposes of this section include all funding provided by a covered agency directly to an institution but do not include funding associated with Federal student aid programs that cover tuition, fees, or stipends.”⁸⁰

Keywords: free speech, First Amendment, academic freedom, safe spaces, trigger warnings

ENDNOTES

- 1 Evelyn Beatrice Hall, writing under the pseudonym S. G. Tallentyre, paraphrasing Voltaire, *The Friends of Voltaire* 199 (1906). Justice Stevens, writing for the Court in *Young v. American Mini Theatres*, 427 U.S. 50, 63 (1976) (upholding a zoning ordinance requiring adult movie theaters and business to be dispersed through a city rather than grouped in one area) credited the precise quote to Tallentyre as relying on Voltaire, citing a 1907 publication:

A remark attributed to Voltaire characterizes our zealous adherence to the principle that the government may not tell the citizen what he may or may not say. Referring to a suggestion that the violent overthrow of tyranny might be legitimate, he said: "I disapprove of what you say, but I will defend to the death your right to say it."

The difference in dates is because the book was originally published in 1906 in France by S. G. Tallentyre, *The Friends of Voltaire* (Richard West Publishers, 1906). A year later it was published in England Evelyn Beatrice Hall, *The Friends of Voltaire*, (G. P. Putnam's Sons Publishers, 1907).
- 2 Dugan Arnett, "Academia wrestles anew with how freely words can flow," *Boston Globe*, September 7, 2016, 2016 WLNR 27184214.
- 3 Thomas Gelsthorpe, "Academia promotes 'diversity' yet expects group-think," *Cape Cod Times* (Hyannis, MA), November 14, 2018, at A9, 2018 WLNR 35469778.
- 4 Ellie Nakamoto-White, "Backlash after GCU nixes Shapiro speech," *The Arizona Republic* (Phoenix, AZ), Feb. 3, 2019 at A 12, 2019 WLNR 3540795 (reporting that Shapiro had an invitation to speak at Grand Canyon University, the largest Christian University in the US, rescinded due to fears his message would be "too divisive and run counter to the school's mission;" also indicating that "universities, including Gonzaga, California State University at Los Angeles and DePaul have also turned down Shapiro from speaking, citing safety issues [for fear of violence from his critics] presence as their main concerns." But see Rachel Leingang, "GCU to invite Ben Shapiro to speak on campus," *Arizona Republic* (Phoenix, Ariz.), Feb. 6, 2019 at A10, 2019 WLNR 3829157 (reporting that "Gonzaga University, a Catholic institution, reversed its decision to cancel a Shapiro event on campus" and will allow him to speak).
- 5 Rachel Leingang, "Ben Shapiro now says he will speak at GCU," *The Arizona Republic* (Phoenix, Arizona), February 8, 2019, at A 14, 2019 WLNR 4108644.
- 6 Janet Albrechtsen, "The mind coddles," *Section: The Inquirer*, The Australian, November 2, 2016 at 11, 2016 WLNR 33399568.
- 7 Ibid. For a book on this topic, see Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind: How Good Intentions and Bad Ideas Are Setting Up a Generation for Failure* (Penguin Random House, 2018).
- 8 Tim Palmer, "Monash University trigger warning policy fires up free speech debate: Has Monash University melted in the face of the 'Snowflake Generation' or is it just looking after its students' wellbeing?" *Australian Broadcasting Corporation Premium News*, March 28, 2017, 2017 WLNR 9518234.
- 9 One study reports that trigger warnings can be harmful because they may inadvertently undermine some aspects of emotional resilience. The study called for further research on the generalizability its findings, especially to collegiate populations and those with trauma histories. Benjamin W. Bellet, Payton J. Jones, & Richard J. McNally, "Trigger warning: Empirical evidence ahead" (2018) 61 *Journal of Behavior Therapy and Experimental Psychiatry* 134.
- 10 Francesca Laguardia, Venezia Michalsen, & Holly Rider-Milkovich, "Trigger Warnings: From Panic to Data" (2017) 66 *Journal of Legal Education* 882 at 882.
- 11 Rae Padilla Francoeur, "Review of 'The Coddling of the American Mind: How Good Intentions and Bad Ideas are Setting Up a Generation for Failure,'" *Salem (Massachusetts) Gazette*, December 7, 2018, at B 3, 2018 WLNR 37995413.
- 12 Foundation for Individual Rights in Education, Key Findings, What Students Think about Expression, Association, and Student Fees on Campus, January 2019, <<https://www.thefire.org/publications/>

student-surveys/student-attitudes-association-survey/student-attitudes-association-survey-full-text/#executiveSummary>. This was a national online survey of 2,225 undergraduate students currently attending two- or four-year educational institutions in the US conducted between September 24, 2018 and October 11, 2018.

- 13 Ibid.
- 14 Ibid.
- 15 Trevor N. Ward, "Protecting the Silence of Speech: Academic Safe Spaces, The Free Speech Critique, and the Solution of Free Association" (2017) 26 *William & Mary Bill of Rights Journal* 557.
- 16 Allan Bloom's, *The Closing of the American Mind* (Simon & Schuster, 1987) was a stinging critique of the failure of American higher education to expose students to varying perspectives.
- 17 See, e.g., Henry Gass, "Free-speech challenge: Can First and Second Amendments be exercised simultaneously?" *Christian Science Monitor*, August 25, 2017, at 2017 WLNR 26266250.
- 18 See "FIRST AMENDMENT: Jones might be in for a constitutional surprise," *The Providence Journal* (Providence, RI), September 3, 2018 at A7, 2018 WLNR 26955193
- 19 Angie Leventis Lourgos, "Dean's letter prompts backlash, U. of C. students say 'safe spaces' critic cited as ally online," *Chicago Tribune*, August 27, 2016 at 1, 2016 WLNR 26172032. A copy of the letter can be found at Foundation for Individual Rights in Education, "University of Chicago Letter to Incoming Freshman 2016," August 16, 2016, <<https://www.thefire.org/university-of-chicago-letter-to-incoming-freshman-2016/>>.
- 20 Jane Stancill, "UNC faculty pushes importance of free speech by adopting 'Chicago principles,'" *The Charlotte [NC] Observer*, April 13, 2018, <<https://www.charlotteobserver.com/news/state/north-carolina/article208845484.html>>. See also, Alex Morey, "U. Chicago's 'Academic Freedom' Letter a Win for Campus Speech, Foundation for Individual Rights in Education," August 25, 2016 <<https://www.thefire.org/u-chicagos-academic-freedom-letter-a-win-for-campus-speech/>>.
- 21 See, e.g., Samantha Harris, "Think Trigger Warnings are never Mandatory on Campus? Think Again," Foundation for Individual Rights in Education, August 31, 2016, <<https://www.thefire.org/think-trigger-warnings-are-never-mandatory-on-campus-think-again/>> (identifying Drexel University, Bay Path University, Colby-Sawyer College, North Iowa Area Community College, and St. Vincent's College as having trigger warning policies).
- 22 Michael Allan Wolf, "Looking Backward: Richard Epstein Ponders The 'Progressive' Peril," 105 *Michigan Law Review* 1233, 1245, n. 50 (2007).
- 23 See Joseph Bottum "The Wound in American Education: Review: recent debate on free speech in the academy," *Washington Free Beacon*, February 7, 2019 <https://freebeacon.com/culture/the-wound-in-american-education/?utm_source=Freedom+Mail&utm_campaign=235ccc3a80-EMAIL_CAMPAIGN_2019_02_08_09_09_COPY_01&utm_medium=email&utm_term=0_b5e6e0e9ea-235ccc3a80-46166445> (reviewing books criticizing American colleges and universities for their lack of intellectual diversity)
- 24 *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967).
- 25 Nicholas Kristof, "The Dangers of Echo Chambers on Campus," *N.Y. Times*, December 10, 2016, <<https://www.nytimes.com/2016/12/10/opinion/sunday/the-dangers-of-echo-chambers-on-campus.html>>.
- 26 Although the express text does not contain a protection for the freedom of political communication, the High Court has found an implication of such a freedom in the democratic federal structure established by the Commonwealth Constitution of Australia. For a discussion of this issue, see, Paul Babie, 'The Concept of Freedom of Religion in the Australian Constitution: A Study in Legislative-Judicial Cooperation' (2018) *Quaderni Di Diritto e Politica Ecclesiastica* 259, 275-276 (discussing cases from the High Court of Australia recognizing an implied right of political communication). See also the most recent pronouncement of the High Court of Australia: *Unions NSW v New South Wales* [2019] HCA 1 (29 January 2019) (invalidating the Electoral Funding Act 2018 (NSW) as impermissibly burdening the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution). As such, this paper should be timely for educational leaders, their attorneys, and students of the law in exploring the boundaries of implied Constitutional freedom.

27 249 U.S. 47, 52 (1919).
 28 Ibid.
 29 315 U.S. 568, 570 (1942).
 30 Ibid. at 571.
 31 Ibid. at 572. *See Watts v. United States*, 394 U.S. 705, 708 (1969) (refusing to treat an alleged statement that the defendant would have refused induction into the armed forces and would have had the President in his sight as a “true threat,” adding that it could invalidate an action or speech if it is a “true threat”). The Court subsequently invalidated a statute allowing individuals to be charged with a misdemeanor for publicly mutilating or casting contempt on any flag of the US in *Street v. New York*, 394 U.S. 576 (1969). Then, in *Texas v. Johnson*, 491 U.S. 397 (1989) and *United States v. Eichman*, 496 U.S. 310 (1990), the Court upheld burning of the US flag as protected speech.
 32 505 U.S. 377 (1992).
 33 Ibid. at 380.
 34 See also *Virginia v. Black*, 538 U.S. 343 (2003) (rejecting the claim that a ban on cross burning with intent to intimidate violated First Amendment if such intent can be proven).
 35 562 U.S. 443 (2011).
 36 Ibid. at 475 (Alito, J., dissenting).
 37 Ibid. at 453 (internal citations omitted).
 38 538 U.S. 343 (2003).
 39 391 U.S. 563 (1968).
 40 See also *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) (holding that where a teacher showed that protected conduct in calling a program on talk radio talk about a school issue was a substantial or motivating factor when his board choose not to renew his contract, the board had to be afforded the chance to show it would not have re-employed him absent the protected conduct); on remand, *Doyle v. Mt. Healthy City School District Board of Education*, 670 F.2d 59 (6th Cir. 1982) (affirming that the board proved it would not have renewed the teacher’s contract regardless of whether he placed the call to the radio talk show); *Connick v. Myers*, 461 U.S. 138 (1983) (creating a two-part test to evaluate whether speech of public employees, here an assistant district attorney, is entitled to First Amendment protection: first, the judiciary must consider whether the speech involved a matter of public concern by examining its content and form along with the context within which it was expressed; second, if speech deals with a matter of public concern, the judiciary must balance employees’ interests as citizens in speaking out on such matters against those of public employers in promoting effective and efficient services; the Court refused to treat the attorney’s speech as protected); *Garcetti v. Ceballos* (*Garcetti*), 547 U.S. 410 (2006) (affirming that because a deputy district attorney’s complaints about supervisors were not on matters of public concern, his speech was not entitled to First Amendment protection, adding that insofar as public employees who speak out pursuant to their official duties are not doing so as citizens for First Amendment purposes, the Constitution does not protect their communications from employer discipline).
 41 393 U.S. 503 (1969).
 42 *Wooster v. Sunderland*, 148 P. 959 (Cal. Ct. App. 1915).
 43 Ibid. at 506 (1969).
 44 Ibid. at 509.
 45 408 U.S. 169 (1972).
 46 478 U.S. 675 (1986).
 47 484 U.S. 260 (1988).
 48 Ibid. at 273.
 49 551 U.S. 393 (2007).
 50 *Beussink ex rel. Beussink v. Woodland R-IV School District*, 30 F. Supp.2d 1175, 1182 (E.D. Mo. 1998).
 51 Pursuant to the relevant portion of the First Amendment, adopted in 1791 as part of the Bill of Rights, “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble” The right to freedom of association flows from the last clause in the quotation.

- 52 *Kleindienst v. Mandel*, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting).
- 53 AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, available at
<<http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>>.
- 54 Ibid.
- 55 Ibid.
- 56 Justice Oliver Wendell Holmes penned a relevant description of truth: “[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market....” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (affirming convictions for conspiring to violate the 1917 Espionage Act).
- 57 For an examination of wider attacks on freedom of speech, see Greg Lukianoff, *Unlearning Liberty: Campus Censorship and the End of American Debate* (Campus Books, 2012).
- 58 For a commentary on point, see J. Peter Byrne, “Academic Freedom: *A Special Concern of the First Amendment*” (1989) 99 *Yale Law Journal* 251.
- 59 354 U.S. 234, 262 (1957) (Frankfurter, J., dissenting) (treating the placing a plaintiff in contempt for refusing to answer questions about the content of his lectures and knowledge of a political party was an invasion of his liberties in the areas of academic freedom and political expression) (internal citations omitted).
- 60 385 U.S. 589, 603 (1967) (invalidating statutes and regulations making membership in specified organizations prima facie evidence of disqualification for employment in public colleges and universities).
- 61 Cited in more than seventy of its cases, perhaps the Court’s most apropos use of the term is in *Keyishian v. Board of Regents*, Ibid. at 603 (“The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’). Internal citations omitted.
- 62 Friedrich Nietzsche, *The Dawn of Day* (1911), Project Gutenberg, p. 262, line 297, available at
<<http://www.gutenberg.org/files/39955/39955-h/39955-h.html>>.
- 63 For a commentary to this effect criticizing Monash University’s trigger warning policy, see Johanna Leggatt, “In a harsh world, triggers won’t help students cope,” *Herald Sun* (Melbourne, Australia), July 13, 2017 at 42, available at 2017 WLNR 21236749 (noting that “[t]he Network of Women Students Australia’s long list of triggers include misophonia (hatred of certain sounds), classism, corpses, slimy things (yes, really), spiders, trichotillomania (desire to pull out one’s hair) and vomit, as well as the standard triggers of paedophilia, sexism, abuse and Islamophobia.”).
- 64 See Greg Lukianoff, *Freedom from Speech* 30-31 (Encounter Books, 2014) (pointing out that since 2000, of the 257 incidents when students and/or faculty members sought to ban speakers with whom they disagreed, they achieved their objective 111 times).
- 65 See, e.g., Nicholas Kristof, “A Confession of Liberal Intolerance,” *N.Y. Times*, May 7, 2016, <<https://www.nytimes.com/2016/05/08/opinion/sunday/a-confession-of-liberal-intolerance.html>>.
- 66 For a discussion of threats to free speech, see Robert Shibley, “Current Threats to Speech on Campus” (2016) 14 *First Amendment Law Review* 239 (2016).
- 67 Among expressions of concern and respect for students, 45% of academics thought trigger warnings have or will have a negative effect on classroom dynamics, 62% thought they have or will have a negative effect on academic freedom. A substantial minority (17%) viewed trigger warnings favorably. Colleen Flaherty, “Trigger Warning Skepticism,” *Inside Higher Education*, Dec. 2, 2015, <<https://www.insidehighered.com/news/2015/12/02/survey-sheds-new-light-faculty-attitudes-and-experiences-toward-trigger-warnings>>.
- 68 AAUP, *On Trigger Warnings*, a report drafted by a subcommittee of Committee A on Academic Freedom and Tenure, August 2014, and approved by Committee A, <<https://www.aaup.org/report/trigger-warnings>>.
- 69 Ibid. This report was not without its critics. Peter Schmidt, “A Faculty’s Stand on Trigger Warnings Stirs Fear Among Students,” *Chronicle of Higher Education*, October 6, 2015, <http://www.chronicle.com/article/A-Faculty-s-Stand-on-Trigger/233656> (citing critics who denounced the report because it might have undermine those who are psychologically vulnerable).

- 70 *Other People's Money* 62 (National Home Library Foundation ed. 1933), cited in *Buckley v. Valeo*, 424 U.S. 1, 67, note 80 (1976) (striking down limits on election spending for political campaigns).
- 71 See above notes 17-18 and accompanying discussion.
- 72 In his own inimitable manner, Justice Scalia, in a caustic dissent from the Supreme Court's order in *Lee v. Weisman*, 505 U.S. 577, 637 (1992) (Scalia, J., dissenting), invalidating prayer at public school graduation ceremonies mused: "We indeed live in a vulgar age. But surely 'our social conventions,' have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence." (internal citations omitted).
- 73 A recent study reported that in American higher education, faculty members who register as Democrats outnumber those who are Republican by a margin of more than ten-to-one. Margaret Langbert, "Homogeneous: The Political Affiliations of Elite Liberal Arts College Faculty," National Association of Scholars, April 24, 2018, <https://www.nas.org/articles/homogenous_political_affiliations_of_elite_liberal>.
- 74 See, e.g., Richard Dawkins, *Science in the Soul: Selected Writings of Richard Dawkins*, (Random House, 2017); Richard Dawkins, *The Blind Watchmaker: Why the Evidence of Evolution Reveals a Universe without Design* (W.W. Norton and Co., reissued 2015); Richard Dawkins, *The God Delusion* (Houghton Mifflin Co., 2008).
- 75 Richard Dawkins, Twitter, <<https://twitter.com/RichardDawkins/status/658022567085801472>> (Oct. 24, 2015).
- 76 Jeremy Bauer-Wolf, 'Free Speech, Safety and the Constitution,' *Inside Higher Education*, April 21, 2017, <<https://www.insidehighered.com/news/2017/04/21/auburn-berkeley-incidents-illustrate-how-difficult-it-public-colleges-bar-speakers>> (reporting that due to "safety concerns, two universities this week attempted to block planned appearances at their campuses -- one from white nationalist Richard Spencer at Auburn University, the other from conservative political commentator Ann Coulter at University of California, Berkeley," but relented and allowed them to appear).
- 77 For a classic work in defense of liberal education see John Henry Newman, *The Idea of a University* (Assumption Press, 2014).
- 78 Donald J. Trump, Presidential Executive Order, Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities, <https://www.insidehighered.com/sites/default/files/media/White%20House%20Executive%20Order.pdf> May 21, 2019 at Section 2a.
- 79 Ibid. at Section 3.
- 80 Ibid.