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Freedom of Speech under Assault on Campus

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EXECUTIVE SUMMARY

Freedom of speech has been severely criticized at many American universities. Meanwhile, such prestigious transnational institutions as the United Nations and the European Union have endorsed censorship of hate speech, as well as denial of Holocaust and climate change, and even blasphemy.

Those trends are antithetical to classically liberal ideals about both the freedom of speech and the purpose of the university. John Stuart Mill thought higher education should not tell us what it is our duty to believe, but should “help us to form our own belief in a manner worthy of in-

telligent beings.” He added that “there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine,” regardless of its falsity, immorality, or even harmfulness.

The classical liberal argument for free speech has historically been championed in two distinct ways. First, the Founding documents of the United States recognize freedom of speech as a natural right. Second, alternatively, that right might be grounded in utility, meaning its acceptance best promotes human flourishing. Ironically, the very trends on campus that threaten freedom of speech also lend strong support to both justifications for it.

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INTRODUCTION

Many academics now consider freedom of speech just another American eccentricity, like guns and religion. What they call free speech fundamentalism is misguided at best, in their view, and an embarrassment before our more sophisticated European counterparts. Meanwhile, such prestigious transnational institutions as the United Nations and the European Union have endorsed censorship of a wide range of opinions classified as hate speech, as well as Holocaust and climate change denial, and even blasphemy—when called defamation of religion or incitement to religious hatred (and selectively applied). These developments coincide with the growing antagonism toward freedom of speech at American universities, especially from the most politically assertive groups on campus.

In considering this phenomenon, note that academia is now overwhelmingly dominated by progressives and other leftists, many of whom are not only skeptical of freedom of speech but intolerant of dissenting opinion.¹ When students protest speakers who challenge political orthodoxy, claiming to be oppressed by hateful opinions whose expression constitutes aggression against them, they often see no reason to limit their tactics to criticism and demonstration. Their violent rhetoric of aggression and assault encourages violent countermeasures. Not surprisingly, student protests are increasingly designed to punish their opponents and to prevent them from speaking or being heard: to shut them up or shout them down. The protesters are supported and encouraged by a vocal segment of activist faculty and are appeased by administrators—even when the protests shut down student events and transgress official university policy. Academic freedom, too, is now championed primarily as a matter of guild privilege, in defense of an activist pedagogy that promotes political orthodoxy and does not shrink from stifling dissent.

These trends are antithetical to classically liberal ideals about both the freedoms of conscience and the purpose of the university.² John Stuart Mill expressed these ideals incisively by

advocating a “more expository, less polemical, and above all less dogmatic” system of education, especially moral and religious education. The mission of higher education is not to tell us what it is our duty to believe, Mill held, but to “help us to form our own belief in a manner worthy of intelligent beings.”³ The autonomy of an individual requires that she be left free to make up her mind on the basis of evidence, acquainted with the strongest arguments for the opposing positions. Although the substance of academic orthodoxy has changed drastically since Mill’s time (for example, professors were required to swear an oath to the articles of the Church of England), skepticism about its dogmas is treated much the same: less to be defeated by argument than abolished by social sanction. When dissent is treated as immoral—a kind of secular heresy—the goal is not so much persuasion as decontamination. This is the current situation. Marxist philosophy professors argue on prominent blogs that conservative thinkers should be banned from campus lest they corrupt impressionable minds. Socrates would have recognized the argument.

Mill held that an atmosphere of intellectual freedom not only cultivates genius but is also a prerequisite for even commonplace knowledge. For our beliefs to be justified, we must be able to respond to the best arguments against them. Yet people naturally dislike what Mill called adverse discussion—that is, exposure to opposing arguments—and tend to avoid it. Hence, they are led to argue against straw men as much from ignorance as dishonesty. For those reasons and others, Mill defended freedom of speech in uncompromising terms: “[T]here ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine,” regardless of its falsity, immorality, or even harmfulness.⁴

Mill’s arguments for free speech anticipated several psychological phenomena that are now widely recognized: epistemic closure, group polarization, and confirmation bias, as well as simple conformism. *Epistemic closure* is the tendency to restrict one’s sources of information, including other people, to those largely in

agreement with one's views, thereby avoiding adverse discussion. *Group polarization* describes how like-minded people grow more extreme in their beliefs when unchecked by the presence of dissenters. (Whence Nietzsche: "Madness is rare in individuals—but in groups, parties, nations, and ages it is the rule.") *Confirmation bias* is the tendency to focus on evidence that supports what we already believe and to discount contrary evidence. These phenomena are widespread and well documented, and they all tend to undermine the justification of our beliefs. Hence, the toleration of unpopular opinions constitutes a prerequisite for knowledge. Yet such toleration amounts only to its immunity to punishment, not its protection from criticism.

The classical liberal argument for free speech has historically been championed in two distinct ways. First, the Founding documents of the United States recognize freedom of speech as a natural right: self-evident, inalienable, and endowed by our Creator. Those words still inspire many people, and the Bill of Rights stands among the paramount achievements of classical liberalism. But there is a problem with natural rights claims in general: they are vulnerable to competing claims about exactly what rights we have.⁶ Thus, in this election cycle, we hear that among our moral rights are access to health care at unspecified levels, free college tuition, and an increased minimum wage. Of course, not all these claims are equally compelling. The point is that sincere disagreement over rights claims makes less plausible the idea that they are self-evident truths. The second way to defend rights claims is to ground them in utility, by claiming that their acceptance best promotes human flourishing.

That was Mill's approach, but it has problems of its own. The trouble with this utilitarian argument is that it is always open to dispute: Would it be optimal to violate a right in exceptional circumstances? In short, the natural rights approach to freedom of speech can seem too dogmatic, and the utilitarian approach too contingent. The two approaches to classical liberalism are embodied, in the philosophical tradition, by John Locke and Mill, respectively. (Note that, although the natural rights approach

inspired the U.S. Constitution, and the utilitarian Philosophical Radicals led the liberal movement in 19th-century England, neither the natural rights nor the utilitarian tradition has been uniformly liberal in the classical sense that I use in this essay.⁷) But if freedom of speech is now especially in need of defense within academia, then, ironically, the very trends on campus that threaten it also lend strong support to both versions of the liberal argument.

ACADEMIC CHALLENGES TO FREEDOM OF SPEECH

The traditional objection to free speech is straightforward. It holds that some opinions are so dangerous or immoral—and of such little value—that their expression should be prohibited. Hence, we must reject the liberal claim to rights of free expression for the sake of the common good or the preservation of the moral ecology. The current hostility toward freedom of speech among academics and intellectuals arises from three novel developments. Although the arguments are not entirely distinct or mutually exclusive, it is helpful to differentiate them as the *postmodern*, the *progressive*, and the *multiculturalist* challenges to freedom of speech. The postmodern challenge holds that freedom of speech is impossible, because censorship is ubiquitous and inevitable. The progressive challenge holds that freedom of speech ought to be sacrificed to equality, understood in terms characteristic of the social justice ideology. And the multiculturalist challenge holds that certain opinions constitute violence against marginalized groups such as minorities and therefore fall beyond the pale of free speech protection; they are analogous to incitement or even assault.

Consider first the postmodern argument that freedom of speech is not so much misguided as impossible. Although defenders of free speech advance a seemingly absolute and neutral doctrine—the toleration of all opinions, liberal and illiberal alike—no one doubts that some speech must inevitably be prohibited and punished. Even Mill did not intend the immu-

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nity provided to the expression of all opinions and sentiments to extend to threats and fraud; that was his point in referring specifically to the fullest liberty of their profession and discussion *as a matter of ethical conviction*. Yet the claim that freedom of speech is impossible relies crucially on the truism that it would be impossible to tolerate all of what philosophers call *speech acts*: actions performed by speaking. The clichéd example here is shouting “fire” in a crowded theater, which—in certain contexts, such as when intended to induce panic—lies beyond the pale of free speech immunity.⁸

That objection, however, presupposes a conception of freedom of speech as the freedom to perform *any* speech act, which is to argue against a straw man. No defender of free speech advocates the liberty to do anything that can be done merely by speaking, such as to incite a riot or suborn murder. A more sophisticated version of this challenge admits that no one defends such sweeping immunity, but it claims these examples to show that what seems to be an argument about principle is really a political dispute over who is allowed to speak and who will be silenced. Yale law professor Robert Post insists that censorship is *inevitably* “the norm rather than the exception” and celebrates the Left’s liberation from the constraints of toleration.⁹ Thus, contemporary debates over freedom of speech on campus have become power struggles in which the dominant political force silences opposition while claiming to represent the disempowered. Yet, this ironic state of affairs does not arise from any incoherence in the liberal conception of free speech but from a misguided or disingenuous caricature of it.

Mill used two examples to illustrate the liberal conception; together they anticipate and answer the crux of the postmodern challenge. First, Mill noted that the question of the *moral-ity* of the doctrine of tyrannicide—the opinion that it is legitimate to assassinate a tyrant—is irrelevant to his argument, because even immoral opinions are to be tolerated. Yet, he also discussed an example that might seem to vindicate the postmodern claim that censorship is inevitable: the case of the corn dealer and the mob.

Mill insisted that the opinions that corn dealers are starvers of the poor and that property is theft must be allowed to be professed and discussed. Nevertheless, he agreed that the expression of those opinions can be punished, consistent with freedom of speech, when they are advocated to an angry mob gathered outside a corn dealer’s house. If Mill had been willing to prohibit opinions on the basis of their potential harmfulness, the postmodern challenge would have force against him. Disputes over whether moral and factual opinions have good or bad consequences are indeed inevitable, like disputes over their truth, as Mill acknowledged. Anyone who thinks some opinion is harmful would then claim that it falls beyond the pale of toleration. Because we all hold that view of one opinion or another, censorship would be ubiquitous, and the “free speech” debate would inevitably become merely political: a power struggle.

However, the corn dealer example does not constitute an exception for harmful speech as such, since the opinion that corn dealers are starvers of the poor threatens to harm the interests of corn dealers simply by being advocated, regardless of the context of its expression. In fact, Mill considered Proudhon’s dictum that property is theft (the other opinion mentioned in this passage) to be harmful to the interests of the poor as well as the rich.¹⁰ But he rejected the notion that even a false opinion such as that one, which would be harmful if generally believed, should be silenced in any ordinary context where its expression does not constitute some legitimately prohibited speech act. He thus made a point of reiterating that those opinions must be tolerated. Otherwise, this example would indeed conflict with his doctrine that even the “pernicious consequences” of an opinion do not put it beyond the pale of toleration.

Mill’s point was rather to illustrate the proper conception of freedom of speech, which protects it from the specious objection that censorship is ubiquitous and inevitable. Freedom of speech is not the freedom to say anything at any time, anywhere. It does not conflict with noise regulations at libraries or prohibitions on speech in monasteries. Even more significantly,

it does not immunize all of the things that one can *do* with words. As Mill put it, no one pretends that actions should be as free as opinions. The corn dealer example illustrates that, in certain peculiar but not unrealistic contexts, an act that would ordinarily be merely an expression of opinion constitutes a performative speech act: incitement to violence. Although certain tokens of expression of an opinion can be prohibited, that prohibition does not count as an exception to the absolute freedom of speech Mill advocated because it does not prohibit the expression of any doctrine as a matter of ethical (or scientific, political, or religious) discussion.¹¹

The postmodern challenge thus founders but nonetheless illustrates an important point about the argumentative strategy employed by opponents of free speech. As soon as it is established that freedom of speech involves the freedom to express any opinion or sentiment but not to do more performative things with words (such as conspire to murder or incite riot), the antagonist will try to shoehorn despised opinions into the class of speech acts that lie beyond the pale of free speech immunity.

That tactic is the most insidious aspect of recent attempts to ban so-called incitement to religious hatred, which would prohibit those opinions deemed to be hateful or harmful in all contexts. To take a realistic case, an individual would not be free to question the dogma that Islam is a religion of peace. Again, the issue is not whether the opinion is true or false, moral or immoral, or even so vague as to be meaningless. It is rather that the postmodern challenge must either conflate speech and action (for instance as incitement to hatred) or ban certain opinions as intolerable (for instance by calling them hate speech). Here is one example: United Nations Secretary-General Ban Ki-moon has stated that, as much as he supports free speech, “When some people use this freedom of speech to provoke or humiliate some others’ values and beliefs, then this cannot be tolerated.”¹² Notice that the criterion for toleration—that no one’s values or beliefs can be humiliated, or anyone provoked—would, if taken seriously and applied consistently, make

censorship commonplace. Of course, no one actually proposes to apply the standard consistently; it merely serves as a heckler’s veto, or rather a rioter’s veto, of speech by incentivizing claims of provocation and humiliation.

Yet, many academics—including leading constitutional law scholars—consider this standard more sophisticated than what they decry as American exceptionalism. “In much of the developed world, one uses racial epithets at one’s legal peril,” Frederick Schauer, a First Amendment scholar at Harvard Law School, writes approvingly, “and one urges discrimination against religious minorities under threat of fine or imprisonment.”¹³ Even a ban on racial epithets faces the same problem: there is no principle for what counts as a slur and no prospect for consistency of application. Worse yet, the proposal that it be illegal to *urge* discrimination empowers the politically powerful to censor dissent by declaring opinions to be discriminatory. Does it count as urging discrimination to publish polls on the percentages of Muslims in various countries who agree with various less-than-peaceful, even extremist, ideas? If we accepted the proposals of Schauer and others, that question would be answered at our legal peril. Clearly, those are not the conditions under which we can conduct an honest discussion of the claim that Islam is a religion of peace.

The crux of the matter is that a ban on *incitement to believe* some opinion or to feel some sentiment differs from a ban on *incitement to riot*. To ban an opinion on the grounds of its value (whether it is truth value or moral value) would be to rule out its profession and discussion, which would eradicate the conditions under which it could be justified or undermined. And that would preclude knowledge by preventing us from making up our own minds in the manner worthy of intelligent beings: by weighing the arguments for and against it.

Consider contemporary efforts to suppress climate change “denial.” Those efforts ostensibly address a matter of empirical fact rather than an evaluative judgment. Yet, modern censors consider skepticism about catastrophic anthropogenic global warming so dangerous

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that it cannot be tolerated. Rather than engage in argument against the skeptical position, they seek to suppress it. The rhetoric of *denial* is, of course, borrowed from Holocaust denial, which has been banned for decades in Europe without succeeding in eradicating the proscribed view, let alone eliminating the hatred and persecution of Jews. Similarly, the movement to ban climate change skepticism is not based on any calculation of the actual effects of toleration versus suppression. Instead, the argument is simply that because it would be bad for people to doubt the doctrine, skepticism should be suppressed. Again, dissent gets punished rather than refuted—here, in the name of science but contrary to the norms of scientific inquiry. And on matters in which scientific evidence seems to support heretical opinion—as with the existence of innate differences between the sexes—this fealty to science gets sacrificed to ideology.

As Post approvingly puts it, “Liberated from traditional inhibitions against official suppression of speech, the left has mobilized to pursue a rich variety of political agendas.”¹⁴ Notably, the agendas are evidently not so various as to include dissent from leftist orthodoxy. Even so, Post’s admission can be seen as admirably frank. Notwithstanding its pretenses to the contrary, the postmodern challenge is not some hypersophisticated “interrogation of all binary oppositions.” It is rather a stalking horse for another argument—the progressive challenge to freedom of speech—which at least has the virtue of being overtly ideological. Progressivism rejects the liberal’s individualistic focus on rights and personal responsibility in favor of collectivism and an expansive view of the legitimate role of state power.

That stark divergence has been obscured by the change in meaning of *liberal*, especially in American usage, where it has become almost synonymous with *progressive* as a name for leftist politics. Sometimes progressivism purports to be a merely pragmatic program with an optimistic view of the ability of government to promote the common good through paternalism and redistribution. Classical liberals take a narrower view of the legitimate role of government in principle and of its abilities in practice. But

the profoundly illiberal turn of progressivism comes when it goes beyond the softer paternalism of seat belt laws and drug prohibitions—which at least compel people for the sake of goods they accept—to the radical claim of *false consciousness*. This is the idea that the unenlightened masses are pervasively mistaken about what is good for them, perhaps because they have been duped by repressive social norms, propaganda, or the machinations of the rich.

By its own admission, such a radical program cannot succeed by persuasion but must be subversive. In part, that subversion is linguistic, in that it involves coopting central liberal ideals such as toleration, freedom, and justice. The current illiberal moment cannot be understood without appreciating the manipulation of language at its core, especially through persuasive definition, meaning the redefinition of words to mask ideological claims as matters of fact or uncontroversial value judgments. A prominent figure in this subversive turn was Herbert Marcuse. He argued that “the realization of the objective of tolerance would call for *intolerance* toward prevailing policies, attitudes, [and] opinions,” which he recommended expressly as “a partisan goal, a subversive liberating notion and practice.”¹⁵

The general pattern of that argument is to advance a tendentious view of the objective of some liberal ideal, such as toleration or freedom of speech, and then claim that the end is best advanced through illiberal means. Though the underlying critique of liberalism can be put forward in an intellectually honest manner, the subversive aspect lies in the tendency to coopt the language of liberalism. (Note that Marcuse’s school of thought, critical theory, poses as blandly critical of the status quo rather than as advocating a specific ideology—when, in fact, its central inspiration is Marxist.) Whatever the substantive merits of this view, its *political* weakness lies in the fact that its conception of liberation is so authoritarian that it can triumph only covertly, at least in the United States. Nevertheless, its success in academia can be seen in the widespread acceptance of the activist or “engaged” conception of the mission of the university.

Consider just one example by way of illustration. On October 22, 2012—two weeks before the presidential election—the University of Michigan sponsored a panel discussion whose original title was “The Republican War on Women.” That was, of course, a Democratic campaign slogan of the season. The panel comprised journalists from Jezebel.com, Salon.com, and *The Nation*—all overtly leftist publications. The moderator, the chair of the Communications Department, is the author of essays called “It’s the Stupid Republicans, Stupid” and “It’s Okay to Hate Republicans.”¹⁶ Inconveniently for the organizers of the event, however, both Michigan law and university rules prohibit using public resources to engage in political activities for or against a candidate.¹⁷ The solution found by the event’s organizers, which evidently sufficed for the administration and university lawyers, was to rename the event, “The Republican War on Women?” The addition of a question mark was all that was required.

That is what the so-called scholarship of engagement looks like under one-party rule. It involves indoctrination into leftist causes—to the point of violation of law and university rules and the organized silencing of what exists of the Right—in the name of social justice. The protest side of campus activism silences dissenting opinion in two ways. It uses the traditional heckler’s veto methods of shouting down the opposition, blocking access to auditoriums, and otherwise menacing its antagonists. But the novel turn might be called the victim’s veto, which amplifies the offense taken to expressions of dissent into harm, in order to accuse those expressing unpopular opinions of violence.¹⁸ However benign the label—whether it is called the scholarship of engagement or campus activism—such fashionable deviations from the liberal conception of the mission of the university are hard to distinguish from indoctrination and censorship.

Subversive semantics allow many academics to deny that they are engaged in indoctrination despite championing activism that amounts to just that. Often, they sincerely see themselves as

engaged merely in the pursuit of social justice: a substantive political program that purports to be simply morality. As F. A. Hayek noted, however, one would be hard pressed to find a definition of social justice that does not simply recapitulate leftist ideology. Insofar as the term has a determinate meaning, it opposes the liberal conception of justice as a criterion of individual conduct according to moral rules. “The most common attempts to give meaning to the concept of ‘social justice’ resort to egalitarian considerations,” Hayek wrote, “and argue that every departure from equality of material benefits enjoyed has to be justified by some recognizable common interest which these differences serve.”¹⁹

Perhaps some form of egalitarianism is true, but it requires an honest argument rather than persuasive definition. How can one oppose social justice except by being anti-social or anti-justice? Yet, that ideology subverts the liberal conception of justice, which is premised on equality under the law and other rules about what counts as permissible means to a desired end. And it has come into conflict with freedom of speech because its champions are now firmly in power on campus.

The great irony at the heart of the current attack on freedom of speech in academia is that the antagonists of free speech claim to be defending the victimized when, in fact, they are the oppressors. The social justice warriors on campus ignore the actual power structure of the university to maintain the pretense that those groups disempowered in society at large are similarly victimized within academia. Hence the third argument against freedom of speech, the multiculturalist challenge, has—in the name of diversity—become the driving force behind the antagonism to intellectual and political diversity on campus. This argument shares the ideology of the progressive argument and accepts the postmodern doctrine that censorship is inevitable. What is novel about the multiculturalist argument is that it invokes the rhetoric of violence as justification for its own threats. In this view, the only issue is how violence is going to be used: in service of the social justice agenda or against it.

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SPEECH AND VIOLENCE

American universities have steeped themselves in the rhetoric of violence at the expense of their traditional mission: training students to form beliefs in a manner fit for intelligent beings. College campuses haven’t actually become more violent. In fact, violent crime has decreased on campus, corresponding to its general decrease in recent decades. Certainly, Yale University—a recent flashpoint for the battle over free speech—is far safer than when I was a student there in the 1980s. Those days, the campus was less an oasis than a fort in the midst of blighted New Haven.²⁰ Of course, most campuses are far safer than Yale’s. The current rash of violence is metaphorical, however, in that it fundamentally concerns opinions and their expression. This is a war of and about words.

The leading thought of this movement is that the expression of hateful ideas is literally an act of violence, which should be treated accordingly. In that view, words wound like weapons, and hate speech traumatizes its targets like the injuries caused by violent actions.²¹ But according to the multiculturalist argument, only specifically protected groups of people are vulnerable to the harms of hate speech. (No one considers punishing a department head who calls Republicans stupid and encourages hatred of them, for instance, on the grounds that she thereby commits violence against conservative students.) Moreover, those of us who reject the assimilation of speech with violence, without engaging in hate speech ourselves, are often claimed to be complicit in the assault on victims of institutional oppression. Our arguments are not disputed so much as denigrated as vestiges of privilege, even though they protect the speech rights of all students and faculty regardless of their politics or identity.

One of the most blatant examples of persuasive definition can be found in the claim, now approaching a dogma in academia, that only the powerful can be racist. That definition is not the commonplace meaning of *racism* but a politically motivated redefinition, designed to obscure its subversion of the liberal commitment to equality under the law.²² Even if the

racially motivated murder of a member of a nonprotected group cannot be racist, because the murderer lacks social or institutional power, that does not change anything about the action’s underlying nature. It just does not count as racist by stipulation, given the persuasively defined term.²³ But moral arguments cannot rest on semantic fiat. If the racially motivated murder of a “privileged” victim cannot be racism, because of the persuasive definition, that does not change its character. We could call it racist* instead, though that approach would be to capitulate to subversive semantics.

Perhaps the most objectionable aspect of such a rhetorical ploy is that it gets used to defend hateful and even racist (or racist*) speech against dissenters who are women or minorities—even when the objectionable speech is perpetrated by white men, so long as it supports the progressive orthodoxy. As a matter of sociological fact, the immunity to racism and hate speech ordinarily given to members of protected groups does not extend to those who fail to espouse progressive positions. On the contrary, they are attacked even more vehemently as race traitors, often in overtly racist or sexist terms. Women, minorities, or gays and lesbians who dare to stray from the opinions they are supposed to have—that is, those considered representative of their assigned identity—not only are subject to abuse by the supposedly oppressed campus activists but also forfeit the special protections they would otherwise be granted.²⁴ Thus, Ayaan Hirsi Ali and Condoleezza Rice have been disinvited and heckled at academic events, and they have been attacked by the very groups that claim to defend women of color against assaultive speech. But white progressive allies who champion the correct ideology—who “check their privilege”—are allowed to speak, albeit as social inferiors who must defer to their more authentic superiors.

In short, to advocate a position contrary to the orthodox ideology is de facto racist, regardless of the speaker’s reasoning or motivation; but progressives are given broad immunity to engage in what would otherwise be considered hate speech against their political opponents regardless of race, class, and gen-

der. Again, mere partisan intolerance of unpopular opinion gets framed as an exception for speech that somehow constitutes violence. Yet, such putatively hateful or violent speech is not identified by its motivation or effect, because analogous speech that targets dissenting opinion is immune. What matters is whether the speech serves the social justice ideology or not. That is the realization of Marcuse's "liberating" practice of intolerance, an overtly partisan goal carried out subversively.

In fact, the popular conflation of speech and violence is the inevitable consequence of the dogma that hateful speech is beyond the pale of free speech immunity. Here is the crux of the matter. The idea that opinions can *wound*, that they can *trigger* traumatic emotional episodes—which lead to (often violent) behavior for which the victim is not responsible—and that people should be *safe* from offensive views amounts to a substantive and dangerous claim that masquerades as innocuous and benign. The practical effect of banning hate speech is to present a new weapon to the antagonists of free speech: to argue that some doctrine is beyond the pale of toleration, one merely needs to claim that it constitutes hate speech. If putatively harmful or hateful speech is banned, then those who wish to suppress unorthodox opinion will attempt to frame it as hateful and violent. That is just what we now see playing out on campus.

Consider the degree to which political argument gets couched in terms that censure the motives of the opposition. We can put entirely to the side the question of the merits of various positions on gay rights. The relevant issue is semantic: positions held to be anti-gay are now almost universally called *homophobic*. That usage is highly tendentious, implying that the only basis for opposition to the legalization of same-sex marriage, or so-called bathroom equality, is the irrational fear of homosexuality. That is the nature of a phobia. The same rhetorical ploy is now being taken up by people who use the term *Islamophobia* as their analogue to anti-Semitism. Moreover, what can be done with fear can also be done with hate. When hatefulness becomes the criterion of

speech that is beyond the pale, subject to either legal or social sanction, then that criterion creates a powerful incentive to label one's opponents' motives as hateful. It should be no surprise to see this happening.

The great irony of these developments is that they buttress both of the liberal arguments for freedom of speech, whether founded in natural rights or utility. The natural rights argument needed to show that the claim to a right of freedom of speech—properly understood, as the right to profess and discuss any opinion or sentiment, regardless of its truth or consequences—is better justified than any conflicting rights claim. The crucial point to notice is that the attempt to control the moral ecology of a campus (or the country) by banning putative hate speech amounts to just such a claim: that students (or citizens) have a right to a safe space free from opinions and sentiments that they find offensive. Note, too, that since it is impossible for everyone to be protected from ideas and emotions they find abhorrent, this right can be granted only unequally—to some, not to all. And no one proposes to grant the right to a safe space to dissenters. Thus, the claim of a right to a safe space free from hurtful opinions undermines not only the freedoms of conscience but also the principle of equality of rights. This point does not vindicate the natural rights argument for freedom of speech, but it shows that it rests on a much stronger foundation than does the illiberal counterargument.

The utilitarian argument for freedom of speech needed to show that attempts to promote the common good by circumventing individual rights would be so prone to abuse as to have worse consequences than a doctrine that tolerates all opinion and sentiment without exception. That argument gets even stronger support from the ongoing assault on unpopular speech in academia. The cognitive biases that undermine knowledge—conformism, group polarization, confirmation bias, and epistemic closure—are all exacerbated by the idea that certain opinions constitute "microaggressions" that should be prohibited and subject to sanction. A recent list of such heretical ideas approved by

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the University of California warned professors against claiming, for example, that America is the land of opportunity, that the most qualified person should get the job, and that affirmative action is racist. By officially discouraging the profession and discussion of these ideas, the university shuns adverse discussion and undermines the mission of teaching its students how to form their beliefs in a manner worthy of intelligent beings. Instead, it establishes an orthodoxy of political opinion and encourages the punishment of dissenting opinion as racist or otherwise hateful and, hence, unworthy of counterargument. That orthodoxy makes political opposition tantamount to heresy.

What is more, such intolerance creates an incentive for hypersensitivity, since it empowers campus activists—again exclusively leftist activists—to suppress dissent. The multiculturalist assimilation of speech with violence, alongside the postmodern and progressive arguments that preceded it, amounts to an invitation to turn opposition into abhorrence and to exaggerate emotional trauma. This movement encourages the cultivation of intellectual vices that are antithetical to an intellectually diverse society by granting power to the thin-skinned and the hot-headed—or at any rate to those most ready to claim injury or to threaten violence. And it does so subversively, by pretending to enforce norms of civility and tolerance, while doing violence to the classically liberal ideals of a freethinking and intellectually diverse university.

NOTES

1. See Daniel B. Klein and Charlotta Stern, “Group-think in Academia: Majoritarian Departmental Politics and the Professional Pyramid.” *The Independent Review* 13 (2009): 585–600. See also José L. Duarte, Jarret T. Crawford, Charlotta Stern, Jonathan Haidt, Lee Jussim, and Philip E. Tetlock, “Political Diversity Will Improve Social Psychological Science,” *Behavioral and Brain Sciences* 38 (2015): 1–13.

2. This essay endorses norms of academic freedom and non-indoctrination, in line with not just the classically liberal approach but also common as-

sumptions about the mission of academia (at least outside of religious institutions, which advertise their alternative missions), and to illustrate ways in which our universities are increasingly deviating from those norms. That is not to say that private universities must be legally required to adhere to free speech. If Harvard were to declare itself a Progressive institution dedicated to social justice, even at the expense of academic freedom, then they should not be barred from doing so. That would be a bad idea, but—putting to the side complex issues about tax exemptions and the like—plenty of bad ideas should not be legally prohibited.

3. John Stuart Mill, “Inaugural Address Delivered to the University of St. Andrews,” February 1, 1867, in *Collected Works*, 11 ed., John M. Robson (Toronto: University of Toronto Press, 1984), p. 248.

4. John Stuart Mill, “On Liberty” (1859), in *Collected Works* 18, ed. John M. Robson (Toronto: University of Toronto Press, 1984), p. 228fn. Mill’s advocacy for tolerating opinions and sentiments regardless of claims about their “pernicious consequences” (*ibid.*, p. 234) is often misconstrued by those who attribute to him a “harm principle” rather than what he more aptly termed a principle of liberty. For more discussion, see Daniel Jacobson, “Review of David O. Brink, *Mill’s Progressive Principles*,” *Ethics* 126, no. 1 (2015): 204–10.

5. Friedrich Nietzsche, *Beyond Good and Evil*, trans. and ed. Walter Kaufmann (New York: Vintage, 1966), p. 90.

6. It is important to differentiate between legal rights, which are established procedurally, and moral rights that purport to be independent and prior to the law. Natural rights claims (like “human rights”) are about moral rights.

7. The term *liberal* used to describe a coherent set of beliefs and values centered around liberty, which stressed individual rights and personal responsibility. Even in 1973, Milton Friedman described himself simply as a liberal, in *Capitalism and Freedom*, without fear of massive misunderstanding. But that semantic battle is lost; outside

of a few circles, one now needs to refer to *classical* liberalism to refer to this position rather than generic progressivism.

8. Ironically, the metaphor was inapt from its conception, as the case that spawned the cliché, *Schenck v. United States*, concerned anti-war protesters in World War I who circulated pamphlets opposing the draft. Nevertheless, the point remains that the intentional provocation of a panic, when it constitutes a clear and present danger, is not protected speech under the First Amendment.

9. For just one example, see Robert C. Post, ed., *Censorship and Silencing: Practices of Cultural Regulation* (Los Angeles, CA: The Getty Research Institute, 1998), especially Post's introduction to the volume. Post is the dean and the Sol and Lillian Goldman Professor at Yale Law School; he is a constitutional law scholar who specializes in the First Amendment. The locus classicus for the postmodern argument is perhaps Stanley Fish, *There's No Such Thing as Free Speech...and It's a Good Thing, Too* (New York: Oxford University Press, 1994).

10. "We suppose the majority [of the poor] sufficiently intelligent to be aware that it is not to their advantage to weaken the security of property." John Stuart Mill, "Considerations on Representative Government, in *Collected Works*, 18, ed. John M. Robson" (Toronto: University of Toronto Press, 1984), p. 442.

11. This account is not yet comprehensive enough to satisfy defenders of the free society—or even to reflect the state of First Amendment jurisprudence—but it will serve our focus on moral and political speech.

12. Secretary-General Ban Ki-moon, Press Conference at United Nations Headquarters, New York, September 19, 2012, <http://www.un.org/press/en/2012/sgsm14518.doc.htm>.

13. Quoted in Adam Liptak, "Hate Speech or Free Speech? What Much of the West Bans Is Protected in the U.S.," *New York Times*, June 11, 2008, <http://www.nytimes.com/2008/06/11/world/>

americas/11iht-hate.4.13645369.html?_r=0. The exceptional nature of American speech rights is a longstanding theme of Schauer's work.

14. Post, *Censorship and Silencing*, p. 2.

15. Herbert Marcuse, "Repressive Tolerance," in Robert Paul Wolff, Barrington Moore Jr., and Herbert Marcuse, *A Critique of Pure Tolerance* (Boston, MA: Beacon Press, 1965), p. 81; emphasis added.

16. See *Michigan Capitol Confidential*, <http://publicaffairs.vpcomm.umich.edu/key-issues/guidelines-for-political-campaigns-and-ballot-initiatives/>.

17. See University of Michigan, <http://publicaffairs.vpcomm.umich.edu/key-issues/guidelines-for-political-campaignsand-ballot-initiatives/>.

18. On this tendency, see Jason Kuznicki, "Attack of the Utility Monsters: The New Threats to Free Speech," Cato Institute Policy Analysis no. 652, November 16, 2009.

19. F. A. Hayek, *Law, Legislation, and Liberty* (London: Routledge, 1993), p. 243.

20. According to the *Yale Daily News*, "In 2008, Yale reported 296 major crimes on campus, one-fifth as many as reported in 1990. And New Haven has followed a similar trend—in 1994, there were 2,648 violent crimes in the city; in 2008, there were just 1,637." According to this article and official crime statistics, crime on Yale's campus peaked in 1990 at 1,439 major crimes and has continued to decline in New Haven since 2009. See <http://yaledailynews.com/blog/2009/09/15/safety-in-new-haven-a-tale-of-two-cities/>.

21. The locus classicus is Mari Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, CO: Westview Press, 1993).

22. Although one might differentiate in an intellectually honest way between, say, racism and racial prejudice, those who make this argument typically trade illicitly on the claim that an ac-

tion can't be racist unless it targets minorities.

23. This point is entirely independent of the issue of whether a racially motivated crime is as bad when committed by a member of a minority group as when committed by a nonminority.

24. Question: how can a Muslim student be subject to a hate crime that goes almost unpublicized on campus, and its perpetrators go unpunished? Answer: if he is a conservative or libertarian. See <http://reason.com/blog/2014/12/15/social-justice-bandits-vandalize-apartme>.