## Answers to States CP

### AT: States

#### State action fails- state level first amendment protections are incomplete, subject to circumvention/nonenforcement, and allow indirect censorship through retaliation

Buller, AAG Iowa, 14

(Tyler, JD Iowa, The State Response to Hazelwood V Kuhlmeier, 66 Maine L. Rev. 89 https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2064957)

IV. THE STATE RESPONSE TO HAZEL WOOD The movement to counter Hazelwood's threat to student journalism began immediately following the decision, in the spring of 1988.134 Within four months, at least six states had proposed bills to combat Hazelwood's new standard for censorship of the scholastic press.'35 Bills have been introduced in dozens of states since, but few of these efforts have run the full legislative gauntlet and been signed into law. One writer estimates that 83 percent of attempts to enact a student-press law have failed, either during the legislative process or following gubernatorial veto. 136 At the state level,'37 student-press protections have been included in both statutes and administrative regulations. As discussed below, seven states have enacted legislation that restores at least some of Tinker's protections to student journalists. Two more states have adopted somewhat nebulous administrative regulations that-at least arguably-provide similar protection. A. Seven States Have Adopted Anti-Hazelwood Statutes that Restore the Protections of Tinker to Student Publications. Following Hazelwood, seven states adopted new statutes-or modified laws already on the books-to explicitly reject the degradation of students' free-speech rights. As discussed below, six of the seven statutes generally follow the structure of the first student-press law in California. The other state, Massachusetts, has a substantially different statute that provides less specificity and has been interpreted somewhat differently. 1. The California Model (Six States) To understand the California model of student-press statutes, it is important to first understand the history of the California Student Free Expression Law. The original California statute pre-dates Hazelwood and was adopted in 1971, just two years after Tinker.138 From the outset, California courts have held that the statute embodied at least the protections afforded students by Tinker, if not more.139 The statute's current form was adopted in 1976 as Education Code 48907,140 though it would be more than a decade before that statute saw litigation in a reported case.141 Finally, just two weeks after Hazelwood was decided by the Supreme Court, the California Court of Appeals held that Section 48907 provided broader protection than the federal First Amendment and that "[t]he broad power to censor expression in school sponsored publications for pedagogical purposes recognized in [HazelwoodJ is not available to this state's educators."l42 The California State Department of Education adopted a similar position a few months later, in March of 1988.143 In its current form, the California statute reads: (a) Pupils of the public schools, including charter schools, shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not the publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material that so incites pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school. (b) The governing board or body of each school district or charter school and each county board of education shall adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction. (c) Pupil editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of pupil publications within each school to supervise the production of the pupil staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section. (d) There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to a limitation of pupil expression under this section. (e) "Official school publications" refers to material produced by pupils in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee. (f) This section does not prohibit or prevent the governing board or body of a school district or charter school from adopting otherwise valid rules and regulations relating to oral communication by pupils upon the premises of each school. (g) An employee shall not be dismissed, suspended, disciplined, reassigned, transferred, or otherwise retaliated against solely for acting to protect a pupil engaged in the conduct authorized under this section, or refusing to infringe upon conduct that is protected by this section, the First Amendment to the United States Constitution, or Section 2 of Article I of the California Constitution.'44 Portions of this statute have been incorporated into every other enacted anti- Hazelwood statute, with the exception of Massachusetts.145 Each of the statutes modeled on California's-Arkansas, Colorado, Iowa, Kansas, and Oregon- includes two components. First, each includes a positive statement declaring students' statutory free-speech rights.146 Next, the statutes detail an explicit list of materials that may be censored or restrained: those that are obscene,147 libelous, slanderous, incite others to lawless action or to violate lawful school rules,148 or are reasonably forecast to cause a material and substantial disruption to the orderly operation of the school.149 Two statutes-Arkansas and Oregon-also permit censorship of publications that cause an unwarranted invasion of another's privacy,o50 and Colorado permits censorship of gang-related speech."' All of the California-model statutes, with the exception of Arkansas, also require that advisers ensure publications are consistent with standards of journalism and English,152 and half fully immunize school officials from liability when they act pursuant to statute.53 Courts in California, Colorado, and Iowa have all recognized that these statutes codify the Tinker standard in response to Hazelwood and require material and substantial disruption to justify censorship of student speech.154 Commentators also widely agree that the statutes serve as an explicit rejection of Hazelwood in favor of some form of the Tinker standard."' 2. The Massachusetts Model (One State) Unlike the long-standing mandatory California statute, Massachusetts' student- press law was originally enacted as a local-option statute long before the Hazelwood case began working its way through the courts. 156 It includes a positive statement of statutory rights- "[t]he right of students to freedom of expression in the public schools of the commonwealth shall not be abridged"-with only one permitted justification for censorship: speech that causes "any disruption or disorder within the school."'57 Following Hazelwood, legislators acted to make the statute mandatory, rather than optional, but made no other substantive changes.58 The Massachusetts statute has been given fairly detailed treatment by the Massachusetts courts. In Pyle v. South Hadley, the United States First Circuit Court of Appeals certified a question to the Supreme Judicial Court (SJC) of Massachusetts concerning the statute.'59 In answering the certified question, the SJC held that the statute codified Tinker, did not incorporate subsequent Supreme Court case law such as Bethel v. Fraser,160 and did not contain an exception for proscribing any category of lawful speech that is not disruptive.,'6 Essentially, the SJC found that the Massachusetts statute fixed students' free-speech rights permanently in 1969, at the height of the First Amendment's protection for public high school students. B. Two States-Washington and Pennsylvania-Have Administrative Codes that May Provide Greater Protection from Censorship than Hazelwood and Federal Law In addition to state legislatures' statutory responses, two states-Washington and Pennsylvania-have promulgated administrative rules that at least arguably provide students with greater free-speech protection than current First Amendment case law. Washington's administrative code sets forth a series of student rights that parallels the federal Bill of Rights,162 including that "[a]ll students possess the constitutional right to freedom of speech and press . . . subject to reasonable limitations upon the time, place, and manner of exercising such right."163 This provision is entirely untested in the courts, though the Student Press Law Center has taken the position that the code section "may provide students attending Washington public high schools with added protection against administrative censorship."'" Such a position likely reflects an interpretation of the code section that would have those rules codify student-speech rights as they existed when that section was enacted in 1977 and thus imposes the Tinker standard. But another possible interpretation might be that this code section was written to reflect the evolution of "the constitutional right to freedom of speech and press," which would impose the Hazelwood standard, as well as restrictions present in Bethel v. Fraser (concerning lewd and indecent speech)165 and Morse v. Frederick (concerning speech that advocates illegal drug use)'66 in modern litigation. The Pennsylvania administrative code more clearly codifies the Tinker standard, permitting students the right to free speech "unless the expression materially and substantially interferes with the educational process, threatens serious harm to the school or community, encourages unlawful activity or interferes with another individual's rights."l167 The code section also imposes on students "the responsibility to obey laws governing libel and obscenity and to be aware of the full meaning of their expression"'68 and "the responsibility to be aware of the feelings and opinions of others and to give others a fair opportunity to express their views."69 Like the Washington code section, the Pennsylvania administrative code sections pertaining to student speech have not been litigated170 or widely discussed. 17i The Student Press Law Center, however, has taken the position that the regulations "should provide student journalists attending Pennsylvania public high schools with added protection against administrative censorship."72 It is unclear what case law or principles of construction might guide an understanding of this code section. V. PROBLEMS WITH ANTI-HAZEL WOOD STATUTES These statutes share not only a common genesis as a response to Hazelwood, but also a number of substantive flaws and weaknesses that potentially limit their effectiveness and ability to safeguard students' rights. These discrete problems include difficulties in enforcement, vulnerabilities to indirect censorship, mootness of claims, and murky language concerning standards of journalism, profanity, and incitement-all of which are discussed below. In addition to the narrow issues that individually plague a handful of statutes, each of these statutes also shares a common concern: as a group, anti-Hazelwood statutes have seen little-and in some cases, no-litigation. Iowa's statute has only been substantively litigated in one case,173 while the Californial74 and Massachusetts'75 statutes have each been litigated in just a handful of cases. The Arkansas, Kansas, and Oregon statutes have yet to be relied on in a single lawsuit, while the Colorado statute has seen only marginal treatment in a federal graduation-speech case.'76 The scarcity of case law likely shapes the practical effectiveness of these statutes, as both students and administrators often lack clear guidance from the courts about the construction and application of student-press laws. Yet, even in the handful of states where these statutes have been addressed in-depth by the courts, significant flaws and concerns have been exposed. As discussed below, these weaknesses may raise serious questions as to whether the statutes can fulfill their intended purpose of safeguarding students' rights. A. Enforcement: Nearly All Statutes Lack Independent Enforcement Mechanisms and School Districts Often Ignore Statutory Requirements to Adopt Consistent Guidelines Without a mechanism for effective enforcement, student-press laws remain but words on a page, doing little to ensure that students are actually free from administrative censorship. Of the seven statutes and two administrative-code provisions, just one-Oregon's statute-provides a penalty for violations.177 As a result, students are forced to rely on a state's general declaratory-judgment statute or seek injunctive relief, rather than bringing a self-contained cause of action that arises solely out of a student-press statute. This adds additional uncertainty to the litigation calculus by complicating the pleading stage and adding another consideration for students weighing whether to bring a claim.178 Unlike many other civil-rights claims, the state-law rights conferred by student-press statutes are not easily vindicated in the federal courts. Section 1983 of the United States Code-the most common statutory cause-of-action to vindicate civil-rights claims-only permits actions to remedy deprivations of rights under federal law or the federal constitution.'79 This means that, if school officials violate a student's statutory free-speech rights, but not federal law (as would be the case when administrators censor pursuant to Hazelwood in a state with an anti- Hazelwood statute), students cannot obtain federal relief4so and must instead turn to often-underutilized state civil-rights statutes.18' And even then, students may be severely limited in the relief they can seek.182 While six of the seven statutes lack a mechanism for judicial enforcement, five of these statutes (Kansas being the exception) provide a mechanism for local, school-level enforcement by requiring school boards to adopt guidelines consistent with the statutes' requirements.83 Because school board policies "carr[y] the force of law for public employees, students, or visitors on school property,"l84 students can appeal to school officials and elected school board members for enforcement. Unfortunately, there is significant evidence that school districts have, in practice, utterly failed to comply with statutory requirements and some have even adopted policies that directly conflict with student-press statutes. Although there is limited evidence as to whether schools' noncompliance with statutes is willful or ignorant, at least one study suggests that, among administrator-preparation programs, not even school-law instructors (most of whom have graduate-level degrees) are aware of anti-Hazelwood statutes.186 Based on these factors, it is hardly surprising that isolated incidents of censorship continue to crop up in states with anti-Hazelwood statutes.87 In sum, the anti-Hazelwood statutes are difficult to enforce through litigation and compliance is left largely to the whims of individual boards of education and school administrators. This raises serious questions about whether statutory commands to abstain from censoring student publications have any bite for administrators intent on silencing the student press. B. Indirect Censorship: Anti-Hazelwood Statutes Largely Target Direct Censorship and Provide Students Limited Protection from Indirect Censorship Censorship takes many forms. It can be overt, like when a principal cuts pages out of a newspaper, or it can be indirect, such as when a principal retaliates against a journalism adviser or a school board cuts funding for a publication. By their plain language, most anti-Hazelwood statutes are focused only on direct censorship, and are not easily adapted to combat subtler, more insidious attempts to silence students. One of the most widely discussed examples of indirect censorship is retaliation against journalism advisers. Across the country, school officials-unable to censor students directly-apply pressure to the students' journalism adviser through reprimands, threats of transfer or discipline, or even termination.'88 Yet the vast majority of student-press statutes are silent on adviser-retaliation. Only California and Arkansas' statutes contain explicit adviser-protection provisions189 (though the Iowa courts have found at least some implicit protection against adviser-retaliation emanates from the state's statute).190 I have addressed the problems associated with vindicating advisers' rights elsewhere,'91 but suffice to say, school administrators' ability to reach around student-press statutes by punishing advisers instead of students is a massive statutory gap with significant consequences for students and advisers. And, as with all other forms of censorship, adviser-retaliation chills student speech and undermines the First Amendment's guarantees.192 But retaliation against advisers is not the only form of indirect censorship students face. 9 Particularly at the college level, tales abound of university administrations and student governments attempting to control the student press through budget cuts and funding restrictions.194 These concerns may be just as prevalent at the high school level-perhaps even more so, given the complex machinations of public school funding at the local level. It would not be surprising if many attempts to de-fund student newspapers go unreported due to public (and news media) apathy toward local government or because they are buried in the pre- text of budget cuts warranted by an economic slowdown. This inability to combat indirect censorship is a substantial weakness for most of the anti-Hazelwood statutes. Indirect censorship-like adviser-retaliation and budget cuts-is just as effective at silencing student-speech as taking scissors to a newspaper article, yet these statutes do little to protect students' rights from administrators with the creativity or ambition to circumvent existing statutory safeguards.

### AT: States- Mootness

#### **State laws will be rendered moot by standing requirements**

Buller, AAG Iowa, 14

(Tyler, JD Iowa, The State Response to Hazelwood V Kuhlmeier, 66 Maine L. Rev. 89 https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2064957)

C. Mootness: Most Statutes Do Not Prevent Students' Claims from Becoming Moot After Graduation Anti-Hazelwood statutes also lose much of their punch when, in the rare case where students can rally the resources needed to litigate a claim,195 lawsuits are dismissed as moot because students lack standing. The procedural barrier of standing has been particularly difficult for students who graduate as their cases wind their way through the federal courts.'96 In one notable case, the Supreme Court of the United States even sua sponte declared students' First Amendment claims moot when the Court learned at oral argument that the student-plaintiffs had graduated; the mootness issue in that case had not been briefed by the students or the school district, or raised in the courts below.'97 Although state statutory claims are not necessarily bound by the requirement of Article III standing,'98 state courts are similarly unlikely to reach the merits of claims for relief that have become moot or where no injunctive relief is possible.'99 As plaintiffs, student journalists are unique: the entire staff of a given student publication is guaranteed to turn over every four years due to routine graduation.200 The window shrinks even further if one assumes that newspaper leadership positions (such as a student editorial board) are likely upper-classmen, and the editor-in-chief is very likely to be a graduating senior. Under these circumstances, the window of time in which a student's statutory free-speech claim survives is months at the longest, or as short as weeks when a principal censors a newspaper's senior- or graduation-edition. It is effectively impossible for students to litigate their claims in such a narrow timeframe. Student-press attorneys have suggested that students may be able to game state or federal standing requirements by substituting current editors as named plaintiffs, suing for damages, filing a class-action suit, or alleging that censorship has caused actual harm to the parties.201 But it is unclear whether many, or any, of these tips have practical value for high school students. Every student-editor is unique and it would not be surprising to find that some editors are uninterested in pursuing censorship claims on behalf of their predecessors-especially when school officials replace the students complaining of censorship with peers more in line with administrators' views.202 Students are also unlikely to seek monetary damages, given the limited financial assets of student publications and students' goal of injunctive relief: often an order to prevent censorship and allow distribution of a student publication.203 While some advocates remain optimistic, it is unclear whether any of these strategies will actually increase students' access to the courts under these statutes. One state, however, has addressed this weakness head-on. California amended its student-press laws in 2008 to explicitly confer standing on aggrieved student journalists even after they have graduated.204 Although this provision has yet to be tested in the courts, its straightforward language suggests that it may effectively combat the problem of standing.

### AT: States- Definitional Confusion

#### State laws allow censorship due to definitional uncertainty- this can’t be fiated away

Buller, AAG Iowa, 14

(Tyler, JD Iowa, The State Response to Hazelwood V Kuhlmeier, 66 Maine L. Rev. 89 https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2064957)

D. Murky Justifications for Censorship: Several Statutes Permit Censorship of Publications that Do Not Meet "Standards of Professional Journalism" Five of the seven states that have enacted anti-Hazelwood statutes give school officials the power to regulate student publications based on a vague and ill-defined justification: to ensure student speech is consistent with "professional" or "high" "standards of English and journalism . . . ."205 These provisions raise practical problems of proof-exactly who determines "professional standards of English and journalism?"-and offer an easy cover for administrators who seek to silence otherwise protected speech. The most glaring problem with including a standards-based justification for censorship is that courts are not equipped to determine exactly what "professional standards of English and journalism" are. A lack of institutional experience at least partially explains why every court to address these provisions has done so only in passing. In both the California and Iowa cases, appellate courts have skirted the issue of journalism standards by relying on rules of error preservation206-rules that themselves are designed to ensure judges have an adequate record on which to base their decisions. It is not difficult to imagine a scenario in which parties put on a "battle of the experts" to establish what the standards of English and journalism require and whether a given publication complies with those standards. The product of any attempt at judicial fact-finding is unpredictable at best, given the somewhat amorphous nature of "standards" in journalism education.207 But, even in a hypothetical state with unimaginably detailed standards of journalism, the standards provisions likely remain unworkable. Statutes designed to protect student journalists cannot reasonably be construed in a manner that would allow otherwise protected student speech to be censored because a journalism adviser did not teach enough lessons about em-dashes, apostrophes, or semi-colons. To give school officials the benefit of the doubt-that is, to assume they are more concerned with providing for students' academic growth than silencing speech critical of administrators or school policy-it may make sense to allow school officials to censor speech that does not meet certain minimum thresholds of English and journalistic standards. It makes sense to let schools require student reporters learn the fundamentals of grammar, spelling, and how to report factually accurate information. And it makes sense that schools want to instill basic values of journalism ethics in student journalists. Unfortunately, if even a fraction of reported cases of censorship are accurate, school officials are much more likely to create a situation where "all a principal . . . has to do to kill a story or editorial he or she doesn't like is to label it 'poorly written' or 'inconsistent with the shared values of civilized social order . . ."'208 The Lange case from Iowa provides a strong cautionary tale of the dangers that arise when a school official--or even a district court judge-is placed in the position of determining whether student journalism meets appropriate standards of English.209 In Lange, the student newspaper at issue was an April Fool's parody- edition of the Waukon Senior High School newspaper, The Tribe-une.210 By any measurement, this edition of The Tribe-une was not a pinnacle of journalistic excellence. Among its many satirical and parody stories, it included a digitally created photo of an infant smoking a cigarette, a fictional story about a methamphetamine lab found in a biology classroom, and a story quoting students about their (presumably exaggerated) aspirations of becoming exotic dancers.211 During depositions, the school district's superintendent indicated that he justified censorship of the newspaper in part based on his opposition to the "parody, satire type of reporting, editorializing, whatever" that the students had engaged in.212 Not in so many words, the school district advanced the claim that parody-at least of the type practiced by the Waukon Senior High students--did not meet professional standards of journalism or English. Yet the letters of reprimand issued to the newspaper's adviser do not mention disagreement over style or journalistic standards, but rather highlight the school's belief that the material was "inappropriate, "had a negative impact on the [school district]," and "offended" members of the community.213 It would be naive to assume that Lange v. Diercks was an anomaly, and that other school officials would not seek to suppress otherwise lawful student speech based on perceived deficiencies in "journalism standards." Against this backdrop, the best understanding of the statutes' standards-of- journalism component is likely that a school should only be authorized to require students writing for an official student publication to correct gross problems of grammar, spelling, or inadequate research.214 Essentially, these provisions should operate to ensure journalism advisers are able to do their job: to provide students advice on sound principles of journalism, English, and writing, without requiring students to accept every suggested comma or line-edit to escape censorship.215 Much like a coach provides student-athletes advice on how to play-without running onto the field and ripping the football from a player's hands-these statutes should give students the breathing room they need to learn and grow with 216 the advice, support and assistance of teacher-advisers. Until courts come to this conclusion, however, students in states with "standards" provisions should be vigilant against school officials' attempts to abuse statutes and use backdoor- censorship to squelch controversial or unpopular stories.

### AT: States-Studies Prove

#### Studies show state action has no effect on censorship

Buller, AAG Iowa, 14

(Tyler, JD Iowa, The State Response to Hazelwood V Kuhlmeier, 66 Maine L. Rev. 89 https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2064957)

Two studies have explored the effects of student-press laws by testing the impact of changing student-press standards on a single population over time. The first study, by Professor Carol Lomicky, was published in 2000 and focused on editorials published in an anonymous Midwestern high school's student newspaper during the eight years before and after the Hazelwood decision.254 Lomicky found significant differences in the types of editorials published before and after Hazelwood.255 The number of critical editorials decreased from 40 to 12, while the number of editorials appealing to causes and written for entertainment increased significantly.256 The topics discussed also shifted from a criticism of school policies and personnel decisions to "safer issues," like crowded hallways, homecoming activities, and student parking.257 The second study, by high school journalism adviser Jennifer Garner and college journalism professor Bruce Plopper, was published in 2010 and investigated a stratified sample of Arkansas public high schools' student newspapers published before and after enactment of Arkansas's Student Publications Act.258 The Garner and Plopper study found no significant change in the number of controversial259 editorials or news/feature stories published after implementation of the Arkansas anti-Hazelwood statute.260 What differences the study did reveal were hypothesized to be due to school size (urban versus rural) and the level of training and experience for the schools' journalism advisers.261 A related study by Plopper provides some context for these findings, noting that "student-press laws may not have much effect on student-press censorship" given the proliferation of censorship in Tinker states,262 the lack of adviser-awareness about anti-Hazelwood statutes,263 and many districts' failure to comply with requirements of the Arkansas Student Publications Act.264 In the aggregate, the data from these surveys is mixed. In terms of newspaper content, the Lomicky study (finding editorial content at a single high school changed after Hazelwood) seems at odds with the Garner and Plopper study (finding little difference in controversial coverage before and after enactment of a student-press statute). Similarly, the survey data revealing little difference among attitudes of advisers and student-editors after Hazelwood seems at odds with reported differences in the attitudes of principals and other school officials. As many writers in this area have noted, more data is needed to better gauge whether anti-Hazelwood statutes are having the intended effect of allowing student journalism to flourish in the absence of censorship by school officials.265 To that end, the study described in the following subsections was designed to provide additional data concerning differences between student newspapers in Tinker and Hazelwood states.

### AT: States- Preemption

#### Administrators use federal law- title IX- to justify censorship

Malone, JD Candidate, 17

(Patrick O, THE MODERN UNIVERSITY CAMPUS: AN UNSAFE SPACE FOR THE STUDENT PRESS? Fordham Law Review Vol 85)

The university’s vice president for student affairs recognized the article’s satirical nature but believed “there are people out there that do take it literally.”17 As a result, within a month, the university’s student government voted to slash the publication’s funding.18 The school also sanctioned the paper, requiring its staff members to complete Title IX training on sexual discrimination.19 The university administrator said that the university was legally required to act under Title IX, even if such action violated the First Amendment, because he believed that constitutional rights do not supersede Title IX.20 “Title IX is a federal compliance policy,” he asserted, and “[t]hose policies supersede anything else.”21

#### Administrators rely on federal law to justify censorship to hide “image” motivations

Malone, JD Candidate, 17

(Patrick O, THE MODERN UNIVERSITY CAMPUS: AN UNSAFE SPACE FOR THE STUDENT PRESS? Fordham Law Review Vol 85)

Universities have their own interests that affect freedom of speech on campus. First, they require order on campus.205 Failing to discipline student speech when it rises to the level of harassment may risk interfering with students’ education or otherwise create a hostile or disruptive environment.206 Additionally, a university has an interest in preserving its reputation—one of the most influential factors in attracting applicants and donors.207 Because many universities fund student publications that may also bear the university’s name, universities may seek to control published content if students or the public reasonably believe the publication “bear[s] the imprimatur of the school.”208 Some scholars have further noted the increasing “corporatization” of the university, whereby colleges treat students as customers or clients.209 In adopting corporate organizational models to compete for students, universities increasingly view student media as part of the institution’s brand and thus may seek to prevent student publications from publishing controversial content that may offend prospective students or otherwise portray the university poorly.210 B. Recent Controversies Several recent events involving student publications on university campuses demonstrate the tension between students’ free speech rights and universities’ interests in protecting the student body from harassing or otherwise offensive speech. These incidents highlight disciplinary action that schools have taken under the color of Title IX and through their own policies. 1. Title IX Disciplinary Action Recently, college administrators and students have invoked Title IX to sanction published student speech, pitting the school’s interests against students’ free speech rights. For example, in April 2013, the University of Alaska Fairbanks, a public university, launched an inquiry into its student newspaper, the Sun Star.211 The university commenced the investigation after the paper, which was funded by both advertising revenue and student activity fees, published a satirical article in its April Fools’ Day issue about the university’s plans to build a “vagina-shaped” building on campus.212 A university professor filed a formal written complaint with the school’s Office of Diversity and Equal Opportunity, alleging that many faculty members found the article objectionable and that the satirical piece “reproduce[d] the ‘rape culture’ that trivializes the forced and non-consensual display and penetration of women’s bodies.”213 The university determined the article’s content did not merit disciplinary action.214 The same professor subsequently appealed the finding and filed a Title IX complaint against the university for failure to investigate, alleging that the article’s “sexual jokes, graphic displays of women’s genitals, and use of sexual slang create[d] a hostile environment because it comprises sexual harassment.”215 Pursuant to OCR’s 2011 Dear Colleague letter, the university was obligated to commence a Title IX investigation, despite its earlier finding, because the professor’s allegations amounted to a prima facie case for harassment and failure to investigate.216 During the course of the investigation, the university’s faculty senate sent a letter to the Sun Star, asking the paper to permanently remove the satirical article from its website.217 The Office of Diversity and Equal Opportunity and the faculty senate conducted a months-long investigation and concluded that the article did not violate Title IX. The university subsequently dismissed each of the professor’s claims.218 The complainant professor appealed the ruling.219 Several months later, an outside review affirmed that the First Amendment protected the Sun Star’s articles, and the expiration of a final opportunity to appeal rendered the decision final.220 Although the school found the paper and its student writers were fully acting within their constitutional rights, it still burdened them with a months-long inquiry, which included the university’s dean advising the paper’s editor not to take classes with certain professors.221 This example is illustrative of the different interests at stake in conflicts regarding potentially harassing speech.222 The American Association of University Professors (AAUP)223 argues that OCR’s failure to distinguish speech and conduct in Title IX guidance threatens constitutionally protected speech.224 Although the AAUP typically focuses on professors’ rights on college campuses, the group addressed how Title IX and resultant university policies infringed on students’ free speech rights in a recent report.225 Specifically, the AAUP argues that, over the past decade, OCR has failed to strike an appropriate balance between preventing sexual harassment and protecting speech and academic freedom essential to the academic environment.226 The AAUP notes that OCR’s initial guidance on sexual harassment specifically addressed First Amendment concerns by confirming that universities should not construe OCR’s guidance to mandate policies that infringe on protected speech.227 However, the AAUP noted that since OCR’s 2011 Dear Colleague letter, the agency has failed to provide an adequate statement reaffirming free speech protections, which leaves uncertain what speech protections—if any—apply in a school’s investigation of hostile environment claims.228 This ambiguity creates a risk of universities overreaching when they pursue disciplinary action they believe Title IX mandates, threatening free speech rights on campuses.229

### AT: States Answers Apply to Aff

#### Lack of federal clarity on first amendment protections drives censorship

Malone, JD Candidate, 17

(Patrick O, THE MODERN UNIVERSITY CAMPUS: AN UNSAFE SPACE FOR THE STUDENT PRESS? Fordham Law Review Vol 85)

In recent years, universities have taken an active role in regulating published student speech.28 Pressure to do so has come from several sources. First, the Department of Education’s Office for Civil Rights (OCR) expanded its definition of harassment in its 2011 Title IX guidance.29 Thus, editorial content can be limited because the school deems it harassing. Second, in addition to OCR’s expanded definition, universities adopted their own prohibitions on speech that the universities’ administrations deem harassing or otherwise impermissible.30 Third, universities and student government associations have implemented broad prohibitions on speech, including written communication, in the name of creating more inclusive campus environments or eradicating speech they deem harassing, hateful, or offensive.31 Recently, the response of several universities and student governments to student newspaper content that has offended some students has raised questions about whether, on the modern university campus, student media can maintain its independence. In the backdrop of these developments is the unsettled question of what protections the Constitution affords student publications on university campuses today.32

## Answers to Cap K

### Censorship Kills the Alt

#### Case is a disad to the alt

Farber, PhD Sociology, 2-27-17

(Samuel, Professor Emeritus of Political Science @Brooklyn College, https://www.jacobinmag.com/2017/02/garton-ash-free-speech-milo-yiannopoulos/)

Garton Ash offers a wide-ranging exposition on the right to self-expression and a coherent defense of free speech from an explicitly liberal point of view. Socialist theory and practice has never satisfactorily established the place of free speech in the struggle for social transformation and in a future socialist society — all the more reason to seriously grapple with the challenge posed by Garton Ash’s new book.

#### Socialists vote aff

Farber, PhD Sociology, 2-27-17

(Samuel, Professor Emeritus of Political Science @Brooklyn College, <https://www.jacobinmag.com/2017/02/garton-ash-free-speech-milo-yiannopoulos/>)

The ACLU’s defense included two arguments relevant to the present discussion. On the one hand, they pointed to the dangers posed by allowing the state, local, or federal government to limit or regulate speech, fearing it would set a precedent that could be turned against other social movements’ democratic rights, including organized labor, minority groups, and the Left. Indeed, the danger of empowering the state to limit free speech rights is precisely why socialists cannot rely on the state when confronting violent intimidators.

### Reform Good

#### All or nothing critique of capital relies on a flawed critique of reform-no root cause, no alt solvency-those arguments are based on essentialist assumptions

ROBBINS, PhD Harvard, 13

(BRUCE, Old Dominion Foundation Professor in the Humanities, https://nplusonemag.com/issue-16/reviews/balibarism/)

BALIBAR’S NEW BOOKS will appear in an intellectual landscape where a revolutionary Marxism — at least from a glance at bookstores and syllabi — is still in vogue. Ambivalent as they are about revolution, what kind of reception will these books receive? Why do people read Marxist philosophers anyway? It would be hard to argue that the fashion for Marxism during the past decade or so has had anything to do with the perceived proximity of revolution or even the strength or militancy of working-class organizations. In the 1960s Marxist writers rode a wave of political energy and hope. That has mostly not been true for the generation that came of age around or after September 11, 2001, which saw inequality and unemployment rising but labor unions and left-wing parties falling. Interest in Marxism makes more sense as a response to the intensified financialization and globalization of capital, with its most revelatory moments in the bursting of the dot-com bubble in 2000–01 and more recently the 2008 financial crisis. It seems worth adding here that the digital revolution, which did for today’s generation something like what the Industrial Revolution did for Marx — prove that dramatic change was possible — helps explain some of the otherwise inexplicable enthusiasm for Hardt and Negri. As Balibar observes, their argument splits apart the Marxist concept of the material base, making much of (digital) technology, which has changed, but leaving out the relations of production, which have not, or at least not for the better. If you want to be a serious materialist, he says, you have to hold onto both. One consequence of capitalism’s ever-firmer annexation of the global scale and ever-tighter squeezing of the majority’s living standards has been that ordinary domestic politics, especially electoral politics, have come to feel ever more trivial and irrelevant. One need only look at voter turnout, even for elections like 2008, to see that abstention is the one principle in the US that enjoys broad consensus. Under these circumstances, even hard-won battles in the name of race, gender, and sexuality could come to seem a bit beside the point. To Žižek, who routinely gets laughs at the expense of multiculturalism, Balibar no doubt looks too eager to please the “identity” constituencies. To Balibar, Žižek and Badiou no doubt seem to have given up on the idea of speaking to any constituencies — that is, to have given up on the project of politics. Paradoxical as it may seem, giving up on politics has probably been part of Marxism’s seductiveness for a long time. No one in Balibar’s cohort (Balibar was born in 1942, Badiou in 1937, Rancière in 1940, Žižek in 1949) could have felt confident that as Marxists they came of age at a propitious time for plunging into the class struggle. If 1968 didn’t turn out to be the revolutionary conjuncture, no moment that has followed has come closer. In nonrevolutionary times, the most tempting and pervasive of revisionisms is to give up on changing the world and just interpret it. Nothing supplies serviceable analytic distance like the conviction that you don’t have a horse in this race. Witness the quietism of the New Left Review, the foremost organ of Marxism in the English-speaking world and yet a journal that you go to for searching analysis, not for uplifting news of movements and conflicts. For some years NLR, strongly influenced by Althusser, ostentatiously ignored thinkers in the messianic mode — and bless them for it. But isn’t there a sort of secret alliance between messianism and quietism? How can you stay so coolly detached unless you’re absolutely sure that in the end your day will come? Balibar wants no part of this alliance. His unwillingness to maintain an authoritative detachment from ongoing political struggles, however insignificant posterity may judge those struggles to be, is of a piece with his lack of certainty that he knows where History is going or who will lead it there. For some readers, this will be frustrating. His distaste for political theology, his premise that even in situations of political urgency there is no excuse for pretending that Marxism has all the answers, has doubtless driven away some who, whether aware of it or not, preferred a system that did have all the answers while also preferring prophets who carry those answers down from the mountain and deliver them in thunder. This seems the most likely reason why, as radical social transformation has reappeared as a historical possibility, as Marxism has reappeared to analyze its chances, and as Americans in search of political enlightenment continue to eavesdrop on exchanges among left-wing French philosophers, many of them Althusser’s former students, Balibar has had less of a hearing than the aging superstars around him. It is true that Balibar is personally mild, self-deprecating almost to a fault, and does not seek out occasions for newsworthy confrontation. David Rieff observes in a nasty but not inaccurate review of Claude Lanz-mann’s recent memoir that “self-deprecation has never been much prized in French intellectual life.” Things are not so different in the US. For whatever reasons, Balibar’s putative rivals have also largely avoided on-screen collisions with him. I note that Žižek calls Balibar out in two of his books, Revolution at the Gates and The Ticklish Subject — and then, seemingly forgetting he’s thrown down the gauntlet, devotes most of his pages to Badiou. Is Badiou an easier target? If so, what makes Balibar a harder one? Consider The Idea of Communism (2010), a collection of papers delivered with much fanfare at Birkbeck College in London in 2009, a year or so into the financial crisis, and coedited by the conference organizers, Žižek and Costas Douzinas. Balibar is not included in the collection (he was invited to the conference but was stuck teaching in California) and he is not cited in the index. His omission from the index is especially curious because he is in fact argued with, at least glancingly, in two places that I noticed: on the question, What is politics? and on the question, Should the left claim human rights? In both cases the underlying issue is whether it’s hopelessly naive to engage in politics at the level of the state. Balibar is taken, rightly, as assuming that politics at the level of the state, rights, and law remains a significant obligation. It’s clear that the other speakers disagree, but they don’t feel obliged to spell out why. Badiou’s contribution to The Idea of Communism openly rejects the enterprise of “ordinary” politics. (Much might be said about the assumption that passing previously unimaginable legislation like the forty-hour workweek or the graduated income tax or the regulation of the financial industry would count as “ordinary.”) Badiou takes as his premise that “ordinary history” is “confined within the State.” By contrast, the kind of history he thinks we need, the kind that is not confined within the State, is history that is faithful to “the Idea.” Badiou takes his argument about “the Idea” from Plato, whose usefulness to the left he seems recklessly eager to promote. But there is something post-Hellenic about the idea of an Idea that floats above ordinary history and beams encouragingly down on those, wherever and whenever they are, who are distressed by life on the ground. This might be what Balibar had in mind when he called Badiou a theologian. In the same volume Bruno Bosteels describes the disagreements among Badiou, Žižek, Rancière, and Balibar as the “fights of a dysfunctional family.” He doesn’t designate parents and children, but he admits that Lenin had a point when he described the dogmatic antistatism of the holier-than-thou Communists to his left as indicative of “an infantile disorder.” Rather than thinking of the family members as squabbling over who loves Marx most or who was Althusser’s favorite, it seems more generous to imagine them deciding whether to invest their nest egg in political ventures that may or may not pay off. Many of the issues that have filled the news over the past decades — ethnic cleansing, violence against immigrants, Palestinian self-determination, European unity — have not exactly cried out for a Marxist vocabulary. What about, say, Europe? Europe is a subject that absorbed much of Balibar’s attention in the 1990s and has continued to preoccupy him since — see Politics and the Other Scene (2002) and We, the People of Europe? (2004) as well as a volume now out in France, Europe, crise et fin? His latest pronouncements have been extremely pessimistic. But they emerge against his expectation that the project of European unification, rather than a ploy of the bankers and/or a creative new version of apartheid, might become a site of bottom-up democratic zeal and give birth to a new set of transnational institutions. As Žižek notes disapprovingly, this hopefulness sets Balibar against both the antistatism of the New Left and current cynicism about an emergent transnational politics of any kind. Balibar’s line on Europe is not that we should make the best of the European institutions we have, poor as their performance has been. Those institutions have failed, he says, definitively. Where he differs from his cohort is in his passionate will to see them replaced — in other words, his refusal to give up on Europe altogether. His critique of “statism without a State”—technocratic top-down solutions to the European crisis without encouragement of broad democratic participation — assumes (against Rancière’s argument in his own essay on French solidarity with Algeria) that democracy is possible not just on a national but a transnational scale. Balibar’s call for a left populism to counter the racist, xenophobic populism that threatens to become the only populism we can recognize in Europe also assumes (here he borrows from Rancière and diverges from Žižek) that racism is not a fixed psychic quantity that cannot be diminished by any conceivable rejiggering of social arrangements. And it assumes (arguing with both Žižek and Badiou) that democracy is a good in itself, and that, stretched and intensified, it might create the sort of European institutions that the victims of European integration (many of them, like the Greeks, still theoretically committed to the European Union) will like a lot better.

#### Democratic states can restrain capital- institutions are one tool among many, foregoing them makes the alt non persuasive and condemns a huge number to death

ROBBINS, PhD Harvard, 13

(BRUCE, Old Dominion Foundation Professor in the Humanities, https://nplusonemag.com/issue-16/reviews/balibarism/)

BECAUSE OF ITS CONSPICUOUS FAILURES of late, democracy itself, with its tedious institutions and “ordinary” politics, has been a tempting object of derision. Žižek succumbs to the temptation in The Year of Dreaming Dangerously, despite the fact that he speaks repeatedly of “Communism” and “the dictatorship of the proletariat” and applies these charged words to the Arab Spring, protests in Spain and Greece, Occupy, and other headline-grabbing political events of 2011. “Badiou hit the mark,” he writes in support of his great ally, “with his apparently weird claim that ‘Today, the enemy is not called Empire or Capital. It’s called ‘Democracy.’ It is the ‘democratic illusion,’ the acceptance of democratic procedures as the sole framework for any possible change, that blocks any radical transformation of capitalist relations.” This sounds plausible until you start to think about it. Did anyone claim that existing political institutions offer the sole framework for change? And wait a moment — is Badiou really calling democracy “the enemy” rather than Capital? OK, what he probably means is not that capitalism is not the enemy but that it hides behind a mask of democracy, which it does. But it doesn’t follow that democratic procedures can never under any circumstance be used to call capitalism to account, or for that matter that a “dictatorship of the proletariat” would be better. Does Žižek really think that when he runs this rather tainted phrase up the flagpole, his readers are going to salute? It seems unlikely. This is not carelessness on Žižek’s part. He’s got to know that what it will most likely do is make people stay in their seats, fully entertained, enjoying the outrageousness rather than marching or leafletting or (God forbid) joining anything. When Žižek proclaims his communism, he is not recruiting. There’s no piety, and there are no strings — and having no strings is part of the magic formula that keeps his audiences so thoroughly entertained. It doesn’t seem coincidental that the phrase “dictatorship of the proletariat” (on which Balibar has also written provocatively, but in 1976) is resuscitated on the same page as an endorsement of Badiou’s argument “against participation in ‘democratic’ voting.” Žižek says that “we do not get to vote on who owns what.” This too seems plausible, but it happens not to be true. When an earlier generation’s elected officials instituted a graduated income tax, they were deciding to decide what slice of the pie people should own. If we were to elect officials who would institute a much higher tax on capital gains, or a tax on financial transactions, or a 100 percent inheritance tax, that’s what we would have voted in. Ditto if we reinstituted a decent welfare system. Speaking of which, should we really be indifferent, as Žižek recommends, to “the ongoing dismantling of the Welfare State”? This dismantling is not, Žižek says, “the betrayal of a noble idea,” but “a failure that retroactively enables us to discern a fatal flaw of the very notion of the Welfare State.” The flaw is the idea that capitalism can be made “socially responsible.” I think this is wrong not because I’m sure that capitalism can be made socially responsible — can we know until we try?—but because it’s entirely about Ideas. The dismantling of the welfare state is worth fighting not because the welfare state was or is a noble Idea but because it’s a card we’ve been dealt and discarding it means wrecking a considerable number of lives. Better to be agnostic about the fate of capitalism in the long term: who can say that they know for sure? In the meantime, all we need is the assurance that some political efforts do have results. Žižek’s “fail again, fail better” motto ought to be taken literally: some failures really are better than others, and the welfare state is one of them.

### Rights Good

#### Pessimism is in fashion but wrong- reform can have positive long lasting effects, giving up is worse

ROBBINS, PhD Harvard, 13

(BRUCE, Old Dominion Foundation Professor in the Humanities, https://nplusonemag.com/issue-16/reviews/balibarism/)

For many, respect for human rights would of course count as such evidence. Balibar does not join their chorus. The awkward neologism (in French, égaliberté) that gives The Proposition of Equaliberty its title defines a crucial right we do not possess. During the cold war, human rights were largely a weapon of the so-called “free world”: it was assumed that what rights protect is freedom, and freedom is something that “we” have and “they” do not. This was — and has remained — the justification for innumerable wars, covert and not, by “us” on “their” behalf (against some other “them”). So equality has become irrelevant. Balibar’s riposte is that if rights are not serving the cause of equality, both within the nation and among nations, they are not worth getting excited about. But the implication is that rights can in fact be made to serve that cause — and so are very much worth getting excited about. This corollary is not universally admitted. It is worth comparing these remarks with the much more famous reflections on rights by Jacques Rancière. Rancière appears to be experiencing the same sort of boomlet as Badiou (a recent panel proposed that we “forget Foucault” and “read Rancière”), and one reason for this fashion is clearly his horror of complacency in any form. Though he was one of Balibar’s comrades in Althusser’s seminars, he turned away from Althusser early, embracing a left populism. On Europe Balibar too has come out for populism. Nevertheless their differences remain instructive. Consider Rancière’s now classic 2004 essay “Who Is the Subject of the Rights of Man?” which takes on triumphalism about human rights. Rights, for Rancière, are never a possession; they exist only insofar as they are asserted and actively claimed. This sounds properly bracing. However, it’s self-contradictory. While Rancière stresses the urgency of action, he undermines that action in advance by denying that it will have any lasting effects. If the active claim of rights by one generation can never be passed down to the next generation, if the next generation must always start from nothing, then what is the point of acting in the first place? Rancière sounds like a defender of democracy when he attacks democracy’s attackers, but he asserts (in Hatred of Democracies) that “We do not live in democracies,” and if he means it, then what does he think there is to defend? In spite of Rancière’s indignation, his position is in effect that no successful moves toward equality have ever been made, no territory has ever been occupied, no structural advantage has ever been conferred on those who come after. From his perspective no progress can ever be claimed without a fatal fall into the abyss of complacency. In a kind of frenzy of voluntarism or presentism, the urgency of doing something now makes anything done before disappear, including the establishment of rights, however limited and fragile. The contrast is clear in Citizen Subject, where Balibar discusses the meaning of anti-imperialism in France during the Algerian struggle for national liberation, which was an early version of metropolitan antiwar militancy. As originally drafted (by Blanchot), the “Manifesto of the 121” supporting French draft resisters was titled “Déclaration sur le droit à l’insoumission,” or “Declaration on the Right of Insubordination.” Balibar underlines the fact that declaration evokes the French Revolution’s “Declaration of the Rights of Man and Citizen” and the tradition that comes out of it. He obviously shares Rancière’s misgivings about triumphalism, but for Balibar these misgivings must be weighed against the demonstrated efficacy of the tradition, “the permanence of a revolution that has already been made.” The Declaration was a resource that French protesters against French colonial brutality could and did appeal to. The revolutionary act of declaring rights, Balibar observes elsewhere, “was the anchoring point for the series of claims that, from the morrow of the Declaration, begin to base upon it their claims for the rights of women, of workers, of colonized ‘races’ to be incorporated into citizenship.” There are always good reasons for thinking of rights as yet to be conquered, and that it’s foolish for people to stick only to defending the rights they already possess. Still, it is equally foolish to imagine that like Sisyphus we are forever damned to begin at the beginning, that in the domain of rights there is no such thing as what the French call an acquis — something attained.

#### Reform doesn’t view oppressive institutions as legitimate, but instead “legitimate enough”- this is a superior rubric to revolution

ROBBINS, PhD Harvard, 13

(BRUCE, Old Dominion Foundation Professor in the Humanities, https://nplusonemag.com/issue-16/reviews/balibarism/)

AT A DEBATE IN SOUTHERN CALIFORNIA IN 2007, the French philosopher Alain Badiou informed the French philosopher Étienne Balibar that he, Balibar, was a reformist. “And you, monsieur,” Balibar replied, “are a theologian.” Both of these epithets have more than a grain of truth to them. Both also say something, alas, about why Badiou, Rancière, Žižek, and Hardt and Negri all sell better in America than Balibar. Reform sounds like a chore. But left-wing theology! That has an occult, revolutionary ring to it. In fact much of what passes for left-wing thinking in a country without an organized left is daydreams of the end of the world featuring mysterious, all-powerful messiahs — think of Hardt and Negri’s “multitude.” Žižek and Badiou operate at a higher level, but they too are drawn to scenarios in which Everything Is Suddenly and Utterly Changed. “Customers who bought these items have also bought Left Behind.” In most American circles “reformist” is not the fatal put-down it once was in the vicinity of France’s Communist Party, where Balibar did two decades of activism. (Membership in the CP of course created problems for his entry into the US, where he has nevertheless worked off and on for the past two decades.) But in any case it’s not an epithet Balibar applies to himself. If the shoe fits, it’s mostly at the level of style. Badiou, like many of his comrades, is a stylistic theologian: in his Ethics he does not hesitate to describe “Man” as “Immortal.” Balibar can write a forceful manifesto (see last summer’s declaration of solidarity with Greece, which Badiou also signed), but his irresistible attraction to parentheses and qualifications makes his philosophical writing sound reformist. His sentences are forever stopping to give credit to every thinker who might have had some hand in shaping his argument, especially thinkers who are not his ideological allies. Like a crosstown bus, he brakes at every conceptual intersection. Not for him the high road of careening, prophetic self-assertion. And how could it be, given his undisguised belief that existing political institutions are legitimate enough to be worth making demands on — not legitimate, but legitimate enough? Enoughness of this sort is probably a more useful way of laying out the stakes in this argument than “revolution.” An article in Le Nouvel Observateur in October 2011, marking the French publication of Citoyen sujet, one of three new books by Balibar that are about to appear in English, underlined his precise position in its subhead: revolution and democracy require each other. Democracy may seem uninspiring and even discredited, having failed so spectacularly to rein in capitalism’s entirely predictable disasters. But we have yet to see it revolutionized. And the going alternative seems to be Heidegger’s “only a god can save us.” Among the questions posed by the back-and-forth between Badiou and Balibar is whether revolution has a secular equivalent, or how to make do without its mystic splendor.

### AT: Speech Unbalanced Link

#### Society is unequal- censorship solidifies power

Jacobson, PhD Michigan, 16

(Daniel, Philosophy @Michigan, Freedom of Speech under Assault on Campus 8-30 https://object.cato.org/sites/cato.org/files/pubs/pdf/pa796.pdf)

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-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 morality 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.(3-4)

#### No link and turn- endorsing speech doesn’t mask oppressive institutions, it’s a pre-requisite to challenging them

Redish, Law@NU, 82

(Martin H, University of Pennsylvania Law Review, Vol. 130, No. 3 (Jan., 1982), pp. 591-645)

First, it should be noted that the impact of the elitists' argu- ment goes at most to the instrumental value of democracy, and in no way challenges the intrinsic value of allowing individuals to maintain self-rule.63 More importantly, the elitist theorists do not seem to question the normative imperative recognized by classical theorists, but rather only its attainability. Indeed, the impact of the elitist theorists is arguably to shift the emphasis from attaining this goal through the political process to its achievement through individual involvement in the private sector. Modern theorists have redefined the concept of the "political" to include decision- making within areas such as the work place, where decisions are likely to have a more immediately recognizable impact on the indi- vidual's daily life.64 Therefore, the elitist theory can be seen as being totally compatible with the thesis asserted here; democratic political control is only one means of achieving the values inherent in a democratic system, and it is therefore necessary to recognize that free speech may aid attainment of those values in nonpolitical settings. Elitist thinking, then, does not undermine-indeed, it may fa- cilitate-the extension of Meiklejohn's reasoning about the role of free speech to such nonpolitical activities as various kinds of com- munity groups, as well as to the work place.65 What remains unclear, however, is whether this logic may be extended as well to such purely private decisions as commercial purchases or an indi- vidual's choice of friends. The difficulty is that it has been gen- erally assumed, since democracy's origins in ancient Athens, that the moral benefits to the individual derived from being forced to look beyond his or her own narrow interests and to work with others to attain the common good.66 It is perhaps for this reason that Professor Bachrach, the leading exponent of the redefined "po- litical" sphere, believed it necessary to stay within the bounds of the "political," no matter how strained his definition of the term.67 But whatever unique benefits one derives from involvement in organizations that look to the common, as opposed to the individual, good, it is impossible to deny that many of the developmental values-particularly the intellectual benefits-that are thought to result from participation in the political process also may be ob- tained from private self-government. After all, the elitists tell us that "[p]olitical participation constitutes an effort to protect threatened interests," 68 and by adopting a democratic system we are expressing a belief that presumably individuals are capable of deciding what is best for them. There is therefore no basis to believe that development can be derived solely from common, as opposed to individual, activity. (609-10)

#### Critiques indict an antiquated notion of rights as property, the affirmative embraces rights as relational

Kiss, Phd, 95

(Elizabeth, B.Phil. and D.Phil. in philosophy from Oxford, President @Agnes Scott, ALCHEMY OR FOOL'S GOLD? Assessing Feminist Doubts About Rights Dissent v42 p342-7 Summ '95)

(2) Rights-based approaches can also abandon those they are supposed to help when they ignore crucial strategic issues about how rights can be made effective. There are at least three ways in which this can occur: first, formal equality of rights can obscure real inequalities that make it difficult or even impossible for those in less powerful positions to exercise their rights. This is the classic critique articulated with elegant irony by Anatole France: "The law, in its majesty, grants rich and poor alike an equal right to sleep under bridges." Women (like other disadvantaged groups) may have formally equal rights in the labor market but be doomed, through inequalities of wealth, education, and influence, and the invidious effects of prejudice and harassment, to lower status jobs. The gap between legal principle and practice can work the other way, too. As Kim Scheppele has argued, some West European legal systems appear to limit abortion severely, but in practice early abortions are easy to obtain. By contrast, the post-Roe United States affords constitutional protection for early abortions, but these have become increasingly difficult to obtain in many parts of the country.(FN9) Second, a right may be vitiated or at least seriously weakened if the procedures or strategies associated with claiming it, and in particular for demanding redress when it has been violated, are themselves ineffective, intimidating, or degrading. Soviet-style legal systems provided extreme examples of this phenomenon, guaranteeing rights in the Constitution and then vitiating them through statutory clauses that required that they be exercised "in accordance with socialist values"--which, in effect, made illegal any exercise of a right in opposition to the ruling party. Less dramatic examples of this phenomenon are depressingly common. Legal and administrative procedures for claiming redress can be costly, can further victimize the victim, can enmesh victims in intimidating professional-client relationships. By focusing on individual litigation, they can also privatize and narrow claims of harm in ways that obscure the larger structural inequalities at the root of the problem. Formal procedures for dealing with rape, gender discrimination, and sexual harassment exhibit many of these features. Third, rights strategies may concentrate on attaining ex post facto redress for violation or neglect of rights rather than on the forms of mobilization required to prevent the violation or neglect in the first place. This is also a form of abandonment, since the harm has already occurred by the time the rights strategy kicks in. Moreover, successful redress may be so indirect that it is not experienced as helpful by the person who was harmed. Taken together, these three examples reveal how rights strategies can abandon those they are supposed to help by ignoring the social and political changes required to make rights effective. But they do not demonstrate the futility of rights as such. The lesson to be drawn from these examples is that we should conceive of rights not as commodities the law grants us, but as relationships to be established and secured.

### Turn: Call Out Culture

#### Call out culture replicates neoliberal precarity- can never be progressive

Featherstone, Journalism @NYU, 2-6-17

(Liza, MA Columbia, Knight-Bagehot Fellow in Business and Economics, https://thebaffler.com/blog/youre-fired-featherstone)

This past Christmas Day, white supremacists reached out to tell me that I was a stupid cunt, some of them using just those words. Messages like this can be read with pleasure, a sign that one is angering truly horrible people, thus living one’s best life. But sexist vulgarity was not the most disturbing feature of these communications. George Ciccariello-Maher, a professor at Drexel University (and a friend of mine) had angered the online white racist community by tweeting, “All I Want For Christmas Is White Genocide.” Some on the left found this funny, some didn’t, but whatever you think of his judgment or sense of humor, George’s tweet was a joke, playing on the alt-right’s fear of “white genocide,” the notion that the white race will disappear because of miscegenation and multiculturalism. When the quip was publicized by white supremacists through social media, baying mobs called upon the Drexel administration to fire George. Although he had tenure, the administration had initially responded not with a statement of support but, chillingly, by condemning the tweet as “reprehensible” and summoning the professor for a meeting. Along with hundreds of other left-leaning social media users, my crime, for the alt-right, was forwarding a petition urging Drexel to stand behind George. (The administration eventually issued a public statement doing just that; the petition campaign probably helped and, after all, he does have tenure.) The Christmas messages filling my inbox were hate-filled and disgusting, but of their common themes, only one was scary: some declared their intention to get me fired from my own (nontenured, adjunct) job teaching journalism. They never did call my bosses, but the bullying tactic struck me as disturbingly familiar. That’s because I’d also encountered it from online liberals. Much has been written about the toxicity of internet “call out” culture over the past five years. But less has been said about the prevalence of efforts to fire people, one of that culture’s creepiest and most authoritarian features. Some of the specific examples are well known. Justine Sacco was fired from her PR job after making an anti-racist joke widely misunderstood as a racist joke (humor on the internet often goes awry in this way). Journalists have been particularly vulnerable given the obligation to tweet with a distinct voice and be “controversial.” In 2011, Nir Rosen, a writer on the war in Iraq, was forced to resign from his fellowship at New York University Law School after tweeting (with inexcusable callousness) about CBS correspondent Lara Logan’s rape during the Egyptian uprising. The people terrifying us on the internet by tagging our bosses are not serving any kind of progressive movement. Other examples have slipped under the mainstream media radar. Two journalist friends of mine with distinct politics and unapologetic voices, both women, have been fired under complicated circumstances in which a progressive Twitter mob was a factor. A writer interviewed for this essay was fired from a job he’d had for seven years, after someone told his boss he was a Marxist. Given that liberal Twitter enemies, who’d butted heads with him during the Democratic primary, had made threats along these lines, he has reasonable suspicions about who made the call. (I’m withholding names of most victims and perpetrators in this essay, to protect those on all sides of such dust-ups from harassment.) Relatively few people have lost jobs, but threats and intimidation are common, amplified by the “You’re Fired” left’s occasional successes. Some might tag your employer on social media while accusing you of something terrible, like harassment (this has happened to me and is common). Even people who are anonymous on social media aren’t exempt, as a common form of online aggression is to unmask users’ identity. It’s not unusual for Twitterati, sometimes media professionals with a significant following, to publicly coordinate a campaign, often posting the email address of a target’s employer and urging others to contact them. When they succeed in getting someone fired, they will gloat publicly and use the victory to frighten others. After several liberal journalists succeeded in getting a blogger fired for alleged rudeness to women, one boasted on Twitter that their victim was only “the first to sink” and vowed that “there will be more cases.” Identitarians didn’t invent the tactic, and the self-styled “alt-right” aren’t the first conservatives to use it. During Gamergate, reactionaries on Reddit organized to try to fire people they disagreed with, and pro-Israel groups have a long record of petitioning universities to dismiss academics for criticizing Israeli policy. And as Ellen Schrecker showed in her 1994 book, The Age of McCarthyism, the punishments for political dissent during the Red Scare were mostly economic. Accused communists lost jobs in many industries. What’s going on now hasn’t been comparable to McCarthyism yet, only because social justice Twitter didn’t have state power, but now that the alt-right has a man on the National Security Council, the historical parallel may draw, uncomfortably, closer. Precarity and economic terror tend to exacerbate bigotries. “You’re fired” tactics make sense for the alt-right, which is crusading for a meaner society in which bullies reign and workers can be fired more easily. Progressives, supposedly, are fighting for the opposite vision. That the threat to get an interlocutor fired from her job would become a common mode of political discourse even for progressives shows how deeply neoliberalism pervades our culture. Particularly in the educated classes, many now view themselves as little managers, or entrepreneurs. Those who offend become the poorly-performing help. Their livelihoods are disposable, and they deserve to be made to feel their precarity. Only in a society with almost no safety nets, in which few people have the job security afforded by union protections or tenure, could random bullies on the internet terrify us by tagging our bosses. People who do this are not serving any kind of progressive movement; indeed they are working hard at strengthening neoliberalism in all its ruthlessness and anxiety. When workers feel less secure, only bosses benefit. Some will protest that self-identified feminists tagging a man’s boss over a sexist tweet are not engaged in a morally equivalent project from that of the white yahoos threatening the employment of my friend George, who was making fun of racism. But the two projects are the same, and not only because both violate the (important) principle of free speech. If you’re looking to create a society with less racism and sexism, you should be especially opposed to “You’re Fired” liberalism, because—as recent elections in the United States, Britain, and elsewhere have demonstrated—precarity and economic terror tend to exacerbate exactly such bigotries. Let’s leave these tactics to the alt-right, and make the left a hostile space for their practitioners. Indeed, people who try to get others fired, no matter how feminist or woke their reasons, should just go ahead and join the alt-right. They’ll easily find comrades who appreciate their tactics. And why shouldn’t they? After all, they’re already helping to build the anxious, resentful electorate that put Trump into power.

#### Censorship produces call out culture where economics are used to discipline ideas in the name of protecting students

WHH 15

(White hot Harlots is an anonymous tumblr run by a university professor, <http://whitehotharlots.tumblr.com/post/114067452180/a-personal-account-of-how-call-out-culture-has>, 3-19)

I’ve been in academe for about a decade now, and the only professors I’ve known who have slept with or dated students were female. I’m sure plenty more shenanigans were happening out of public view. Absolutely. But I don’t pry. I don’t care, really. I trust my colleagues not to be rapists, and barring severe warning signs I’d never take any interest in their sex lives, even if those sex lives involved relationships of a sort that I’d personally never partake in. But lately I’ve noticed a marked, very loud silence from these professors and instructors, the ones who dated students. See, there’s a big kerfuffle going on about a female Northwestern professor, Laura Kipnis, who made the mistake of speaking honestly on the internet. She said that blanket bans on teacher-student relationships were dumb and infantilizing. In response, students and colleagues have called for her to be formally censured. And out of the several female professors I’ve known to have engaged in relationships with students, not a one has lent Kipnis a single word of support. This isn’t an issue of hypocrisy. This is a matter of real, palpable fear. Saying anything that goes against liberal orthodoxy is now grounds for a firin’. Even if you make a reasonable and respectful case, if you so much as cause your liberal students a second of complication or doubt you face the risk of demonstrations, public call-outs, and severe professional consequences. My friends and colleagues might well agree that the student-teacher relationship ban is misguided, but they’re not allowed to say as much in public. C-can you guys see the problem, here? Personally, liberal students scare the shit out of me. I know how to get conservative students to question their beliefs and confront awful truths, and I know that, should one of these conservative students make a facebook page calling me a communist or else seek to formally protest my liberal lies, the university would have my back. I would not get fired for pissing off a Republican, so long as I did so respectfully, and so long as it happened in the course of legitimate classroom instruction. The same cannot be said of liberal students. All it takes is one slip—not even an outright challenging of their beliefs, but even momentarily exposing them to any uncomfortable thought or imagery—and that’s it, your classroom is triggering, you are insensitive, kids are bringing mattresses to your office hours and there’s a twitter petition out demanding you chop off your hand in repentance. Is this paranoid? Yes, of course. But paranoia isn’t uncalled for within the current academic job climate. Jobs are really, really, really, really hard to get. And since no reasonable person wants to put their livelihood in danger, we reasonably do not take any risks vis-a-vis momentarily upsetting liberal students. And so we leave upsetting truths unspoken, uncomfortable texts unread. There are literally dozens of articles and books I thought nothing of teaching, 5-6 years ago, that I wouldn’t even reference in passing today. I just re-read a passage of Late Victorian Holocausts, an account of the British genocide against India, and, wow, today I’d be scared if someone saw a copy of it in my office. There’s graphic pictures right on the cover, harsh rhetoric (“genocide”), historical accounts filled with racially insensitive epithets, and a profound, disquieting indictment of capitalism. No way in hell would I assign that today. Not even to grad students. Here’s how bad it’s gotten, for reals: last summer, I agonized over whether or not to include texts about climate change in my first-year comp course. They would have fit perfectly into the unit, which was about the selective production of ignorance and the manipulation of public discourse. But I decided against including them. They forced readers to come to uncomfortable conclusions. They indicted our consumption-based lifestyles. They called out liars for lying. Lots of uncomfortable stuff. All it would take was one bougie, liberal student to get offended by them, call them triggering, and then boom, that’s it, that’s the end of me. So… yeah. This is what call out culture has begot. An academic climate where teachers are afraid to make students think, and where academics themselves are afraid to say a single word that bucks the status quo. Congrats, guys. You’ve won.

### Turn: Censorship is Capitalist

#### Censorship relies on an economic risk model to discipline deviant behavior

Goodman, PhD, 15

(Robin Truth, English @FSU Corporate Humanities and the Imperial University: The Economy of Debt in the Culture of Higher Education College Literature, Volume 42, Number 2, Spring 2015, pp. 337-347 (Review))

De Genova’s experience (as well as Puar’s, Abowd’s, and most recently, Salaita’s) can be seen as an example of the policing and suppression of academic speech, this time through post-9/11 policy interventions and ideological manipulations. Though clearly the “War on Terror” has reworked how power, in a Foucauldian sense, would operate in the demarcation of what can and cannot be said, The Imperialist University does not consider 9/11 and its aftermath as an isolated historical aberration. Di Leo, too, understands such controls on speech to be not only an eff ect of nationalist politics and wartime rallying but also a broader domination of language production by global markets. Historicizing “terror” as not always grounded in violence, Di Leo notes that neoliberal higher educational policies are being set in place through intimidation; that “professors threatened with course and program elimination who ‘corporatize’ them do so to protect themselves and their curricular areas from imminent destruction by neoliberal administrators” (54). The “War on Terror” ushered in, for example, the USA PATRIOT Act with its suspensions of civil liberties, intensifi cation of surveillance regimes, and crack down on public uses of public spaces that have become so familiar, even normal, at the same time as the economy’s downward turn regularized cuts into worker retirement, healthcare coverage, salaries, collective bargaining, and employment longevity, especially for the poor and middle classes, minorities, and women. While war culture criminalizes free speech, these economic trends have similarly refashioned free speech into a risk-prone investment with potentially punishing, even life endangering, repercussions.(344)

### Turn: Right Wing Backlash

#### Unconditional support for free speech is crucial- any compromise will be used by the right to persecute socialist movements

Parenti, PhD, and Davis, 4-1-17

(Christian, Global Liberal Studies @NYU, and James, Irish author and documentary filmmaker, https://www.jacobinmag.com/2017/04/free-speech-charles-murray-campus-protest/)

You have to give the political right credit. In recent months, they have, Judo-style, baited the campus left into bumptious overreactions that have seen student activists at Middlebury, UC Berkeley, and a few other places calling on university administrations to shut down — that is, censor — vile speakers like Milo Yiannopoulos and Charles Murray. Students and faculty are absolutely correct to challenge reactionary speakers. But they should never ask for censorship. This might seem like a minor or technical point; it is not. Censorship used against our enemies will soon be used against us. The Left will never win the battle of ideas by trying to suppress opposing arguments. The only way to win is by a concerted, long-term effort to out-argue, out-educate, and out-organize the Right. To be clear, we are not making a moral argument. We are not saying that racist and reactionary ideas are worth hearing — they are not. Rather, our point is purely strategic. Asking for censorship makes the Left appear narrow-minded and afraid. And it opens the door for censorship to be used against us. Lest one think that last concern is an abstraction, recall that in January Fordham University denied Students for Justice in Palestine the right to operate on campus because the group’s work “leads to polarization.” The strategic way to frame left opposition to offensive right-wing speakers is with more speech. Use free speech to drown them out, and more importantly, expose them for what they are. Fight speech with speech. Slogans like “free speech against hate speech” are better than “free Milo from ever speaking again.” What then is the line on hate speech? It would seem that direct threats against actual people on campus — frat boys being encouraged to physically attack whomever — crosses the legal line into “fighting words” which are defined as personal threats or insults addressed to a specific person that are likely to start immediate violence. Fighting words are not a legally protected form of speech. Yiannopoulos’ threats to out undocumented students, or his habit of calling out individual trans or feminist students, often leading to his followers threatening and bullying them, would seem to qualify as fighting words. Other than that, it is our job to crowd out and out-speak the Right, but never to demand that the university do it for us. Censorship is a slippery slope, and the next offensive speaker censored might just be you. While the annals of extending free speech in America have included a few pioneering journalists and obscene artists, what is more striking is the large number of feminists, anarchists, communists, and socialists who show up in the story. The Right is part of this history as well, but almost always on the side of censorship. In the nineteenth century, they appear as the southern Slave Power in the House of Representatives passing the gag rules that automatically killed discussion of abolitionist bills; and as the South Carolina Attorney General indicting northern abolitionist, William Lloyd Garrison, for using the US postal system to send abolitionist literature into the South. Later, the Right also shows up within the state and municipal governments that repressed and censored labor organizers, suffragettes, and pacifists. And in the mid-twentieth century, the Right are the federal authorities who used the Smith Act of 1940, which made it illegal to advocate overthrowing the US government, to imprison the African American politician and communist Ben Davis and deport the radical labor leader Harry Bridges. Into the early twentieth century, First Amendment rights were often interpreted as applying only to a person’s relationship with the federal government. States and cities, it was held, retained the power to suppress speech, usually left-wing speech. The struggle for free speech was most often entwined with broader labor struggles. Thus, in 1893, when Emma Goldman encouraged hungry workers onto the streets, she was arrested. Defending herself on the grounds of free speech, Goldman lost and did eight months in jail. In 1909, the Industrial Workers of the World began what would become a multi-year, nationwide campaign of nonviolent civil disobedience against local ordinances suppressing free speech. Starting in Spokane, Washington, Wobbly activists violated local censorship laws at public rallies, filling the jails with hundreds of prisoners at a time until the local press and even mainstream liberal civic groups had to rally to the Wobblies’ cause. All along, the Right and capital fought back, using the state to suppress speech. The Espionage Act of 1917 and Sedition Act of 1918 were created for these purposes. In 1917, Socialist Party presidential candidate Eugene V. Debs was convicted under the Espionage Act for speaking against the First World War and was sentenced to ten years in prison. It was from these struggles that the American Civil Liberties Union emerged in 1920. Only in 1925 were First Amendment rights affirmed as applying to the states. The case was Gitlow v. People of New York, in which Mr. Gitlow was convicted of “criminal anarchy” for distributing a tract called “the Leftwing Manifesto.” In 1931, the Supreme Court finally extended speech rights to nonverbal symbols like flags in the case Stromberg v. California. Again, the hero was a leftist, the nineteen-year-old Ms. Yetta Stromberg of the Young Communist League. Her crime had been to violate California’s “red flag law,” which prohibited the display of a red flag as “an emblem of opposition to the United States Government.” The extension of free speech to universities was famously championed by the UC Berkeley Free Speech movement, which emerged to defend left-wing students who wanted to distribute radical literature and make radical speeches on campus. Winning that fight came at the price of students being beaten and jailed. How could we have taken the enemy’s bait and called for censorship? No doubt it appeared to some activists as merely a responsible first step. In other struggles, that makes perfect sense. For example, students calling for divestment from fossil fuels first request divestment — that is, open negotiations with the administration — and when rejected they move on to disruptive protest. But there is a more troubling side to this as well. Let’s face it, on some elite college campuses, the student activists are obsessed with symbolic gestures and the rigorous policing of language. One recalls the Oberlin students who in 2015 denounced their cafeteria for “cultural appropriation” when serving underwhelming versions of Banh Mi and General Tso’s chicken. The campus left’s hypersensitivity to language has provided the Right with an opening. While many far-right ideas sound patently insane to the average person — for example, that the United Nations has secretly occupied the US and patrols the skies with black helicopters — the Right’s jabs at campus culture are not so easily dismissed. The Right is in the process of running a damn good play: baiting the Left into an embrace of censorship and thereby robbing one of the Left’s great cultural prizes, the morally sacrosanct banner of “Free Speech.” We cannot allow that.