



THE ANATOMY OF CANCEL CULTURE

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In this paper, I undertake a qualitative exploration of how social regulation of speech works in practice on university campuses, and of the extent to which social regulation in practice affirms or undermines the stereotypes and caricatures that characterize the cancel-culture wars. I first summarize the two narratives that anchor public debates over the social regulation of speech—consequence culture and cancel culture. I then describe the social regulation of speech and its five phases: dissemination, accusation, pillory, sanction and direct action. I explain how these five phases were reflected in the speech events under study and the extent to which their real-world features challenge or support the cancel-culture and consequence-culture narratives. I end by suggesting further research on the implications of this phases framework for efforts to balance universities’ dual commitments to free speech and inclusive community on their campuses.

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INTRODUCTION

In the past few years, there have been innumerable conferences, books, symposia, op-eds and campus surveys addressing the social regulation of speech and its role in a society committed to democratic principles.¹ I define social regulation of speech as the process by which ordinary citizens in society use collective pressure on businesses and institutions to establish and enforce a set of national or regional speech norms. This enforcement is primarily horizontal (enforced by citizens

¹ Emily A. Vogels et al., *Americans and 'Cancel Culture': Where Some See Calls for Accountability, Others See Censorship, Punishment*, PEW RSCH. CTR. (May 19, 2021), <https://perma.cc/HJA9-R2TP>; The Learning Network, *What Students Are Saying About Cancel Culture, Friendly Celebrity Battles and Finding Escape*, N.Y. TIMES (Nov. 19, 2020); Suzanne Nossel, *'Cancel Culture' Censorship Can Be Most Dangerous for Those Who Promote Social Justice*, NBC NEWS (Aug. 4, 2020), <https://perma.cc/5K3N-YLU5>; *High School Student Views on the First Amendment: Trends in the 21st Century*, KNIGHT FOUND. (Nov. 20, 2019), <https://perma.cc/6EYP-AUW6>; *College Student Views on Free Expression and Campus Speech 2022*, KNIGHT FOUND. (Jan. 25, 2022), <https://perma.cc/DTA8-SL7Q>; Ronald K. L. Collins, *Recent ASU Law School Conference on 'Non-Governmental Restrictions on Free Speech' Draws Noted Scholars – FAN 334*, FIRE (Apr. 6, 2022), <https://perma.cc/S55S-CDLL>.

against other citizens) rather than vertical (enforced by citizens against the government). As I noted in an earlier article, social regulation of speech is the necessary corollary of a regime of constitutional free speech limited to vertical enforcement.² Indeed, our earliest understandings of the First Amendment included not only rights to speak, but also an expectation that speakers who violated community standards would be held accountable by the same.³ It was the constitutionalization of tortious speech during the Civil Rights Movement,⁴ however, that shifted community accountability from juries in the courts of law to everyday people in the courts of public opinion.

The interest in and debate over social speech regulation is especially visible on university campuses.⁵ This is due to the fact that universities are increasingly viewed as both engines for the production of knowledge and norms in society and as vehicles of racial integration and class mobility. Unsurprisingly, in times of hyperpolarization underscored by unprecedented demographic change,⁶ the twin goals of knowledge production and of racial integration and mobility seem to be in deep tension.

For example, two distinct narratives related to the social regulation of speech have emerged from the debates over inclusion and free speech on university campuses, and over offensive speech and injurious speech. As used here, offensive

² Franciska A. Coleman, *They Should Be Fired: The Social Regulation of Free Speech in the U.S.*, 16 FIRST AMEND. L. REV. 1, 3 (2017) (portraying “the First Amendment as reflecting a choice of social regulation over legal regulation”).

³ See *Alexander v. United States*, 509 U.S. 544, 567–68 (1993) (Kennedy, J., dissenting) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151–52 (4th ed. 1876)) (“The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.”).

⁴ See Coleman, *supra* note 2, at 6–8.

⁵ Thomas Healey, *Return of the Campus Speech Wars*, 117 MICH. L. REV. 1063, 1063–65 (2019).

⁶ See William H. Frey, *The US Will Become ‘Minority White’ in 2045*, CENSUS PROJECTS, BROOKINGS INST. (Sept. 10, 2018), <https://perma.cc/6L4G-LWXB>; Deenesh Sohoni, *The Coming Majority Minority State?: Media Coverage of U.S. Census Projections, Demographic Threat, and the Construction of Racial Boundaries*, 63 SOCIO. Q. 94 (2022).

speech is a largely subjective standard and refers to speech that offends the sensibilities of others but that does not harm individuals in ways sufficient to justify governmental regulation. Injurious speech, however, is labelled in a way that implies a degree of objectivity; it refers to speech that directly harms individual listeners or that indirectly harms the listener and their group by its instigation of others to do harm. An individual's construction of a particular instance of transgressive speech as offensive or injurious often turns on which narrative is embraced by the discourse community they inhabit.

In one narrative, social regulation of speech is a gross betrayal of the principles of free speech and academic freedom. This is the “social regulation of speech as cancel culture” narrative. In this narrative, social regulation of speech is a regulation of offensive speech rather than of injurious speech and is deployed to suppress disagreement and controversy rather than defamation or marginalization.⁷ In an alternative narrative, social regulation of speech is necessary to protect vulnerable groups on campus from assault, marginalization and psychological injury. This is the “social regulation as consequence culture” narrative. In this narrative, social regulation operates primarily on injurious speech—for example, hate speech, group defamation, intimidation and sexual harassment. The cancel-culture narrative is reflected in an open letter signed by a group of 150 writers, activists and academics, in which they expressed concern over the fact that:

Editors are fired for running controversial pieces; books are withdrawn for alleged inauthenticity; journalists are barred from writing on certain topics; professors are investigated for quoting works of literature in class; a researcher is fired for circulating a peer-reviewed academic study; and the heads of organizations are ousted for what are sometimes just clumsy mistakes.⁸

The consequence-culture narrative, however, tracks what Charles Lawrence describes as “assaultive speech.” According to Lawrence:

Racial epithets and harassment often cause deep emotional scarring, and feelings of anxiety and fear that pervade every aspect of a victim's life. Many victims of hate propaganda have experienced physiological and emotional symptoms ranging from rapid pulse rate and difficulty in breathing, to nightmares, post-traumatic stress disorder,

⁷ Elliot Ackerman et al., *A Letter on Justice and Open Debate*, HARPER'S MAG. (July 7, 2020).

⁸ *Id.*

psychosis and suicide.⁹

Moreover, in addition to the direct harms inflicted on the individual listener, such speech can indirectly harm all members of the targeted group. The Holocaust Museum captured this view when, in response to the alt-right rhetoric of Richard Spencer, it noted that “[t]he Holocaust did not begin with killing; it began with words.”¹⁰ In both framings, it is injurious speech, not simply controversial speech, that is being regulated.

In addition to having very different accounts of the type and effect of speech that is generally the object of social regulation, proponents of the different narratives also tend to discount the narratives of the other side. For those who believe free speech should be privileged due to its unique role in democratic self-governance, the harms of injurious speech are often rendered invisible and/or presented as clearly outweighed by the dangers of regulation.¹¹ For those most invested in securing greater equity and inclusion on their campuses, it is the anecdotes of cancellation and the dangers of speech regulation that are exaggerated or misplaced.¹²

⁹ Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 462.

¹⁰ Julie Zauzmer, ‘*The Holocaust Did Not Begin with Killing; It Began with Words.*’ *Museum Condemns Alt-Right Meeting*, WASH. POST (Nov. 22, 2016), <https://perma.cc/MS47-QXM4>.

¹¹ Ari Shapiro et al., *How Cancel Culture Became Politicized—Just Like Political Correctness*, NPR (July 26, 2021), <https://perma.cc/6F2C-5MCF> (quoting former President Donald J. Trump, “[t]he goal of cancel culture is to make decent Americans live in fear of being fired, expelled, shamed, humiliated and driven from society as we know it”); Editorial, *America Has a Free Speech Problem*, N.Y. TIMES (Mar. 18, 2022) (“You can’t consider yourself a supporter of free speech and be policing and punishing speech more than protecting it. Free speech demands a greater willingness to engage with ideas we dislike and greater self-restraint in the face of words that challenge and even unsettle us. . . . When speech is stifled or when dissenters are shut out of public discourse, a society also loses its ability to resolve conflict, and it faces the risk of political violence.”).

¹² RALPH WILSON & ISAAC KAMOLA, *FREE SPEECH AND KOCH MONEY: MANUFACTURING A CAMPUS CULTURE WAR* 150 (2021) (“The hyperbolic narrative of an out-of-control campus ‘cancel culture’ that maliciously targets conservatives, tramples on individual liberty, and routinely uses violence to prevent open dialogue is simply overstated.”); @CharlesMBlow, TWITTER (July 11, 2020, 8:09 AM), <https://perma.cc/Z6CX-RDSF> (“Once more: THERE IS NO SUCH THING AS CANCEL CULTURE. There is free speech. You can say and do as you [please], and others can choose never to deal this [sic] you, your company or your products EVER again. The rich and powerful are just upset that the masses can now organize their dissent.”).

Perhaps unsurprisingly, the official responses of universities to accusations of transgressive speech swing between the protection of transgressive speech in the name of free speech and the sanctioning of speakers in the name of inclusion. Georgetown's responses to Christine Fair, a tenured professor of Security Studies at the School of Foreign Services, and Ilya Shapiro, then the newly hired director of Georgetown's Center for the Constitution, are cases in point.

In October 2018, Christine Fair tweeted: "Look at thus [sic] chorus of entitled white men justifying a serial rapist's arrogated entitlement. All of them deserve miserable deaths while feminists laugh as they take their last gasps. Bonus: we castrate their corpses and feed them to swine? Yes."¹³ In response to early criticism, Georgetown's president leaned into the narrative of the importance of academic freedom, stating that:

We protect the right of our community members to exercise their freedom of expression. This does not mean the University endorses the content of their expression . . . While the speech of our faculty members is protected, we are deeply committed to having our classrooms and interactions with students be free of bias and geared toward respectful dialogue.¹⁴

A few years later, in January 2022, Ilya Shapiro tweeted: "Objectively best pick for Biden is Sri Srinivasan, who is solid [progressive] & [very] smart, Even has identity politics benefit of being first Asian (Indian) American. But alas doesn't fit into latest intersectionality hierarchy so we'll get lesser black woman. Thank heaven for small favors?"¹⁵ In response to early criticism, the Dean of the Georgetown Law Center leaned into the narrative of equity and inclusion:

Racial stereotypes about individual capabilities and qualifications remain a pernicious force in our society and our profession. I am keenly aware that our law school is not exempt. We will continue our work with students, staff, alumni, and faculty to put in

¹³ Colin Kalmbacher, *Georgetown University Responds to Professor Who Tweeted About 'Castrating' Kavanaugh Supporters*, LAW & CRIME (Oct. 3, 2018), <https://perma.cc/8H6L-RSQV> (citing @CChristineFair, TWITTER (Sept. 29, 2018, 12:54 PM) (since deleted)).

¹⁴ Press Release, Statement from John J. Degioia, President, Georgetown University (Oct. 2, 2018), <https://perma.cc/7HU9-P2JA>.

¹⁵ Christine Charnosky, *Ilya Shapiro, on Heels of Georgetown Law Hiring, Tweets That Biden's SCOTUS Pick Will be a 'Lesser Black Woman'*, LAW.COM (Jan. 27, 2022), <https://perma.cc/C6RS-LA8H> (citing Mark Joseph Stern (@mjs_DC), TWITTER (Jan. 27, 2022, 7:42 AM), <https://perma.cc/8HS8-CTGH> (preserving the since-deleted, controversial tweet from @ishapiro)).

place strategies, policies, and practices to strengthen our community and our commitment to justice and equality for all. And I remain committed to working with each of you to create a community where we can all thrive.¹⁶

The outcries against both professors continued after the University's statements. In response, Georgetown administrators added a concern for equity and inclusion to their evaluation of Fair's speech¹⁷ and a concern for academic freedom to their evaluation of Shapiro's speech.¹⁸

Social regulation of speech on university campuses often resembles a struggle for supremacy between the proponents of free speech and academic freedom and the proponents of equity and inclusion.¹⁹ Faced with this dynamic, scholars and university administrators tend to respond either by privileging free speech and academic freedom, as in the Chicago Statement,²⁰ or by privileging equity and inclusion, as in calls for the creation of faculty committees charged with disciplining

¹⁶ Press Release, William M. Treanor, Dean & Executive Vice President, Georgetown Univ. L. Ctr., Dean William M. Treanor Statement: Update on Ilya Shapiro (Jan. 31, 2022), <https://perma.cc/EU34-YAED>.

¹⁷ The Dean of the School of Foreign Services announced that Fair would go on an immediate research leave while President Degioia stated that, "We can and do strongly condemn the use of violent imagery, profanity, and insensitive labeling of individuals based on gender, ethnicity or political affiliation in any form of discourse." See President Degioia Statement, *supra* note 14.

¹⁸ In his second statement announcing that Shapiro would not be terminated, Dean Treanor made his first mention of academic freedom, placing it ahead of his comments on diversity:

Georgetown Law is committed to preserving and protecting the right of free and open inquiry, deliberation, and debate. We have an equally compelling obligation to foster a campus community that is free from bias, and in which every member is treated with respect and courtesy. I am committed to continuing to strive toward both of these indispensable goals.

Press Release, William M. Treanor, Dean & Executive Vice President, Georgetown Univ. L. Ctr., Dean's Statement re Ilya Shapiro (June 2, 2022), <https://perma.cc/X7G3-BZQG>.

¹⁹ Jeannie Suk Gersen, Address, *Academic Freedom and Discrimination in a Polarizing Time*, 59 HOUS. L. REV. 781, 793–94 (2022) ("We see increasing clashes that look like fights between anti-discrimination commitments and principles of academic freedom.").

²⁰ See Press Release, Geoffrey R. Stone et al., Comm. on Freedom of Expression, Univ. of Chi., Report of the Committee on Freedom of Expression (Jan. 2015), <https://perma.cc/LS24-2QEC> [hereinafter *The Chicago Statement*]. See generally *Adopting the Chicago Statement*, FIRE, <https://perma.cc/QT86-RW9Z> (providing an overview of the Chicago Statement and a guide for implementation on any college campus).

other faculty for racist speech and publications.²¹ As the Fair and Shapiro examples reveal, however, it is difficult to maintain such clear hierarchies in practice if a university's networks are ideologically heterogenous. Both the choice to privilege academic freedom over equity and inclusion and the choice to privilege equity and inclusion over academic freedom will arouse the ire of key university stakeholders, creating a Catch-22 situation in which key university constituents will be angered and disillusioned whichever choice a university makes.²²

Unfortunately, much of the discourse on free speech and inclusion proposes solutions that elevate one value over the another.²³ For many, free speech is an absolute value that does not allow room for regulations designed to promote equity and inclusion,²⁴ at least in part because such regulations are believed to do more

²¹ Tracy K. Smith et al., *Faculty Letter to President Eisgruber et al.* (July 4, 2020), <https://perma.cc/RT4K-9667> [hereinafter Princeton Faculty Letter]. Among the faculty's demands:

Constitute a committee composed entirely of faculty that would oversee the investigation and discipline of racist behaviors, incidents, research, and publication on the part of faculty, following a protocol for grievance and appeal to be spelled out in Rules and Procedures of the Faculty. Guidelines on what counts as racist behavior, incidents, research, and publication will be authored by a faculty committee for incorporation into the same set of rules and procedures.

Id.

²² See Gersen, *supra* note 19, at 791–92 (“Academic freedom cannot simply mean the right to freely discriminate. Addressing discrimination also cannot mean firing or expelling people for expressing views that offend others. But it is much more complicated than it would seem to distinguish instances of discrimination or harassment from the exercise of academic freedom. And it has become harder in the recent past because of changing ideas of discrimination and harassment, as well as increased political polarization that makes it more difficult for people to give each other the benefit of the doubt.”).

²³ “[D]efense of freedom of speech is most necessary when the message is one most people find repulsive. Constitutional rights must apply to even the most unpopular groups if they’re going to be preserved for everyone.” ACLU, *Free Speech*, <https://perma.cc/NXS5-6HGV>.

²⁴ See, e.g., NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP 4 (2018) (“Speech may not be censored because its message might have a disturbing impact on the hearts or minds of some audience members. Viewpoint-based restrictions pose the greatest danger to the core value underlying the First Amendment: our right as individuals to make our own choices about what ideas we choose to express, receive and believe.”).

harm than good.²⁵ In contrast, others view concerns about free speech on campus as rooted in false equivalencies²⁶ or as pretexts designed to protect patriarchal white supremacy.²⁷ As such, it is something to be subordinated to diversity, equity and inclusion efforts, which seek to protect those who are truly vulnerable.²⁸ Even those who try to balance inclusion and free speech struggle to offer a non-hierarchical solution.²⁹

The difficulty of moving beyond zero-sum arguments is due in large part to the prevalence of stereotypes and caricatures on both sides of the debate. Each side has its own interested, anecdotal account of what is happening on university campuses, and it is these competing accounts that produce incompatible solutions. There is a strong need in these debates for a grounded qualitative exploration of how social regulation of speech works in practice on university campuses and of the extent to which social regulation in practice affirms or undermines the stereotypes and caricatures that characterize the cancel culture wars.

This paper seeks to provide such an account of social regulation of speech on university campuses. In Part I of this paper, I provide a brief description of my research methodology and give a summary of four representative speech events: the firing of Professor Lisa Durden, the firing of Dr. James Riley, the clearing of Professor Andrea Quenette and the resignation of Mr. Ilya Shapiro. In Part II of this paper,

²⁵ *Id.* (“These speech-protective precepts are not based on a presumption that speech cannot cause harm. To the contrary, we cherish speech precisely because of its unique capacity to influence us, both positively and negatively. But even though speech can contribute to potential harms, it would be more harmful to both individuals and society to empower the government to suppress speech for that reason . . .”).

²⁶ See Khiara M. Bridges, *Evaluating Pressures on Academic Freedom*, 59 HOUS. L. REV. 803, 804 (2022) (“I resist the construction of equivalents in this account. It appears to propose that the directives coming from the ‘diversity and inclusion office’ are equivalent to the recent well-funded, coordinated attacks against ‘Critical Race Theory’—attacks that have led to the ‘purging’ of social justice courses from Idaho colleges and universities as well as legislation in several states that purports to ban the teaching in K–12 schools of critical race theory or other ‘divisive concepts.’”).

²⁷ See Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223, 1224 (2020) (“[A] First Amendment appeal is often used to support dominant status and power, backing white supremacy and masculinist misogynistic attacks in particular.”).

²⁸ See *id.* at 1226.

²⁹ See, e.g., Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence from the Last Reconstruction*, 100 YALE L.J. 1229 (1991).

I attempt to unpack the stereotypes and caricature that inform the cancel-culture wars. I do this by describing the narratives and assumptions underlying the competing terms “consequence culture” and “cancel culture” and by summarizing the assumptions and limitations of these two ways of framing the social regulation of speech.

In Part III, I seek to move beyond these narratives and to provide an account of social regulation of speech in practice, drawn from a review of seventy-nine instances of social speech regulation on university campuses between January 2015 and January 2022. I describe social regulation of speech as having five phases: publication and dissemination, accusation, pillory, sanction and direct action. I begin by describing the publication-and-dissemination phase, in which the transgressive speech is brought to the attention of the broader public, either by the speaker themselves or by third parties who have access to the speech. This is followed by the accusation phase, in which one or more members of the public engages with the utterance in a way that directly or implicitly accuses the speaker of violating speech norms, which is then used as evidence that the speaker holds views society finds repugnant. The third phase is the pillory phase, in which random citizens from across the nation take turns vilifying the speakers, piling on abuse and scorn, one post or tweet at a time. This phase may also involve other citizens attempting to defend and justify the same speech, similar to how the historical pillory involved communities throwing flowers as well as dung.³⁰ The fourth phase is the sanctions phase. In this phase, the university imposes sanctions on the speaker or announces that the speaker has not engaged in transgressive speech. I end this part with a discussion of the direct-action “phase.” This refers to real-time collective action by victims and critics of the speech, and is designed to increase the efficacy of a particular phase, such as by amplifying the accusation or by increasing the pressure on the targeted institution to impose the preferred sanction.

In the conclusion, I suggest that such a phases framework can help generate policies that add transparency and consistency to the social regulation of speech on

³⁰ Terry Bracher, *The Pillory as Punishment*, WILTSHIRE & SWINDON HIST. CTR. (Oct. 10, 2014), <https://perma.cc/FL7H-HMJS>; Richard Cavendish, *Daniel Defoe Put in the Pillory*, HIST. TODAY (July 2003), <https://perma.cc/AVJ3-86VB>.

university campuses. I note that the use of such policies in themselves can transform social regulation of speech on campuses by helping to shape expectations and by placing certain options and sanctions off the table *ex ante*. I conclude by observing the need for further research on the types of framework policies that would be most suitable for private versus public universities and for the different types of university speakers.

I. METHODOLOGY

A. *How Events Were Selected for Review*

Much of the concern over cancel culture centers on the university. For example, most free speech studies focus on college students, and the two most recent comprehensive databases that track social sanctions imposed on speech—the Foundation for Individual Rights in Education (FIRE) Scholars Under Fire Database and the database of the Duke First Amendment Clinic—focus on campus speech. As a result, this paper’s analysis of how cancel culture works also focuses on the university campus.

This paper is based largely on a review of speech-sanctioning events drawn from the early FIRE litigation database and general internet searches.³¹ It focuses on events between January 2015 and January 2022. Speech-sanctioning events where the speaker’s identity was unclear, because the speakers were presented as an undifferentiated group or because the speaker’s race and gender could not be determined from existing accounts, were excluded. Speech-sanctioning events at non-US schools were also excluded, as were events where the primary speakers were students or outside faculty.

This left seventy-nine speech-sanctioning events. The speakers included fifty-six individuals who presented as males, twenty-two individuals who presented as females and one nonbinary individual. In addition, sixty-six speakers appeared to be white and thirteen appeared to be persons of color. The speakers included twenty

³¹ FIRE’s Scholars Under Fire Database came online after the transgressive speech events for this paper had already been collected and were in the process of being coded. See *Scholars Under Fire Database*, FIRE, <https://perma.cc/EM4T-BJYC> (last updated July 8, 2022). The Scholars database includes numerous speech events for which no action was taken, placing them outside the scope of this study. As a result, the Scholars Under Fire database was not included as source of individual transgressive speech events in this study.

non-tenure-track faculty, fifty-one tenure-track faculty, four administrators, three staff and one hiree. I supplemented this data with broad trends from FIRE's new Scholars Under Fire Database.³²

Lastly, I should note that although the term transgressive speech is used, it is descriptive rather than prescriptive. It is used to refer to speech that is condemned as injurious or offensive by some individual or group in society. It is not a claim that the speech at issue "should" be viewed as transgressive.

B. Some Archetypical Examples

This section sets forth the facts of four illustrative speech-sanctioning events. The selected events are archetypical in that they reflect the two most common types of publication (social-media posts and real-time public speech) as well as the most common types of sanctions (firing/resignation and condemning remarks) found in the speech events I collected.

1. Boohoo, you white people

Professor Lisa Durden, a political commentator and adjunct faculty member at Essex County College in Newark, was interviewed by Tucker Carlson on June 6, 2017.³³ During the interview, she was asked to give her opinion on the decision of a local Black Lives Matter chapter to host a Memorial Day event exclusively for Black people.³⁴ Professor Durden, an African American woman, took a firm and assertive stance from the very beginning of the interview, opening with, "What I say to that is, 'boohoo!' You white people are angry because you couldn't use your white-privilege card to get invited to Black Lives Matter all-Black Memorial Day celebration."³⁵ She then referenced research that Memorial Day began as a means of honoring Black Union soldiers.³⁶ As Tucker continued to insist that it was

³² *Id.* At the time of this writing, FIRE's Scholars Under Fire Database contained 712 accounts of petitions against scholars for their speech, which were used to generate a summary report that identified trends.

³³ *Tucker Carlson Smashes BLM Supporter Lisa Durden for Real Racism*, YOUTUBE (June 7, 2017), <https://perma.cc/G5LJ-6248> [hereinafter Durden-Carlson Interview] (recording of Tucker Carlson's interview with Lisa Durden on his Fox News show *Tucker Carlson Tonight*).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*; see generally Olivia B. Waxman, *The Overlooked Black History of Memorial Day*, TIME (May 22, 2022), <https://perma.cc/Q2RB-DJH5>.

a racist act to exclude white people, Professor Durden countered, “White folks crack me up. All of a sudden when we want to have one day for Black folks to focus on ourselves—but you’ve been having white days forever. You don’t say the words anymore because you know it’s politically incorrect.”³⁷ After that heated exchange, Carlson posed a hypothetical about fairness if white people showed up anyway to a Black Lives Matter event. Professor Durden pointed out that there are many Black Lives Matter events at which white people are welcome but “this particular day, they said, stay your asses out.”³⁸

The morning after the interview, Jeffrey Lee, Essex’s Vice President and Chief Academic Officer, initiated an investigation of Professor Durden’s personnel records,³⁹ seemingly in response to the complaint of an unnamed caller regarding her remarks on Fox News.⁴⁰ On June 8, 2020, with only six days remaining on her summer contract, Professor Durden was suspended from her position⁴¹ (with pay), and another professor took over her course for the final week.⁴² Approximately two weeks later, the college’s president, Anthony Monroe, announced that Durden would no longer be employed by the college. In a video statement, he noted that “the character of this institution mandates that we embrace diversity, inclusion, and unity. Racism cannot be fought with more racism.”⁴³ He also claimed that immediately after the interview, the college had been “inundated” by emails and phone calls.⁴⁴ However, an open-records request by FIRE, which required a separate lawsuit to enforce, revealed that in the first thirteen days after the interview,

³⁷ Durden-Carlson Interview, *supra* note 33.

³⁸ *Id.*

³⁹ *Essex-County-College-OPRA-Production-Emails-Redacted*, FIRE (Jan. 21, 2018), <https://perma.cc/UHH3-877R>.

⁴⁰ See Colleen Flaherty, *Suspended for Standing Up to Fox News?*, INSIDE HIGHER ED (June 21, 2017), <https://perma.cc/LM77-9Q6J>.

⁴¹ Samantha Schmidt, *Professor Fired After Defending Blacks-Only Event to Fox News. ‘I Was Publicly Lynched,’ She Says*, WASH. POST (June 26, 2017), <https://perma.cc/Q77R-VPMW>.

⁴² *Id.*; Flaherty, *supra* note 40.

⁴³ Jessica Mazzola, *College Defends Firing Professor After Fox News Appearance*, NJ.COM (June 24, 2017), <https://perma.cc/KW82-SRAA>; Essex County College, *Statement from Essex County College President Anthony E. Munroe*, YOUTUBE, at 03:49 (June 23, 2017), <https://perma.cc/382T-DVFW>.

⁴⁴ FIRE, *supra* note 39.

the University received only a single, outside email related to Durden's interview.⁴⁵ In it, the individual noted

No individual of this level of hatred and exclusion should be educating young minds. I will be petitioning the removal of this lunatic. Until then, I expect a press release rebuking her racist views . . . I will not rest until this person if [sic] no longer employed here or at any other educational institution.⁴⁶

It was not until a story regarding her suspension appeared in the local news⁴⁷ that the administration received additional feedback—twenty-nine emails, two Facebook messages, and a single voicemail,⁴⁸ most supporting the college's decision to suspend her.⁴⁹

In an interview in August 2020, Prof. Durden was asked how she had recovered from the cancellation. She responded:

I never recovered. As we speak right here, I'm still not a professor. And my reputation was harmed. And I have never recovered. So that's the problem. . . . So, when you're poor and it happens, it's ten times more detrimental to you—your career and your financial security.⁵⁰

At the time of this writing, Professor Durden's lawsuit against the college was still pending.⁵¹

2. American flag represents history of systemic racism

On February 25, 2019, the University of Alabama hired Dr. Jamie Riley, an African American man, as an assistant vice president and dean of students. A little more than six months later, on September 4, 2019, Breitbart published a story that

⁴⁵ Zaid Jilani, *New Jersey College Suspended a Professor After Being "Inundated" with Complaints over Her Fox New Debate. Here's What Really Happened*, INTERCEPT (Jan. 26, 2018), <https://perma.cc/WE4F-A3M7>.

⁴⁶ *Id.*

⁴⁷ Barry Carter, *Going on Fox News Cost Me My Job, Professor Claims*, NJ.COM (June 20, 2017), <https://perma.cc/58ZM-JB3A>.

⁴⁸ The number of actual calls remains unknown. See Adam Steinbaugh, *After FIRE Lawsuit, Essex County College Finally Turns Over Documents About Firing of Black Lives Matter Advocate*, FIRE (Jan. 23, 2018), <https://perma.cc/GRC9-HDGK>.

⁴⁹ *Id.*

⁵⁰ *Cancelled with Rob Rosen and Desma Simon: Professors Under Fire*, LISTEN NOTES (Aug. 12, 2020), <https://perma.cc/T2JF-K2GY>.

⁵¹ *Essex County College – Stand Up for Speech Lawsuit*, FIRE, <https://perma.cc/ABM5-GP6X>.

focused on three tweets Dr. Riley had made years before he was hired by the University of Alabama. The Breitbart story presented the tweets as evidence that Dr. Riley “once believed the American flag and police in America are racist.” The three tweets referenced in the story are as follows:

September 26, 2017

The [American flag emoji] flag represents a systemic history of racism for my people. Police are a part of that system. Is it that hard to see the correlation?

October 11, 2017

I’m baffled about how the 1st thing white people say is, ‘That’s not racist!’ when they can’t even experience racism? You have 0 opinion!

October 8, 2016

Are movies about slavery truly about educating the unaware, or to remind Black people of our place in society?⁵²

The very next day, on September 5, the University of Alabama announced that Dr. Riley had resigned his position “by mutual agreement.”⁵³ That same evening, his contact information appears to have been removed from the Dean of Students’ webpage.⁵⁴ In response to a FOIA request, the University of Alabama provided a copy of Dr. Riley’s separation agreement, which was signed the same day the Breitbart story was published.⁵⁵ According to the agreement, Dr. Riley would receive \$346,200 from the University in staggered payments through January 31, 2020, for lost wages and compensatory damages.⁵⁶ As a condition of the agreement, Dr. Riley

⁵² Kyle Morris, *University of Alabama Dean: American Flag and Police Represent ‘Systemic History of Racism’*, BREITBART (Sept. 4, 2019), <https://perma.cc/PZS9-7NFP> (first quoting Jamie R. Riley (@jrriley03), TWITTER (Sept. 26, 2017, 6:25 AM) (since deleted); then quoting Jamie R. Riley (@jrriley03), TWITTER (Oct. 11, 2017, 11:24 AM) (since deleted); and then quoting Jamie R. Riley (@jrriley03), TWITTER (Oct. 8, 2016, 12:29 AM) (since deleted)).

⁵³ Howard Koplowitz, *Jamie Riley, UA’s Dean of Students, Resigns Following Breitbart Story on Controversial Tweets*, AL.COM (Sept. 6, 2019), <https://perma.cc/JL5P-B6JD>.

⁵⁴ Jessa Reid Bolling et al., *BREAKING: Dean of Students Resigns After Pictures of Past Tweets Surface*, CRIMSON WHITE (Sept. 5, 2019), <https://perma.cc/5M43-P5BY>.

⁵⁵ See Ed Enoch, *UA to Pay Ex-Dean \$346,200*, TUSCALOOSANEWS.COM (Oct. 11, 2019), <https://perma.cc/43KY-3J6D>.

⁵⁶ See Jessa Reid Bolling & Keely Brewer, *UPDATE: Document Shows Riley Resigned Same Day as Breitbart Article Published*, CRIMSON WHITE (Oct. 11, 2019), <https://perma.cc/WF7H-MK9Z>.

agreed not to comment publicly on the terms of his resignation.⁵⁷

Though Dr. Riley indeed did not publicly comment, his resignation caused a small furor in the University of Alabama community. On September 6, 2019, a “former prospective student” sent an open letter to university administrators noting that “here is the University of Alabama, again, being a historically racist institution, to the detriment of a Black person.”⁵⁸ He then recounted several incidents from Alabama’s past—the Governor blocking university doors to hinder enrollment of Black students, police attacking civil-rights protestors on the Edmund Pettus Bridge, the bombing of a Black church that killed four little Black girls, and the arrest of Rosa Parks.⁵⁹ He said of Dr. Riley’s tweets, “[t]hose tweets reminded me that all of this happened in America—in Alabama.”⁶⁰ Six days later, an open letter, signed by 533 students from every college at the University of Alabama, questioned the University’s commitment to free speech and expressed solidarity with Dr. Riley.⁶¹ The same day, the Student Government Association passed a resolution to affirm free speech on campus, but removed mention of Dr. Riley.⁶²

The University’s Black Faculty and Staff Association (BFSA) also weighed in on the controversy, sending a letter to the president and also posting it on Twitter.⁶³ In it, they expressed concern about the firing of Dr. Riley, while noting that their goal was not to “revers[e] any job action or pry into circumstances surrounding Dr. Riley’s resignation.”⁶⁴ They asked the president to clarify whether faculty, staff and

⁵⁷ See *id.*

⁵⁸ GeColby Youngblood, Opinion, *Open Letter: This University Isn’t Made for Me*, CRIMSON WHITE (Sept. 8, 2019), <https://perma.cc/FWD5-48LE>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Jack Kappelman & Marquis Hollingsworth, Opinion, *Open Letter: Free Speech Is Not Conditional*, CRIMSON WHITE (Sept. 12, 2019), <https://perma.cc/WZR9-3U6U> (“We stand with Dr. Riley and wish to express our deepest dissatisfaction with the way the University of Alabama’s administration has handled this whole affair.”).

⁶² Jess Reid Bolling et al., *Members of the UA Community Ask for an End to the Silence*, CRIMSON WHITE (Sept. 13, 2019), <https://perma.cc/F9TC-88RR>.

⁶³ *Id.* (citing The University of Alabama’s Black Faculty and Staff Association (@bfsa_ua), TWITTER (Sept. 13, 2019, 5:24 PM), <https://perma.cc/784X-FG9L>).

⁶⁴ The University of Alabama’s Black Faculty and Staff Association (@bfsa_ua), TWITTER (Sept. 13, 2019, 5:24 PM), <https://perma.cc/784X-FG9L>.

students are “at risk of reprisal and/or dismissal for research or statements related to systemic racism? Does the university consider online discussions, commentary or research on social justice and/or systemic racism to be grounds for dismissal?”⁶⁵ A similar open letter from the United Campus Workers of Alabama was also published.⁶⁶ In addition, students, faculty, and staff engaged in direct protest—including sit-ins, “die-ins,” and work-ins—demanding that the University take measurable steps to affirm its commitment to free speech and creating a more inclusive campus.⁶⁷ According to the BFSA President Andre Denham, two of the group’s demands were met: providing increased transparency in the search for a VP of Student Life and having the president make a statement affirming the University’s commitment to academic freedom.⁶⁸ Additionally, the University created an advisory committee to support DEI efforts.⁶⁹

On March 5, 2020, Dr. Riley, who is currently an advocate in the non-profit sector, wrote an open letter about the broader professional community’s response to his resignation:

In an instant, my life and safety were both threatened because I spoke 400 years (1619–2019) of truth and power into 140 typed characters on Twitter. . . . In the midst of this newfound chaos, I mistakenly felt a sense of security and a deep feeling that I would be protected via a cadre of higher education/student affairs faculty, professionals, administrators, and association leaders who would strategically and purposefully act, organize and speak out against Breitbart’s attack. I was sure of this because, throughout my career, I’d seen it done before. I’d seen our associations take very public stances against policies and legislation that sought to limit access or opportunities for same-gender-loving and transgender professionals. I witnessed our associations lead boycotts of states that passed exclusive legislation. I observed platforms given to other professionals and faculty who had been wronged or targeted for their very progressive and inclusive views. . . . Comparatively, six months later and no formal action has

⁶⁵ *Id.*

⁶⁶ United Campus Workers of Alabama, *Letter to the Editor: Open Letter to UA Administration*, CRIMSON WHITE (Oct. 8, 2019), <https://perma.cc/7SZC-BFDL>.

⁶⁷ Jessa Reid Bolling, *A Month After Riley’s Resignation, Demonstrations Continue*, CRIMSON WHITE (Oct. 10, 2019), <https://perma.cc/PN2L-YSCG>. A “die-in” is a demonstration where protesters lie down “on the ground motionless to mimic dead bodies.” *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

been taken on my behalf.⁷⁰

3. It's not like I see N*gger spray painted on walls

Prof. Andrea Quenette began working as tenure-track faculty in the Department of Communication Studies at the University of Kansas in 2013.⁷¹ On November 17, 2015, eleven graduate students from one of her courses published an open letter demanding that she be fired.⁷² According to the letter, on November 12, 2015, a student asked during class: “‘In light of last night’s university-wide town-hall meeting about race and discrimination on campus, what is the best approach to talk about that event and these issues with our students?’”⁷³ During the conversation, Prof. Quenette noted that, “‘As a white woman I just have never seen racism. . . It’s not like I see ‘N*gger’ spray painted on walls.’”⁷⁴ Her casual use of a racial slur stunned her students. In their open letter, the eleven students condemned Prof. Quenette’s “deployment of racially violent rhetoric” and provided additional examples of transgressive speech on her part.⁷⁵ They demanded that Prof. Quenette’s “relationship with the University of Kansas, the Department of Communication Studies, and the Basic Course [be] terminated.”⁷⁶ After the letter was posted, the hashtag “#FireAndreaQuenette” began trending on Twitter.⁷⁷ Prof. Quenette was not fired or even formally suspended, but instead requested—and received—a paid leave of absence amidst the resulting outcry.⁷⁸ Her husband later said the paid-leave request was originally suggested to her by an associate dean.⁷⁹

⁷⁰ Jamie Riley, *An Open Letter to Student Affairs: Student Affairs Is Not Safe for Black/African American People*, MEDIUM (Mar. 5, 2020), <https://perma.cc/CN7A-568L>.

⁷¹ See *Reception Will Welcome New Faculty to the College of Liberal Arts and Sciences*, UNIV. KAN. (Sept. 6, 2013), <https://perma.cc/A6NR-G4ZH>.

⁷² Amy Schumacher et al., *An Open Letter Calling for the Termination of Dr. Andrea Quenette for Racial Discrimination*, MEDIUM (Nov. 17, 2015), <https://perma.cc/8YYZ-YXNS>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See Colleen Flaherty, *Professor Cleared and Still Out of a Job*, INSIDE HIGHER EDUC. (May 18, 2016), <https://perma.cc/3PHL-VULV>.

⁷⁸ *Id.*

⁷⁹ *Id.*

After a four-month investigation, the University announced that Prof. Quenette's use of the racial slur did not violate university policy and that she could return to teaching.⁸⁰ A couple of months later, however, Prof. Quenette was effectively fired for failure to meet the University's research standards.⁸¹ Though she had expected her request for additional time to meet the research standard to be granted as a matter of course, it was instead denied. Prof. Quenette retained her employment for that year, but she was not re-appointed to her tenure-track position.⁸² Though the reason given was her failure to meet the tenure standards, Prof. Quenette believed that her termination was due to her transgressive speech.⁸³ At the time of this writing, Prof. Quenette was listed as an associate professor of communication studies at Indiana University East and the director of its Public Speaking and Communication Center.⁸⁴

4. Lesser Black woman

On January 21, 2022, Georgetown announced that Ilya Shapiro, former vice president of the Cato Institute, would be joining the University as a senior lecturer and as the executive director of the Georgetown Constitution Center.⁸⁵ Five days later, on January 26, 2022, Shapiro sent the following tweet: "Objectively best pick for Biden is Sri Srinivasan, who is solid [progressive] & [very] smart. Even has identity politics benefit of being first Asian (Indian) American. But alas doesn't fit into latest intersectionality hierarchy so we'll get lesser black woman. Thank heaven for small favors?"⁸⁶ The tweet prompted Aderson Francois—Director of Georgetown's Institute for Public Representation Civil Rights Clinic—to reply the next

⁸⁰ *Victory: University of Kansas Professor Reinstated After Four-Month Investigation into Classroom Speech*, FIRE (Mar. 21, 2016), <https://perma.cc/Q9P6-SQGM>.

⁸¹ Anthony Gockowski, *KU Prof Loses Job Despite Being Cleared by Investigation*, CAMPUS REFORM (May 26, 2016), <https://perma.cc/NCV2-KHM2>.

⁸² *See id.*

⁸³ *See* Flaherty, *supra* note 40.

⁸⁴ *Directory*, IND. UNIV. E, <https://perma.cc/9LLK-BVLG>.

⁸⁵ Press Release, *Constitutional Law and Supreme Court Expert Ilya Shapiro Joins the Georgetown Center for the Constitution*, GEORGETOWN OFF. MEDIA RELS. (Jan. 21, 2022), <https://perma.cc/YR2Y-TJCH>.

⁸⁶ *See* Christine Charnosky, *Ilya Shapiro, on Heels of Georgetown Law Hiring, Tweets that Biden's SCOTUS Pick Will Be a 'Lesser Black Woman'*, LAW.COM (Jan. 27, 2022), <https://perma.cc/>

morning: “Mr. Shapiro, as one of your future Georgetown colleague [sic], I am curious: is your phrase ‘lesser Black woman’ meant to describe a particular Black woman or do you intend ‘lesser Black woman’ to encompass the general set of Black women under consideration for the seat?”⁸⁷ In response, Shapiro deleted his “lesser” tweet and posted an apology: “I apologize. I meant no offense, but it was an inartful tweet. I have taken it down.”⁸⁸

The next day, Georgetown’s Black Law Students Association tweeted a copy of a letter it had sent the law school’s administration.⁸⁹ The letter’s stated purpose was to “demand the revocation of [Ilya Shapiro’s] employment contract and to condemn his racist tweets.”⁹⁰ The letter described Shapiro’s tweet as “offensive, racist, sexist, misogynistic, inflammatory, deplorable, insensitive and unprofessional.”⁹¹ In calling for Shapiro’s dismissal, the letter-writers observed that Shapiro had a history of degrading women of color, as with his comments about Justice Sotomayor.⁹²

An official statement from the law school’s dean, William Treanor, was issued a few days later, on January 31, 2022.⁹³ In his statement, Dean Treanor condemned Shapiro’s tweets as “antithetical to the work we do here every day to build inclusion, belonging and respect for diversity.”⁹⁴ He also announced that Shapiro had been

5CCJ-GUR4 (citing Mark Joseph Stern (@mjs_DC), TWITTER (Jan. 27, 2022, 7:42 AM), <https://perma.cc/9KV8-7NK3> (preserving the since-deleted Shapiro tweets via shared screenshots)).

⁸⁷ Aderson Francois (@abfrancois), TWITTER (Jan. 27, 2022, 5:51 AM), <https://perma.cc/BU6B-X77G>.

⁸⁸ Lauren Lumpkin, *Incoming Georgetown Law Administrator Apologizes After Tweets Dean Called ‘Appalling’*, WASH. POST (Jan. 27, 2022, 9:25 PM), <https://perma.cc/8X4Q-3C8N> (citing Ilya Shapiro (@ishapiro), TWITTER (Jan. 27, 2022, 6:36 AM) (since deleted)).

⁸⁹ Georgetown BLSA (@GeorgetownBLSA), TWITTER (Jan. 28, 2022, 11:51 AM), <https://perma.cc/ZSQ4-V54J>.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* (“Shapiro has a history of publicly discounting and degrading women of color, notably Supreme Court Justice Sonia Sotomayor.”); *see also* Isabel Van Brugen, *Ilya Shapiro Previously Said Sonia Sotomayor Supreme Court Pick Was ‘Not Based on Merit’*, NEWSWEEK (Jan. 28, 2022), <https://perma.cc/R5BS-LVYZ>.

⁹³ Press Release, William M. Treanor, Dean & Executive Vice President, *Update on Ilya Shapiro*, GEORGETOWN L. (Jan. 31, 2022), <https://perma.cc/EU34-YAED>.

⁹⁴ *Id.*

placed on paid administrative leave “pending an investigation into whether he violated our policies and expectations on professional conduct, non-discrimination, and anti-harassment, the results of which will inform our next steps.”⁹⁵ The investigation was to be conducted by the University’s Office of Institutional Diversity, Equity and Affirmative Action (IDEAA) and by its Office of Human Resources (HR).⁹⁶ In response, FIRE issued a statement strongly condemning Shapiro’s suspension and announcing that a member of its legal team would be representing Shapiro.⁹⁷ The following day, Georgetown’s BLSA led student sit-ins outside Dean Treanor’s office to protest the decision to place Shapiro on paid administrative leave⁹⁸ and to demonstrate their collective, continued support for Shapiro’s immediate termination.⁹⁹ The University did not change course, however, and continued its investigation.

After four months, on June 2, 2022, Dean Treanor announced in a statement that IDEAA and HR had completed their investigation of Ilya Shapiro’s tweet.¹⁰⁰ Their reports concluded that Shapiro could not be disciplined for his tweet, as he was not an employee of the University at the time that he tweeted the statement.¹⁰¹ Dean Treanor affirmed that Shapiro could begin his work as the Executive Director of the Center for the Constitution and that he would also be permitted to teach upper-class elective courses.¹⁰² The statement went on to note that due to the negative impact Shapiro’s tweet had had on the Georgetown community, Shapiro would

⁹⁵ *Id.*

⁹⁶ Press Release, William M. Treanor, Dean & Executive Vice President, *Dean’s Statement re Ilya Shapiro*, GEORGETOWN L. (June 2, 2022), <https://perma.cc/EU34-YAED> [hereinafter *Dean Treanor’s Statement from June 2, 2022*].

⁹⁷ *FIRE Statement on Georgetown’s Suspension and Investigation of Ilya Shapiro*, FIRE (Jan. 31, 2022), <https://perma.cc/VRK7-3PER>.

⁹⁸ See Georgetown BLSA (@GeorgetownBLSA), TWITTER (Feb. 1, 2022, 9:09 PM), <https://perma.cc/CJB2-9WVY>.

⁹⁹ See Nate Hochman (@njhochman), TWITTER (Jan. 31, 2022, 8:24 PM), <https://perma.cc/884V-4UUX>.

¹⁰⁰ See Dean Treanor’s Statement from June 2, 2022, *supra* note 96.

¹⁰¹ *Id.* (“IDEAA and HR concluded that Mr. Shapiro was not a Georgetown employee at the time of his tweets. As such, he was not properly subject to discipline for them.”).

¹⁰² *Id.*

participate in “programming on implicit bias, cultural competence, and non-discrimination” and would also “make himself available to meet with student leaders concerned about his ability to treat students fairly.”¹⁰³ A few days later, however, Shapiro announced his resignation, explaining that the University had “painted a target on [his] back such that [he] could never do the job [he] was hired for. . .”¹⁰⁴ At the time of this writing, he was employed by the Manhattan Institute as a senior fellow and director of constitutional studies.¹⁰⁵

II. CANCEL CULTURE OR CONSEQUENCE CULTURE

The social sanctioning of Prof. Durden, Dr. Riley, Prof. Quenette and Mr. Shapiro were contested, with their defenders and critics employing different narratives to describe the content and impact of their speech. Defenders of the speech adopted a cancel-culture narrative, which framed the call for sanctions as the undemocratic censorship of opposing/offensive viewpoints and as undermining free speech principles. Critics of their speech adopted a consequence culture narrative which framed the call for sanctions as a form of accountability needed to oppose racist speech and deter racist speakers. The broader assumptions of these two narratives are discussed in more detail in the following sections.

A. *Social Speech Regulation as Cancel Culture*

“[Cancel culture is] unfairly getting rid of businesses, people, things, traditions, and history because someone doesn’t agree with it or perceives or associates it as racist/sexist/homophobic/etc.’

— Woman, 60s, Conservative Republican”¹⁰⁶

“[Cancel culture is] destroying a person’s career or reputation based on past events in which that person participated, or past statements that person has made, even if their beliefs or opinions have changed.’

— Man, 50s, Conservative Republican”¹⁰⁷

“[Cancel culture is] supposed to be, in a way, an ‘anti-bullying’ type of movement (closest analogy I could think of), but it’s typically the people that try to cancel others

¹⁰³ *Id.*

¹⁰⁴ Ilya Shapiro, *Resignation Letter to Georgetown University Law Center*, FIRE (June 6, 2022), <https://perma.cc/CA3L-Q3WW>.

¹⁰⁵ *Ilya Shapiro*, MANHATTAN INST., <https://perma.cc/H5VU-P8GM>.

¹⁰⁶ Vogels et al., *supra* note 1.

¹⁰⁷ *Id.*

that do the bullying.’

— Man, 20s, Conservative Republican”¹⁰⁸

“‘Social media is rampant with trolls and sensitive individuals who are looking to be outraged. Therefore, many people are unjustly censored or attacked.’

— Man, 30s, Moderate, no partisan leaning”¹⁰⁹

Social regulation of speech is perhaps most commonly known by the descriptor “cancel culture.” This phrase grew out of the slang use of the word “cancel” as a reference for removing unwanted people from one’s life.¹¹⁰ It was popularized in 2014, when Cisco Rosado told his love interest on the reality show *Love and Hip-Hop: New York* “You’re canceled,”¹¹¹ borrowing the line from Wesley Snipes’ character in *New Jack City*.¹¹² Shortly after Rosado’s *Love and Hip-Hop* episode aired, the phrase “You’re canceled” began trending on Black Twitter.¹¹³ Over time, cancellation of acquaintances and celebrities morphed into collective efforts to de-platform and boycott transgressive speakers of all stripes. (By transgressive speakers, I mean speakers who are stigmatized as “transgressive” as a result of becoming the objects of social speech regulation, not that their speech transgressed norms in any objective sense.)

When cancel culture is used as a shorthand for the social regulation of speech, it comes with a set of built-in assumptions about the type of speech being regulated, the nature of the harm posed by the speech, and the persons or groups harmed by social regulation. For example, cancel-culture critiques often assume that the social regulation of speech operates to regulate *offensive* speech (rather than injurious speech) and to suppress disagreement. The offensive-speech framing has appeared in many of the free speech surveys promulgated in recent years. Such surveys ask questions such as:

If you had to choose, do you think it is more important for colleges to:

Option One → Allow students to be exposed to all types of speech even if they may

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See generally Aja Romano, *Why We Can’t Stop Fighting About Cancel Culture*, VOX (Aug. 25, 2020), <https://perma.cc/LE2E-599X> (explaining the origin and recent swell of “cancel culture”).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

find it offensive or biased

OR

Option Two → Protect students by prohibiting speech they may find offensive or biased.¹¹⁴

Other questions posed to participants of the various surveys have included “In general, when people publicly call out others on social media for posting content that might be considered offensive, are they more likely to. . .”¹¹⁵ and “Agree/Disagree: The political climate these days prevents me from saying things I believe because others might find them offensive.”¹¹⁶

The Chicago Statement,¹¹⁷ signed by multiple universities, also implies that the speech wars are primarily about offensive speech:

[I]t is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. . . . [C]oncerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.¹¹⁸

The Chicago Statement reflects the traditional assumption of free speech doctrine that offensive speech is best countered by more speech rather than by suppression or censorship.¹¹⁹

¹¹⁴ *College Student Views on Free Expression and Campus Speech 2022: A Look at Key Trends in Student Speech Views Since 2016*, KNIGHT FOUND.-IPSOS (Jan. 2022), <https://perma.cc/2RH8-7RQT> [hereinafter KNIGHT FOUND.-IPSOS Survey]; Other studies asked about the appropriateness of regulating “hateful” speech or “uncomfortable” speech. See, e.g., *The First Amendment Under Stress: A Survey of UW-Madison Students’ Views on Free Speech and Religious Liberties*, TOMMY G. THOMPSON CTR. ON PUB. LEADERSHIP & UNIV. WIS. SURV. CTR. (Jan. 2021), <https://perma.cc/CPA5-RYVW>.

¹¹⁵ *2020 Pew Research Center’s American Trends Panel, Wave 74*, PEW RSCH. CTR. (Sept. 2020), <https://perma.cc/YZ6X-U36G>.

¹¹⁶ Emily Ekins, *Poll: 62% of Americans Say They Have Political Views They’re Afraid to Share*, CATO INST. (July 22, 2020), <https://perma.cc/QJC4-NGPK>.

¹¹⁷ The Chicago Statement, *supra* note 20.

¹¹⁸ *Id.*

¹¹⁹ “Those who won our independence believed that . . . freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . [T]hey knew that . . . fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.” *Whitney v. California*,

Moreover, even when liberal critics of speech regulation acknowledge the potential harmfulness of speech, they still embrace the more-speech assumption due to a belief that the harms to democracy from censorious speech regulation outweigh the harms of particular transgressive speech acts.¹²⁰ This orientation reflects in part the lessons learned from the loyalty investigations and communist witch hunts of the McCarthy era. It sees in “cancel culture” a reprise of the evils that brought that era into disrepute—the arbitrary firings and blacklisting of transgressive speakers, the chilling of constitutionally protected speech and association and the narrowing of public discourse from the fear of sanctions based on past beliefs and associations.¹²¹ The McCarthy era was infamous for investigations ostensibly designed to sanction harmful speech but which in hindsight operated to silence those seeking racial equality and an end to the exploitation of the poor.¹²² For liberal cancel-culture critics, such distortion is an ever-present threat that argues against attempting to use censorship in the service of equality.

While liberal critics and scholars often concede the harmfulness of the speech allowed under traditional doctrine,¹²³ lay critics of cancel culture tend to deny the very existence of injurious speech, as in the opening quotes of this section.¹²⁴ Their

274 U.S. 357, 375 (1927) (Brandeis, J., concurring); Ronald K. L. Collins, *Academic Speech—Protected or Perilous? ACLU’s David Cole Weighs in on Georgetown University Law School Controversy*, FIRE (Feb. 22, 2022), <https://perma.cc/8G77-REKB> (“The classic First Amendment principle is that the best response to speech we don’t like is more speech.”).

¹²⁰ STROSSEN, *supra* note 24; *Free Speech: What’s at Stake*, ACLU, <https://perma.cc/F484-BSXR> (“We have defended the speech rights of communists, Nazis, Ku Klux Klan members, accused terrorists, pornographers, anti-LGBT activists, and flag burners. That’s because the defense of freedom of speech is most necessary when the message is one most people find repulsive. Constitutional rights must apply to even the most unpopular groups if they’re going to be preserved for everyone.”).

¹²¹ Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 22 (1991).

¹²² *Id.*

¹²³ STROSSEN, *supra* note 24.

¹²⁴ See Vogels et al., *supra* note 1.

discounting of injury helps anchor populist claims that cancel culture is unfair censorship¹²⁵ and a form of bullying.¹²⁶ For, when the targeted speech is constructed as subjectively offensive rather than objectively injurious, social regulation that imposes severe harm—like the loss of livelihood—appears disproportionate and unfairly coercive, disconnected from justice and accountability.¹²⁷

This leads to the second assumption of the cancel-culture narrative, which concerns not the type of speech, but the nature of harms. It is the assumption that restraining or sanctioning speech harms speakers and society but that allowing speech is 1) far from the physical violence with which it is increasingly equated,¹²⁸ or 2) imposes harms less grave than those threatened by regulation.¹²⁹ Strands of

¹²⁵ *Id.*

¹²⁶ *See id.*

¹²⁷ Ken White & Greg Lukianoff, *What's the Best Way to Protect Free Speech? Ken White and Greg Lukianoff Debate Cancel Culture*, REASON MAG. (Aug. 4, 2020), <https://perma.cc/C5A9-JXLV>.

¹²⁸ “The idea of a ‘micro-aggression’ reflects the belief that the utterance of certain ideas constitutes aggression—aggression of a sort that justifies violent response and/or legal restriction. Support of legal restrictions on hate speech often rests on the claim that certain language amounts to an assault.” Tara Smith, *Just Sayin’—How the False Equivalence of Speech with Action Undermines the Freedom of Speech*, 11 DREXEL L. REV. 467, 470 (2019) (internal citations omitted). Commentators have observed “a rising idea that . . . speech itself can be a form of violence.” Amanda Hess, *America Is Struggling to Sort Out Where ‘Violence’ Begins and Ends*, N.Y. TIMES MAG. (Aug. 15, 2017). *See also* Jason N. Blum, *Don’t Bow to Blowhards*, CHRON. HIGHER EDUC. (Sept. 3, 2017) (“The demarcation between words and actions has blurred, as psychologists and activists argue that language itself can be a form of violence.”). In the words of Nobel Prize-winning novelist Toni Morrison, “Oppressive language does more than represent violence; it is violence.” Smith, *supra* note 128, at 471 (first citing Nell Gluckman, *Weeks After Charles Murray’s Visit, Middlebury Continues to Debate the Contours of Free Speech*, CHRON. HIGHER EDUC. (Mar. 28, 2017); and then citing Toni Morrison, Acceptance Speech at the 1993 Nobel Prize Ceremony (Dec. 7, 1993)).

¹²⁹ *See* Mary Ellen Gale & Nadine Strossen, *The Real ACLU*, 2 YALE J.L. & FEMINISM 161, 171, 186 (1989) (“[C]ontrary to Dworkin’s contention, the ACLU does not justify the defense of racist or sexist speech on the grounds that the speakers present no ‘real threat’ to their chosen victims. We know that they do. We know that free speech poses great personal and societal risks, and that the risks are borne, unfairly and disproportionately, by individuals and groups that any just and humane society would single out instead for respect, compassion, help, and even reparation for past wrongs. But we also know that racism, sexism, and silence have combined too often to form an unholy trinity in the history of oppression in the United States. . . . Feminists as well as civil rights activists, political, religious, moral, and aesthetic dissidents, all have sheltered in its embrace. We risk the harms of free expression because we have found no other way to ensure its benefits.”).

this assumption can be found in the Chicago Statement. The bulk of the statement presupposes the regulation of offensive speech; while there is a brief mention of injurious speech, it is narrowly defined as only covering constitutionally proscribed speech.¹³⁰ Moreover, protection from such speech is presented as limited, with the Statement emphasizing that “it is vitally important that these exceptions never be used in a manner that is inconsistent with the University’s commitment to a completely free and open discussion of ideas.”¹³¹ In this way, the Chicago Statement reflects both the idea that campus speech regulation is about offensiveness rather than sanctionable harm and the idea that, even if there is some harm, there is a free speech exception to the harm principle. In other words, the importance of free speech requires a relaxation of the principle that the state can regulate to protect against harm.¹³²

This “harmless speech” assumption has a long history and is reflected in the mantra “Sticks and stones may break my bones, but words will never hurt me.” It is the belief in the relatively harmlessness of speech vis à vis the fragility of speakers and free speech culture. In this construction, the key harms surrounding transgressive speech are harms to speakers—their silencing, their sanctioning, their chilling—and harms to democracy due to restrictions on the free exploration of ideas. Harms to listeners are invisible or explicitly discounted. The invisibility of listeners is reflected in a quote that has become something of a creed for critics of cancel culture: “I disapprove of what you say, but I will defend to the death your right to say it.”¹³³ The quote presupposes a laudable forbearance of an enemy’s offensiveness for the greater good of society. Indeed, for lay cancel-culture critics, the virtue and pride associated with the protection of the speech of one’s enemy seems

¹³⁰ The Chicago Statement, *supra* note 20.

¹³¹ *Id.*

¹³² See Lawrence Douglas, *The Force of Words: Fish, Matsuda, MacKinnon, and the Theory of Discursive Violence*, 29 *LAW & SOC’Y REV.* 169, 172 (1995) (“If such a principle would seem to supply a possible basis for the control of discourse, the First Amendment essentially creates an exception for speech.”).

¹³³ See EVELYN BEATRICE HALL, *THE FRIENDS OF VOLTAIRE* 199 (1906) (attributing this phrase to the French philosopher Voltaire).

to rest on the assumption that the speech itself, while offensive, is not truly injurious.¹³⁴ Even academic critics who acknowledge the harm of utterances that constitute injurious speech, discount the harms to the listeners or assume that they are generally outweighed by the harms to society of majoritarian silencing of speakers.¹³⁵

Timothy Wu argues, however, that the scholarly critique of social speech regulation is a byproduct of the days when speakers were rare and easily suppressed by the government.¹³⁶ He claims that in the current era, it is not speakers that are scarce, but the attention of listeners¹³⁷ and that social regulation is not by the government but by online communities, corporations and other institutions.¹³⁸ Indeed, an increasing number of scholars today view the problem of speech as lying not so much in the availability of speech as in the content of the speech that is flooding the available avenues.¹³⁹

The emphasis on speakers and speaker harms (rather than listeners and content) is related to the third key assumption of cancel culture: that the speakers harmed by cancel culture are predominantly white, male and conservative.¹⁴⁰ While the first two assumptions are often explicitly stated, the third assumption tends to be implicit in the racially asymmetrical regulation of transgressive speakers. For example, FIRE's 2021 report on scholars under fire noted that while white Americans were more likely to be targeted for their speech, people of color were more

¹³⁴ See Vogels et al., *supra* note 1.

¹³⁵ See, e.g., STROSSEN, *supra* note 24, at 1–9 (noting the capacity of hate speech laws to inflict general harm upon society).

¹³⁶ See Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 558–60 (2018).

¹³⁷ *Id.* at 554 (“If it was once hard to speak, it is now hard to be heard. Stated differently, it is the attention of the listeners that is now scarce.”).

¹³⁸ See also Coleman, *supra* note 2 (arguing that “[s]ocial regulation of offensive speech has developed a distinct and often collective mechanism of enforcement—market pressures on corporations” and that “people wishing to establish community speech norms . . . must appeal to a corporation’s self-interest, not to their legislator’s fiduciary obligations”).

¹³⁹ See, e.g., Wu, *supra* note 136, at 454; Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200 (2017).

¹⁴⁰ Adam Johnson, *NYT’s Campus Free Speech Coverage Focuses 7-to-1 on Plight of Right, FAIRNESS & ACCURACY IN REPORTING, INC.* (Nov. 15, 2017), <https://perma.cc/9WZY-GHTN>.

likely to be sanctioned for their speech.¹⁴¹ The over-sanctioning of people of color found in the FIRE study accords with other studies that have shown that African Americans are punished more harshly than white Americans for similar behaviors.¹⁴² While this study was not designed to study asymmetries in the regulation of speakers, the opening examples contain a similar asymmetry. James Riley was fired and remains unemployed for suggesting that racism is a common and unique experience for African Americans in the U.S. (a controversial view that is nevertheless held by many scholars). Andrea Quenette was officially cleared for an arguably more serious speech transgression—using an explicit racial slur casually with students. Moreover, she was able to find new academic employment even after being effectively fired on other grounds.¹⁴³

A recent example of the asymmetrical concern for white speakers can be found by comparing two new Florida laws. These laws, while not an instantiation of social regulation, are nevertheless a product of the public debates over the social regulation of speech, a case of norms and narratives influencing law. Florida House Bill 233 mandates the “exposure of students, faculty, and staff to, and the encouragement of their exploration of, a variety of ideological and political perspectives.”¹⁴⁴ Other language in the bill makes clear that this provision is about free speech and ensuring that “students, faculty, and staff, feel free to express their beliefs and viewpoints on campus and in the classroom.”¹⁴⁵ The racial and political coding of this language becomes apparent only when considered in tandem with H.B. 7, which

¹⁴¹ Komi German & Sean Stevens, *Scholars Under Fire: 2021 Year in Review*, FIRE (2022), <https://www.thefire.org/research/publications/miscellaneous-publications/scholars-under-fire/scholars-under-fire-2021-year-in-review-full-text> [<https://perma.cc/2ANF-NSCA>].

¹⁴² See ACLU, *Racial Disparities in Sentencing: Hearing on Racism in the Justice System of the United States* 7–8 (Oct. 27, 2014), <https://perma.cc/9NVA-T2ZC>. (For example, the penalties African Americans receive for minor crimes are imposed on white Americans only for major crimes.)

¹⁴³ See *supra* Part I.B. It is likely that asymmetries in status on university campuses, with people of color being overrepresented in non-tenure track positions, also contributes to the asymmetries in sanctions.

¹⁴⁴ H.B. 233, 2021 Leg. (Fla. 2021).

¹⁴⁵ *Id.*

singles out critical race theory as a prohibited ideological perspective.¹⁴⁶ This creates a free speech principle of viewpoint diversity while carving out an exception to that principle for critical race theory. This carve-out is not unrelated to the fact that critical race theory is more likely to be espoused by liberals and more likely to entail ideological perspectives pioneered by people of color. Their radical critiques of racism are viewed as attempts to silence others, rather than as political speech entitled to robust protection.¹⁴⁷ As a result, in this construction, liberals and scholars of color are not victims of cancel culture, but its agents.

Few of the most outspoken critics of cancel culture also challenge the critical-race-theory bans.¹⁴⁸ Instead, as Jonathan Zimmerman, a historian at University of Pennsylvania has noted, the irony of the critical-race-theory bans is that they use the same logic their conservative proponents purport to despise, but in favor of a different group. “[I]f you dig into the text of the [critical-race-theory bans], they echo one of the arguments that have increasingly been used to justify limiting speech on college campuses—the idea that if speech upsets people, it should be forbidden.”¹⁴⁹

Yet, the marginalization of speakers of color was not an unbroken trend across time. One of the earliest cases to reject “cancellation” of a speaker overturned the conviction of Angelo Herndon, an African American man. After organizing a peaceful, biracial protest for unemployment relief in Atlanta during the Great Depression, Herndon barely avoided the death penalty.¹⁵⁰ He was convicted under a Georgia law which prescribed the death penalty for “[a]ny attempt, by persuasion

¹⁴⁶ H.B. 7, 2022 Leg. (Fla. 2022); *see also* *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, No. 4:22CV304-MW/MAF, 2022 WL 16985720, *1 (N.D. Fla. Nov. 17, 2022) (noting that “[HB 7] officially bans professors from expressing disfavored viewpoints in university classrooms while permitting unfettered expression of the opposite viewpoints”), *appeal pending*.

¹⁴⁷ *Id.*; *see also* Jonathan Butcher & Mike Gonzalez, *Critical Race Theory, the New Intolerance, and Its Grip on America* (Dec. 7, 2020), <https://www.heritage.org/civil-rights/report/critical-race-theory-the-new-intolerance-and-its-grip-america>.

¹⁴⁸ FIRE and the Academic Freedom Alliance are notable exceptions.

¹⁴⁹ Jennifer Schuessler, *Bans on Critical Race Theory Threaten Free Speech, Advocacy Group Says*, N.Y. TIMES (Nov. 9, 2021) (section discussing Jonathan Zimmerman’s response to the PEN report on the threats critical race theory bans pose to free speech).

¹⁵⁰ *See* TIMOTHY C. SHIELL, *AFRICAN AMERICANS AND THE FIRST AMENDMENT: THE CASE FOR LIBERTY AND EQUALITY* 36–39 (2019).

or otherwise, to induce others to join in any combined resistance to the lawful authority of the state,”¹⁵¹ but allowed jurors to show mercy. Herndon’s “mercy” was a sentence of 18–20 years on a prison chain gang, a form of punishment which generally resulted in death within five years.¹⁵² After several trials and appeals,¹⁵³ Herndon’s conviction was overturned by the U.S. Supreme Court. Justice Roberts, writing for the Court, noted that under the state’s interpretation, “[e]very person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government he may be convicted of the offense of inciting insurrection [and sentenced to death].”¹⁵⁴ To Justice Roberts, this made the statute vague and unconstitutional.¹⁵⁵ While the *Herndon* opinion did not directly engage with the racism that characterized Herndon’s trial, its holding that vague and indeterminate limitations on speech are unconstitutional had a particular significance in the context of the speech of racial minorities. For, in the early twentieth century, indeterminate proscriptive language was an important mechanism in the suppression of civil-rights activism¹⁵⁶ and key to the discriminatory enforcement of statutes.¹⁵⁷

As a result, interposing the First Amendment between the speakers and consequences served to protect vulnerable speakers who were protesting various racial

¹⁵¹ *Id.* See also GA. CODE § 26-902 (1935).

¹⁵² Dennis Childs, “*You Ain’t Seen Nothin’ Yet*”: *Beloved, the American Chain Gang, and the Middle Passage Remix*, 61 AM. Q. 271, 272 (2009).

¹⁵³ See *Herndon v. Lowry*, 301 U.S. 242, 242–45 (1936).

¹⁵⁴ *Id.* at 262.

¹⁵⁵ See *id.* at 263–64.

¹⁵⁶ See Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 80–81 (discussing the Warren Court’s use of vagueness doctrines to protect civil rights protestors charged with loitering and disorderly conduct).

¹⁵⁷ See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (invalidating the Chicago Gang Congregation Ordinance on vagueness grounds, due in part to its potential for discriminatory enforcement).

and economic inequalities. For example, the disallowance of sanctions against laborers picketing for fairer work conditions,¹⁵⁸ against newspapers covering acts of state violence during the Civil Rights Movement,¹⁵⁹ and against anti-war protesters advocating civil disobedience¹⁶⁰ played a significant role in preserving the ability of marginalized groups to successfully advocate for important social reforms. These successes in turn became elements in the paradigm of free speech as unregulated speech.

Yet, in many ways, as discussed in the next section, it was the success of the equality advocacy made possible by consequence-free speech that revealed the need for consequence culture.

B. Social Speech Regulation as Consequence Culture

“Views expressed online are just as damaging if not more damaging than views expressed in person. People who promote and validate views that hurt other people should have to deal with the consequences of their actions.’

—Gender non-conforming, 20s, Liberal Democrat”¹⁶¹

“[Cancel culture is] a term used by (mostly) White people complaining when others want to remove, for example, Confederate monuments from public areas. They don’t see how those representations affect African Americans or Indigenous people and argue that their culture is being canceled.’

—Woman, 50s, Liberal Democrat”¹⁶²

“Although everyone has the right to their opinion, the use of offensive content can be damaging to the recipient of the content. Therefore, accountability is necessary, especially if there is no truth to the content.’

—Man, 60s, Conservative Republican”¹⁶³

“You’re going to hear a lot of talk about “offense” We aren’t complaining about ‘being offended’. . . What we object to is the harm that content like this does to the trans community.”¹⁶⁴

¹⁵⁸ See Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2069–70 (2018).

¹⁵⁹ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁶⁰ See, e.g., *Cohen v. California*, 403 U.S. 15 (1971).

¹⁶¹ Vogels et al., *supra* note 1.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ @RainofTerra, TWITTER (Oct. 6, 2021, 7:49 PM), <https://perma.cc/UE5G-GQBQ>.

One effect of successful dissent and its attendant reforms was the inclusion of racial and ethnic minorities in spaces that had historically excluded them. Continuing hostility to such inclusion led to an outpouring of invectives and defamation against the students and professionals entering these spaces.¹⁶⁵ Their new experiences, as subordinated insiders rather than protesting outsiders, caused many scholars and activists to see the First Amendment “no consequence” calculus in a different light, one that increasingly served to protect racist and defamatory expression. As a result, concerns over the oppression of dissenting speakers gave way to concerns over the intimidation and rhetorical violence directed towards unwilling listeners in hostile spaces. Black activists and intellectuals began to shift their focus from the “political imperative to protect free speech” to the “moral imperative to suppress hate speech.”¹⁶⁶ The movement to regulate campus hate speech through legally enforceable speech codes largely failed but has experienced a second life through the mechanism of social speech regulation. LeVar Burton’s remarks on *The View* exemplify how the ideology of the campus-hate-speech wars has come to be popularized and reflected in the new cancel culture wars. In his words, rather than a cancel culture, we have a “consequence culture.”¹⁶⁷ The need for consequences for racist speech was a pillar of the advocacy for campus speech codes¹⁶⁸ and has come to be an important part of the justification for the social regulation of speech on campus.

Like cancel-culture discourse, consequence-culture narratives entail assumptions about the type of speech being regulated, the nature of the harms and the persons or groups harmed. In terms of the type of speech being regulated, consequence culture assumes that injurious speech, rather than simply offensive speech, is being regulated. In this framing, individuals are not being fired for inartful phrasing or

¹⁶⁵ *Racism on Campus: Stories From New York Times Readers*, N.Y. TIMES (Nov. 17, 2015).

¹⁶⁶ Henry Louis Gates Jr., *War of Words: Critical Race Theory and the First Amendment*, in *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* 17, 17 (1994).

¹⁶⁷ *Levar Burton Says It’s Not ‘Cancel Culture’—It’s ‘Consequence Culture’*, RELEVANT (Apr. 27, 2021), <https://perma.cc/6JQM-3M4H>.

¹⁶⁸ See David L. Hudson & Lata Nott, *Hate Speech & Campus Speech Codes*, FREEDOM F. INST. (Mar. 2017), <https://perma.cc/C3PC-BW7U>.

“clumsy mistakes,”¹⁶⁹ but for discursive violence that assaults listeners, denies them equal dignity¹⁷⁰ and encourages third parties to inflict real-world harms on group members. The challenge with this framing is that on university campuses, social regulation is not only applied to censorable speech that seems clearly injurious (like racial epithets and sexual harassment) but also to speech that is difficult to categorize as objectively injurious, what I term contested or discreditable speech.

As I have noted elsewhere, to be considered censorable, speech must be stigmatized and considered harmful across a wide range of speakers of different races, ethnicities, and religious or political ideologies.¹⁷¹ Censorable speech, by definition, presupposes the existence of a somewhat national norm. Racist epithets are the quintessential example of censorable speech (and arguably the most objectively injurious), which explains why most accusations allege some form of racism. Contested speech, however, is characterized by deep disagreement on both the value of the speech and its sanctionability. Speech is contested when two things are true: (1) A socially or politically influential group in society views the speech as high-value political speech deserving of special protection; and (2) A similarly influential group views the same speech as low-value speech that warrants condemnation and sanctions.¹⁷² Some of the harsher critiques of police and policing by Black Lives Matter activists fall into the category of contested speech, as does speech differentiating between the rights of cisgender and transgender women. The third category, discreditable speech, is speech around which there is broad consensus on its low value, but also broad disagreement on whether the speech warrants sanction of any kind.¹⁷³ Discreditable speech is typically rude, callous or insensitive, but it does not target vulnerable or protected groups in the manner characteristic of censorable speech.¹⁷⁴ Thus, social regulation of discreditable speech is a type of tone-policing.

While these categories are very useful in understanding the breadth of content that is socially regulated, the category to which an utterance “actually” belongs is

¹⁶⁹ Ackerman et al., *supra* note 7.

¹⁷⁰ See generally Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 434–46, 452.

¹⁷¹ Coleman, *supra* note 2, at 18–19.

¹⁷² See *id.* at 20.

¹⁷³ *Id.* at 23.

¹⁷⁴ *Id.*

always in process, contested and negotiated. For, public speech is inherently dialogic. Readers of tweets on social media, like readers of other texts, “apply their own assumptions, beliefs, values, and expectations when interpreting the voice of the writers.”¹⁷⁵ For example, a reader’s beliefs about the vulnerability of a particular group tend to influence their categorization of speech as censorable or discreditable. The same is true of speakers. This introduces an element of subjectivity into evaluations of speech that are parasitic on a discourse community’s understanding of the world and its construction of the “real” victim. For example, whether the Boycott, Divestment and Sanctions movement is injurious antisemitic speech or accountability speech that some find offensive depends in part on whether one constructs Jews or Palestinians as the “real” victims.

For many critics, the contested nature of such content evaluations means that such speech is better viewed as subjectively offensive rather than objectively injurious. For proponents of the consequence-culture narrative, however, the demotion of injury to offense is viewed as part of a larger historical and societal trend of discounting and disbelieving marginalized groups’ accounts of their pain.¹⁷⁶ In this way, in response to cancel culture’s insistence that almost all social regulation is about offensive speech, consequence culture tends to insist that almost all social regulation is about injurious speech. (This article does not seek to resolve this issue, but instead suggests that both claims are interested and non-objective.)

Consequence culture also differs from cancel culture in its understanding of the nature of harms posed by speech. For example, Mari Matsuda notes that,

From the victim’s perspective, all [forms of racism] inflict wounds, wounds that are neither random nor isolated. . . . Violence is a necessary and inevitable part of the structure of racism. It is the final solution, as fascists know, barely held at bay while the tactical weapons of segregation, disparagement, and hate propaganda do their work. The historical connection of all the tools of racism is a record against which to consider a legal response to racist speech.¹⁷⁷

¹⁷⁵ John Flowerdew & Simon Ho Wang, *Identity in Academic Discourse*, 35 ANN. REV. APPLIED LINGUISTICS 81, 86 (2015).

¹⁷⁶ See Kenneth D. Craig et al., *Pain in Persons Who Are Marginalized by Social Conditions*, 161 PAIN 261, 261–62 (2020) (explaining that minorities are often disbelieved or invalidated when reporting their experiences of physical pain).

¹⁷⁷ Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2335 (1989).

In the discourse of consequence culture, free speech only appears to be free from the speakers' perspective because the real-world costs of transgressive free speech are borne by the listeners. These costs include the mental and economic harms that "othering" narratives have always imposed on vulnerable groups,¹⁷⁸ as well as the physical violence against groups that is often a corollary of successful "othering." In this telling, the marketplace of ideas becomes yet another datapoint in systems of exploitation, with the emotional energies and capacities of the marginalized being continually drained, so that the privileged may be free to speak without regard for the impact of their words.

Lastly, consequence culture shares cancel culture's construction of speakers as race- and often gender-privileged, though to different ends. For example, in the 1990s, advocacy of hate-speech regulation was often rooted in an awareness of subordinated groups' collective experiences with assaultive speech in newly integrated spaces. As a result, definitions of hate speech often presupposed that the transgressing speakers were from racially privileged groups and that the injured listeners were from historically oppressed groups. Mari Matsuda's proposed hate-speech standard is in this vein, as it would require actionable hate speech to imply racial inferiority and to be directed against a historically oppressed group.¹⁷⁹ This essentially paints speakers as white and listeners as nonwhite. For it is racially privileged speakers who tend to disparage other groups as racially inferior, and in the U.S., racially privileged has historically meant white.

Consequence culture, though it shares the white-speaker/nonwhite-listener framing, broadens the frame of privilege beyond race to include gender, class, disability and sexuality, among others. The language of consequences and accountability are embedded in discourses of privilege and structural inequality, and linked to the idea that some individuals and groups in society have been able to violate norms and laws with impunity due to their privileged position in race, gender and class hierarchies. As a result, accountability and consequences are not demanded in a vacuum, but rather in a context in which some groups in society have long

¹⁷⁸ John A. Powell, *On Speech and Belonging*, BERKELEY BLOG (Sept. 18, 2017), <https://perma.cc/2Q25-9Q3K>.

¹⁷⁹ See Matsuda, *supra* note 177, at 2357.

avoided accountability and consequences for bad acts due to their privileged position. In this way, the speakers that consequence culture has in mind are the same speakers that proponents of the hate-speech regulation had in mind (and indeed the same speakers cancel-culture narratives have in mind)—speakers who hold a privileged position at the intersections of race, gender and class. Catherine MacKinnon captures this intuition when she remarks that “[t]he First Amendment was written by those who already had speech; they also had slaves, many of them, and owned women. . . . You have to already have speech before the First Amendment, preventing government from taking it away from you, does you any good.”¹⁸⁰

It is not happenstance, therefore, that the First Amendment theory presupposed by consequence culture is the theory of *Beauharnais v. Illinois*¹⁸¹ rather than the theory of *New York Times Co. v. Sullivan*.¹⁸² In *Beauharnais*, a white male disparaged all African Americans as gun-toting, knife-wielding, marijuana-smoking rapists and robbers.¹⁸³ While upholding the speaker’s conviction for group libel, the *Beauharnais* Court noted that,

In the face of [our] history and its frequent obligato of extreme racial and religious propaganda, . . . the Illinois legislature was [not] without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented.¹⁸⁴

In its holding, the Court recognized that the dignity of an individual citizen can be parasitic on the reputation of the racial or religious group of which she is a member. For many proponents of social and legal regulation of hate speech, protecting and guaranteeing the equal dignity and citizenship of the marginalized lies at the core of the justifications for hate speech regulation and the consequence culture narrative.

However, people of color, especially on university campuses, are not just marginalized listeners. If cancel culture forgets that assaultive speech is a real issue, consequence culture forgets that people of color are also speakers and in fact are most

¹⁸⁰ CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 204 (1987).

¹⁸¹ 343 U.S. 250, 262 (1952).

¹⁸² 376 U.S. 254 (1952).

¹⁸³ *Beauharnais*, 343 U.S. at 261.

¹⁸⁴ *Id.*

likely to suffer consequences for violations of speech norms, whether real or imagined. This is the lesson of the Civil Rights Era, of Angelo Herndon and of *New York Times Co. v. Sullivan*. The public debate thus can only progress if it moves beyond an oversimplified narrative binary of white speakers denied free speech and listeners of color denied protection against racist speech. Instead, universities seeking to affirm commitments to both inclusiveness and academic freedom must base solutions on the more complex underlying reality. The next section seeks to provide an introductory framework for understanding that reality.

III. FIVE PHASES OF SOCIAL SPEECH REGULATION

Social regulation of speech on campus typically has five phases that vary in length, sequence, and primary influencers.¹⁸⁵ These phases are: (1) publication and dissemination; (2) accusation; (3) pillory; (4) sanction; and (5) direct action. This section will describe each of the five phases, using this article's opening examples for illustration.

A. *Publication and Dissemination*

The first phase of social speech regulation is the publication and dissemination (“publication”) phase. In this phase, the speech in question is brought to the attention of the broader public either by the speaker themselves or by third parties who have access to the speech. In this study, the top three methods of publication were via social media, in the classroom and through traditional avenues. I defined social-media publication as tweets, Facebook posts, YouTube videos and personal blogs. I defined classroom publication as speech that took place during the instructional time set aside for a particular course, as well as speech that constituted a part of a course's instructional materials—such as assigned articles, exams and syllabi. I defined traditional avenues as in-person public lectures and television appearances, as well as the posting of flyers in public spaces. (Publication in newspapers and journals was treated as a separate category and was not one of the top three avenues.)

Social-media publication accounted for most of the publications in this study, though that may be due to the role Twitter plays in academic self-definition. Transgressive speech was also disseminated in classroom lectures and materials (such as

¹⁸⁵ By primary influencers, I mean those who are opinion leaders in various discourse communities and networks, such as those recognized as social-media influencers.

Quenette's comments during her seminar), through traditional avenues (such as Durden's Fox News interview), and through newspapers, emails, legal representation and art.

In addition to occurring over a variety of media, acts of publication fell along a continuum from intentionally disseminated by the speaker to unintentionally disseminated by the speaker or by third parties. I define intentional publication as the deliberate publication by the speaker using some form of public or social media. Unintentional publication is publication by third parties without the speakers' consent or publication by the speaker on accident. In this study, the publication of transgressive speech by university-affiliated speakers was overwhelmingly intentional. It was generally published directly by the speaker rather than a third party, such as with Professor Durden's comments on Fox News¹⁸⁶ and the Shapiro's tweet about a "lesser Black woman."¹⁸⁷ While there was at least one case of private/semi-private speech by university speakers being unintentionally published to the broader public,¹⁸⁸ the vast majority of the speakers personally and voluntarily placed their transgressive utterances in the public view. This outspokenness of university-affiliated speakers is inseparable from the special responsibility universities have for truth-seeking and the creation and dissemination of expert knowledge.¹⁸⁹ It also seems to reflect a unique combination of responsibility and privilege—a responsibility to speak freely and a privilege to speak offensively in the name of truth-seeking and expert-knowledge production.

The general intentionality of transgressive speech by academics seems related to another characteristic of university speakers—their discursive construction of identity. The discursive construction of identity is the use of social and linguistic resources to author oneself in the world, discursively performing the attitudes, values and beliefs of some socially constructed roles in opposition to other roles.¹⁹⁰

¹⁸⁶ See Durden-Carlson Interview, *supra* note 33.

¹⁸⁷ Charnosky, *supra* note 86.

¹⁸⁸ See, e.g., Robert Shibley, *One Georgetown Law Professor Fired, One Resigns After Conversation About Black Students' Academic Performance Accidentally Recorded*, FIRE (Mar. 18, 2021), <https://perma.cc/9FYQ-XHMH>.

¹⁸⁹ Keith E. Whittington, *Academic Freedom and the Mission of the University*, 59 HOUS. L. REV. 821, 823–29 (2022).

¹⁹⁰ See MATTHEW CLARKE, LANGUAGE TEACHER IDENTITIES: CO-CONSTRUCTING DISCOURSE

The socially constructed roles that individuals seek to perform are often determined by their discourse communities—a collection of individuals who have a shared narrative of how the world works and should work, and who share discursive practices for the use of language when speaking, listening, reading and writing.¹⁹¹ An individual’s discourse community sets and enforces the discursive practices or “scripts” for “*recognizing and getting recognized* as certain sorts of *whos* doing certain sorts of *whats*.”¹⁹² A common university script is that of a liberal academic doing the work of being an ally. When university-affiliated speakers publish their utterances, they are not merely seeking to contribute their ideas and expertise to the public debate. They are also seeking to enact an individual identity in a way that makes visible the broader discourse communities in which they claim membership—academic, liberal, Republican, etc.¹⁹³

Discourse communities define norms of identity-enactment and recognition for their members,¹⁹⁴ which means that speech voluntarily posted to social media is both an intentional enactment of identity and a bid for recognition. Such speech simultaneously indexes the individual voice of the speaker and the performative appropriation of the voices within the discourse community to which the speaker wants to be recognized as belonging. In times of polarization, it is very difficult to evaluate the personal dimensions of voluntarily published utterances apart from the discursive practices of the underlying discourse community.¹⁹⁵ Moreover, it is also difficult to disaggregate the discursive practices of an academic’s social discourse communities—their extramural speech—from the discursive practices of their professional communities. This means that the sanctioning of individual speakers is not always the sanctioning of an individual, but rather is often an attempt to suppress a competing discourse community by targeting its members. Such attempts tend to succeed most often against the most vulnerable members of

AND COMMUNITY 24–27, 158 (2008).

¹⁹¹ See James P. Gee, *Discourse vs. Discourse*, in *THE ENCYCLOPEDIA OF APPLIED LINGUISTICS* 1761, 1761–62 (Carol A. Chapelle ed., 2013).

¹⁹² *Id.* at 1763.

¹⁹³ See Michael Bamberg, Anna De Fina & Deborah Schrifflin, *Discourse and Identity Construction*, in *HANDBOOK OF IDENTITY THEORY AND RESEARCH* 177, 188 (Seth J. Schwartz et al. eds., 2011).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

the discourse community. As a result, the way a university polices publication and dissemination is never simply about its support or lack of support for the principles of academic freedom or inclusion, but always implicates the discourse communities its administrators favor or disfavor and their implicit and explicit biases against certain speakers and discourses. One need not go as far as Stanley Fish in dismissing academic freedom as just “the name we give to verbal behavior that serves our substantive agendas,”¹⁹⁶ but it is important to recognize the role of ideology in determining which narrative (consequence culture or cancel culture) administrators apply to calls for speech regulation.

Unintentionally published speech requires a slightly different approach, however. The speakers’ attempt to keep their speech private or semi-private often reflects an awareness or suspicion that the speech violates existing community norms and could tarnish their public-facing identity. This means that unintentionally disclosed speech is likely to be more transgressive than speech used to construct public-facing identities. It is not clear, however, what this means for the social regulation of speech. For, when we sanction private speech that was involuntarily made public, we are not seeking to deter or punish violation of public speech norms. The private, hidden nature of the speech suggests, rather, that the speaker tried to comply with public speech norms by only expressing such views in private. It is likely that what is being sanctioned instead are the hidden ideas that gave rise to that speech and the person’s status as a holder of such noxious ideas. This raises a different set of concerns from intentional publication of transgressive speech and warrants further research.

Speech published or republished by third parties years or even decades after the original utterance or publication also requires nuanced treatment. Discursive practices change over time—often through dialogue, persuasion and clashes between competing discourse communities. When speech sanctions are too backward-looking, they run the risk of sanctioning individuals for discursive practices that have already changed and for past membership in discourse communities that no longer even exist. Such sanctioning seems to punish individuals for the somewhat arbitrary infraction of not changing their discursive practices “fast enough”—for being

¹⁹⁶ STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH: AND IT’S A GOOD THING, TOO* 102 (1994).

settlers rather than pioneers. As backward-looking speech sanctions will not punish every settler or even the most culpable settlers, but only those settlers who were unlucky enough to be in the public eye at the wrong time, such an approach is likely to be counterproductive and to embolden cancel-culture critics. Universities seeking to err on the side of consequence culture rather than cancel culture should carefully consider the dynamics of publication—discursive identity-construction, intentionality, and temporal dimensions of utterance—when engaging in the social regulation of speech.

B. Accusation

Once an utterance has been published, the second phase of social speech regulation is accusation. In this phase, one or more members of the public engages with the utterance in a way that directly or implicitly accuses the speaker of violating speech norms. The accusation phase is successful when it results in a university's acknowledgement of the accusation and unsuccessful when there is no such acknowledgement. Moreover, the accusation phase can vary in its level of publicness, with accusations made on social media being among the most public.

In this study, successful public accusations were directed to the employing university on a form of social media accessible to the general public, while successful accusers tended to be individuals and groups able to build a robust pillory for speakers through networks valued by the university. As a result, most successful accusers tended to be university students, employees, or influential alumni or donors. In addition, the most successful accusations tend to be accusations of racism. For example, Mark Joseph Stern, a DC-based alum of Georgetown University and a legal-affairs correspondent with over 100,000 followers, was very direct in accusing Mr. Shapiro of racism:¹⁹⁷ “I hate to draw attention to this troll because attention is what he craves. But now that @GeorgetownLaw has hired him, I feel an obligation to condemn his overt and nauseating racism, which has been a matter of public record for some time. I am deeply ashamed of my alma mater.”¹⁹⁸ Similarly, the Open Letter from Prof. Quenette's students centered upon an accusation of racism,

¹⁹⁷ Mark Joseph Stern (@mjs_DC), TWITTER (Jan. 27, 2022, 7:42 AM), <https://perma.cc/9KV8-7NK3>.

¹⁹⁸ *Id.*

with her students condemning her speech as “inhospitable, anti-black . . . unprofessional and based on racially insensitive notions of how language is used.”¹⁹⁹ Racism has increasingly become the catch-all term for all forms of marginalizing speech.²⁰⁰

When the accusation phase is primarily nonpublic, however, little is known about the accuser(s) or their relationship to the University. In the archetypical examples, nonpublic accusations were used against marginalized speakers. For example, the accusation against Lisa Durden was attributed to an unnamed caller about whom we still have no information²⁰¹ despite an open-records request from FIRE. The documents the University handed over in response to FIRE’s public-records request, however, did include an additional nonpublic accusation of racism. It was sent to the members of the Essex College administration from a general member of the public whose email revealed no known relationship to the University or any special influencer status.²⁰²

In Dr. Riley’s case, the accusation phase seemed to have both a public and nonpublic component. The public component, the Breitbart story, was implicitly accusatory, suggesting as it did that it is racist to believe that America is racist or that white people cannot experience racism. It is not clear how the implicit accusation in the Breitbart story was taken up by the University or whether there were other nonpublic accusations that contributed to Dr. Riley’s forced resignation. However, though Breitbart has no disclosed relationship with the University of Alabama, and is stigmatized as a news source,²⁰³ the speed of the University’s response suggests that Breitbart is embedded in networks valued by the University or by high-level individuals affiliated with the University.

¹⁹⁹ Schumacher, *supra* note 72.

²⁰⁰ See A. Nicole Kwapisz, *Classification of Homosexuals Under the Equal Protection Clause: Forward-Looking Disparate Impact Test*, 5 DEPAUL J. FOR SOC. JUST. 71, 94 (2011) (noting the use of racism findings for other types of discrimination due to universal characteristics and patterns); *Defending Our Right to Learn*, ACLU (Mar. 10, 2022), <https://perma.cc/52AT-TKYE> (noting critical race theory has become a catchall term for discussion of all types of discrimination.)

²⁰¹ Flaherty, *supra* note 40.

²⁰² Steinbaugh, *supra* note 48.

²⁰³ Jonah Engel Bromwich, *What Is Breitbart News?*, N.Y. TIMES (Aug. 17, 2016).

In the speech events in this study, accusers and speakers often belonged to different discourse communities with different understandings about which groups are vulnerable. As a result, speech that accusers and their discourse communities painted as censorable was presented by speakers and their discourse communities as belonging to the contested or discreditable categories.²⁰⁴ For example, Ilya Shapiro described his tweet as “inartful” phrasing,²⁰⁵ which seems to acknowledge problematic tone or word choice, but falls far short of admitting to racist speech. Similarly, several readers of Ilya Shapiro’s tweets interpreted his reference to “a lesser Black woman” as part of a broader anti-affirmative action discourse which presupposes that there are objective markers of merit and that privileging of the race and/or gender over objective markers awards positions to less-qualified candidates. Robby Soave noted of Shapiro’s tweet: “It’s not right to say he had asserted that black women as a category would make poor Supreme Court justices. Rather, he indicated that he thought the absolute best choice—from a progressive standpoint—was a specific judge, Sri Srinivasan (an Indian American and member of the Hindu faith, which would also be a first for the Court). In his tweet, Shapiro was lamenting that Biden’s commitment to choosing a justice who fits a specific demographics profile would preclude him from making this selection.”²⁰⁶ Similarly, John McWhorter stated that, “I think Shapiro meant that, one, Biden would choose a Black woman and two, that because Srinivasan is—in his view—the “best” of the judges that a Democratic president would consider nominating, any other potential nominee, including any of the Black women on the president’s short list, would be less qualified than Srinivasan. I don’t think Shapiro meant to say that a Black woman would be less qualified because she is a Black woman.”²⁰⁷ To them and others like them, Shapiro’s tweet was not an example of racist speech but of contested speech.

At the same time, many others interpreted Shapiro’s tweet as reflecting historical stereotypes of African Americans as intellectually inferior and incompetent.

²⁰⁴ See Ilya Shapiro discussion *supra*, Section II.B.

²⁰⁵ See *supra* Section I.B.4.

²⁰⁶ Robby Soave, *Georgetown Ends Investigation of Ilya Shapiro for Bad Tweet, Will Not Fire Him*, REASON MAG. (June 2, 2022), <https://perma.cc/QQE2-KGYN>.

²⁰⁷ John McWhorter, *Don’t Assume Ilya Shapiro’s ‘Lesser Black Woman’ Tweet Was Racist*, N.Y. TIMES (Feb. 4, 2022), <https://perma.cc/T4W8-YN4D>.

One example is Paul Butler, a professor at Georgetown, who noted that “[t]he problem is not that Shapiro is opposed to Biden’s selection criteria. Shapiro is unfit for our community not only because he called Black women ‘lesser’ but also because his tweet evidences a pattern of bias that isn’t just a poor choice of words. . . . If someone had complained that a more qualified gentile had been passed over for a ‘lesser Jew,’ it would be obvious that comment was antisemitic. The fact that Shapiro’s tweet isn’t, to some, as obviously biased demonstrates the hurdles facing women of color. They are presumed incompetent, even when Biden’s two leading candidates graduated from top law schools, clerked for Supreme Court justices and have unimpeachable records as appellate judges.”²⁰⁸ To Butler, Shapiro’s tweet was blatantly racist.

Categorizing speech is made even more indeterminate by the fact that the social categorization of groups as vulnerable or not vulnerable changes over time. When a new group in society demands to be recognized as vulnerable, speech previously treated as discreditable can become contested instead. If the group is successful in having their bid for protection accepted across a wide range of speakers of different races, ethnicities, and religious or political ideologies, the previously contested speech will become censorable. This is part of the reason why the length of time between utterance and publication matters.

C. *The Pillory*

The third phase of social speech regulation is the pillory phase, so called due to its similarity to the sixteenth-century pillory, which was often used as punishment for libel.²⁰⁹ The sixteenth-century pillory consisted of a wooden post and a frame that contained holes to secure the offender’s neck and wrists. The pillory was usually attached to a raised platform and placed in a prominent place in the town, like the market square. The offender would be forced to stand for several hours in the pillory while being vilified by fellow citizens and pelted with rotten eggs, mud, dead rats and filth of all kinds.²¹⁰ If the citizens felt that the offender’s speech had value,

²⁰⁸ Paul Butler, Opinion, *Yes, Georgetown Should Fire an Academic for a Racist Tweet*, WASH. POST (Feb. 20, 2022), <https://perma.cc/ZA7A-VKH2>.

²⁰⁹ Bracher, *supra* note 30.

²¹⁰ *Id.*

however, they could choose to throw flowers instead.²¹¹ If the citizens united in throwing flowers, it functioned as vindication for the speaker similar to jury nullification.

The pillory phase in social speech regulation functions similarly. Once a speaker has been successfully accused, they are held up to the public for condemnation. Random citizens from across the nation take turns vilifying the speakers, piling on abuse and scorn one post or tweet at a time. Other citizens, the flower throwers, try to defend and justify the speech. Given that there is no single “right” interpretation of an utterance, the pillory will often determine which interpretation the university adopts. Though times of high polarization, such as that we are currently experiencing, seldom see truly unified vindication of speakers, sufficient non-unanimity among university discourse communities can lead universities to adopt academic-freedom evaluations of tweets over equity-and-inclusion evaluations, and vice versa.

The comments in the case of Prof. Sellers, a Georgetown adjunct, are illustrative of the mud-and-flowers duality of the pillory phase. After ending her Zoom class (and unaware that the recording had not been stopped), Prof. Sellers remarked to her co-teacher: “I hate to say this. I end up having this angst every semester that a lot of my lower ones are Blacks, happens almost every semester. And it’s like, ‘Oh, come on.’ You get some really good ones, but there are also usually some that are just plain at the bottom. It drives me crazy.”²¹² During the pillory, individuals both criticized and defended her remarks. For example:

“I just love how she exposes herself. You hear how she never mentions what she as an educator does to help ‘the blacks’ that are allegedly always on the bottom . . . she should be fired off that alone.”²¹³

“As a teacher, and a former student . . . I assure you that the bottom students are there because she expects them to be there. Implicit bias in the classroom shows up when we don’t call on ‘the blacks’ or accuse them of plagiarism when they do

²¹¹ Cavendish, *supra* note 30.

²¹² Ewan Palmer, *Who is Sandra Sellers? Georgetown Professor Fired Over ‘Abhorrent’ Comments on Black Students*, NEWSWEEK (Mar. 12, 2021), <https://perma.cc/7H93-DAH8>.

²¹³ A. J. Chandler (@_Chandler), TWITTER (Mar. 10, 2021, 9:31 PM), <https://perma.cc/XVQ7-Z288>.

well. It is 2021. . . .”²¹⁴

“Sure, just blame the teachers—even the black ones? How about a little personal accountability? Or maybe even some support from parents? The problem won’t be solved by jumping to the racism card every time.”²¹⁵

“My understanding is she wants people to prosper but certain people are accepted into schools with underperforming scores.”²¹⁶

In Prof. Sellers’ case, the tweets criticizing her appeared earlier and were much more numerous than those defending her. Perhaps as a result, she was fired the day after the video was posted to Twitter, and before many of the defenders of her speech had registered their views.²¹⁷

When the accusation phase is nonpublic, however, the pillory phase cannot inform or shape the university’s response, and if it exists at all, it will often be very truncated. For example, by the time the public learned of Dr. Riley’s fate, the sanction had already been applied. Though some members of the public expressed support for Dr. Riley’s comments through various forms of direct action and protest, these did not have any effect on the university’s action in relation to Dr. Riley’s speech. The sanction had already been applied before the pillory phase began, and it was not rescinded.

D. Sanctions

In the sanctioning phase, the university imposes sanctions on the speaker or announces that the speaker has not engaged in transgressive speech. The sanctions phase is generally controlled by the institution (or institutions) to which the accusation was addressed. In this study, the most frequent outcomes in the sanctions phase were termination/resignation, verbal condemnation, and clearing the speaker.

It must be noted, however, that being formally cleared is not always the final

²¹⁴ Leta Johnson (@letajohn), TWITTER (Mar. 10, 2021, 10:14 PM), <https://perma.cc/8WXD-AKGE>.

²¹⁵ Cassandra (@Cassand68007460), TWITTER (Mar. 16, 2021, 9:22 AM), <https://perma.cc/PL4U-UAMX>.

²¹⁶ @Mordikain, TWITTER (Mar. 13, 2021, 12:07 PM), <https://perma.cc/S72Q-9HPV>.

²¹⁷ Michael Levenson, *Georgetown Law Fires Professor for ‘Abhorrent’ Remarks About Black Students*, N.Y. TIMES (Mar. 11, 2021).

disposition. Professor Quenette was formally cleared but was fired the following year for what the University stated was an unrelated reason.²¹⁸ Former Princeton Professor Katz claimed a similar thing happened to him. In July 2020, Professor Katz published an article on *Quillette*, criticizing the recommendations in an anti-racist letter signed by numerous Princeton faculty,²¹⁹ including one calling for the creation of a faculty committee charged with policing and disciplining the racist behaviors, incidents, research, and publication[s]” of other faculty.²²⁰ The criticism that anchored the calls for his cancellation, however, was one which concerned students. In disagreeing with the recommendation that the University “[a]cknowledge, credit, and incentivize anti-racist student activism, beginning with a formal public University apology to the members of the Black Justice League and their allies,”²²¹ Professor Katz used hyperbolic language to condemn the Black Justice League. He wrote, “The Black Justice League, which was active on campus from 2014 until 2016, was a small local terrorist organization that made life miserable for the many (including the many black students) who did not agree with its members’ demands.”²²² Though a storm of criticism erupted over Professor Katz’s use of the word “terrorist” to describe a Princeton student organization, he was ultimately neither investigated nor fired for this speech.²²³ Instead, Professor Katz was fired in May 2022 for issues related to sexual misconduct (a consensual relationship with a student) that had occurred fifteen years prior²²⁴ and for which he had already been sanctioned—suspended without pay for one year, required to undergo counseling and placed on a three-year probation.²²⁵ While the University insisted that the firing

²¹⁸ *College Teacher Who Used Racial Slur in Class Fired*, AP NEWS (May 24, 2016), <https://perma.cc/P6NW-WP3N>.

²¹⁹ Joshua T. Katz, *A Declaration of Independence by a Princeton Professor*, *QUILLETTE* (July 8, 2020), <https://perma.cc/KJF8-SX62>.

²²⁰ See Princeton Faculty Letter, *supra* note 21.

²²¹ See Katz, *supra* note 219.

²²² *Id.*

²²³ Joshua T. Katz, Opinion, *I Survived Cancellation at Princeton*, *WALL ST. J.* (July 26, 2020).

²²⁴ Anemona Hartocollis, *Princeton Fires Tenured Professor in Campus Controversy*, *N.Y. TIMES* (May 23, 2022).

²²⁵ Cathy Young, Opinion, *Did a Princeton Professor Get Fired for Pissing Off Campus Activists?*, *DAILY BEAST* (May 25, 2022), <https://perma.cc/6EUK-D6S5>.

was due to new information related to the misconduct investigation, others attributed it to cancel culture.²²⁶

The sanctioning phase is not always a one-time event; rather, for some, it is a series of sanctioning events over time, which continue to occur for as long as the ire of society remains aroused or is re-aroused.²²⁷ Thus, termination of a transgressive speaker's employment by one institution could be followed by additional sanctions by other institutions, such as refusals to hire,²²⁸ the rescission of honors,²²⁹ the cancellation of book contracts²³⁰ and/or the withdrawal of speaking invitations.²³¹ As a result, the potentially sanctioning institutions are not only those with current relationships with the transgressive speaker. Institutions previously affiliated with the speaker can also take sanctioning-type actions to repudiate that prior affiliation, while future institutions can abandon plans to cooperate with the transgressing speaker as a form of sanctioning. In addition, there is no statute of limitations in this process, no predetermined limit on how far into the past the sanctioning can extend²³² nor how far into the future it can intrude.²³³ The temporal dimension is

²²⁶ *Id.*; Joshua Katz, Opinion, *Princeton Fed Me to the Cancel Culture Mob*, WALL ST. J. (May 24, 2022); Paul Du Quenoy, Opinion, *Princeton University Has Disgraced Itself by Firing Free Speech Hero Joshua Katz*, NEWSWEEK (May 25, 2022), <https://perma.cc/8ZXXN-6SSS>.

²²⁷ See, e.g., Christopher Ferguson, *The Firing of Bo Winegard: When Academic Freedom and Outrage Collide*, AREO (Mar. 16, 2020), <https://perma.cc/PBE6-RGBX>; Derrick Bryson Taylor, *Professor Fired After Joking that Iran Should Pick U.S. Sites to Bomb*, N.Y. TIMES (Jan. 11, 2020), <https://perma.cc/48KL-ABN6>.

²²⁸ Cf. Madison Alder, *U.S. Judge Won't Hire Yale Law Clerks Citing 'Cancel Culture'*, BLOOMBERG L. (Sept. 30, 2022), <https://perma.cc/AHJ8-DUDM> (reporting that a federal appellate judge is "boycotting hiring" students who initiate cancellations of faculty).

²²⁹ See, e.g., Susan Snyder, *University of Pennsylvania Strips Steve Wynn, Bill Cosby of Honors*, PHILA. INQUIRER (Feb. 1, 2018), <https://perma.cc/L7AQ-JN4C>.

²³⁰ See, e.g., Elizabeth A. Harris, *How Getting Canceled on Social Media Can Derail a Book Deal*, N.Y. TIMES (Feb. 11, 2021).

²³¹ See, e.g., Julia Taliesin, *A University of Chicago Professor Saw His MIT Lecture Canceled. He Blames a Twitter 'Outrage Mob'*, BOSTON.COM (Oct. 7, 2021), <https://perma.cc/JC9G-JPBU>.

²³² See, e.g., Jenny Gross, *Boeing Communications Chief Resigns Over 33-Year-Old Article*, N.Y. TIMES (July 8, 2020); Laura Vozzella, Jim Morrison & Gregory S. Schneider, *Gov. Ralph Northam Admits He Was in 1984 Yearbook Photo Showing Figures in Blackface, KKK Hood*, WASH. POST (Feb. 1, 2019), <https://perma.cc/X3H5-7ZH7>.

²³³ See *An Honest Living*, STEVE SALAITA (Feb. 17, 2019), <https://perma.cc/QS68-53C7>.

left entirely to the discretion of the sanctioning institutions. If termination of current employment is conjoined with the successive refusal of new institutions to affiliate themselves with the transgressive speaker indefinitely, social regulation may produce a permanent loss of livelihood. In the view of some, this is precisely what happened to Steven Salaita, a Palestinian American who accepted an offer of tenure from the University of Illinois in 2013 and who, after a series of social sanctions,²³⁴ is now a bus driver.²³⁵ This is also the reason Lisa Durden could insist that she “never recovered.”²³⁶

In addition, in the sanctioning phase, a transgressing speaker’s privilege and social capital, rather than normative definitions of injuriousness or offensiveness, may determine the type of sanction imposed. For example, in the archetypical examples, injuriousness or offensiveness alone served to justify almost-immediate termination for those lacking racial privilege or tenure-track status.²³⁷ For those with racial privilege or tenure-track status, however, further investigation seemed to be required in order to determine whether the offensive or injurious speech was actually sanctionable.²³⁸ Moreover, university administrators seemed more likely to privilege free-speech discourse over equity-and-inclusion discourse for privileged speakers and to deploy less-nuanced and more-disproportional forms of social regulation for less-privileged speakers.²³⁹ This is an emerging trend, which will be explored in greater detail in a planned study of adjunct professors. For now, however,

²³⁴ See *Settlement Reached in Case of Professor Fired for “Uncivil” Tweets*, CTR. FOR CONST. RTS. (Nov. 12, 2015), <https://perma.cc/GT8M-Q5FQ>. In July 2014, Salaita posted a series of caustic tweets criticizing Israel’s Operation Protective Edge, which were deemed antisemitic by many in the University of Illinois community. Wealthy donors placed enormous pressure on the university and Salaita’s offer was rescinded shortly before his appointment was scheduled to begin. Salaita’s attempts to obtain positions at other universities met with failure, with some viewing his difficulties as a continuation of the social sanctioning of his prior tweets. Though Salaita was able to obtain a \$875,000 settlement from the University of Illinois, he is no longer a member of the academy.

²³⁵ SALAITA, *supra* note 233.

²³⁶ *Cancelled with Rob Rosen and Desma Simon: Professors Under Fire*, *supra* note 50.

²³⁷ For example, the almost-immediate firing of James Riley and Lisa Durden can be contrasted with the investigations and clearings of Ilya Shapiro and Andrea Quenette.

²³⁸ *Id.*; see, e.g., Section I.B.

²³⁹ Compare Madeleine Lamon, *After ‘Disparaging’ Comments on Black Students, Amy Wax Barred From Teaching First-Year Course*, DAILY PENN (Mar. 13, 2018), <https://perma.cc/M2XC-CY28> (describing how, when tenured professor Amy Wax claimed during a national interview that

it should be noted that this trend is in accord with accounts that Black women are more likely to be tone-policed than any other group,²⁴⁰ that racial minorities are more likely to be sanctioned for speech than white Americans,²⁴¹ and that students of color feel least protected by constitutional free speech provisions.²⁴² Moreover, similar to the finding that juries in the criminal legal system are more likely to impose the death penalty when a murderer kills a white person than when they kill a Black person,²⁴³ the differing sanctions may also imply that higher levels of social ire attend perceived insults to the police and white males than insults to African Americans.²⁴⁴

E. Direct Action

The last phase, the direct-action phase, is often a means of augmenting the actions taken in the other phases. It is real-time collective action—a march, protest, sit-in, etc.—designed to increase the efficacy of social speech regulation either by

“I have never seen a Black Penn Law student graduate in the top quarter of the class,” she was relieved of teaching responsibilities in required courses) with Lauren Lumpkin, *Georgetown Law Professor Terminated After ‘Reprehensible’ Comments About Black Students*, WASH. POST (Mar. 11, 2021), <https://perma.cc/5ELH-6MUE> (describing how, when adjunct professor Sandra Sellers noted in a remark intended to be private “I hate to say this. I end up having this angst every semester that a lot of my lower ones are Blacks—happens almost every semester,” she was fired immediately).

²⁴⁰ See, e.g., Dana Brownlee, *Dear Corporate America: Stop Tone Policing Black Women. We Have Every Right to Be Angry*, FORBES (Nov. 23, 2021), <https://perma.cc/8UUUV-E9WS>; Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017, 2051 (“One oppositional word, spoken loudly or softly, and a Black women[sic] who is quietly going about her business gets transformed into the ‘Angry Black Woman.’”); Sherri L. Wallace et al., *African-American Women in the Academy: Quelling the Myth of Presumed Incompetence*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 421, 423 (Gabriella Gutiérrez y Muhs et al. eds., 2012) (noting that several studies have shown that black women “must be especially careful about tone of voice”).

²⁴¹ German & Stevens, *supra* note 141.

²⁴² See, e.g., *Free Expression in America Post-2020: A Landmark Survey of Americans’ Views on Speech Rights*, KNIGHT FOUND. (Jan. 6, 2022), <https://perma.cc/Z4AW-J3KB>; Dana Brownlee, *Dear Corporate America: Stop Tone Policing Black Women. We Have Every Right to Be Angry*, FORBES (Nov. 23, 2021), <https://perma.cc/8UUUV-E9WS>.

²⁴³ *McCleskey v. Kemp*, 481 U.S. 279, 279–81 (1987).

²⁴⁴ See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1741–45 (discussing the hypervaluation of whiteness and the corresponding devaluation of people of color).

amplifying the regulators' demands or by increasing the pressure on the targeted institution to accede to those demands. For example, when Georgetown placed Ilya Shapiro on an administrative suspension rather than firing him, Georgetown's BLSA conducted a sit-in in order to amplify their original demand that Shapiro be fired.²⁴⁵

CONCLUSION AND FURTHER RESEARCH

Social regulation of academic speakers often takes the form of a clash of absolutes, pitting a university's commitment to academic freedom against its commitment to equity, inclusion and belonging. More problematically, social regulation often seems like a flash-mob phenomenon, occurring spur of the moment without rhyme or reason, and with participants who embrace very different narratives of social speech regulation. The conjunction of these factors often forces universities to balance fundamental values on a hasty ad hoc basis, with little time for principled deliberation or fact-checking. It is thus unremarkable that so many university administrations give proxies like tenure -status and the social capital of accusers and defenders an outsized role in the social regulation process.

A key contribution of this paper is the idea that the madness of social speech regulation has a clear method. Social regulation of speech occurs across a set of identifiable phases—publication and dissemination, accusation, pillory, sanction and direct action. The predictability of the phases means that universities that reject the simplistic narrative of the Chicago Statement can still engage in principled protection of free speech and inclusion. Such universities can use the factors that characterize the phases framework—time and method of publication, content and source of the accusation, community opinion and engagement in the pillory, severity and duration of sanctions—to create clearly defined policies and boundaries for the social regulation of speech on campus. For example, universities could adopt a policy of only responding to accusations focused on speech published within a specified time period or published while the speaker was employed by the university. A university might also adopt a blanket policy of non-termination of speakers or of termination only when demanded by a truly representative cross-section of

²⁴⁵ Sophia Ankel, *Georgetown Law Students Staged a Sit-In to Demand Firing of Academic Who Said Biden Would Name a 'Lesser Black Woman' to SCOTUS*, INSIDER (Feb. 2, 2022), <https://perma.cc/8KWE-CURS>.

the broader campus community.

Policies tied to the factors in the phases framework have the potential to bring greater transparency and consistency to the social regulation of speech on university campuses and to shift public expectations away from termination as a “one size fits all” solution. For example, by placing certain options and sanctions off the table *ex ante*, social regulation policies could help to reshape demands and expectations around the social regulation of speech on campus. Instead of the current “anything goes” free for all, social regulation policies would allow universities to commit to a set of moderate and proportional sanctions in advance. A university could then use those pre-commitments to normalize investigation and the imposition of moderate sanctions, even in highly charged situations. Over time, and as more universities adopted such policies, moderation could become the new normal. Further research is needed, however, to determine precisely which types of policies would enable universities to best balance their dual commitments to academic freedom and inclusion, and to determine whether different policies are needed for public versus private universities, for tenure- versus non-tenure-track faculty, and for faculty versus students.

