

**RESPONDING TO HATE SPEECH:  
COUNTERSPEECH AND THE UNIVERSITY**

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*How should universities — and specifically university presidents — respond to hate speech on their campuses? Most responses to this question revolve around whether the hate speech should be restricted, but we take a different approach. Instead of focusing on the hate speech, we focus on what a university leader can say to disrupt the harm that the hate speech causes, while also allowing the hate speech to proceed in line with First Amendment protections and principles. Drawing on speech act theory from philosophy of language, we argue that a university leader's silence in these situations — whether literal or in the form of ineffective counterspeech — is not a neutral response. Such silence accommodates injustice. However, a leader who engages in counterspeech can challenge the hate speech's legitimacy and prevent it from resetting the terms of debate in such a way that the discrimination in the hate speech becomes normalized, even if this counterspeech cannot undo the harm entirely. Thus, the kind of counterspeech that university leaders undertake matters a great deal. If it challenges the implied authority of the speaker and seeks to counter the inegalitarian norms the hate speech embodies, counterspeech can mitigate the harms of hate speech and simultaneously enhance the free speech environment on campus. This Article thus does three things. It contributes important insights to the specific literature about free speech on campus, it contributes more widely to the literature about free speech and harmful speech, and it suggests a way of systematically reframing thinking about the boundaries between free speech and harmful speech in campus debates.*

INTRODUCTION

In recent years, free speech controversies on university campuses have become intense and prominent. Disputes have raged over the propriety of safe spaces, trigger warnings, claims that liberal biases make campuses inhospitable to conservative students and faculty, requests that universities cancel events featuring controversial outside speakers, protests that seek to disrupt events, and more.<sup>1</sup> University leaders have responded to these

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<sup>1</sup> Chris Vanderstouwe, *Combating Privilege, Regulating Language: The Struggle to Create and Maintain University Safe Spaces*, 4 J. LANGUAGE & SEXUALITY 272 (2015); ERWIN CHERMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS (2017); KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH (2018); ULRICH BAER, WHAT SNOWFLAKES GET RIGHT: FREE SPEECH, TRUTH, AND EQUALITY ON CAMPUS

controversies in various ways, ranging from cancelling events, to non-engagement, to speaking about the importance of free speech, to refuting speakers' views. Some universities also use counterspeech — responding to speech which one finds disagreeable with more speech — which has long been a mainstay of First Amendment jurisprudence and culture.<sup>2</sup>

The perspective that a hearer should oppose speech with which they disagree by engaging in their own counterspeech is an approach which many across the political spectrum advocate.<sup>3</sup> Perspectives vary on who can and should engage in this counterspeech: targets of the speech or bystanders, individuals or institutions. Despite the popularity and ubiquity of counterspeech, the concept of counterspeech has been surprisingly under-theorized, although it is beginning to become more refined.<sup>4</sup> Some aspects of this literature ask how institutions can engage in effective counterspeech, although no scholars have yet engaged the idea of universities participating in counterspeech.

In the literature about free speech on campus, however, some scholars seek to find ways for universities to fulfill their core missions of engaging in critical scrutiny of ideas and sustaining campus communities that are inclusive of a diverse student body.<sup>5</sup> Others call for the regulation of hate

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(2019); MICHAEL S. ROTH, *SAFE ENOUGH SPACES: A PRAGMATIST'S APPROACH TO INCLUSION, FREE SPEECH, AND POLITICAL CORRECTNESS ON COLLEGE CAMPUSES* (2019).

<sup>2</sup> Richard Delgado, *Legal Realism and the Controversy over Campus Speech Codes*, 69 CASE W. RES. L. REV. 275, 285–87 (2018).

<sup>3</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). See, e.g., Christina Bohannon, *On the 50th Anniversary of Tinker v. Des Moines: Toward a Positive View of Free Speech on College Campuses*, 105 IOWA L. REV. 2233 (2020); WHITTINGTON, *supra* note 1.

<sup>4</sup> Rae Langton, *Blocking as Counter-Speech*, NEW WORK ON SPEECH ACTS 144 (2018); Maxime Lepoutre, *Can "More Speech" Counter Ignorant Speech?*, 16 J. ETHICS & SOC. PHIL. 155 (2019); Mary Kate McGowan, *Responding to Harmful Speech: The More Speech Response, Counter Speech, and the Complexity of Language Use*, in VOICING DISSENT: THE ETHICS & EPISTEMOLOGY OF MAKING DISAGREEMENT PUBLIC 182 (Casey R. Johnson ed., 2020); Philip M. Napoli, *What If More Speech is no Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55 (2018); Lynne Tirrell, *Toxic Misogyny and the Limits of Counterspeech*, 87 FORDHAM L. REV. 2433 (2019).

<sup>5</sup> Benjamin Bindewald & Joshua Hawkins, *Speech and Inquiry in Public Institutions of Higher Education: Navigating Ethical and Epistemological Challenges*, 53 EDUC. PHIL. & THEORY 1074 (2020); JOHN G. PALFREY, *SAFE SPACES, BRAVE SPACES: DIVERSITY AND FREE EXPRESSION IN EDUCATION* (2017); Keith E. Whittington, *Free Speech and the Diverse University*, 87 FORDHAM L. REV. (2019); Kristina M. Johnson, *Hate Crimes, Hate Speech and Freedom of Speech on College Campuses*, 92 N.Y. STATE BAR J. 18 (2020).

speech; others propound explicitly anti-racist curricula;<sup>6</sup> and still others defend a strongly protective view of the importance of free speech, including proposing new doctrinal and theoretical approaches.<sup>7</sup> This Article thus builds on research which has explored the regulation of hate speech on campus,<sup>8</sup> the impact of hate speech and silence around race,<sup>9</sup> and the importance of ensuring all students have democratic access to speech on campus.<sup>10</sup>

Specifically, this Article adds to the literature by utilizing “speech act theory,” from philosophy of language, to propose an analytical framework to evaluate university leaders’ (usually university presidents’) counter-speech. We frame this in the specific context of university leaders’ speech in response to requests that they cancel campus events featuring outside speakers such as Richard Spencer<sup>11</sup> or Milo Yiannopoulos,<sup>12</sup> who engage

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<sup>6</sup> See, e.g., Candice L. Bledsoe et al., *Silence is Complicity: Why Every College Leader Should Know the History of Lynching*, CHANGE: THE MAG. OF HIGHER LEARNING 22 (2020).

<sup>7</sup> See WHITTINGTON, *supra* note 1, *passim*; Joseph W. Yockey, *Bias Response on Campus*, 48 J.L. & EDUC. 1 (2019); Howard Schweber & Eric Segall, *Free Speech on Campus: A New Forum Based Approach*, L., CULTURE, & THE HUMANS. (2020); William E. Thro, *Follow the Truth Wherever it May Lead: The Supreme Court’s Truths and Myths of Academic Freedom*, 45 U. DAYTON L. REV. 261 (2020); Jamal Greene, *Constitutional Moral Hazard and Campus Speech*, 61 WM. & MARY L. REV. 223 (2019); Mary Anne Franks, *The Miseducation of Free Speech*, 105 VA. L. REV. ONLINE 218 (2019).

<sup>8</sup> Alan E. Brownstein, *Regulating Hate Speech at Public Universities: Are First Amendment Values Functionally Incompatible with Equal Protection Principles?*, 39 BUFF. L. REV. 1 (1991); Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); Gregory P. Magarian, *When Audiences Object: Free Speech and Campus Speaker Protests*, 90 U. COLO. L. REV. 551 (2019).

<sup>9</sup> Angelina E. Castagno, *“I Don’t Want To Hear That!”: Legitimizing Whiteness Through Silence in Schools*, 39 ANTHROPOLOGY & EDUC. Q. 314 (2008).

<sup>10</sup> MEGAN BOLER, DEMOCRATIC DIALOGUE IN EDUCATION: TROUBLING SPEECH, DISTURBING SILENCE §240 (2004).

<sup>11</sup> Nada Tawfik, *Richard Spencer Speech at Florida Campus Sparks Mass Protest*, BBC NEWS (Oct. 20, 2017), <https://www.bbc.com/news/world-us-canada-41683713>; Brett Barrouquere, *Richard Spencer’s Campus Tour Ends With a Whimper as Last Lawsuit is Quietly Settled*, S. POVERTY L. CTR. BLOG (Apr. 25, 2018), <https://www.splcenter.org/hatewatch/2018/04/25/richard-spencers-campus-tour-ends-whimper-last-lawsuit-quietly-settled>; David Smith, *Richard Spencer Acted Like Gang Boss, Charlottesville Conspiracy Trial Hears*, THE GUARDIAN (May 25, 2018), <https://www.theguardian.com/us-news/2018/may/24/richard-spencer-charlottesville-conspiracy-trial>.

<sup>12</sup> Doug Lederman & Scott Jaschik, *Amid Violence, Yiannopoulos Speech at Berkeley Cancelled*, INSIDE HIGHER EDUC. (Feb. 2, 2017), <https://www.insidehighered.com/news/2017/02/02/violent-protests-visiting-mob-lead-berkeley-cancel-speech-milo-yiannopoulos>; James McWilliams, *How Higher Education is Evolving Its Thinking Around Controversial Campus Speakers*, PAC.

in systemically discriminatory speech (which we define below in Part I.A.). We propose how university leaders ought to respond to these types of controversies if they seek to let the hate speech proceed, consistent with the First Amendment, and yet mitigate the harms it incurs. Specifically, we explain under what circumstances counterspeech is effective in achieving these aims.

We argue that university responses matter, and that all counterspeech is not the same. We contend that when outside speakers engage in systemically discriminatory speech, university leaders can seek to disrupt the harms of that speech and try to prevent the speech from altering campus norms, by responding to it in a robust, unequivocal manner. A university leader's limited, indirect response to the substantive issues raised by the systemically discriminatory speech lacks the ability that robust counterspeech has to disrupt its harms and prevent norms from being adjusted. As a result, a limited response is functionally equivalent to no response, insofar as it accommodates the injustices carried out by the speakers. Thus, it is important for universities to pay attention not only to the fact of responding to such events, but also to the manner in which they respond with counterspeech.

In Part I, we explain the theoretical framework — speech act theory — we use to understand the types of speech with which we are concerned — systemically discriminatory speech and counterspeech. Although speech act theory grew out of philosophy of language, scholars across disciplines have contributed to its evolution, and thus our framework integrates scholarly contributions from philosophy, political science, and law to develop an innovative theoretical and analytical framework. In Part II, we outline recent events on American college campuses, establishing the context in which recent controversies have occurred. Finally, in Part III, we illustrate the significance and relevance of our theoretical and analytical framework by applying it to events featuring outside speakers on university campuses. In the primary event we focus on, the university's sustained, explicit counterspeech positioned the outside speaker's views in opposition to the university's values, and this invited the university community to affirmatively opt in to different views than the speaker advocated. While we do not claim that a response like this will always, necessarily, or entirely undo the harms of systemically discriminatory speech, we do contend that this type of counterspeech can do two things. First, it can challenge the implied authority of the systemically discriminatory speech. Second, and perhaps more importantly, it can seek to prevent the systemically discriminatory speech from resetting the conversation in such a way that such speech becomes normalized. In doing the latter, robust counterspeech by university leaders prevents marginalized and minoritized students from being further excluded from the free speech

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STANDARD (Jan. 16, 2019), <https://psmag.com/education/how-higher-education-is-evolving-its-thinking-around-controversial-campus-speakers>.

environment and thus protects and ultimately enhances free speech on university campuses.

## I. SYSTEMICALLY DISCRIMINATORY SPEECH AND EFFECTIVE COUNTERSPEECH

In this Article, we focus on speech that is commonly described as “hate speech,”<sup>13</sup> and has also been described as “offensive public speech,”<sup>14</sup> “discriminatory verbal harassment,”<sup>15</sup> “assaultive speech,”<sup>16</sup> and “toxic” speech.<sup>17</sup> In the United States, the First Amendment protects this type of speech because it is a core requisite for political discourse.<sup>18</sup> Accordingly, we do not contend here that such speech should be restricted. Rather we theorize and analyze the effectiveness of counterspeech in response to it. This Part first engages the question of how speech can constitute and cause harm before discussing methods for mitigating that harm.

### *A. How and Why Speech Can Harm*

Many regard discriminatory speech as harmful to a sufficient degree to warrant consideration alongside other, comparable harms. Legal scholar Charles R. Lawrence III, describes assaultive racist speech as “like receiving a slap in the face.”<sup>19</sup> He argues that targets experience this as a “blow” which, once struck, reduces the likelihood of dialogue and therefore engagement in free speech.<sup>20</sup> Philosopher Susan Brison contends that “verbal assaults” can lead to “psychic wounds” that become long term injuries.<sup>21</sup> Philosopher Lynne Tirrell argues that “toxic speech” is “deeply derogatory” speech with cumulative effects that threatens its’ targets “well-being and even the very lives” of its targets.<sup>22</sup> She describes it as “deeply derogatory” speech that, over time, accumulates in its effects like a slow acting poison.<sup>22</sup> An account of hate speech in the literature, which

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<sup>13</sup> ALEXANDER BROWN, *HATE SPEECH LAW: A PHILOSOPHICAL EXAMINATION* (2015).

<sup>14</sup> Laura B. Nielsen, *Power in Public: Reactions, Responses, and Resistance to Offensive Public Speech*, in *SPEECH & HARM: CONTROVERSIES OVER FREE SPEECH* 148 (Ishani Maitra & Mary Kate McGowan eds. 2012).

<sup>15</sup> Lawrence, *supra* note 8, at 450.

<sup>16</sup> Susan Brison, *Speech, Harm, and the Mind-Body Problem in First Amendment Jurisprudence*, 4 *LEGAL THEORY* 39 (1998).

<sup>17</sup> Tirrell, *supra* note 4, at 2433.

<sup>18</sup> James Weinstein, *Cyber Harassment and Free Speech: Drawing the Line Online*, in *FREE SPEECH IN THE DIGITAL AGE* 52 (Susan J. Brison & Katharine Gelber eds. 2019).

<sup>19</sup> Lawrence, *supra* note 8, at 452.

<sup>20</sup> *Id.*

<sup>21</sup> Brison, *supra* note 16, at 39.

<sup>22</sup> Tirrell, *supra* note 4, at 2433.

<sup>22</sup> Tirrell, *supra* note 4, at 2433 (“Focusing on exit moves emphasizes the...power of deeply derogatory terms”).

we will apply here and discuss in detail below, is that of systemically discriminatory speech.<sup>23</sup> We have selected this approach because it acknowledges the harms of a narrowly defined type of speech, and because it coheres with the framework of speech act theory that we use to ground our argument and analysis.

It is well-known<sup>24</sup> that speech act theory (developed by philosopher of language J. L. Austin) recognizes that speech can *do* things.<sup>25</sup> Speech can acquit, name, marry, permit, consent, and more, which means it can *do* things in the world, subject to the conditions of the speech being felicitous (to use Austin's term), and therefore enabling it to achieve its meaning and force.<sup>26</sup> In the 1970s, philosopher of language David Lewis built on Austin's work to examine the role of the hearer in contributing to the conditions within which the meaning and force of a speech act are achieved. Lewis argued that if something is said that requires the listener to presuppose other elements for the statement to make sense, those elements come into existence in the conversation.<sup>27</sup> He calls these "rules of accommodation," and they mean that the acceptability of what is said depends on the history of the conversation, and on "mental representations" interpolated into the conversation impliedly or through assumptions on the part of hearers.<sup>28</sup> The rules of a conversation are dynamic and there is a tendency for them to evolve "to make whatever occurs count as correct play."<sup>29</sup> Importantly, "conversation" is not limited to a specific exchange between two individuals, but also includes a less well-defined, multi-party, ongoing discourse.

Speech act theorists have applied these perspectives to the idea that speech can harm. Predominantly preoccupied with racist and misogynist speech, they have argued that some types of speech can harm both *constitutively* and *causally*. Philosopher Rae Langton's introduction of a feminist lens to speech act theory illuminated group-based power dynamics

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<sup>23</sup> Katharine Gelber, *Differentiating Hate Speech: A Systemic Discrimination Approach*, 24 CRITICAL REV. INT'L. SOC. & POL. PHIL. 384, 393 (2019) (explaining the rationale for the "systemic discrimination approach").

<sup>24</sup> See generally SPEECH AND HARM: CONTROVERSIES OVER FREE SPEECH (Ishani Maitra & Mary Kate McGowan eds., 2012).

<sup>25</sup> J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 6 (1st ed. 1962) ("To utter the sentence is not to describe my doing...it is to do it."); J. L. Austin, *Performatives Utterances*, in THE SEMANTICS-PRAGMATICS BOUNDARY IN PHILOSOPHY 21 (Maite Ezcurdia & Robert Stainton eds., 2013); Daniel W. Harris et al., *Speech Acts: The Contemporary Theoretical Landscape*, in NEW WORK ON SPEECH ACTS 5–7 (Daniel W. Harris et al., eds., 2018) (discussing how H.P. Grice's simultaneous work developed many of the same ideas and was later integrated into speech act theory).

<sup>26</sup> Austin, *supra* note 25, at 14 (discussing the "doctrine of infelicities").

<sup>27</sup> David Lewis, *Scorekeeping in a Language Game*, 8 J. PHIL. LOG. 339, 340 (1979).

<sup>28</sup> *Id.* at 347.

<sup>29</sup> *Id.*

within and around speech acts.<sup>30</sup> Langton argued that speech can subordinate, rank as inferior, and disempower its targets,<sup>31</sup> and that these are constitutive harms that occur in the saying of the speech. Such speech can also causally harm by leading to discrete acts of discrimination or violence, physiological harms such as anxiety or PTSD,<sup>32</sup> social harms such as isolation, or democratic harms by excluding targets from public discourse.<sup>33</sup> Even where a speaker directs an utterance at an individual, its harms are experienced collectively (by the group to which the target is perceived to belong) and cumulatively over time.<sup>34</sup> For the purposes of our argument, we accept the premise that harms can result from this narrowly conceived category of speech.

This premise is, of course, contested. For example, one of its core claims is that hate speech can disempower its targets by “silencing” them, rendering their speech ineffective and “unspeakable.”<sup>35</sup> Philosopher of law Ronald Dworkin argued this claim was philosophically unconvincing.<sup>36</sup> He suggested that claims to causal harms were implausible either because the evidence was weak, or that if harms were caused this still did not

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<sup>30</sup> Rae Langton, The Oxford University Locke Lectures: How to Undo Things With Words (June 3, 2015); *See generally* Rae Langton, *The Authority of Hate Speech*, in OXFORD STUDIES IN PHILOSOPHY OF LAW 123 (John Gardner, et al. eds., 2018) [hereinafter *The Authority of Hate Speech*].

<sup>31</sup> Rae Langton, *Whose Right? Ronald Dworkin, Women and Pornographers*, 19 PHIL. & PUB. AFF. 311, 350–53 (1990) (discussing how some forms of pornographic speech play a role in “perpetuating the subordinate status of women”) [hereinafter *Whose Right?*]; Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293 (1993) [hereinafter *Speech Acts and Unspeakable Acts*]; Mary Kate McGowan, *On Pornography: MacKinnon, Speech Acts and “False” Construction*, 20 HYPATIA 22 (2005); Ishani Maitra, *Silencing Speech*, 39 CAN. J. PHIL. 389 (2009).

<sup>32</sup> Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH & THE FIRST AMENDMENT 4 (Mari J. Matsuda, et al. eds. 1993); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989); Jennifer Hornsby, *Speech Acts & Pornography*, 10 WOMEN’S PHIL. REV. 38 (1993); SUSAN DWYER, THE PROBLEM OF PORNOGRAPHY (1995).

<sup>33</sup> Katharine Gelber, *Freedom of Political Speech, Hate Speech and the Argument from Democracy: The Transformative Contribution of Capabilities Theory*, 9 CONTEMP. POL. THEORY 304 (2010); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011); JEREMY WALDRON, THE HARM IN HATE SPEECH (2012).

<sup>34</sup> Katharine Gelber & Luke McNamara, *Evidencing the Harms of Hate Speech*, 22 SOC. IDENTITIES 324 (2016).

<sup>35</sup> Langton, *Speech Acts and Unspeakable Acts*, *supra* note 31.

<sup>36</sup> Ronald Dworkin, *Women and Pornography*, 36 N. Y. REV. BOOKS, 40 (1993); Ronald Dworkin, *Two Concepts of Liberty*, in ISAIAH BERLIN: A CELEBRATION 104 (Edna Ullman-Margalit & Avishai Margalit eds., 1991).



provide an adequate justification for restricting speech.<sup>37</sup> However, philosophers Jennifer Hornsby and Rae Langton suggested that the way in which Dworkin approached the debate exposed his misunderstanding of the nature of the claim, and that he was committed to a conception of speech which prevented him from recognizing its harms.<sup>38</sup> More recently, legal scholar Eric Heinze has described the claim of causal harms as “purely rhetorical empiricism.”<sup>39</sup> Yet, Heinze overlooks considerable scientific and community literature evidencing harmful physiological effects on targets, as well as evidence from targets themselves. Heinze describes the claim of constitutive harms as “febrile theorizing” and suggests it underpins a view that almost all speech should be regulated.<sup>40</sup> Our argument makes it clear that we do not suggest that almost all speech should be regulated — in fact, we do not discuss the regulation of speech at all. Therefore, while we acknowledge this contestation, the position we take in this Article — acknowledging that speech can constitute and cause harm — is well supported in the literature; leads to a range of possible responses by the state, organizations, and individuals; and does not automatically require speech restrictions.

Political theorist and co-author of this Article, Katharine Gelber, has articulated the conditions that are required in order for speech to be *capable* of harming its targets.<sup>41</sup> This contribution builds on arguments by philosophers Ishani Maitra,<sup>42</sup> Mary Kate McGowan,<sup>43</sup> and Rae Langton<sup>44</sup> which contend that for speech to be capable of harming, a speaker must have authority. This authority may be conferred formally, informally, even unintentionally as a product of a social context infused with oppression. Gelber concluded that in order to be capable of harm, an utterance needs to be: 1) expressed in public,<sup>45</sup> 2) directed at a group or member of a group that is identifiable as being subjected to systemic discrimination in the context in which the speech occurs, and 3) an “act of subordination that interpolates structural inequality into the context in which the speech takes

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<sup>37</sup> *Id.* at 104.

<sup>38</sup> Jennifer Hornsby & Rae Langton, *Free Speech and Illocution*, 4 LEGAL THEORY 21 (1998); Jennifer Hornsby, *Disempowered Speech*, 23 PHIL. TOPICS 127 (1995).

<sup>39</sup> ERIC HEINZE, HATE SPEECH AND DEMOCRATIC CITIZENSHIP 126 (2016).

<sup>40</sup> *Id.* at 75.

<sup>41</sup> Gelber, *supra* note 23.

<sup>42</sup> Ishani Maitra, *Subordinating Speech*, in SPEECH AND HARM: CONTROVERSIES OVER FREE SPEECH 94 (Ishani Maitra & Mary Kate McGowan eds., 2012).

<sup>43</sup> Mary Kate McGowan, *Oppressive Speech*, 87 AUSTRALASIAN J. PHIL. 389 (2009).

<sup>44</sup> Langton, *The Authority of Hate Speech*, *supra* note 30.

<sup>45</sup> *Public*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/public> (last visited Oct. 19, 2020) (in this instance, “public” refers to speech which is expressed in an “open” manner and thus is “exposed to general view”).

place, and in so doing ranks targets as inferior, legitimates discriminatory behavior against them, and deprives them of powers.”<sup>46</sup>

Gelber’s prior work thus elaborates Langton’s and West’s insight that “the moves one can make in a language game can depend upon one’s position of relative power in that language game.”<sup>47</sup> Additionally, it demonstrates how an utterance can serve as a strategic move that “reinforces and perpetuates extant systemic discrimination against a marginalized minority.”<sup>48</sup> In such circumstances, a speaker can have “the capacity for their speech act to count as an act of oppression by virtue of it having taken place in a society that is imbued with that systemic discrimination.”<sup>49</sup> Thus, the connection between a speaker’s authority to harm and their targets’ vulnerability to harm is the presence of systemic discrimination in the context in which the speech act is uttered.

This conclusion limits the category of systemically discriminatory speech to targets for whom it is possible to establish systemic discrimination in the relevant context. This is, of course, also contested. Both media coverage and scholarly work attest to the existence of systemic racism against Blacks and migrants of color, sexism and misogyny, and discrimination against LGBTQIA+ people in the United States.<sup>50</sup> This is important because it underpins our differentiation between a narrowly conceived category of speech that is capable of harming in these ways, and speech that is not.

### B. Responding to Harmful Speech

At this point, the pertinent question is: How might all of this intersect with silence on the part of a hearer, and further intersect with the idea of counterspeech? Recall Lewis’ admonitions that the behavior of hearers in response to a speech act can set the rules of the game; the rules are dynamic; and hearers can “accommodate” unspoken rules of the game through acquiescence. Lewis contended that in conversation, a failure to

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<sup>46</sup> Gelber, *supra* note 23, at 407.

<sup>47</sup> Rae Langton & Caroline West, *Scorekeeping in a Pornographic Language Game*, 77 AUSTRALASIAN J. PHIL. 303, 313 (1999).

<sup>48</sup> Gelber, *supra* note 23, at 402.

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1<sup>st</sup> ed. 1998); DENNIS ALTMAN, *HOMOSEXUAL OPPRESSION AND LIBERATION* (2<sup>nd</sup> ed. 1993); CORNEL WEST, *RACE MATTERS* (2<sup>nd</sup> ed. 2002); ARUN KUNDNANI, *THE END OF TOLERANCE: RACISM IN 21<sup>ST</sup> CENTURY BRITAIN* (2007); Hazel Conley & Margaret Page, *Revisiting Jewson and Mason: The Politics of Gender Equality in UK Local Government in a Cold Climate*, 24 GENDER, WORK & ORG. 7 (2016). We are not convinced by arguments that men as a group, or white people as a group, face systemic discrimination in the United States as these arguments lack sound evidence. *But see* PAUL NATHANSON & KATHARINE YOUNG, *LEGALIZING MISANDRY: FROM PUBLIC SHAME TO SYSTEMIC DISCRIMINATION AGAINST MEN* (2006).

affirm or object to a speaker's assertions constitutes an "accommodation" of a speaker's position,<sup>51</sup> and thus creates a default adjustment in what counts as fair play.<sup>52</sup> This means that when a speaker's assertion is accommodated through a listener's silence, this changes what is considered true or acceptable going forward. The new assertion is more legitimate from that point on — even if the acceptability of the assertion was uncertain until it was spoken. Thus, a hearer's silence can — and often does — change the score because it changes the rules of the game.

Langton has connected the idea of silence with that of authority, showing that one can gain authority through accommodation.<sup>53</sup> Langton has theorized that a hearer in the language game may accommodate a speaker's assertion of authority through their silence or acquiescence. Where speakers remain silent they grant authority to the speaker for their speech to count as true, and for an audience to accept it. When individual bystanders fail to block a speaker's assertion, they give it, "to a certain degree, a 'licensed practical authority.'"<sup>54</sup> Taken together, these ideas explain why, in Langton's words, "powerful people can generally do more, say more, and have their speech count for more than the powerless."<sup>55</sup>

A hearer's silence in response to harmful speech can be understood as accommodating the injustice that the speech constituted and caused by allowing it to count in ways that it may not have, had hearers spoken up in response. This is primarily because it accommodates the legitimacy of the speech act — the ranking as inferior, the subordination, and the deprivation of the targets' powers. It concedes that to do these things is acceptable in a way that interpolates this suggestion into the resulting conversation. As a result, the rules of the game change and the harmful speech becomes normalized. Future speech reflects the changed social norm and thus even before harmful speech is spoken it can count as fair play. When hearers with greater authority than individual bystanders remain silent, (for example, silence by institutions) they grant the speaker "derived practical authority."<sup>56</sup> This means that the speaker implicitly assumes the legitimacy and validity of the powerful hearer's authority in the situation. As Langton contends, the state's failure to block harmful speech can actually grant additional force to the speech.<sup>57</sup> Thus, when a hearer fails to respond to harmful speech, the hearer subsidizes injustice.<sup>58</sup>

This analysis, therefore, suggests that counterspeech is vital. How might counterspeech disrupt the injustice that systemically discriminatory speech attempts to create and perpetuate? Despite the ubiquity of the idea

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<sup>51</sup> Lewis, *supra* note 27, at 172.

<sup>52</sup> *Id.* at 173.

<sup>53</sup> Langton & West, *supra* note 47, at 318.

<sup>54</sup> Langton, *supra* note 44, at 133.

<sup>55</sup> Langton, *Whose Right*, *supra* note 31, at 299.

<sup>56</sup> *Id.* at 132.

<sup>57</sup> *Id.* at 134.

<sup>58</sup> Maitra, *supra* note 42.

that counterspeech is an appropriate response, it has to date been relatively under-theorized. The idea of counterspeech is vulnerable to a range of criticisms, including that it places an unfair burden on targets of harmful speech to respond; that it is not always realistic to ask targets to engage in counterspeech when the speech at issue has made their counterspeech more difficult; that most counterspeech advocates assume a level playing field for speech interactions; and that engaging in counterspeech can place targets at risk of further harm.<sup>59</sup>

However, focusing on an institution's counterspeech does not place the burden of responding to systemically discriminatory speech on the targets. Rather, university leaders who are well resourced to respond carry this responsibility. It does not, therefore, place targets at further risk of harm, or ask targets to engage in counterspeech in spite of the harms they have already suffered. In addition to overcoming these difficulties, our focus on university leaders' responses is useful for three other reasons. First, it coheres with universities' broader mission, which political philosopher and education scholar Sigal Ben Porath describes as "serving a diverse population alongside pursuing truth through honest and open-minded research and teaching."<sup>60</sup> Engaging with, rather than ignoring, speech that potentially challenges that mission therefore seems warranted. Second, universities are elite institutions,<sup>61</sup> dedicated to the creation of knowledge and the promotion of conditions of learning.<sup>62</sup> This suggests that universities should take seriously the potential risk some speech poses to their mission, and respond appropriately. Third, linguist Teun van Dijk has defined "elites" as the few members of a group with "a special role in planning, decision-making and control over the relations and processes of the enactment of power" who have, because of their position, "special access to discourse."<sup>63</sup> This special access creates social power.<sup>64</sup> Universities are elite entities. This means that universities that ignore a speaker's hate speech or fail to denounce it give the speech a "derived practical authority" which is even greater than the authority individual bystanders can confer. It also means universities' responses can have a significant impact. The most powerful representatives of a university are its senior leaders.

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<sup>59</sup> Katharine Gelber, *Speaking Back*, in THE OXFORD HANDBOOK ON FREEDOM OF SPEECH 249 (Adrienne Stone & Frederick Schauer eds., 2021).

<sup>60</sup> SIGAL R. BEN-PORATH, FREE SPEECH ON CAMPUS 45 (2017).

<sup>61</sup> B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 DUKE L. J. 705 (2010).

<sup>62</sup> WHITTINGTON, *supra* note 1, at 15.

<sup>63</sup> Teun A. Van Dijk, *Principles of Critical Discourse Analysis*, 4 DISCOURSE & SOC'Y 255 (1993).

<sup>64</sup> Crispin Thurlow & Adam Jaworski, *Introducing Elite Discourse: the Rhetorics of Status, Privilege, and Power*, 27 SOC. SEM. 234 (2017).

Their voices, individually and as an embodiment of the institution, carry a great deal of weight.<sup>65</sup>

Furthermore, new theoretical work posits conceptions of counterspeech that seek to overcome deficits in earlier theorizing. Langton has recently argued that a hearer may engage in counterspeech by “blocking” an assertion. Importantly, “blocking” does not mean silencing the speech. Rather, it means denying it the authority to accomplish the result it might otherwise have. Challenging the authority of the speaker, which is often assumed or implied, can undo the presupposition that a speaker has the authority to say what they are saying.<sup>66</sup>

McGowan also contributes to filling the gaps in previous theoretical work. She has theorized an approach to counterspeech that recognizes that the conversations in which we participate can enact inegalitarian norms. She argues that silence “can be causally responsible for problematic content being added to the common ground,” and that traditional views of counterspeech are vulnerable to the criticisms we summarize here.<sup>67</sup> She argues that counterspeech “cannot simply reverse all of the effects of the speech to which it responds” because “some effects cannot be undone.”<sup>68</sup> She advocates a “positive” view of counterspeech in which hearers respond to the “(hierarchical) norms functioning in the background” of the conversation.<sup>69</sup> Addressing the norms embodied in the speech, rather than its content, enables listeners to challenge the uptake of the harmful speech.

A further contribution to this genre, by political theorist Maxime Lepoutre, also advocates a “positive” type of counterspeech that “affirms a correct vision of the world that is inconsistent with the falsehoods at hand.”<sup>70</sup> Lepoutre argues this kind of counterspeech can occur before an incident of hate speech, in which case it can serve to inoculate the community by undermining the assumed authority of hate speakers.<sup>71</sup>

An approach to counterspeech informed by this more recent scholarship, and by speech act theory, suggests that universities, as elite institutions, face choices about accommodating or rejecting the legitimacy of a systemically discriminatory message; granting or attempting to deny such speech acceptability; and normalizing or refusing to normalize it as simply another point of view. Universities are well placed to engage in a type of counterspeech that seeks to block the assumed or implied authority of a

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<sup>65</sup> Alexandra Jaffe, *Differentiated Eliteness: Socialization for Academic Leadership*, 27 SOC. SEM. 370 (2017).

<sup>66</sup> Langton, *supra* note 4.

<sup>67</sup> MARY KATE MCGOWAN, *Responding to Harmful Speech: The More Speech Response, Counterspeech, and the Complexity of Language Use*, in VOICING DISSENT: THE ETHICS AND EPISTEMOLOGY OF MAKING DISAGREEMENTS PUBLIC (Casey Johnson ed. 2018).

<sup>68</sup> *Id.* at 189.

<sup>69</sup> *Id.* at 191, 194.

<sup>70</sup> Lepoutre, *supra* note 4, at 167.

<sup>71</sup> *Id.* at 180.

hate speaker. They can deny the speaker derived practical authority and can challenge the norms embedded in the claims to deter their uptake in the conversations that follow. After discussing the context in which relevant events have occurred in Part II, we will apply this framework to prominent examples of systemically discriminatory speech on university campuses in Part III.

## II. ON-CAMPUS PROTESTS OF OUTSIDE SPEAKERS AND UNIVERSITY RESPONSES, 2016-2020

From 2016 through early 2020, American campuses were the site of protests about outside speakers.<sup>72</sup> Although free speech controversies on campus dimmed beginning during spring 2020 and continuing through 2021 due to the impact of the novel coronavirus pandemic (many institutions became partially or fully remote during different parts of this time), the roots of the tensions that erupted between 2016 and 2020 run deep. It is reasonable to assume that as campuses are able to return to increasingly more in-person classes and events, free speech controversies in one form or another will also reemerge.

There are three primary factors that contributed to our focus on the 2016–2020 time period. First, in 2015, six University of Chicago faculty — including an eminent free speech scholar — drafted a document that has become known as the “Chicago Principles” and was designed to articulate “the University’s overarching commitment to free, robust, and uninhibited debate and deliberation among all members of the University’s community.”<sup>73</sup> The Chicago Principles quickly gained traction across higher education.<sup>74</sup>

Second, this period was characterized by intense and polarizing public debates about equality and free speech, partially in the context of the 2016 and 2020 presidential elections; this discord impacted university

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<sup>72</sup> GALLUP INC., FREE EXPRESSION ON CAMPUS: A SURVEY OF U.S. COLLEGE STUDENTS AND U.S. ADULTS (2016), [https://knightfoundation.org/wp-content/uploads/2020/01/FreeSpeech\\_campus.pdf](https://knightfoundation.org/wp-content/uploads/2020/01/FreeSpeech_campus.pdf); Lorelle L. Espinosa & Jennifer R. Crandall, *Free Speech and Campus Inclusion: A Survey of College Presidents*, AM. COUNCIL ON EDUC. (Apr. 9, 2018), <https://www.higheredtoday.org/2018/04/09/free-speech-campus-inclusion-survey-college-presidents/>; PEN AMERICA, CHASM IN THE CLASSROOM: CAMPUS FREE SPEECH IN A DIVIDED AMERICA (2019), <https://pen.org/chasm-in-the-classroom-campus-free-speech-in-a-divided-america/>; Jack Dickey, *The Revolution on America’s Campuses*, TIME (May 31, 2016), <https://time.com/4347099/college-campus-protests/>.

<sup>73</sup> GEOFFREY STONE & EDWARD H. LEVI ET AL., REPORT ON THE COMMITTEE ON FREEDOM OF EXPRESSION I (2015), <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>.

<sup>74</sup> Sigal Ben Porath, *Against Endorsing the Chicago Principles*, INSIDE HIGHER ED. (Dec. 11, 2018), <https://www.insidehighered.com/views/2018/12/11/what-chicago-principles-miss-when-it-comes-free-speech-and-academic-freedom-opinion>.

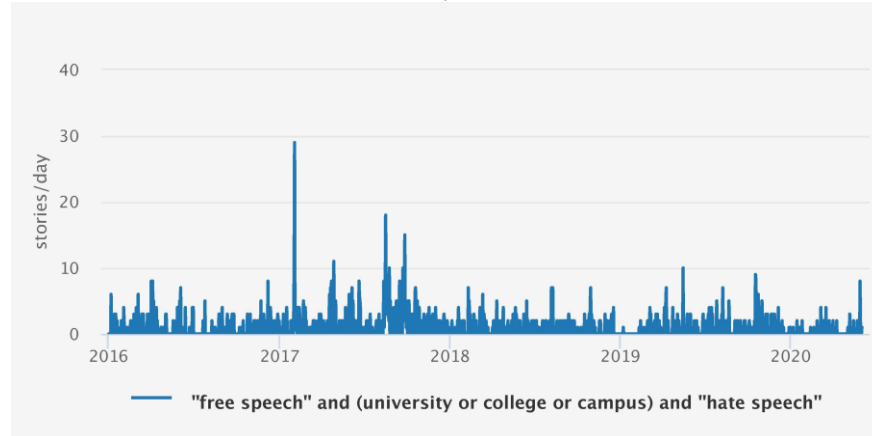
campuses. The Pew Research Center and others described the 2016 election as “one of the most divisive campaigns in recent memory,” with the divisiveness continuing after the election.<sup>75</sup> A search we conducted of the top US media sources<sup>76</sup> in MIT and Harvard’s media search engine “Media Cloud” indicates both that the issue of free speech on campus continued to be prominent (Figure 1) and that former President Trump engaged the issue of free speech on campus directly and often during his time in office. Of the 1572 media articles between January 1, 2016 and June 1, 2020 that included the terms “free speech” and “hate speech” as well as “campus,” “college,” or “university,” 31% include a reference to Trump.

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<sup>75</sup> J. Baxter Oliphant & Samantha Smith, *How Americans are Talking About Trump’s Election in 6 Charts*, PEW RSCH. CTR. (Dec. 22, 2016), <https://www.pewresearch.org/fact-tank/2016/12/22/how-americans-are-talking-about-trumps-election-in-6-charts/>; *On Eve of Inauguration, Americans Expect Nation’s Deep Political Divisions to Persist*, charts. PEW RSCH. CTR. (Jan. 19, 2016), <https://www.pewresearch.org/politics/2017/01/19/on-eve-of-inauguration-americans-expect-nations-deep-political-divisions-to-persist/>; David Boeri, *Was the Vitriol in Election 2016 Truly “Unprecedented”?* *History Argues the Point*, WBUR POLITICKER RADIO PROGRAM (Nov. 9, 2016), <https://www.wbur.org/politicker/2016/11/09/election-vitriol-history>; Vianney Gomez, *Democrats More Optimistic Than Republicans that Partisan Relations in Washington Will Improve in 2020*, PEW RSCH. CTR. (Dec. 1, 2020), <https://www.pewresearch.org/fact-tank/2020/12/01/democrats-more-optimistic-than-republicans-that-partisan-relations-in-washington-will-improve-in-2021/>; Katherine Schaeffer, *Far More Americans See “Very Strong” Partisan Conflicts Now Than in the Last Two Presidential Election Years*, PEW RSCH. CTR. (Mar. 4, 2020), <https://www.pewresearch.org/fact-tank/2020/03/04/far-more-americans-see-very-strong-partisan-conflicts-now-than-in-the-last-two-presidential-election-years/>.

<sup>76</sup> Media Cloud provides a list of the 87 media sources included in the database we used, “U.S. Top Sources 2018,” at the following link, which requires the creation of a free account and login: <https://sources.mediacloud.org/#/collections/186572516>.

FIGURE 1: FREQUENCY OF ARTICLES DISCUSSING FREE SPEECH, HATE SPEECH AND UNIVERSITIES IN THE UNITED STATES JANUARY 1, 2016 – JUNE 1, 2020.



The early 2017 spike in media coverage is one example of this dynamic. In February 2017, protests at the University of California opposing an event featuring Milo Yiannopoulos became violent, leading the university to cancel the event because it could not guarantee students' safety.<sup>77</sup> President Trump stated on Twitter that he would cut the University of California's federal funding in response.<sup>78</sup> Although the funding cut did not come to pass, in March 2019 Trump signed an executive order described as protecting free speech on campuses, although it had no immediate practical effect.<sup>79</sup> In January 2020, the Department of Education issued proposed regulations to implement the President's order; over two dozen leading higher education associations joined together to express serious concerns about the proposals. The Department of Education implemented the regulations in September 2020.<sup>80</sup>

<sup>77</sup> Lederman & Jaschik, *supra* note 12.

<sup>78</sup> Christopher Mele, *Berkeley Cancels Milo Yiannopoulos Speech*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/01/us/uc-berkeley-milo-yiannopoulos-protest.html>.

<sup>79</sup> Susan Svrluga, *Trump Signs Executive Order on Free Speech on College Campuses*, WASH. POST (Mar. 21, 2019), <https://www.washingtonpost.com/education/2019/03/21/trump-expected-sign-executive-order-free-speech/>; Katherine Mangan, *If There Is A Free Speech "Crisis" On Campus, PEN America Says Lawmakers Are Making It Worse*, CHRON. OF HIGHER EDUC. (Apr. 12, 2019), [https://www.chronicle.com/article/if-there-is-a-free-speech-crisis-on-campus-pen-america-says-lawmakers-are-making-it-worse/?cid2=gen\\_login\\_refresh&cid=gen\\_sign\\_in](https://www.chronicle.com/article/if-there-is-a-free-speech-crisis-on-campus-pen-america-says-lawmakers-are-making-it-worse/?cid2=gen_login_refresh&cid=gen_sign_in).

<sup>80</sup> Ted Mitchell et al., *Letter to Secretary DeVos Regarding Proposed Rule-making*, AM. COUNCIL ON EDUC. (June 10, 2020), <https://www.acenet.edu/Documents/Letter-Devos-T9-regulatory-relief-061020.pdf>; *U.S. Secretary of Education Betsy DeVos Delivers on Promise to Protect Free Inquiry and Religious Liberty*, EMERGENT NEWS (Oct. 31, 2020),



This public debate took place in the context of allegations regarding a rise in incidents of systemically discriminatory speech on university campuses.<sup>81</sup> The Anti-Defamation League reported that during the 2016-17 academic year, 165 incidents involving “white supremacist propaganda” occurred on college and university campuses, with the number rising to 292 during 2017-18, to 313 during 2018-19, and to 410 during fall semester 2019 alone.<sup>82</sup> These trends are consistent with an increasing incidence of hate speech and hate crimes in the United States.<sup>83</sup> The US Census Bureau reported that 99% of the 250,000 hate crimes recorded each year from 2004-2015 (only half of which were reported to law enforcement) “cited offenders’ use of hate language as evidence of a hate crime.”<sup>84</sup>

By mid-2020, sixteen American states (and two Canadian provinces) had enacted legislation about free speech on campus.<sup>85</sup> Leading higher education providers had associations develop extensive resources for university leaders.<sup>86</sup> PEN America, a nonprofit organization that advocates in

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<https://www.aacrao.org/edge/emergent-news/u.s.-secretary-of-education-delivers-on-promise-to-protect-free-inquiry-and-religious-liberty>.

<sup>81</sup> Espinosa & Crandall, *supra* note 72, at 1. Surveys of the frequency of student protests show a reduction when comparing the results from the 2016 Gallup survey, and an ACE survey.

<sup>82</sup> *White Supremacist Propaganda on U.S. College Campuses Rises 77 Percent Over Past Nine Months*, ANTI-DEFAMATION LEAGUE (June 28, 2018), <https://www.adl.org/news/press-releases/white-supremacist-propaganda-on-us-college-campuses-rises-77-percent-over-past>; *White Supremacists Double Down on Propaganda in 2019*, ANTI-DEFAMATION LEAGUE (2019), <https://www.adl.org/blog/white-supremacists-double-down-on-propaganda-in-2019>.

<sup>83</sup> John Eligon, *Hate Crimes Increase for the Third Consecutive Year*, *FBI Reports*, N.Y. TIMES (Nov. 13, 2018), <https://www.nytimes.com/2018/11/13/us/hate-crimes-fbi-2017.html>.

<sup>84</sup> U.S. DEP’T. OF JUST., OFF. OF JUST. PROGRAMS, HATE CRIME VICTIMIZATION 2004-2015: REPORT (2017), <https://bjs.ojp.gov/content/pub/pdf/hcv0415.pdf>.

<sup>85</sup> Neal Hutchens, *New Legislation May Make Free Speech on Campus Less Free*, THE CONVERSATION (June 28, 2017), <https://theconversation.com/new-legislation-may-make-free-speech-on-campus-less-free-77609>; Neal Hutchens, *Campus Free Speech Laws Being Enacted in Many States, But Some May Do More Harm Than Good*, THE CONVERSATION (Apr. 9, 2019), <https://theconversation.com/campus-free-speech-laws-being-enacted-in-many-states-but-some-may-do-more-harm-than-good-114551>; AMERICAN ASS’N OF UNIV. PROFESSORS, *CAMPUS FREE-SPEECH LEGISLATION: HISTORY, PROGRESS, AND PROBLEMS* (2018); Kristine L. Bowman, *University Speech and the First Amendment*, 99 NEB. L. REV. 896 (2021); Jamie Cameron, *Compelling Free Speech on Campus: A Free Speech Paradox*, 29 CONST. F. 1 (2020); Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299 (2021).

<sup>86</sup> PEN AMERICA, *supra* note 72, at 8; ASS’N OF GOVERNING BODS. OF UNIVS. AND COLLS., *FREEDOM OF SPEECH ON CAMPUS: GUIDELINES FOR*

support of free expression, had reported that controversies about outside speakers peaked in 2017, and speculated that “the intermittent earthquakes of the past few years have been replaced by a near constant—if less sensational—rumble.”<sup>87</sup>

Third, as our focus in this Article is to deepen understanding of university leaders’ responses to such controversies, a 2018 American Council on Education (“ACE”) survey of American college and university presidents is relevant. Eighty-eight percent of respondents reported that they “manage the tension between free speech and inclusion on campus” by making “clear, public statements that reinforce stated university values,” although they were not asked to indicate what the university values were.<sup>88</sup> Twelve percent of respondents did not report employing such statements.<sup>89</sup> The self-reported lack of a speech-based response from the university leaders is slightly greater at public universities (14%) than private (10%), with the difference being meaningful because public universities enroll roughly three times as many students as private institutions.<sup>90</sup> Thus,

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GOVERNING BOARDS AND INSTITUTIONAL LEADERS (2017), <https://www.pomona.edu/sites/default/files/public-dialogue-assoc-of-gov-boards-free-speech-on-campus-white-paper.pdf>; GALLUP INC., FREE EXPRESSION ON CAMPUS: WHAT COLLEGE STUDENTS THINK ABOUT FIRST AMENDMENT ISSUES (2018), <https://knightfoundation.org/reports/free-expression-on-campus-what-college-students-think-about-first-amendment-issues/>; AM. COUNCIL ON EDUC., TO THE POINT: CAMPUS INCLUSION AND FREEDOM OF EXPRESSION: CONTROVERSIAL SPEAKERS (2018), <https://www.acenet.edu/Documents/To-The-Point-Controversial-Speakers.pdf>.

<sup>87</sup> PEN AMERICA, *supra* note 72, at 8.

<sup>88</sup> American Council on Education, *Free Speech and Campus Inclusion: A Survey of College Presidents* (Apr. 9, 2018), <https://www.higheredtoday.org/2018/04/09/free-speech-campus-inclusion-survey-college-presidents/>.

<sup>89</sup> *Id.*

<sup>90</sup> DIG. OF EDUC. STAT., *Table 105.30: Enrollment in elementary, secondary, and degree-granting postsecondary institutions, by level and control of institution: Selected years, 1869-70 through fall 2028* (2018), [https://nces.ed.gov/ipeds/data/digest/d18/tables/dt18\\_105.30.asp](https://nces.ed.gov/ipeds/data/digest/d18/tables/dt18_105.30.asp); At the same time, university presidents have been criticized for responses characterized as “sterile” or “tone deaf.” INSIDE HIGHER ED & GALLUP INC., 2017 SURVEY OF COMMUNITY COLLEGE PRESIDENTS (Scott Jaschik & Doug Lederman eds., 2017); R. Kirk Anderson, *Toward Thick Responsiveness: Engaging Identity-Based Student Protest Movements*, 90 J. HIGHER EDUC. 402 (2018); Margaret Hartmann, *MSU President Lou Anna Simon Resigns Amid Handling of Nassar Scandal*, N.Y. MAG. (Jan. 25, 2018), <https://nymag.com/intelligencer/2018/01/msu-president-lou-anna-simon-resigns-over-nassar-scandal.html>. We suspect a disconnect exists between how and whether college leaders respond, and how students expect or want them to respond. This is consistent with research documenting that about half to two-thirds of American university students are satisfied with “their campus’s administrative response to discrimination.” GALLUP INC., FREE EXPRESSION ON CAMPUS: A SURVEY OF U.S. COLLEGE STUDENTS AND U.S. ADULTS (2016).

in any given year between 2016 and early 2020, there were likely as many as two million students attending American colleges and universities where university presidents did not respond to these tensions in speech-based ways that reinforced institutional values.<sup>91</sup>

The ACE study and our extrapolation of its significance are consistent with emerging literature that examines university presidents' speech. For example, education scholar Benterah Morton and colleagues studied 32 university presidents' statements issued in response to the 2017 Charlottesville, Virginia riot (the study identified 81 institutions initially, but 49 institutions did not express a position).<sup>92</sup> Similarly, education scholars Eddie Cole and Shaun Harper studied university presidents' responses to 18 racial incidents on campuses between 2012 and 2015.<sup>93</sup> Both groups of researchers concluded that while most university presidents expressed support for diversity, equity, and inclusion — and even called for individuals to help create inclusive communities — few directly addressed the systemic racism that grounded the incidents to which the university presidents replied.<sup>94</sup>

### III. UNIVERSITY LEADERS' COUNTERSPEECH DURING ON-CAMPUS CONTROVERSIES

To illustrate how our normative framework for robust counterspeech would apply to a conflict on campus, this Part focuses on two prominent examples in which students and others called for a controversial outside speaker's event to be cancelled, but the speech nevertheless went ahead. This allowed us to use transcripts and media coverage as sources of data, including time for university leaders to respond. Additionally, we chose to study public universities because they are bound by First Amendment jurisprudence, whereas private universities are not.<sup>95</sup>

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<sup>91</sup> In May and June 2020, the prevalence and content of university leaders' responses to protests against police brutality and the killing of unarmed Black Americans seemed markedly different in frequency and content than university leaders' responses to other events. Lindsay McKenzie, *Words Matter for College Presidents, But So Will Actions*, INSIDE HIGHER EDUC. (June 8, 2020), <https://www.insidehighered.com/news/2020/06/08/searching-meaningful-response-college-leaders-killing-george-floyd>. Although these statements were not responsive to on-campus events, which is the context we engage in this article, we note that they form an important part of the evolving context, and suggest important areas of future research.

<sup>92</sup> Benterah C. Morton & Peggy M. Delmas et al., *No Place for Hatred: University Presidents' Responses to Charlottesville*, 43 J. HIGHER EDUC. POL'Y & MGMT 264 (2020).

<sup>93</sup> Eddie R. Cole & Shaun R. Harper, *Race and Rhetoric: An Analysis of College Presidents' Statements on Campus Racial Incidents*, 10 J. DIVERSITY HIGHER EDUC. 318 (2017).

<sup>94</sup> Morton & Delmas, *supra* note 92, at 267.

<sup>95</sup> WHITTINGTON, *supra* note 1, at 124.

### A. Blocking Systemically Discriminatory Speech

After summarizing a prominent free speech on campus conflict, we apply our theoretical and analytical framework to the event, thus illustrating the utility of our conceptual contribution.

#### 1. An Event at the University of Florida

We selected a Richard Spencer event at the University of Florida in October 2017. This unfolded over the course of two months, late August through late October, during which the university president regularly issued public statements in his official capacity.

Spencer spoke at the University of Florida on October 19, 2017. He was not invited by the university or a university group; rather, an external organization sought to rent space on campus for his event.<sup>96</sup> The university first received this request at the same time as Spencer's Unite the Right rally in Charlottesville, Virginia, was unfolding. That rally occurred on August 11-12, 2017, and led to 19 people being injured, one killed, and the Virginia Governor declaring a state of emergency.<sup>97</sup> On August 16, the University of Florida president announced the university would deny the space rental request due to significant safety concerns.<sup>98</sup>

After Spencer's organization secured a lawyer, the University of Florida agreed to let the event go forward and began working with local law enforcement to provide additional security at a cost of approximately half a million dollars.<sup>99</sup> The Florida Governor declared a state of emergency in advance of the event.<sup>100</sup> An online petition called for the event to be cancelled.<sup>101</sup> Protesters disrupted the indoor event itself with chants, although

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<sup>96</sup> Kent Fuchs, *Potential Speaker on Campus*, UNIV. OF FLA. (Aug. 12, 2017), <http://statements.ufl.edu/statements/2017/08/potential-speaker-on-campus.html>.

<sup>97</sup> Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), <https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/>.

<sup>98</sup> Kent Fuchs, *UF denies request for speaking event – Message from President Fuchs*, UNIV. OF FLA. (Aug. 16, 2017), <http://statements.ufl.edu/statements/2017/08/uf-denies-request-for-speaking-event---message-from-president-fuchs.html>.

<sup>99</sup> Claire McNeill, *UF security costs top \$500,000 for Richard Spencer's talk on white "separation,"* TAMPA BAY TIMES (Oct. 12, 2017), <https://www.tampabay.com/news/education/college/uf-security-costs-top-500000-for-richard-spencers-talk-on-white-separation/2340689/>.

<sup>100</sup> Laura Wamsley, *Florida's Governor Declares State Of Emergency Ahead Of Richard Spencer Speech*, NPR (Oct. 17, 2017), <https://www.npr.org/sections/thetwo-way/2017/10/17/558294630/floridas-governor-declares-state-of-emergency-ahead-of-richard-spencer-speech>.

<sup>101</sup> Paige Fry, *University of Florida to host white supremacist event, expects \$500,000 in security costs*, PALM BEACH POST (Oct. 16, 2017),

Spencer eventually answered audience questions.<sup>102</sup> Spencer's comments focused on his free speech rights and his white supremacist views. Classes proceeded as scheduled, although protests effectively consumed the campus.

## 2. Applying Our Framework

Applying our framework involves asking and answering three questions sequentially: (1) Whether the outside speaker's speech is systemically discriminatory, (2) Whether the university responded with counter-speech, and (3) Whether the counterspeech blocked the harms of the hate speech. In this part we apply our framework and conduct such an analysis.

*Is the outside speaker's speech systemically discriminatory?* The threshold question is whether Spencer's utterances are capable of harming in the manner outlined in Part I.A. Opposition to Spencer was stated to be due to his "white supremacy," "white nationalism," and "anti-Semitic" views.<sup>103</sup> He has openly declared his desire to create a "white ethno-state," a "homeland for white people" that would be segregated from people of color.<sup>104</sup> He contends it is impossible for people of different races to co-exist. His ex-wife has accused him of domestic violence, and of saying that "the only language women understand is violence."<sup>105</sup> He has used far-right tropes, such as declaring "Hail our people! Hail victory!" at a speech in Washington, DC.<sup>106</sup>

Spencer's views are explicitly exclusionary towards people of color, specifically Blacks, and support violence towards women. He has made these views known publicly in a context in which racism and sexism are systemically extant. His words attempt to subordinate Blacks and other

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<https://www.ajc.com/news/national/university-florida-host-white-supremacist-event-expects-500-000-security-costs/qioLdCfWXilJb08saxoXsJ/>.

<sup>102</sup> Ruptly, *LIVE: Alt-right Figure Richard Spencer Holds Speech at University of Florida Among Protestors*, YOUTUBE (Oct. 17, 2017), <https://www.youtube.com/watch?v=u2XvwcNSDmw>.

<sup>103</sup> *Tell University of Florida President and Trustees: Do not host Richard Spencer on our campus!*, UNITED FAC. OF FLA., <https://actionnetwork.org/forms/tell-university-of-florida-president-and-trustees-do-not-host-richard-spencer-on-our-campus>.

<sup>104</sup> Callum Borchers, *Is Richard Spencer a White Nationalist or a White Supremacist? It Depends on the News Source*, WASH. POST (Oct. 19, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/10/19/is-richard-spencer-a-white-nationalist-or-a-white-supremacist-it-depends-on-the-news-source/>.

<sup>105</sup> Lois Beckett, *White Nationalist Richard Spencer Accused of Physical Abuse by Wife*, THE GUARDIAN (Oct. 24, 2018), <https://www.theguardian.com/world/2018/oct/23/white-supremacist-richard-spencer-physical-abuse-divorce-filings>.

<sup>106</sup> Maya Oppenheim, *White Supremacist Richard Spencer "Banned from 26 European Countries"*, THE INDEPENDENT (Nov. 23, 2017), <https://www.independent.co.uk/news/world/americas/richard-spencer-ban-european-countries-alt-right-white-supremacist-neo-nazi-eu-a8071971.html>.

people of color, and women, by excluding them from, respectively, his vision of a good and functional society and his understanding of equality. He therefore ranks Blacks, other people of color, and women as inferior. Interestingly, he denies this component of his message.<sup>107</sup> However, this does not override the fact that, from the perspective of speech act theory, an utterance's meaning and force depend on its context. Here, it is clear that Spencer is interpolating inequality and inferiority on the grounds of race and gender, and legitimating discriminatory behavior (exclusion and violence) toward people of color (particularly Blacks), and women. Because this is systemically discriminatory speech, the next step is to analyze the university's response.

**Did the university respond with counterspeech?** The university president and the university issued several public statements. The president's statements made clear that he was speaking in his official capacity, as the voice of the institution. He issued five major statements between August and October.<sup>108</sup> His October 10 statement was recorded and distributed via YouTube, and his October 20 statement appeared in a regular column in the campus newspaper. He was active on social media, posting and sharing others' posts on Twitter about the event and the campus's response at least 40 times. He gave two interviews on October 19 that were distributed on social media.<sup>109</sup> Other senior leaders issued seven additional statements in September and October.<sup>110</sup>

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<sup>107</sup> Borchers, *supra* note 104.

<sup>108</sup> Fuchs, *supra* note 96; Fuchs, *supra* note 98; Kent Fuchs, *Update on potential speaker from President Fuchs*, UNIV. OF FLA. (Aug. 30, 2017), <http://statements.ufl.edu/statements/2017/08/update-on-potential-speaker-from-president-fuchs.html>; Kent Fuchs, *Shutting down Spencer's movement*, UNIV. OF FLA. (Oct. 20, 2017), <https://president.ufl.edu/communications/independent-florida-alligator-columns/columns/name-867656-en.html>.

<sup>109</sup> First Coast News, *UF President Dr. Kent Fuchs Speaks About Richard Spencer Event*, YOUTUBE (Oct. 19, 2017), <https://www.youtube.com/watch?v=rjCdpabNQrM>; Jackson McMillan, *President Fuchs Says Richard Spencer is a Jew-hating Racist Who Has No Place on Our Campus*, THE TAB (Oct. 19, 2017), <https://thetab.com/us/florida/2017/10/19/president-fuchs-richard-spencer-6676>.

<sup>110</sup> University of Florida, *UF Statement Regarding Latest Developments on National Policy Institute Request*, UNIV. OF FLA. (Sept. 1, 2017), <http://statements.ufl.edu/statements/2017/09/uf-statement-regarding-latest-developments-on-national-policy-institute-request.html> [hereinafter *UF Statement Regarding Latest Developments*]; University of Florida, *UF Statement Regarding Latest Development on National Policy Institute Request*, UNIV. OF FLA. (Sept. 7, 2017), <http://statements.ufl.edu/statements/2017/09/uf-statement-regarding-latest-development-on-national-policy-institute-request.html>; University of Florida, *Update on National Policy Institute Event*, UNIV. OF FLA. (Oct. 5, 2017), <http://statements.ufl.edu/statements/2017/10/update-on-national-policy-institute-event.html>; University of Florida, *Statement Regarding Gov. Scott's Declaration*, UNIV. OF FLA. (Oct. 16, 2017), <http://statements.ufl.edu/statements/2017/10/statement-regarding-gov-scotts-declaration.html>; Linda Stump-

The following excerpt from the university president's August 16, 2017 statement is representative of his responses: "I find the racist rhetoric of Richard Spencer and white nationalism repugnant and counter to everything the university and this nation stands for."<sup>111</sup> On October 10, the university president wrote his most detailed response to Spencer:

I ask that you not let Mr. Spencer's message of hate and racism go unchallenged. Speak up for your values and the values of our university. Make it clear that messages of hate on our campus are contrary to those values. Mr. Spencer's message is disproportionately hurtful to members of our Gator community who are targets of hate and violence simply because of their skin color, religion, culture, sexual orientation or beliefs. Those of us in the majority must speak up for those in the minority and make our voice of love and support heard.<sup>112</sup>

Statements from the university used similar language. On September 7, it stated: "UF deplors Spencer's and the National Policy Institute's rhetoric and views, which run counter to those of this institution. We also acknowledge that many of our students, faculty and staff are disproportionately impacted by their racism."<sup>113</sup>

Throughout the course of events, the university responded explicitly to Spencer's speech via statements from the university president, senior leaders, or the institution itself. As an elite institution, the university occupied a position more powerful than any individual bystander. Had the university been silent, its silence could have granted Spencer's speech derived practical authority, allowed it to count as fair play, and adjusted the norms going forward. In this situation, the university did not passively allow Spencer's speech to gain derived practical authority. The university's explicit responses constitute counterspeech, but the inquiry does not stop here.

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Kurnick, *Information Update for Richard Spencer Event*, UNIV. OF FLA. (Oct. 11, 2017), <http://statements.ufl.edu/statements/2017/10/information-update-for-richard-spencer-event.html>; Linda Stump-Kurnick, *UF Leadership Provides Update on Spencer Event*, UNIV. OF FLA. (Oct. 17, 2017), <http://statements.ufl.edu/statements/2017/10/uf-leadership-provides-update-on-spencer-event.html>; David W. Parrot, *Student Affairs Vice President Dave Parrot Informs Students About Spencer Event*, UNIV. OF FLA. (Oct. 13, 2017), <http://statements.ufl.edu/statements/2017/10/student-affairs-vice-president-dave-parrot-informs-students-about-spencer-event.html>.

<sup>111</sup> Fuchs, *supra* note 98.

<sup>112</sup> Kent Fuchs, *Statement from President Fuchs About Richard Spencer Appearance*, UNIV. OF FLA. (Oct. 10, 2017), <http://statements.ufl.edu/statements/2017/10/statement-from-president-fuchs-about-richard-spencer-appearance.html>.

<sup>113</sup> University of Florida, *UF Statement Regarding Latest Developments*, *supra* note 110.

***Did the counterspeech block the harm in the hate speech?*** Because not all forms of counterspeech are the same, it is important to analyze precisely how the university president's, and university's, speech acts functioned. To do this, we focus first on Langton's insights to ask whether the university's speech blocked the implied or assumed authority of the speaker, thus helping to prevent the immediate result of enacting systemic discrimination through subordinating, ranking, or depriving of powers. We then look to McGowan's articulation of positive counterspeech and ask whether the university's speech rejected the norms "functioning in the background" of the systemically discriminatory speech, thus helping to prevent the uptake of the norms and the resetting of what counts as fair play.<sup>114</sup>

As discussed above, the university leaders responded in substantive ways to the controversy. They made multiple, public, official statements on behalf of the university and ensured they were widely distributed. The university president in his official capacity and the university itself labeled Spencer's views as racist and acknowledged these views are not just another point of view with which to agree or disagree; they are discriminatory.<sup>115</sup> Furthermore, the statements condemned the racism underlying Spencer's views as "repugnant" and declared Spencer's views to be counter to the university's values and to an environment of knowledge creation and learning.<sup>116</sup> The university recognized that Spencer's speech harmed Blacks disproportionately. The university supported students and others on campus who are targets of systemically discriminatory speech, and the president called on others to join him in extending their support and challenging racism and other forms of discrimination.<sup>117</sup>

By using its elite power to reject Spencer's views, and speaking affirmatively about its values of inclusion, rejection of racism, and support for Black members of its community, the university directly challenged the legitimacy of Spencer's views. In the conversational game, the university's speech — especially in its unequivocal and repeated form — denied Spencer's message the implied authority it may have otherwise had, and thus attempted to block the harms of the speech. The university used its elite power to call out and explicitly reject the norms of racism and discrimination functioning in the background of Spencer's speech. By labeling white supremacist views as racist and encouraging the university community to oppose racism, the university refused to normalize discrimination. Instead of allowing Spencer's norms to gain traction, the university offered an alternative vision of an inclusive, anti-racist learning environment. This worked to prevent Spencer from resetting what counts as fair play going forward.

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<sup>114</sup> McGowan, *supra* note 4, at 194.

<sup>115</sup> See Fuchs, *supra* note 98; First Coast News, *supra* note 109; University of Florida, UF Statement Regarding Latest Developments, *supra* note 110.

<sup>116</sup> *Id.*

<sup>117</sup> Fuchs, *supra* note 108.



In sum, this example illustrates how a university can engage in effective counterspeech regarding on-campus events and thus refuse to subsidize injustice. On this occasion the university attempted to block the speaker's authority and reject the norms in his speech. Not all university leaders' counterspeech does this, however.

### *B. Accommodating Systemically Discriminatory Speech*

There are many ways in which university responses can accommodate, or fail to attempt to block, systemically discriminatory speech, even if their leaders intend otherwise. A 2016-2017 situation at the University of Colorado illustrates this. A student organization invited Milo Yiannopoulos to speak on campus. Some students called for the cancellation of the event, objecting to Yiannopoulos because of his "racist, sexist" views, and his comments about Islam and transgender people, all of which invoke, constitute, and perpetuate systemic discrimination.<sup>118</sup> University leaders issued two statements.<sup>119</sup> The university president and other leaders spoke in their personal capacity, not their official capacity. They criticized Yiannopoulos' comments for containing vitriol and personal attacks, and expressed their disagreement with his views. They described

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<sup>118</sup> Charles Wofford, *Uninvite Milo Yiannopoulos from speaking at CU Boulder!*, CHANGE.ORG (2016), <https://www.change.org/p/cu-boulder-chancellor-philip-distefano-uninvite-milo-yiannopolous-from-speaking-at-cu-boulder>. For example, following the murder of Muslims in Christchurch in 2019 Yiannopoulos described Islam as a "barbaric, alien religious culture." Shamim Adam, *Conservative Commentator Milo Yiannopoulos Not Allowed in Australia after New Zealand Mosque Shooting Comments*, TIME (Mar. 16, 2019), <https://time.com/5552976/milo-yiannopoulos-banned-australia/>. He has called feminism "cancer" and declared that "birth control makes women unattractive and crazy." Clark Mindock, *Milo Yiannopoulos Filmed Singing "America the Beautiful" While White Nationalists Gave Nazi Salutes*, THE INDEPENDENT (Oct. 7, 2017), <https://www.independent.co.uk/news/world/americas/milo-yiannopoulos-nazi-salutes-video-karaoke-richard-spencer-white-nationalists-karaoke-bar-a7987486.html>. He also suggested that women would be happy if society were to "uninvent the pill and the washing machine." He claims transgender people are psychiatrically disordered, that they are confused about their sexual identity, and that they are a predatory risk to women and children. Noah Michelson, *Here's a Fact-Check on Milo Yiannopoulos' Incendiary Claims About Trans People*, HUFFINGTON POST (Feb. 18, 2017), [https://www.huffpost.com/entry/milo-yiannopoulos-transgender-people-truth\\_n\\_58a84dcae4b07602ad551487](https://www.huffpost.com/entry/milo-yiannopoulos-transgender-people-truth_n_58a84dcae4b07602ad551487).

<sup>119</sup> Philip DiStefano, *Chancellor's Corner: Embracing free speech and listening to different viewpoints*, CU BOULDER TODAY (Dec. 1, 2016), <https://www.colorado.edu/today/2016/12/01/chancellors-corner-embracing-free-speech-and-listening-different-viewpoints>; Phillip DeStefano et al., *CU Chancellor Letter to Faculty Regarding Milo Yiannopoulos*, UNIV. OF COLO. (Dec. 14, 2016).

Yiannopoulos's comments as "uncomfortable" and "offensive" and suggested what was occurring was a difference of opinion.<sup>120</sup>

These leaders' objections were limited in various ways. Importantly, the leaders spoke as individuals rather than on behalf of the institution. Utilizing the institution's much greater authority and capacity to speak would have enhanced the statements' potential to block Yiannopoulos's implied authority. Additionally, the leaders' statements recognized that Yiannopoulos's speech may cause some hurt, but did not acknowledge its systemically discriminatory nature. A speech act theory-derived understanding of speech-based harms renders visible the substantive difference between speech that is merely "uncomfortable" and speech that harms — but the leaders' statements did not recognize this distinction. Further, the university president drew an equivalence between Yiannopoulos' views and those of other speakers by suggesting students should be exposed to "beliefs" with which they agree and disagree. Drawing an equivalence between the beliefs of Yiannopoulos and his critics accommodates and normalizes systemically discriminatory speech, rather than rejecting its normalization. As such, responses like this are unlikely to constitute effective counterspeech because they do not effectively block the speech, nor do they seek to reset the norms in a way that rejects the speech.

#### CONCLUSION

Over 90 years ago, Justice Brandeis famously wrote in *Whitney v. California* that "[i]f there be time to expose through discussion, the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."<sup>121</sup> Although this sentiment anchors both First Amendment jurisprudence and culture, scholars have largely neglected counterspeech as a concept. In this Article, we contribute to an emerging literature that seeks to remedy this oversight by contributing two important ideas.

First, we create a theoretical and analytical framework for analyzing counterspeech by synthesizing insights from multiple disciplines. We have argued that systemically discriminatory speech is harmful and that leaders' responses to this type of speech matter. When university leaders respond with silence, either literally or through an ineffective counterspeech response, their silence can subsidize injustice. When they respond with robust counterspeech, their speech can block the harm the systemically discriminatory speech constitutes and causes. We note, however, that even effective counterspeech does not ameliorate harm entirely. What it does do — importantly — is challenge the authority of the speech and help to prevent the uptake of the speech in the community in which it takes place. In so doing, it tries to prevent the systemically discriminatory speech from resetting the rules of the game in such a way that systemic discrimination

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<sup>120</sup> *Id.*

<sup>121</sup> *Whitney v. California*, 274 US 357 (1927) (Brandeis, J., concurring).

becomes normalized, and the rules of the game adjust to accommodate injustice in future. This theoretical and analytical framework may be generalizable to other situations in which elites and others engage in counter-speech.

Second, we have illustrated with precision how a university leader can attempt to block the implied authority of a hate speaker, block the norms contained in systemically discriminatory speech, and refuse to allow such speech to reset the norms of the conversation. We have also explained how, and why, universities' silence is not neutral, but rather allows the hate speech to shape the campus free speech environment. This illustrates why university leaders may want to, and arguably have a duty to, refute systemic discrimination when present on their campus: doing so reinforces both free speech *and* inclusion. Effective counterspeech can be considered part of how university leaders achieve the mission of the modern university which contains an increasingly diverse student population. This approach is robustly protective of the right to, and the exercise of, freedom of speech. Our argument is therefore ultimately speech-enhancing.

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