

Samantha Harris (00:00):

Hi, my name is Samantha Harris. I'm a partner at the law firm of Allen Harris Law, and I discovered when I started my own law firm that it's really easy to make partner at a law firm. If you start it yourself, you just get to appoint yourself a partner and it's great. But so I have a practice that focuses on free speech and due process at universities because I came to private practice from FIRE where I focused on those issues for many years. So most of my clients are students and faculty who are facing some kind of discipline, often for free speech related issues.

(00:30):

And our panel here today is going to be exploring how we can improve the climate for free speech at universities. We are primarily going to be talking about potential legal solutions, both judicial and legislative. But since I get to moderate this conversation today, I'm also going to be asking our panelists for their thoughts on what needs to happen outside of the legal system because I think that's an important piece of the puzzle too, that climate, and that's something that I heard the previous panelists alluding to.

(00:59):

Speaking from experience the courts can be a tremendous vehicle for enforcing the first amendment against colleges and universities. And we have panelists here today from both FIRE and Speech First two organizations that have done tremendous work challenging campus speech codes in court. But relying on the judicial system to enforce free speech rights does also have some major drawbacks. The first is the sheer length of time that it takes for a case to work its way through the courts. I often, when I'm explaining the flow of litigation to clients, I often describe it as hurry up and wait because you file a motion and then you'll wait... I just filed a motion, a facial challenge to a speech code, and we filed the motion. There's this flurry of briefing and now the judge just gets to take however long he wants to decide it. So we could wait four months, six months, a year, and discovery deadlines get extended.

(01:51):

And if like many of my clients, you've been fired in violation of the First Amendment and you've lost your income and your reputation, this waiting can feel like a lifetime. And then there's also the massive expense of litigation. There are great nonprofit organizations out there bringing First Amendment lawsuits on behalf of embattled faculty and students. But the reality is that the demand for free or low cost legal representation in these cases far out exceeds the supply. The statute under which First Amendment lawsuits are brought does allow for a successful plaintiff to recover attorney fees. But again, that's something that often happens years down the road. And even when you have a strong case, the outcome is deeply uncertain. Honestly, I also worry a lot that we're eventually going to lose the judiciary. When I see things like what happened at Stanford and realize that some of these law students are our future judges, I wonder how long robust First Amendment precedent can hold out against those who truly believe that free speech must take a backseat to diversity, equity, and inclusion concerns.

(02:53):

And actually, I was lucky enough to hear Brett Stevens speak the other day. He spoke at the annual gala for my kid's school and in his speech, he reminded me of that famous quote by Learned Hand about, "Liberty lies in the hearts of men, and when it dies there, no constitution or law can save it." And when I see things like what happened at Stanford, that's what comes to mind.

(03:13):

Now recently we've also seen a lot of legislative pushback against campus DEI efforts. These DEI efforts often violate not only the free speech rights of students and faculty, but also their freedom of

conscience. Increasingly, candidates for faculty positions are required to essentially swear fealty to a particular view of DEI in order to even be considered for jobs and faculty who dare to present views that conflict with this campus orthodoxy are subject to long and intrusive investigations and are often sanctioned. Yet sometimes the legislation offered to fix this free speech problem can itself create other free speech problems when it tries, for example, to ban the discussion of certain topics rather than to ensure that all topics are able to be discussed. And I think if the conservative movement in particular is seen as promoting legislation that violates free speech rights, then we lose some credibility when we complain about our own free speech rights being violated. So I think this is an area where we have to tread cautiously and with balance.

[\(04:13\)](#):

And then there's the thing that can't be fixed by the courts or the legislature, and that's the culture. My own anecdotal sense right now is that a majority of people on campus have been cowed into silence by a minority of people who hold what really are fairly marginal political views. More than anything, I see faculty affected by this because spineless administrators are so terrified of being labeled as racist or sexist or anything phobic that they've ceased to play any gate keeping role whatsoever. When it comes to student complaints against faculty. At many institutions, if a student complains there's an investigation period, there's no one who has the guts to tell a student, "No, we're not going to investigate your professor for what they said in the classroom because that's protected by academic freedom." And as a result, faculty are terrified.

[\(05:01\)](#):

When I started my practice a few years ago, I expected actually that most of my clients would be students, but they aren't. They're faculty. And that's been something that has been a surprise to me, but I also think it's very telling. So anyway, now it's time for me to turn this over to our esteemed panel here. I'm going to let each of them introduce themselves and give some opening remarks of their own, tee up the issues they'd like to talk about. And then I'll ask some questions and we'll have some time for audience Q&A. So, Ilya.

Ilya Shapiro [\(05:28\)](#):

Great. My name's Ilya Shapiro, and I guess this is an academic setting, so I should use my academic credentials. I'm professor emeritus at Georgetown University Law Center

[\(05:41\)](#):

Now with the Manhattan Institute, where lately campus free speech issues and DEI pushback is all I've been doing, although we did file an administrative law brief yesterday as well on standing to challenge regulations that weren't promulgated through notice and comment. So I do do some actual law from time to time as well as talking about culture war 3.0. Now you can read all about my background and my travails and all of that as recently as the Wall Street Journal this week, and I have lots of lessons from that lived experience as it were. If you find yourself in that kind of crisis situation, you want to call Sam Kors Harris, you want to call, I still remember her by her maiden names.

Samantha Harris [\(06:26\)](#):

We were classmates.

Ilya Shapiro [\(06:27\)](#):

We were college classmates. You want to call FIRE, you want to call... Call me for that matter. I mean, you want to develop the right strategy, set your goals is the goal to keep your job to monetize, to move

on to a different job, to expose the rot neck, different strategies. I got a masterclass in PR and crisis strategy during my four days of hell followed by four days of four months of purgatory. I'm writing that as well as this other stuff up in a book, will appear ahead of graduation season next year from Harper Collins called Canceling Justice.

[\(07:01\)](#):

But anyway, what I've learned both personally and professionally and in doing research is that this is not what we've been talking about with the subject matter of this conference is not just the latest iteration of the decades old conservative complaint about the liberal takeover of the faculty lounge. This is not just the next detailing, the next iteration in the curve of that going from 5% Republican professors to 0.1% or something like that. That's a separate issue.

[\(07:32\)](#):

The problem here is the illiberal takeover of higher education, and that is driven as much or probably even more by bureaucratic bloat rather than problems with faculty which do have problems, because they're self-replicating and the younger generation are more illiberal than the older generation, even if they're all classified in surveys as "Democrats" or liberal or whatever it is. And I mean, the numbers are striking and if you look at my testimony in the hearing that Cherise and I testified before the House Education Committee this week, there are footnotes and studies that you're probably familiar with from Jay Green who's now at the Heritage Foundation. Just remarkable statistics about how in many places there are now more administrators than students.

[\(08:21\)](#):

I mean, we're about 15 years past the point where some schools started having more administrators than faculty, non-teaching staff rather than instructors. But now there's somebody wrote an op-ed saying maybe at Yale, each student should just be assigned their own personal butler, going back to how it was 200 years ago, I guess. But the problem is in the last five years especially, this bureaucratic bloat isn't just handholding and administering the lazy rivers and climbing walls that universities build with their endowments to compete for students. It's this DEI stuff, which far from being unhelpful, detracts from the academic truth-seeking mission and fails spectacularly on its own terms. If you read reports, whether by Jonathan [inaudible 00:09:05] as long ago, I think seven years ago, he started talking about this stuff, or Scott Jenner did a fascinating survey of Texas A&M.

[\(09:13\)](#):

If you look at feelings of belonging or attitudes towards diversity and things like that, on those measures, things are going down with correlated with the growth of DEI bureaucracy. So it's a real problem. And the thing is, what I've learned also, I have a little bit of optimism because we've seen, for example, a couple of months ago, John Saylor had one op-ed in the Wall Street Journal about Texas Tech doing a FOIA request that their biology department was hiring faculty based on diversity statements. The very next day the president of Texas Tech said, "No, we're not doing that anymore. This is inappropriate."

[\(09:49\)](#):

So in some senses, these are, to mix metaphors, [inaudible 00:09:52] villages guarded by paper tigers, but the leaders, the deans, the presidents, the provosts, look, they're not woke radicals, but they're spineless cowards and they have to be forced and given bureaucratic incentives just as they've climbed their careerist ladder their whole lives to do the right thing. Not because it's the right thing, but because there are real costs to not doing the right thing. And that's why I've become an advocate for exogenous shocks, whether that's state legislation of the kind that Chris Ruffo and I have proposed to eliminate

bureaucracies and diversity statements and trainings, et cetera, whether it's state AGs with enforcement actions, whether it's Congress as Cherise and I testified earlier this week tying strings to federal funding and employers, judges with clerkships and law schools, alumni and donors, this is what university leaders listen to because again, they're not about doing the right thing, arguing about logic. They're like, "Oh, well, we see the obvious cost of not placating the mob. All of a sudden there's a cost to doing this other stuff. Okay, well let's weigh that."

[\(10:54\)](#):

And so at the end of the day, I think that's the real takeaway for meetings like this one. It takes a multifaceted strategy just like any one particular cancellation, like what I experienced last year. But just to have structural long-term sustained reform, you have to go to the root of the problem rather than just treating every single incident and making rhetorical cases.

Samantha Harris [\(11:21\)](#):

Great.

Cherise Trump [\(11:21\)](#):

Awesome. So my name is Cherise Trump. I'm the executive director of Speech First. We're an advocacy and litigation organization that sues universities on behalf of our student members that violate their free speech rights. So that's the world that we operate in. A lot of my experience is actually going to campuses, interacting with students, talking to them about their legal rights and kind of informing them of what their next steps can be. And so because of that's a lot of what I do, I actually get some real insight on the ground of what's actually happening, and I get to really understand the sentiment of what students are experiencing. And I'm going to tell you it's primarily two things, fear and loathing. Those are the two primary sentiments on campus right now with students. Most of them operate with a sense of fear. They may not always recognize that they're being fearful.

[\(12:07\)](#):

I was just talking to someone, you may know her, Yeonmi Park who is a North Korean dissident, and she's written a couple of fantastic books about her journey and what she's seen in this country that eerily reminds her of her experience in North Korea. But one of the conversations that we were having was about how when you are in such a state of fear, you may not even realize there's something to fight back against. You might not even realize that you are in a state of fear because what's happening is that you're being completely manipulated. Everything that you're seeing, everything that you're hearing is all from one viewpoint, one perspective. And when we're talking about DEI and how inundated students are in this way of thinking, I think it really isn't fully appreciated how much they hear about it every single day through every medium that they interact with.

[\(12:53\)](#):

It is the first thing they see when they step on campus. They go to freshman orientation. We launched a research report last year where we looked at state universities across the country at their freshman orientation materials. 91% of those materials covered primarily DEI topics when I say DEI topics, I mean microaggressions, trigger warnings, critical race theory concepts, as well as political movements like Black Lives Matter that are brought up, definitions of racism, anti-racism, all of these topics that we can think of that are associated with DEI, that's what they were covering. And only a third of those universities even mentioned once free speech or viewpoint diversity. And even the ones that mentioned it was still a seven to one ratio from DEI topics to free speech or viewpoint diversity. So that just gives you a sense of how much more they're hearing about all the reasons they should hate each other or all

the reasons they should fear each other versus all the reasons they should listen to each other and engage.

[\(13:44\)](#):

So that's the mindset that they're operating when they're on campus. I'm going to tell you a few stories just because I think this will really help it resonate. So we had a student at UC, Boulder who was punched in the face for wearing a MAGA hat. And it was an African-American woman came up, started screaming at him, and she punched in the face. She was also a fellow student. He didn't report it because he was convinced that they would do nothing. And I'll be honest, UC Boulder is a pretty bad campus we're talking about very, very biased towards [inaudible 00:14:09]. So that's something that the fact that he didn't even think that he could report it, that literally nothing would be done. Physical assault. These are adults. As an adult, you are physically assaulted on the street. Your first instinct should be to call the police. But if you think there's literally no one coming to save you, no one who's going to come in there and tell you it probably wasn't your fault, right? This is kind of the mindset that they have.

[\(14:30\)](#):

Another story, university of North Texas, you might've seen this in the news. A student was hosting an event where she brought in a speaker who was running for office and he was conservative. An angry mob shouted them down to the point where the event couldn't take place, and then they proceeded to chase the student organizers down the hall and she had to hide in a closet until it was over. So again, when I say fear, this is why.

[\(14:50\)](#):

And so another example, when I talk to students for lawsuit-

Ilya Shapiro [\(14:54\)](#):

Talk about safe spaces.

Cherise Trump [\(14:54\)](#):

I know, well, this is my point, this is my point. DEI's definition, the whole reason... So when we sue administrators, their argument isn't that these policies are constitutionally sound. And I can get into later what the policies are we're talking about, their argument is that it's to create a secure and safe space for students. That's what their argument is. They're not trying to say that. Yeah, we think this is actually, we think this doesn't violate the first amendment. They're saying that it's necessary.

[\(15:19\)](#):

And then so how safe for students, for example, at ASU, when you're a group of young white men studying in the library, and then a gang comes up to you and tells you that you have to leave because of the color of your skin, how safe do you actually feel? Right? Because you're in a reserved area specifically for underrepresented minorities. And how safe do you feel if you're a student trying to sue your school, right?

[\(15:40\)](#):

So this is why Speech First is a membership model. So we actually intentionally went as a membership model for two reasons. One, it's so that we actually, our lawsuits can go up to the appellate level and have real effect and set real precedent because what ends up happening, if you have students say, if you're like Joe's student and you want to sue your school, you're a senior and you graduate, the school

can easily file for a motion to dismiss once you graduate seeing the harm is no longer being done even though it's being done to all of your other fellow students.

[\(16:06\)](#):

So as a membership organization, Speech First can actually, as long as we have ongoing membership on that campus, we can take our lawsuits all the way up to the appellate level and even to SCOTUS. Additionally, the other reason we're a membership model is so that we can keep the students' names out of the lawsuits. And that is vital because they again, are terrified. They do not want to be associated with any kind of lawsuit. There are brave students out there, don't get me wrong. You have the Turning point students who are like, rah, rah, they don't care. Their speech isn't chilled, right? But that's still very, very small percentage of students on college campuses. So we need those students, but we also need the ones whose speeches actually chilled who are going to come up and really do want to take action against their school without fear of reprisal.

[\(16:43\)](#):

So this is something that we really pride ourselves on, but something else that Speech First truly prides itself on is just our style, right? Our model. And the reason I bring this up is because I actually have a quick question for the audience. I'm curious how many of you think that the Dean Martinez's letter, 10 page long letter about respect for free speech is actually going to deter future behavior? Yet almost every single outlet praised it as novel and as wonderful and as something that's going to be something that's going to resonate throughout history. It will not deter future behavior unless people are held accountable for their actions and their choices. And this is why litigation is important. This is why when we talk about trustee members in this room, this is why actions that you take are very, very important. This is why alumni groups are important because it's all about accountability and putting pressure on universities to actually hold people who violate policies, people who violate constitutional rights actually holding them accountable.

[\(17:36\)](#):

And this is what Speech First really prides itself on because we don't send letters, we don't write letters. That's specifically why we were founded. We just come in and we sue you and we say, you know what? You don't need a warning letter. The First Amendment was your warning letter. So we come in, we sue you, we hold you accountable. We name every board member in the lawsuit. We name all the deans in the lawsuit and the president, of course, and we make sure everyone is upset with us so that they don't have to be upset with the students. And so that's something again that I think it's really important that if we really want to see change, that we start to look at the world this way through the lens of action, because that is vital, especially when you see the stories that I've just told you about what's going on with students on the ground.

[\(18:18\)](#):

The last couple of things I want to mention, it has to do with some of the things that I think the future holds. So we talk a lot about Title IX in our line of work and Title ix. Biden administration is changing a lot of rules of Title IX. And I warn students of this as I go to campuses because whether or not we are able to get any kind of legal action to stop it from being enforced by the fall semester is questionable. Title IX, Biden administration is actually going to start compelling speech through the use of pronouns, and that will start in May, and that will be most likely solidified in May. And I make sure students are very aware of this because they could easily be reported under Title IX for not using someone's preferred pronouns. Same goes for faculty. So that's something we can talk more about on this panel, and I'm excited to elaborate on.

[\(18:59\)](#):

Also the affirmative action case students refer to admissions versus Harvard and UNC that's coming down the pike. The decision on that, I think we all know where it's going to go, but what we probably don't talk enough about is how the universities have already been preparing for affirmative action policies to be able to go away for years. This is why you wonder why they want to get rid of standardized testing. It's because they already know that they can't legally start to discriminate against whites and Asians anymore, and that that was coming down the pipe. What they're going to do is start preparing themselves for ways to actually still discriminate without us being able to prove it.

[\(19:28\)](#):

So that's something that universities are doing. And I think the biggest thing that is all on our mind right now, and it was on the mind of many of the Congress people at the panel the other day, was state legislation. And I think whether you agree with what DeSantis is doing or not, what he's doing is important to the fact that he's reminding states that they have a role to play here, that state leaders have a role to play and that they need to be more involved in what's going on in their university system. And that's the vital thing. Trustees. Yes, and exactly, and trustees. And that is vital as well with the new college. Yes. Okay, so I'll leave it there and I look forward to answering your questions.

Joe Cohn [\(20:07\)](#):

So throughout the conference, you've heard about the incident earlier this month at Stanford University of Law School where students with the assistance of a campus administrator shouted down Judge Stewart Kyle Duncans of the US Court of Appeals for the fifth circuit's speech or attempted speech at an event hosted by the Federalist Society chapter. The episode of course earned strong public rebuke and ultimately led to the law school dean issuing a 10-page memo outlining reforms at the law school aimed at fostering a greater appreciation for the principles of free expression. And I agree with Cherise that more needs to be done than a memo.

[\(20:56\)](#):

But one reform set forth in the memo is that all of the Stanford law students will now be required to attend six hour session on freedom of speech. And while this is undoubtedly positive step in the right direction, that silver lining, that small silver lining is not enough. When we consider the fact that the problem is not limited to Stanford Law School censorship is occurring at all of our institutions of higher education, and it takes many forms. And unfortunately, that's one of the reasons why my organization exists.

[\(21:33\)](#):

So I'm Joe Cohen. I'm the legislative and policy director at the Foundation for Individual Rights and Expression, or as we're better known and fire. And since 1999, fire has been a lead advocate defending free speech for faculty and students at institutions of higher education across the country last year, expanding our mission to promote free speech for society as a whole. As I mentioned, the threats to free speech on campus come in many, many forms. There's of course the cultural aspect that Sam highlighted in her opening remarks where Americans are becoming increasingly intolerant of hearing opposing ideas. But there's also written policies that institutions that violate established requirements of the First Amendment jurisprudence policies that Cherice's organization and mine challenge in court.

[\(22:26\)](#):

And then there are the many examples of disruptions to events campaigns to get speakers disinvited and efforts to get faculty and students punished for their protected expressions. So Fire has a number of resources available to the public to help measure these forms of censorship, including our annual spotlight on campus speech codes report, which was launched by Sam when she was my colleague. And

that tracks how written policies at college campuses measure up against the institution's legal obligations either to the First Amendment if it's a public institution or to its commitments to free speech if it's a private institution.

[\(23:08\)](#):

According to our latest report, which analyzed the speech codes of 486 America's top colleges and universities, nearly 88% restrict speech with at least one written policy that does not comply fully with their legal obligations. Another tool that we provide is our disinvitation database that tracks campaigns successful or not to get speakers disinvited from college campuses.

[\(23:35\)](#):

And that database shows that speakers are targeted by people on all sides of the political spectrum and are speakers from all parts of the political spectrum. We have Condoleezza Rice and Madeline Albright, both targeted and even the Dalai Lama a few years ago. So in 2021, we also issued a report titled Scholars Under Fire That tracked 537 incidents in the preceding seven years where faculty were targeted for some form of professional sanction over constitutional protected speech. More than 60% of the targeted incidents resulted in some form of sanction being leveled against the scholar. Okay, so including 28 investigations, 18 suspensions, and 14 terminations.

[\(24:26\)](#):

Another resource that FIRE provides is our annual free speech rankings where we ranked the speech climates of 203 of America's top colleges and universities. The rankings took into consideration the spotlight rankings that we give, but also whether the institutions had sanctioned faculty for their speech or disinvited guest speakers based on their viewpoints. Looking back at a timeframe from 2019 till a few months before publication, and we noticed that institutions where administrations proactively supported free speech rights where the trustees, the boards, the administrators were out the gate protecting free speech rights, there was a strong correlation between students feeling willing to speak their minds as well.

[\(25:15\)](#):

To underscore this point, I just want to say simply put, the leadership matters here. The good news is that there are a number of ways that institutions, lawmakers, students, faculty, alumni, the public, we can all help turn this around. And there are a number of strategies that we can take through oversight legislation, donor pressure writing, op-eds, just engagement at all levels is going to be necessary to solve this. I look forward to talking more about the solutions when we open this up to discussion. Thank you so much for having me, and I look forward to the rest of the hour.

Samantha Harris [\(26:00\)](#):

Thank you. So I'm going to ask some questions of you guys, and I think I'll start off, I'll direct it to one person first, but I'd like to hear each of your thoughts on these various questions. And Joe, you were talking about FIRE's work and Speech First also does a lot of work fighting campus speech codes, either forcing or pressuring universities to change their written policies. Cherise, I'm going to start with you on this question because you mentioned that a lot of your work puts you on the ground with students.

[\(26:29\)](#):

Do you have a sense when a school is either agrees to or is required to reform its written speech codes that this actually affects the culture at that institution in terms of how much fear students feel about expressing themselves? Or is it more like a game of whack-a-mole where you knock out one type of censorship but it just pops up another way? That's something, when I was doing that free speech work, I

often wondered like, okay, I know they're changing their policy, but is anything actually happening? So I'm curious to hear all of your thoughts on that, but Cherise, let's start with you.

Cherise Trump ([27:00](#)):

Yeah, I would say that because a lot of the students that we work with on campuses are also student leaders. They're usually very involved in school and they want to be more outspoken. They want to lead discussions and have these debates in their classrooms. But that's part of the reason they come to us because they feel like they can't. So a lot of them do. I would say on the smaller level, when we remove something like a bias reporting system, which are anonymous reporting systems that universities have to ask students to report on each other and basically on anything of incident of bias, which could be using offensive speech, saying a joke, stereotyping, these are the examples that universities give to students on how they should be reporting on each other when those policies go away, students that we're working with do spread the word on the ground, and that's something that is, I think, palatable.

([27:44](#)):

It's something that students recognize is happening, but I will make the point that there's also a reason why by our model, we also go really, really hard with the press. So when we launch a lawsuit and at every step through the lawsuit, we actually get a lot of press coverage and we make sure that this is something that is widely heard about on the national level. We talk to folks in DC about it, we talk to coalition allies about it and get the word out. We put those schools not just on notice, but we also make sure everyone else knows about this university specifically and what's happening there. And in addition to that, again, like I mentioned earlier, going up to the appellate level also makes a big difference. And so for example, we just won against University of Central Florida last year in the 11th circuit. That's Florida-

Samantha Harris ([28:26](#)):

I'm suing them too and your work helped pave the way.

Cherise Trump ([28:29](#)):

Exactly. So again, this is a good point though. It paves the way for-

Ilya Shapiro ([28:34](#)):

I would rather take depositions in Florida than elsewhere as well.

Cherise Trump ([28:37](#)):

I'll say, it was nice having the hearing in Miami in February. That was pretty nice.

Joe Cohn ([28:40](#)):

With the DeSantis actions we're likely to be taking depositions too.

Cherise Trump ([28:45](#)):

But yeah, the goal is at the 11th circuit you have, so Georgia, Florida, and Alabama. And so what we do is make sure that all of our student contacts on the ground and all of those universities and all of those states also are aware of what's going on and aware of the new lawsuits that are happening and what they could mean for them, and we continue to update them.

[\(29:03\)](#):

So there is a sense that there's a changing tide, but you're right, it is a behemoth, right? You have to chip away at it over time. I wouldn't necessarily say it's because our goal is to get around that by doing more strategic and precedent setting lawsuits, but I would say that it is more like a game of chess. You have to be calculated. You have to make sure that what you're doing is going to result in real impact. You're not just going around suing willy-nilly, just, again, our movement has limited resources, needless to say. So it's something that we have to be very careful with.

[\(29:30\)](#):

So that's something that we focus on and think about a lot in order to make sure that students feel the best impact possible. But I think the media outreach is really what also elevates it quite a bit.

Ilya Shapiro [\(29:41\)](#):

I wonder this issue of speech codes and the actual policies on paper, clearly there's still lawsuits going on someplace, but unlike when FIRE was founded nearly 25 years ago by Samantha's father, Alan Charles Kors and Harvey Silverglate, the issue, it seems like Fire has done a wonderful job and others in getting lots of schools to reform their actual policies. And so the issue at the places that at least make the news, Yale, Stanford, Georgetown, Hastings, Texas A&M, these different places, the policies seem to be okay, but it's the enforcement of them or non-enforcement or the claim tension between speech and DEI, that really has been the issue. I don't know, Joe. I mean, is there still a lot of firework in getting schools to get rid of speech codes or is it more of these secondary tertiary issues?

Joe Cohn [\(30:33\)](#):

I think both are huge extent. 88% of schools either have a yellow or a red light from us, and we do it like a traffic light. And Sam could probably explain it better than me because she created the system. But if a school's policy is blatantly unconstitutional, whether earn a red light, but a school that gives tremendous discretion to administrator to either use or abuse still earns a yellow one because culturally, all of these issues exist where there's a lot of abuse. So when you still have 88% of schools having unconstitutional policies and the policies are real, I mean they're used, that makes a difference. And I think that you're not going to solve the cultural problem with these lawsuits or with the reforms of the policies necessarily. But whether a student organization can actually hold their event or whether the protest can take place matters.

[\(31:21\)](#):

So I don't want to be in a false pitting of whether or not something makes a difference or not, because to the students who want to be able to protest it an issue, it matters to them that they can distribute their literature and get their word out. And so the work that both of our organizations are doing to litigate really does make a difference. But yes, the cultural work cannot just be a side aspect of it. It has to be a focus.

Cherise Trump [\(31:47\)](#):

Oh, sorry. I was just going to make one real point real quick, is that, look, students are aware of these policies because universities are shoving them down their throats repeatedly. Every single classroom has a, "See something say something sign." They're not talking about backpacks with bombs, they're talking about microaggressions. And this universities define microaggressions as anything that could be as simple as asking where someone is from. And they make this very clear to students not only in their freshman orientation materials, but they also make it very clear by constantly sending them emails

saying, "Don't forget, you have a bias reporting system that you can report your students on." Students are weaponizing these policies against their fellow students, against their political enemies on campus. The ones who are going to use these policies against each other know that they exist because they're very close with the administrators.

(32:30):

A lot of the Student Government Association members who are on the very far left, they read that student handbook and they're aware of what they can do against the Turning Point chapter. They know what they can do. If they see a group tabling saying that a man is a man and a woman is a woman, I can report you for harassment because according to our school's harassment policy, you offending a group of people with a specific identity, just with offensive words can actually be considered harassment. So students know about the policies. So when the policies go away and they no longer can use them against each other, that does have an impact. That's the only point.

Samantha Harris (33:02):

One thing I was just going to add is just sort of an interesting anecdote, but it relates to speech codes and it also relates to Title IX is under the Trump administration regulations, right to be considered sexual harassment under Title IX, you have to meet this fairly stringent standard that was set forth by the Supreme Court. It has to be severe, pervasive, and objectively offensive. And so what a lot of schools did in the wake of these regulations was rather than just protect free speech across the board, they established two categories of harassment, Title IX sexual harassment, and non-Title IX sexual harassment. And they have two distinct definitions.

(33:36):

And I'm suing a New Mexico State University on behalf of a professor there who was fired and we're bringing not only an as applied challenge to their speech codes, but also a facial challenge. And we recently moved, and I'm not sharing privileged information here, you can go and PACER and look all of this up, but we recently moved for partial judgment on the pleadings on our facial challenge because we have all the information we need.

(33:58):

We said, "These are your policies." They answered, "Yes, these are our policies." So there are all the facts. The judge needs to decide it. When we pointed out this deeply unconstitutional definition of sexual harassment under the non-Title IX sexual harassment, the school's response was to come back and say, "Well, no, no, you have to read these two definitions together," which is the most cynical thing ever, because literally the strategy was to separate it into two types of policies so that they could continue punishing protected speech. And yet now they're saying, "No, no, you have to look at these together." So schools are sort of endlessly creative in trying to defend their policies.

(34:33):

I want to ask another question related to what happened at Stanford and the fact that I think for all of us in this room who are lawyers, it's particularly distressing, I think, to see this kind of conduct coming from future lawyers because the law is one of our ballparks against unfettered censorship. So you see this and you're like, some of these people are going to end up judges. How fearful are you that we're going to lose the law? I just wonder.

Ilya Shapiro (35:01):

I mean, we're in the eye of the storm. I mean, this is why I personally am spending a lot of my time on this stuff because this is not like the sociology department or the Chicano studies department or something. This is indeed, and it's at Stanford and Yale. It's not at places where, okay, so we have these kids who eventually are going to need to make a living. No, they're going to be picked. They're going to be the political commissars under Biden's new equity executive order, and they're going to be eventually judges and things and occupying the corporate C-suites and general counsel's offices, partners at law firms and all the rest of it. So it is a serious concern.

[\(35:42\)](#):

And as Cherise said, if there's no real consequences, and that's a real deficiency. And I lauded Jenny Martinez's letter, I thought because it's kind of a low bar, but it is the biggest and clearest statement, and it's also about DEI is not this and not that. There are two key paragraphs there that I quoted in my Newsweek op-ed this week where I also criticized her for not having any consequences. And indeed, rather than punishing the disruptors, she has everyone attending this mandatory training. It's like collective punishment. We just do not see any punishment or any discipline. Doesn't mean expulsion or nothing, they're gradations.

[\(36:17\)](#):

But University of Chicago had a disruption. One student invited outside agitators about a decade ago. He was effectively expelled. Things like this just don't happen if deans ultimately stand up. But I'm very concerned that people are... It goes beyond the DEI offices if the admissions offices that screen for people who want to change the world and change the law and all this, and screen for activism. The only thing that perhaps scares me more than the law schools is the medical schools.

Cherise Trump [\(36:44\)](#):

Yeah. Well, one thing to keep in mind about what Dean Steinbach said in her speech is that she called them activists. She didn't call them future lawyers. She said, "We're raising future activists here." And that's really important to recognize. That's how DEI administrators look at students. They see them as future activists for their woke movement, and we can get into a conversation what we mean by woke, but we really don't have time for that today. But I think it's important to recognize that at least it looks at the lens from you're either oppressors or you're oppressed, and one of you has... If you're in the oppressed group, then you have to fight. And that's kind of how they see this as the activist mentality, and that's what she's talking about, lawyers as if they're going to pay this way.

[\(37:24\)](#):

I had a friend who graduated from Georgetown Law recently, and she mentioned that she was really disconcerted with her conversations with her fellow students because a lot of them are saying that even if they were defense attorneys, if they found out someone they were assigned to defend was a Trump supporter, they don't think they could do it. I'm like, oh, okay. That's a serious problem. If you can't separate yourself for the neutrality of the law and understand that everyone has equal access to their legal rights, this is something that's really concerning because this is how these students are thinking. I don't want to call them kids but still behave like kids sometimes.

Joe Cohn [\(37:56\)](#):

I think that we do have to be concerned about the future of professions when our educational structures condition them to not respect core civil liberties. That's why my boss's first book was called On Learning Liberty, which talked about how we are starting to really sow the seeds of what could be a real serious problem down the line. But I also want to just give a counter caution, which is we also do

ourselves no good when we aren't cautious about the strategies that we pursue. And I don't mean any of us in particular here in the room, but I know this will come to as a surprise to some of you, but there are people who are willing to abuse power on either side of the political spectrum. And that if we aren't principled about what the actual correct response is, I'm not interested at FIRE, and I hope you aren't either interested in replacing one group that abuses their power with our group abusing power instead.

[\(38:59\)](#):

So I do look at things like what's happening in Florida where you have state law that tries to say what ideas are not allowed in the college classroom because they are defacto creative of a hostile environment if they're even uttered as being a serious problem that every person here should be saying, "No, no, no, no, no. Ideas don't create a hostile environment because they're uttered in the classrooms." We need to be speaking with the principal consistently every time, or the charge that we are hypocrites will land. And not only that, it will undermine the efforts to get the reforms because it would make us less serious people. So thank you.

Samantha Harris [\(39:42\)](#):

That was the next question I was going to ask. So I'm going to move to another one of my questions. But Joe, I'm I'm really glad you made that point because I worry about that too. I mean, Cherise, I take your point. I think it's important for people to realize that states can be part of the solution and that states have power. But I do also worry a lot that things like the Stop Woke Act give people perhaps understandably, the impression that this isn't really about free speech, that this is just about who gets to control what speech is said.

[\(40:11\)](#):

I want to-

Ilya Shapiro [\(40:12\)](#):

We have to differentiate between structural reforms and due process reforms from first of all what departments universities have and then what classes are offered by those departments, and then what's said in those classes. Each of those things takes a different First Amendment analysis, legal analysis. What is the best public policy analysis? Who should be deciding those issues analysis? So it's more, and these gradations matter.

Samantha Harris [\(40:41\)](#):

Well, if we have time, I'd like to have you elaborate a little more on that. I do want to ask sort of a different question that I think there's debate around, and I'm interested to hear what the three of you think. A lot of people and all of the people in this room really are working to fix existing universities from within. And then you have people like the founders of the University of Austin who are saying, "Nope, we got to just abandon ship and found new institutions that compete with these other institutions which are beyond repair." Where do you fall in that fight? Do you think we can reform institutions from within or do you think we need to focus on founding new institutions?

Cherise Trump [\(41:18\)](#):

So I do think it's admirable like you said. There are thousands of university systems, or not just universities, four universities and colleges, but you also have trade schools and community colleges. I mean, it's quite a competitive environment. One university is not going to change everything. It's nice that it gives students an alternative, kind of like Hillsdale also gives students an alternative. And there's a

few others. I don't think it's not obviously the solution. As I mentioned earlier, it's this whole issue that we're talking about with universities is very large. I mean, there's a lot of money there, a lot of money, and there's a lot of ways.

[\(41:50\)](#):

So again, universities care about two things, money and reputation. This is what I've come to understand about them. If you go after reputation, this is why we go hard on the media-

Ilya Shapiro [\(41:58\)](#):

Football.

Cherise Trump [\(41:59\)](#):

Well, that's the money part. That's the money.

Samantha Harris [\(42:01\)](#):

Reputation.

Cherise Trump [\(42:02\)](#):

That's the money and the reputation that's combined, I guess. Yeah, that's also part of the reasons why it was always hard to get state legislators involved is the football. They wanted those box tickets. So no, it's an uphill battle with these two categories constantly making sure we publicly shame them when they are bad actors, when they're doing things that are wrong, but then also figuring out ways to either defund them or remove, like your model policies are really great, Ilya, if you want to talk about the DEI stuff. Getting legislators to actually put threats and of accountability measures in their legislation, that would be a huge first step. I mean, no one ever wants to put that in there. You will lose funding if you don't follow this policy. That's never in any higher ed legislation ever. There's really, you get private right of action if you're lucky, and that's it.

[\(42:53\)](#):

And so for example, bias reporting systems. This one's pretty straightforward. We made a model policy on this last year and it's pretty successful. [inaudible 00:43:01] taskforce adopted it, and we've got some states that are going to be introducing it. And it's really straightforward. It's short. It just says that public universities or any universities that receive public funding cannot investigate and discipline students for constitutionally protected speech. Sounds pretty basic, right? You can't use these bias reporting systems. And it lists examples, the examples the universities like to use, which are microaggressions, mean jokes or unfair stereotyping, things like that. But when I asked them to put, if you have a policy like this on your campus, you will lose state funding. So far no one wants to put that in there. Again, it seems very basic concept, but that's something that I always struggle with state legislators.

[\(43:39\)](#):

So I think, again, the example set on what DeSantis is doing in Florida, again, you may not agree with everything, and we can elaborate on some of the policies we agree with and disagree with that he's proposing. But how many other states now are putting forward legislation that weren't before? And I think that's what's most important here is that again, states are actually really trying to step in on this.

Samantha Harris [\(44:00\)](#):

I think one thing, this is a little bit off-topic, so I apologize, but you say both investigating and punishing students for protected speech. And I think faculty need to be included in that category too. And I think one thing that's really interesting is figuring out how to address how insidious some of this is. Because a lot of schools know, for example, that you can't actually just investigate somebody for tweeting something unpleasant or for whatever. So then they say, "Well, but actually it's your abrasive," particularly with faculty, "It's your abrasive tone and we're not investigating you for your protected speech. We're investigating you for professionalism, we're investigating you for..." So there are a million insidious ways that universities investigate things they never should be investigating. And I think probably we don't have time to figure out how to stop that now, but I think that's one really important thing to think about is that it's rarely, in my experience, as straightforward as we are investigating you for your protected speech.

(44:56):

For example, the lawsuit that I've mentioned at the University of Central Florida, again, not disclosing anything. You can look this all up in PACER. Charles Negy, my client was a... Well, actually no, he's not a former professor. He got his job back through arbitration through his union, which was amazing, but he's still incredibly damaged by what the university did to him. But he tweeted some things after George Floyd's killing that angered people. And it started this on Twitter and it started this hashtag #UCFfirehim and all of these campus protests. And so what the university administration did was they posted something on the website and says, "We abhor these racist tweets, but it's his first amendment to say those things. However, if you've ever experienced bias or discrimination in the classroom, we want to know about it even anonymously." And lo and behold, all these people made all these outlandish allegations, which the university then said, "Well, we have to investigate these."

(45:50):

So I feel like there is a huge world to unpack when it comes to figuring out how to actually crack down on investigations of protected speech. And I think it's a huge problem that I think we all need to be thinking about.

Ilya Shapiro (46:04):

And the process is the punishment.

Samantha Harris (46:06):

Yes, exactly.

Cherise Trump (46:07):

So that's why we specifically say it in our model policy that you can't have a system that specifically does this because the team or the bias reporting system where you actually go in and you have an anonymous reporting form and you can click on all the... And it is different with students and faculty, I will say, because there's a different relationship there. So that would be difficult to put both into one, into a single.

Samantha Harris (46:24):

Yeah. No, and I didn't mean to suggest that they should both be in one. I just mean that these bogus investigations are a huge problem for faculty too.

Samantha Harris (46:30):

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And often are in some ways harder to fight off because the standards for when faculty do have public university faculty do have free speech rights when they are speaking as private citizens on matters of public concern, like tweeting something about police violence. But when they're in the faculty meeting, if their colleagues find them rude, the school is going to say, well, that's not protected speech. This is workplace speech that we have a greater right to control. But oftentimes it's done directly to try to get at the fact that these people hold opinions that other people don't like. So it's very messy.