

**VIEWS AMONG COLLEGE STUDENTS REGARDING FREEDOM OF EXPRESSION: AN  
ANALYSIS IN LIGHT OF KEY SUPREME COURT DECISIONS**

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ABSTRACT

*This Essay presents and analyzes results from an August 2017 survey of 1,500 current students at U.S. four-year colleges and universities regarding freedom of expression under the First Amendment. The survey was designed to enable an examination of those views in light of key Supreme Court precedents on issues including “true threats,” incitements to imminent lawless action, and defamation. The results indicate that the common stereotype—that students have an overly narrow view of First Amendment freedoms—while correct in some respects, is also an oversimplification. A more accurate characterization is that many students hold views on freedom of expression that are inconsistent with the scope of the First Amendment—overly narrow in relation to expression that they deem offensive, but overly broad in relation to defamation and incitements to imminent lawless action.*

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## INTRODUCTION

Freedom of expression on college campuses<sup>2</sup> has recently been a prominent topic of discussion both in the higher education community and beyond. Anecdotal examples abound of campus events—including at public institutions that have First Amendment obligations—in which speakers holding views considered offensive have been prevented from speaking.<sup>3</sup> This has contributed to a broader narrative under which colleges are often portrayed as places where freedom of expression is under threat.

College students' attitudes toward the First Amendment are of critical importance in determining the on-campus climate for free speech. Additionally, because today's college students are tomorrow's policymakers, legislators, teachers, and judges, their views will have an important impact on the broader societal climate for free speech in the coming decades.

This Essay presents the results and analysis of a survey<sup>4</sup> that was designed with the specific goal of exploring views among college students regarding the scope of freedom of expression under the First Amendment in the context of key Supreme Court decisions. While this is believed to be the first survey designed specifically to explore student views of free speech in light of those Supreme Court First Amendment precedents, it is not the first survey to examine the broader issue of perceptions regarding the freedom of expression among college students. In September 2015, McLaughlin & Associates conducted a survey (hereafter, "McLaughlin 2015") of 800 undergraduates under sponsorship from the William F. Buckley, Jr. Program at Yale University.<sup>5</sup> In early 2016, Gallup, the Knight Foundation, and the Newseum Institute published the results of a survey ("Gallup 2016") of over

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<sup>2</sup> In the remainder of this essay, "college" will be used to refer to both colleges as well as to universities that have four-year undergraduate programs.

<sup>3</sup> See, e.g., Thomas Fuller, *Berkeley Cancels Ann Coulter Speech Over Safety Fears*, N.Y. TIMES (Apr. 19, 2017), <https://www.nytimes.com/2017/04/19/us/berkeley-ann-coulter-speech-canceled.html>; Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, THE ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/>; Howard Blume, *Protesters disrupt talk by pro-police author, sparking free-speech debate at Claremont McKenna College*, L.A. TIMES (Apr. 9, 2017, 10:20 AM), <http://www.latimes.com/local/lanow/la-me-ln-macdonald-claremont-speech-disrupted-20170408-story.html>. See also *Disinvitation Database*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <https://www.thefire.org/resources/disinvitation-database/> (last visited Dec. 9, 2017).

<sup>4</sup> A short summary of a subset of the results from this survey were presented in John Villasenor, *Views among college students regarding the First Amendment: Results from a new survey*, THE BROOKINGS INST. (Sept. 18, 2017), <https://www.brookings.edu/blog/fixgov/2017/09/18/views-among-college-students-regarding-the-first-amendment-results-from-a-new-survey/>.

<sup>5</sup> JIM McLAUGHLIN & ROB SCHMIDT, McLAUGHLIN & ASSOC., NATIONAL UNDERGRADUATE STUDY (Oct. 26, 2015), <https://www.dropbox.com/s/sfmpoeytvqc3cl2/NATL%20College%2010-25-15%20Presentation.pdf>. See also *Notable & Quotable: Unfree Speech on Campus*, WALL ST. J. (Oct. 22, 2015, 7:15 PM), <http://www.wsj.com/articles/notable-quotable-unfree-speech-on-campus-1445555707>.

3,000 college students.<sup>6</sup> In addition, in May 2017, the Panetta Institute for Public Policy and Hart Research Associates, which have been conducting surveys of college students regarding free speech for many years, published results of their 2017 survey (“Panetta 2017”) of 802 college students.<sup>7</sup>

At least three surveys on the attitudes of college students toward free expression were released in the fall of 2017. In addition to the survey that is the focus of this Essay (which will be referred to herein as “Villasenor 2017” to distinguish it from the other surveys cited in this Essay), in October 2017, the Foundation for Individual Rights in Education (FIRE) released the results of a survey (“FIRE 2017”) conducted in May and June of 2017 of 1,250 undergraduates at two- and four-year institutions in the United States.<sup>8</sup> In September 2017, McLaughlin & Associates conducted and released results of a national survey (“McLaughlin 2017”) of 800 undergraduates.<sup>9</sup> Additionally, some of the survey questions in Villasenor 2017 were replicated by *The Economist* and YouGov in a late September 2017 survey (“*Economist/YouGov* 2017”) of 1,500 American adults.<sup>10</sup> Another resource is the set of annual surveys that have been conducted for multiple decades by the Higher Education Research Institute (HERI) at UCLA.<sup>11</sup> The HERI questions address a broad range of topics, including some relevant to freedom of expression.<sup>12</sup> Other useful points of reference include a 2010 publication

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<sup>6</sup> GALLUP, KNIGHT FOUND., AND THE NEWSEUM INST., FREE EXPRESSION ON CAMPUS: A SURVEY OF U.S. COLLEGE STUDENTS AND U.S. ADULTS (2016), [https://www.knightfoundation.org/media/uploads/publication\\_pdfs/FreeSpeech\\_campus.pdf](https://www.knightfoundation.org/media/uploads/publication_pdfs/FreeSpeech_campus.pdf). See also Vann R. Newkirk II, *A Free-Speech Debate Devoid of Facts*, THE ATLANTIC (Apr. 7, 2016), <https://www.theatlantic.com/politics/archive/2016/04/first-amendment-college-campus-millennials/477171/>.

<sup>7</sup> HART RESEARCH ASSOC. ON BEHALF OF THE PANETTA INST. FOR PUB. POLICY, 2017 SURVEY OF AMERICA’S COLLEGE STUDENTS (May 2017), <http://www.panettainstitute.org/wp-content/uploads/Youth-Civic-Engagement-Survey-Report-2017.pdf>. Panetta and Hart have been conducting annual surveys of college students for many years, so there are also Panetta/Hart surveys available from 2016 and earlier.

<sup>8</sup> KELSEY ANN NAUGHTON, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPEAKING FREELY: WHAT STUDENTS THINK ABOUT EXPRESSION AT AMERICAN COLLEGES (Oct. 2017), <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2017/10/11091747/survey-2017-speaking-freely.pdf>.

<sup>9</sup> JIM MCLAUGHLIN & ROB SCHMIDT, MCLAUGHLIN & ASSOC., NATIONAL UNDERGRADUATE STUDY (Sept. 28, 2017), <http://c8.nrostatic.com/sites/default/files/NATL%20Undergrad%209-27-17%20Presentation%20%281%29.pdf>.

<sup>10</sup> YOUGOV SPONSORED BY THE ECONOMIST, POLL: SEPT. 24-26, 2017, [https://d25d2506sfb94s.cloudfront.net/cumulus\\_uploads/document/qok43jc8xn/econTabReport.pdf](https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/qok43jc8xn/econTabReport.pdf). While most of the respondents to the *Economist/YouGov* 2017 poll are presumably not college students, the results for the 18-29 age group are particularly relevant to the college population.

<sup>11</sup> KEVIN EAGAN ET AL., HIGHER EDUC. RESEARCH INST., THE AMERICAN FRESHMAN: NATIONAL NORMS FALL 2016 (2017), <https://www.heri.ucla.edu/monographs/TheAmericanFreshman2016.pdf>.

<sup>12</sup> For example, the 2016 HERI survey included questions related to “tolerance of others with different beliefs” and “openness to having my own views challenged.” *Id.* at 6.

on campus climate from the Association of American Colleges & Universities<sup>13</sup> and the 2011 book “The Still Divided Academy.”<sup>14</sup>

As noted above, the Villasenor 2017 survey differs from other surveys in that it was designed specifically to explore students’ views of freedom of expression under the First Amendment in light of key Supreme Court precedents. Of course, it would not be reasonable to simply ask undergraduate students about those precedents, as the majority of students would likely not be able to answer questions such as “what is your opinion of the 1969 *Brandenburg* decision?”<sup>15</sup> or “do you think ‘true threats’ that are outside the scope of First Amendment protection should be evaluated using a subjective or an objective standard?” Thus, the approach instead was to construct a series of short vignettes, readily understandable to a person with no legal background, that would elicit responses enabling a comparison between the perceived scope of free expression and the actual scope as articulated through Supreme Court jurisprudence.

The overarching conclusions from the analysis presented herein are as follows: First, many students have an overly narrow understanding of First Amendment protections with respect to offensive speech. This was evident in the answers to questions regarding topics including hate speech, counterpoints, and online speech. Second, many students have an overly *broad* view of some aspects of expression, believing, for example, that, at least under certain circumstances, defamation and incitement to imminent lawless action are, or should be, constitutionally protected. Third, with respect to “true threats,” students display substantial uncertainty whether a subjective or objective standard should be applied. This uncertainty is unsurprising given that courts of appeal have reached conflicting conclusions on this point.

The remainder of this Essay is organized as follows: Section I discusses methodology and includes a high-level overview of the topics addressed in the survey questions. The subsequent sections respectively address incitements to imminent lawless action and (separately) defamation, online speech, “true threats,” and several other forms of offensive speech. The final section offers conclusions as well as some recommended courses of action considering the results.

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<sup>13</sup> ERIC L. DEY ET AL., ASS’N OF AM. COLLS. AND UNIVS., ENGAGING DIVERSE VIEWPOINTS: WHAT IS THE CAMPUS CLIMATE FOR PERSPECTIVE-TAKING? (2010), [https://www.aacu.org/sites/default/files/files/core\\_commitments/engaging\\_diverse\\_viewpoints.pdf](https://www.aacu.org/sites/default/files/files/core_commitments/engaging_diverse_viewpoints.pdf).

<sup>14</sup> STANLEY ROTHMAN ET AL., THE STILL DIVIDED ACADEMY: HOW COMPETING VISIONS OF POWER, POLITICS, AND DIVERSITY COMPLICATE THE MISSION OF HIGHER EDUCATION (2011).

<sup>15</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

## I. METHODOLOGY

Data collection for this survey was overseen by the RAND Survey Research Group (RAND SRG).<sup>16</sup> Prospective respondents who answered an email solicitation were screened for eligibility<sup>17</sup> before they were able to take the survey. Information was collected included the respondents' gender, city and state of high school graduation, city and state of college, standing, whether the respondent identified as Hispanic/Latino, and type of college (public or private). Participants who successfully completed the screening process and survey were given a modest incentive payment.

The survey addressed the following topics:<sup>18</sup>

| Question Number | Issue Explored  |
|-----------------|---|
| 1               | Views on whether the First Amendment confers a right to defame  |
| 2               | Views on First Amendment protection for statements of prejudice |
| 3,4             | The First Amendment and online speech                           |
| 5,6             | Relevance of the First Amendment in the 21st century            |
| 7-10            | Acceptability of actions to prevent speech deemed offensive     |
| 11-12           | "True threats" and objective vs. subjective standards           |
| 13              | Incitement to imminent lawless action                           |
| 14              | Views on whether the First Amendment requires counterpoints     |
| 15              | Views on whether the First Amendment protects "hate speech"     |
| 16              | Whether colleges should shield students from offensive speech   |
| 17-18           | Political affiliation and views                                 |

Because an opt-in online method was used to solicit participation, the

<sup>16</sup> UCLA retained RAND to perform the data collection. RAND SRG programmed the online interface to be used by respondents for data collection and used Opinion Access Corporation to solicit participation in the survey.

<sup>17</sup> Prospective respondents were only eligible to complete the survey if they reported that they were currently enrolled undergraduate students at a four-year U.S. college or university, if they reported that they were eligible to vote in U.S. elections, and if they reported that they were 18 years of age or older.

<sup>18</sup> The survey questionnaire is available at: [luskin.ucla.edu/person/john-villasenor/survey](http://luskin.ucla.edu/person/john-villasenor/survey).

resulting sample was a “non-probability sample”<sup>19</sup> as opposed to a “probability sample.”<sup>20</sup> (It is worth noting that a 2016 Pew Research Center report stated that “[w]hile the differences between probability and nonprobability samples may be clear conceptually, the practical reality is more complicated.”)<sup>21</sup> For surveying college students, online opt-in panels, which is a form of non-probability sampling, are a commonly used approach. Among the universe of all possible non-probability samples, there is a large potential variation in how closely, or not, the post-weighting sample statistically resembles a sample that would have been obtained through the purely random selection from the population of interest. In that context, it is worth noting some statistical attributes of the group of 1500 respondents to this survey.

Seventy-four percent<sup>22</sup> of the students sampled reported attending a public institution, and thirty-six percent reported attending a private institution.<sup>23</sup> By comparison, the National Center for Education Statistics (NCES) reports that, as of 2015, seventy-seven percent of undergraduate students attended public institutions and twenty-three percent attended private institutions in 2015.<sup>24</sup> Additionally, eighteen percent of the students sampled self-identified as Hispanic or Latino.<sup>25</sup> The 2015 NCES data reports the same:

<sup>19</sup> See, e.g., Organisation for Economic Co-operation and Development, *Non-Probability Sampling*, OECD GLOSSARY OF STATISTICAL TERMS <https://stats.oecd.org/glossary/detail.asp?ID=5066> (last updated Aug. 11, 2005) (“[A non-probability sample is a] sample of units where the selected units in the sample have an unknown probability of being selected and where some units of the target population may even have no chance at all of being in the sample. Forms of non-probability sampling are numerous, such as voluntary samples (only responses of volunteers are used), quota samples, expert samples.”).

<sup>20</sup> See, e.g., Organisation for Economic Co-operation and Development, *Probability Sample*, OECD Glossary of Statistical Terms, <https://stats.oecd.org/glossary/detail.asp?ID=2134> (last updated Dec. 20, 2005) (“A probability sample is a sample selected by a method based on the theory of probability (random process), that is, by a method involving knowledge of the likelihood of any unit being selected.”) Although the foregoing definition allows the possibility that different units may have different, known likelihoods of selection, for simplifying the discussion in this paper it will be assumed that “probability sample” refers to a sample in which all units have an equal probability of selection.

<sup>21</sup> COURTNEY KENNEDY, ANDREW MERCER, SCOTT KEETER, NICK HATLEY, KYLEY MCGEENEY & ALEJANDRA GIMENEZ, *EVALUATING ONLINE NONPROBABILITY SURVEYS*, PEW RESEARCH CENTER 7 (2016).

<sup>22</sup> Throughout this Essay, rounding of percentages is to the nearest whole number, both in text and in tables. As a result, in some cases percentages will not sum to 100.

<sup>23</sup> Villasenor, *supra* note 4.

<sup>24</sup> NAT’L CTR FOR EDUC. STATISTICS, *Total Fall Enrollment in Degree-granting Postsecondary Institutions, by Level of Enrollment, Sex of Student, and Other Selected Characteristics: 2015*, DIGEST OF EDUCATION STATISTICS, [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_303.60.asp](https://nces.ed.gov/programs/digest/d16/tables/dt16_303.60.asp) (last visited Dec. 13, 2017). It is also worth noting that the responses to the Villasenor 2017 questions were generally very similar across type of college attended (public vs. private), meaning that even if there was a divergence in relation to public/private percentages, if weighting for that factor had been performed it would have had minimal impact.

<sup>25</sup> Villasenor, *supra* note 4.

eighteen percent of undergraduate students self-identified as Hispanic in 2015.<sup>26</sup> Sixty-nine percent of the students sampled self-identified as female.<sup>27</sup> Women do indeed outnumber men among college students, though not to the extent reflected in this sample. To account for this difference, the results presented here have been weighted for gender to target a fifty-seven percent/forty-three percent male/female gender ratio.<sup>28</sup> Gender<sup>29</sup> was the only factor for which the responses in this survey were weighted.

With respect to geographic distribution, respondents were from 49 states and the District of Columbia. The U.S. Census Bureau partitions the country into four census regions, termed Northeast, South, Midwest, and West. The Northeast has seventeen percent of the U.S. population<sup>30</sup> and was the high school graduation location<sup>31</sup> of twenty-one percent of respondents; the South has thirty-eight percent of the US population and was the high school graduation location of thirty-seven percent of respondents; the Midwest has twenty-one percent of the US population and was the high

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<sup>26</sup> NAT'L CTR FOR EDUC. STATISTICS, *Total Fall Enrollment in Degree-granting Postsecondary Institutions, by Level of Enrollment, Sex, Attendance Status, and Race/Ethnicity of Student: Selected Years, 1976 Through 2015*, DIGEST OF EDUCATION STATISTICS, [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_306.10.asp](https://nces.ed.gov/programs/digest/d16/tables/dt16_306.10.asp) (last visited Dec. 13, 2017).

<sup>27</sup> *Id.*

<sup>28</sup> A 57%/43% split was used for the gender weighting. See, e.g., NAT'L CTR FOR EDUC. STATISTICS, *Total Fall Enrollment in Degree-granting Postsecondary Institutions, by Attendance Status, Sex of Student, and Control of Institution: Selected Years, 1947 Through 2026*, DIGEST OF EDUCATION STATISTICS, [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_303.10.asp](https://nces.ed.gov/programs/digest/d16/tables/dt16_303.10.asp) (last visited Dec. 13, 2017) (noting a 57%/43% female/male postsecondary student split as of 2015 and projecting a 58%/42% split in 2017); see also NAT'L CTR FOR EDUC. STATISTICS, *Total Undergraduate Fall Enrollment in Degree-granting Postsecondary Institutions, by Attendance Status, Sex of Student, and Control and Level of Institution: Selected Years, 1970 Through 2026*, DIGEST OF EDUCATION STATISTICS, [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_303.70.asp](https://nces.ed.gov/programs/digest/d16/tables/dt16_303.70.asp) (last visited Dec. 13, 2017) (showing a 56%/44% female undergraduate split as of 2015).

<sup>29</sup> Gender weighting (for non-gender-specific categories) was performed by computing percentages separately for women and men and then using a linear combination of gender-specific percentages, with the coefficients in the equation set in accordance with the female/male split among the target population.

<sup>30</sup> See U.S. CENSUS BUREAU, *Census Regions and Divisions of the United States*, U.S. CENSUS BUREAU, [https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us\\_regdiv.pdf](https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf) (last visited Dec. 13, 2017) (showing how the U.S. Census Bureau demarcates different sections of the country); U.S. CENSUS BUREAU, *United States Population Growth by Region*, U.S. CENSUS BUREAU, [https://www.census.gov/popclock/data\\_tables.php?component=growth](https://www.census.gov/popclock/data_tables.php?component=growth) (last visited Dec. 13, 2017) (noting the growth of populations in each region). This Essay refers to the U.S. government estimates of the July 1, 2016 population.

<sup>31</sup> U.S. CENSUS BUREAU, *United States Population Growth by Region*, see *supra* note 30. Given the importance of political socialization in the context of the family, high school graduation location is arguably more likely to be correlated to views than is college location. See, e.g., M. Kent Jennings, Laura Stoker & Jake Bowers, *Politics Across Generations: Family Transmission Reexamined*, 71 J. OF POL., 782, 787-90, 793-96 (2009) (examining how political views in the family affect the children in the family and noting that “the political views” of “1965 high school graduates” probably stemmed from their parents and that the graduates’ “own children, socialized in a strikingly different social and political era, were about as likely as they were to follow in their parents’ political, and religious, footsteps”).

school graduation location of twenty percent of respondents, and the West has twenty-four percent of the US population and was the high school graduation location of twenty-one percent of respondents.

With regard to political affiliation, forty-six percent of the respondents self-identified as Democrats, seventeen percent self-identified as Republicans, and twenty-nine percent self-identified as Independents. Seven percent of respondents chose the “Don’t know” answer option when asked to state their political affiliation.

In a true probability sample (one involving a completely random selection of respondents from the population of interest), it is straightforward to compute the margin of error associated with a given confidence level. Even when there is a non-probability sample, stating the margin of error that would apply in the case of a probability sample of equivalent size, accompanied by an appropriate caveat, provides more information than staying silent on the issue. More specifically, it provides information on the limiting case of what would occur if the sample were truly random—and of course the more the actual sample deviates from true randomness, the more uncertainty arises in drawing inferences from measurements made using that sample. With the above caveats, for a perfect sample, if 1500 respondents selected from a much larger group are asked a question to which about half of them give a particular answer, the margin of error at a ninety-five percent confidence level would be about 2.5%.<sup>32</sup> For a group with 250 respondents (which is similar in size to the group of 261 Republicans who participated in this survey), the margin of error at this confidence level would be slightly over six percent.<sup>33</sup>

Data collection for this survey took place between August 17, 2017 and August 31, 2017. A few days prior to data collection, a neo-Nazi gathering led to violence at the University of Virginia in Charlottesville, VA. This event gathered national attention and was a major topic in the news during much of the time during which data was collected for this survey. To what extent this might have impacted the views of the respondents is of course impossible to know since there is not an equivalent data set collected, for example, with the same group of respondents just prior to the Charlottesville events. The schedule for data collection was set several months in advance, so the fact that it occurred in the days and weeks immediately following the Charlottesville events was a coincidence. While it could be argued that this

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<sup>32</sup> This 2.5% figure assumes a question in which 50% of the respondents pick a particular answer, as 50% is the number that maximizes the margin of error. For questions in which there is asymmetry in the answer, the margin of error would be smaller.

<sup>33</sup> It is worth noting that other recent non-probability surveys cited herein have also reported margins of error. See, e.g., FIRE 2017, *supra* note 8, at 7 (reporting a 3.1% margin of error); McLaughlin 2017, *supra* note 9, at 2 (reporting a 3.4% “error estimate”); *Economist/YouGov* 2017, *supra* note 10, at 204 (reporting a 3% margin of error).



was an inappropriate time to collect data, there is also a strong argument that that the opposite is true: There is value in measuring sentiment on key civil liberties after critical events, as history shows that it is precisely at such times that civil liberties are most at risk of being abridged.<sup>34</sup>

## II. INCITEMENTS TO IMMINENT LAWLESS ACTION; DEFAMATION

### A. Incitements to Imminent Lawless Action

Under the 1969 *Brandenburg v. Ohio* decision, speech that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”<sup>35</sup> is outside the scope of First Amendment protection. The Villasenor 2017 survey explored students’ attitudes toward incitement using the following question:

*Q13: A protest leader, addressing a crowd of angry protesters, tells protesters they should send a message by smashing the windows of nearby storefronts. Should the protest leader’s statements be protected by the First Amendment?*

The protest leader’s exhortation runs afoul of the *Brandenburg* standard, as the instruction to commit vandalism is certainly an incitement to imminent lawless action, and under the vignette presented, would likely result in such action. The survey responses are as follows:

TABLE 1: INCITEMENTS TO IMMINENT LAWLESS ACTION

SHOULD THE PROTEST LEADER’S STATEMENTS BE PROTECTED BY THE FIRST AMENDMENT?

|                        | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|------------------------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|                        |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| Agree <sup>36</sup>    | 24%   | 25%                   | 27% | 22% | 23%             | 26%     | 16%    | 35%  |
| Disagree               | 76%   | 75%                   | 73% | 78% | 77%             | 74%     | 84%    | 65%  |
| N (unw.) <sup>37</sup> | 1500  | 697                   | 261 | 431 | 1116            | 384     | 1040   | 460  |

<sup>34</sup> See Darren W. Davis & Brian D. Silver, *Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America*, 48 AM. J. POL. SCI. 28, 28 (2004) (observing that “the greater people’s sense of threat, the lower their support for civil liberties”).

<sup>35</sup> *Brandenburg*, 395 U.S. at 447.

<sup>36</sup> In this question and in all other questions herein in which respondents were asked to agree or disagree, respondents had a choice of strongly agree, agree, disagree, and strongly disagree. The “agree” and “disagree” values in the tables present the sum of the associated tabs.

<sup>37</sup> In this and all subsequent tables, “N (unw.)” refers to unweighted N.

Across all categories except gender, there is no sizable variation in responses to this question, with twenty-four percent of respondents stating, contrary to the holding in *Brandenburg*, that the exhortation to lawless action should be protected speech. The gender difference in the responses among the respondents is notable, with men more than twice as likely as women to believe, again despite the contrary holding in *Brandenburg*, that the speech should be protected. While the stereotype is that college students have an overly narrow view of the First Amendment, the table above indicates that about one quarter of the respondents believe that the First Amendment should confer protection on incitement to imminent lawless action, when in fact under *Brandenburg* it does not.

### B. Defamation

Defamation is outside the scope of First Amendment protection. As the Supreme Court wrote in relation to public officials in its 1964 decision in *New York Times Co. v. Sullivan*, the “constitutional guarantees [of the First and Fourteenth Amendments] require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>38</sup> The actual malice standard originally applied to public officials was later broadened to include public figures as well.<sup>39</sup> By contrast, for private figures the standard to show defamation is negligence.<sup>40</sup>

With that as context, Villasenor 2017 included the following two questions to explore attitudes towards defamation. Half of the respondents answered the Question 1A, and another half-answered Question 1B.<sup>41</sup> The questions are similar in that they involve a restaurant diner subjected to rude service and who then attempts to punish the restaurant by publishing a false claim of food poisoning on social media. The difference between the two vignettes is in the level of rudeness experienced by the diner:

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<sup>38</sup> 376 U.S. 254, 279-80 (1964).

<sup>39</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) with respect to public figures: “Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.”

<sup>40</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1976): To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher [with respect to the act of publication]; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” (emphasis added).

<sup>41</sup> More specifically, 749 of the 1500 respondents answered Question 1A, and 751 of the respondents answered Question 1B.

*Question 1A: A man goes to a restaurant and the owner of the restaurant is rude (but not extremely rude) to him. The man is angry about the rude service and so he posts a review on Yelp falsely saying that he got food poisoning from eating at the restaurant. To what extent do you agree or disagree with the following statement: "The man's posting of the Yelp review should be protected by the First Amendment."*

*Question 1B: A man goes to a restaurant and the owner of the restaurant is extremely rude to him. Among other things, the owner makes highly offensive and insulting statements to the man. The man is angry about the rude service and so he posts a review on Yelp falsely saying that he got food poisoning from eating at the restaurant. To what extent do you agree or disagree with the following statement: "The man's posting of the Yelp review should be protected by the First Amendment."*

In both of the above vignettes, the publication of the false Yelp review constitutes defamation. Whether the restaurant owner is a private individual or a limited purpose public figure is irrelevant, as the diner's publication was published with knowledge that it was false, thus meeting the requirement for a defamation claim even under the actual malice standard. In short, the First Amendment does not protect the publication of the false review contemplated in these vignettes.

In constructing this set of questions, the goal was twofold. First, it is of interest to know what how what fraction of respondents believe that the First Amendment should give them license to engage in defamation in response to being treated rudely. Second, it is of interest to know whether the *severity* of the rude treatment leads to different answers regarding the respondents' views on their right to publish a defamatory statement. The answers were as follows (where "agree" corresponds a belief that the defamatory review should be protected, and "disagree" corresponds to a belief that it is not protected).

TABLE 2A: DEFAMATION IN RESPONSE TO RUDE SERVICE

VIEWS ON THE STATEMENT: "THE MAN'S POSTING OF THE YELP REVIEW SHOULD BE PROTECTED BY THE FIRST AMENDMENT."

IF THE DINER RECEIVES RUDE, BUT NOT EXTREMELY RUDE SERVICE (Q1A):

|          | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|----------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|          |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| Agree    | 44%   | 43%                   | 51% | 42% | 43%             | 45%     | 39%    | 50%  |
| Disagree | 56%   | 57%                   | 49% | 58% | 57%             | 55%     | 61%    | 50%  |
| N (unw.) | 749   | 354                   | 130 | 206 | 545             | 204     | 538    | 211  |

TABLE 2B: DEFAMATION IN RESPONSE TO RUDE EXTREMELY SERVICE

VIEWS ON THE STATEMENT: "THE MAN'S POSTING OF THE YELP REVIEW SHOULD BE PROTECTED BY THE FIRST AMENDMENT."

IF THE DINER RECEIVES EXTREMELY RUDE SERVICE (Q1B):

|          | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|----------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|          |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| Agree    | 45%   | 44%                   | 53% | 42% | 44%             | 45%     | 41%    | 50%  |
| Disagree | 55%   | 56%                   | 47% | 58% | 56%             | 55%     | 59%    | 50%  |
| N (unw.) | 751   | 343                   | 131 | 225 | 571             | 180     | 502    | 249  |

When comparing tabulations between questions 1A and 1B, the results suggest that students have very similar attitudes toward defamation regardless of whether the diner receives rude or extremely rude service. In other words, across the different subcategories in Tables 2A and 2B, the *degree* to which the diner in this vignette is the victim of rude service has no notable impact on the responses.

More interestingly, in both tables, just under half of the respondents believe that the First Amendment should protect defamatory statements made in response to rude treatment. There are at least two possible explanations for this. First, it is possible that these respondents believe that defamation in general is (or should be) protected speech. In other words, they may believe that the First Amendment confers a right to engage in defamation for any reason or even for no reason at all. Second, it is possible that these respondents believe that defamation is (or should be) constitutionally protected when it occurs specifically in response to having been wronged. While it is impossible given the survey data to disentangle the two possible explanations, the broader message is clear: A very substantial fraction (forty-four percent in Table 1A; forty-five percent in Table 1B) of respondents believe that constitutional guarantees of freedom of expression should include the right to engage in defamation. Thus, this is an example of another exception to the common stereotype that college students have an overly narrow conception of the First Amendment: In the case of defamation, at least with respect to the pair of vignettes that were presented, many students have an overly broad view of the scope of protected expression.

### III. ONLINE SPEECH

#### A. Level of Protection Given to Online Speech

One of the most interesting and important areas of free expression inquiry relates to online speech. In 1997, only a few years after internet browsers had begun experiencing wide adoption, the Supreme Court considered the anti-indecency provisions of the Communications Decency Act (CDA) of 1996. In finding those provisions to be unconstitutional, the Court concluded that “[i]n order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.”<sup>42</sup> The Court also addressed the broader issue of freedom of expression on the internet, writing that “‘the content on the Internet is as diverse as human thought.’ We agree with [the district court’s] conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”<sup>43</sup> To explore this issue two decades after the *Reno* decision, Villasenor 2017 asked students to respond to the following questions:

*Q3: Statements made on social networking services such as Facebook and Instagram are examples of online speech. By contrast, in-person statements made by a speaker to a listener who is in the same room as the speaker are examples of face-to-face speech. Which of the following three statements do you agree with most?*

- (1) Online speech should have less protection under the First Amendment than face-to-face speech.*
- (2) Online speech should have the same level of protection under the First Amendment as face-to-face speech.*
- (3) Online speech should have more protection under the First Amendment than face-to-face speech.*

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<sup>42</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997).

<sup>43</sup> *Id.* at 870 (quoting *Reno v. American Civil Liberties Union*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

TABLE 3: LEVEL OF PROTECTION OF ONLINE SPEECH SHOULD RECEIVE RELATIVE TO FACE-TO-FACE SPEECH

| Level of protection | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|---------------------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|                     |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| Less (option 1)     | 15%   | 15%                   | 18% | 13% | 16%             | 13%     | 14%    | 18%  |
| Same (option 2)     | 76%   | 75%                   | 70% | 80% | 76%             | 75%     | 81%    | 69%  |
| More (option 3)     | 9%    | 10%                   | 13% | 7%  | 8%              | 13%     | 6%     | 14%  |
| N (unw.)            | 1500  | 697                   | 261 | 431 | 1116            | 384     | 1040   | 460  |

As Table 3 shows, the majority of respondents hold views aligned with the Court's conclusion in *Reno v. ACLU* that the First Amendment should be applied equally broadly in online and offline contexts. For example, seventy-six percent of respondents overall stated that online speech should receive the same level of protection as face-to-face speech, and among the subcategories the percentages ranged from sixty-nine percent to eighty-one percent. This is an encouraging result, but as the question discussed below illustrates, things become more complex when anonymity is explicitly considered as part of the question.

#### *B. Level of Protection Given to Speech that Is Both Online and Anonymous*

Another important area of inquiry is anonymous online speech. In 1995, in relation to paper (as opposed to online) publication, the Court struck down as unconstitutional an Ohio law prohibiting anonymous campaign literature, writing in its ruling in *McIntyre v. Ohio Elections Commission* that “[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.”<sup>44</sup>

The Supreme Court has never ruled on the specific question of constitutional limits in relation to speech that is both anonymous *and* online. However, the combination of the 1995 *McIntyre v. Ohio Elections Comm’n* ruling, which affirmed the constitutionality of anonymous speech, and the 1997 *Reno* decision, which confirmed that the scope of the First Amendment is as broad online as it is in other contexts, makes it plausible to con-

<sup>44</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995).

clude that anonymous online speech should receive the same level of protection as speech in any other context—e.g., whether online or not, and whether anonymous or not. The responses to the following question, however, indicate that many respondents believe that anonymous, online speech deserves less protection:

*Q4: Some social media apps are designed specifically to enable people to publish posts anonymously, so that their identity is not published. Sometimes people post insulting statements using social media apps that provide anonymity. How much protection should insulting, anonymous social media posts be given under the First Amendment?*

*(1) Online statements that are both anonymous and insulting should not be protected under the First Amendment.*

*(2) Online statements that are both anonymous and insulting should have some protection under the First Amendment, but less protection than if those same insulting statements are made online by a speaker who does not hide his or her identity.*

*(3) Online statements that are both anonymous and insulting should have the same level of protection under the First Amendment as insulting statements made online by a speaker who does not hide his or her identity.*

The answers are as follows:

TABLE 4: PROTECTION FOR ANONYMOUS ONLINE SPEECH RELATIVE TO PROTECTION GIVEN ONLINE NON-ANONYMOUS SPEECH

| Level of protection | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|---------------------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|                     |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| None (option 1)     | 27%   | 28%                   | 29% | 25% | 27%             | 29%     | 30%    | 24%  |
| Less (option 2)     | 37%   | 39%                   | 35% | 37% | 39%             | 29%     | 35%    | 40%  |
| Same (option 3)     | 36%   | 34%                   | 36% | 38% | 34%             | 41%     | 36%    | 36%  |
| N (unw.)            | 1500  | 697                   | 261 | 431 | 1116            | 384     | 1040   | 460  |

Thirty-six percent of the students surveyed expressed a belief that insulting speech conveyed both anonymously and online deserves equal protection to similar statements made online but without masking the speaker's identity. Twenty-seven percent of respondents stated that online statements that are both anonymous and insulting should not be protected under the First Amendment, while thirty-seven percent of respondents answered that there should be less (but still some) protection. This suggests a

sizable divergence from what is implied by the combination of the Supreme Court decisions in *McIntyre v. Ohio Elections Commission* and *Reno*. In other words, if under *McIntyre v. Ohio Elections Commission* anonymous speech is viewed as receiving the same level of protection as non-anonymous speech, and under *Reno* online speech is viewed as receiving the same level of protection as offline speech, then a plausible conclusion in light of those two rulings is that speech that is both anonymous and online should be similarly protected. However, nearly two-thirds of respondents appear to hold the view that online anonymous speech (at least to the extent that the speech is insulting) should not receive as much protection as online non-anonymous speech.<sup>45</sup>

#### IV. "TRUE THREATS" AND OBJECTIVE VS. SUBJECTIVE STANDARDS

"True threats" fall outside the scope of First Amendment protection.<sup>46</sup> The Court originally identified "true threats" as unprotected in its 1969 *Watts v. United States* decision, but provided no real guidance on what constitutes a "true threat."<sup>47</sup> Over three decades later in its *Virginia v. Black* ruling in 2003, the Court provided a more substantive discussion of what constitutes a "true threat," writing:

True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals . . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally prescriptible sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.<sup>48</sup>

The above explanation did little to resolve one of the most important questions relating to "true threats:" whether they should be evaluated using a subjective or objective standard.<sup>49</sup> Under a subjective standard, it is

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<sup>45</sup> Adding the twenty-seven percent of respondents who stated that insulting online anonymous statements should *not* be constitutionally protected to the thirty-seven percent of respondents who answered that there should be less (but still some) protection gives a total of sixty-four percent; i.e., just under two-thirds.

<sup>46</sup> See *Watts v. United States*, 394 U.S. 705, 708 (1969).

<sup>47</sup> *Id.*

<sup>48</sup> *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (internal quotation marks and citations omitted).

<sup>49</sup> See generally Paul T. Crane, "True Threats" and the Issue of Intent, 92 VA. L. REV. 1225 (2006), (explaining the differences between subjective and objective standards and how those standards have been applied in the courts through the mid-2000s). For another detailed discussion of these standards, published prior to the 2003 *Virginia v. Black* ruling, see generally Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283 (2001). This issue is also discussed, including after the *Elonis* ruling, in John Villasenor, *Technology and the Role of Intent in*



necessary to get inside the mind of the speaker and assess intent. By contrast, under an objective standard the speaker's intent is not considered; what matters is whether a reasonable person would understand a threat to convey an intent to inflict bodily harm. Of course, it is also possible to simultaneously consider both standards.

Readers of the *Virginia v. Black* ruling who focus on the phrases "speaker means to communicate a serious expression of an intent to commit" violence and "intent of placing the victim in fear of bodily harm or death" find support for a subjective standard. Readers who instead focus on the phrase "[t]rue threats encompass those statements" (emphasis added) can find support for an interpretation that "encompass" means that "true threats" can also include statements evaluated without regard to speaker intent. The years following *Virginia v. Black* saw lower courts issue rulings in cases involving threat statutes using both standards.<sup>50</sup>

In 2014, the issue came before the Supreme Court again when it granted *certiorari* in *Elonis v. United States*,<sup>51</sup> with one of the two "questions presented" asking: "Whether, [consistent with the First Amendment and *Virginia v. Black*, 538 U.S. 343 (2003)], conviction of threatening another person requires proof of the defendant's subjective intent to threaten" or whether it is enough to show that a "reasonable person" would regard the statement as threatening.<sup>52</sup>

However, when the Court issued its *Elonis* decision in 2015,<sup>53</sup> it addressed (and answered in the affirmative<sup>54</sup>) only the other "question presented," which concerned whether conviction under the statute at issue, 18 U.S.C. § 875(c), requires consideration of intent. The Court did not reach the more fundamental question of what the First Amendment itself requires. Therefore, while it is clear that "true threats" are outside of First Amendment protection, post-*Elonis* the issue of what constraints, if any, the First Amendment itself might place on the application of criminal threat statutes with respect to the subjective-objective issue has not been fully resolved. That said, Court's decision in *Elonis* to require a subjective standard when interpreting 18 U.S.C. § 875(c) could be read, at least indirectly,

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*Constitutionally Protected Expression*, 39 HARV. J.L. & PUB. POL'Y 631 (2016).

<sup>50</sup> Compare *United States v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011) (using a subjective standard); *United States v. Magleby*, 420 F.3d 1136 (10th Cir. 2005) (using a subjective standard) with *United States v. White*, 670 F.3d 498 (4th Cir. 2012) (using an objective standard); *United States v. Jeffries*, 692 F.3d 473 (6th Cir. 2012) (using an objective standard); *United States v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005) (using an objective standard); *United States v. Mabie*, 663 F.3d 322, 330 (8th Cir. 2011) (using an objective standard).

<sup>51</sup> 134 S. Ct. 2819 (2014) (granting *certiorari*).

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

<sup>53</sup> *Elonis v. United States*, 135 S.Ct. 2011 (2015).

<sup>54</sup> *Id.* at 2011 (holding that that for conviction under 18 U.S.C. § 875(c), what the defendant thinks "does matter.").

as consistent with an approach in which interpretation of 18 U.S.C. § 875(c) without reference to intent could run afoul of the First Amendment. More broadly, the fact that the Court imposed an intent requirement in 18 U.S.C. §875(c) despite the lack of text in the statute specifically identifying such a requirement could be viewed to imply that the Court would take the position that *any* threat statute must be interpreted as having an intent requirement, even such a requirement is not explicitly present in the text of the statute. Stated another way, there is at least a suggestion that identifying a “true threat” in a manner compliant with the First Amendment requires utilizing a subjective standard.<sup>55</sup> With the foregoing as context, here is the question that was asked in the Villasenor 2017 survey:

*Q12: Consider a hostile statement made by a speaker to a listener. In determining whether the statement should be protected by the First Amendment, which of the following do you agree with most: (respondents were required to pick exactly one)*

*(1) The words of the statement alone are enough to determine whether the speech is protected under the First Amendment. It doesn't matter what the speaker thinks, or what the listener perceives.*

*(2) To determine whether the statement is protected under the First Amendment, the only things that matter are the words of the statement and how the listener perceives the statement.*

*(3) To determine whether the statement is protected under the First Amendment, the only things that matter are the words of the statement and how the speaker intends for the statement to be perceived.*

*(4) To determine whether the statement is protected under the First Amendment, it is necessary to consider the words of the statement, the intent of the speaker and how the listener perceives the statement.*

TABLE 5: “TRUE THREATS” AND SUBJECTIVE OR OBJECTIVE STANDARDS

*(REFER TO DESCRIPTION ABOVE FOR CORRESPONDENCE BETWEEN THE OPTIONS PRESENTED ABOVE AND THE NUMBERS IN THE LEFT COLUMN IN THE TABLE)*

| Option   | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|----------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|          |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| 1        | 23%   | 19%                   | 32% | 24% | 23%             | 24%     | 24%    | 22%  |
| 2        | 22%   | 26%                   | 21% | 19% | 22%             | 21%     | 15%    | 31%  |
| 3        | 16%   | 17%                   | 17% | 16% | 16%             | 15%     | 15%    | 17%  |
| 4        | 39%   | 38%                   | 30% | 41% | 39%             | 40%     | 46%    | 30%  |
| N (unw.) | 1500  | 697                   | 261 | 431 | 1116            | 384     | 1040   | 460  |

<sup>55</sup> Although, not necessarily *only* a subjective standard; it is also possible to require the use of both a subjective and objective standard.

None of the options in Table 5 were selected by a majority of respondents. This is unsurprising, given that federal appeals courts have also reached divergent conclusions on the subjective/objective issue. Thirty-nine percent of respondents chose option 4, which involves use of both objective and subjective criteria. Option 3 (the purely subjective approach) received the least amount of support. This is notable because option 3 is consistent with<sup>56</sup> the Supreme Court ruling in *Elonis*, though it is important to note again that the *Elonis* Court addressed only the statute at issue, and not the broader question of what the First Amendment requires.

In addition to directly asking a question regarding objective and subjective standards, Villasenor 2017 included two different vignettes involving the same threat, but differing in that the intent behind the threat was different. Thus, this question was intended to explore whether respondents considered the state of mind of the person presenting the threat to be important. Half of respondents answered Q11A, and half of respondents answered Q11B.<sup>57</sup>

*Q11A: Tom and Phil live on the same street and strongly dislike each other. While Tom is away from home and traveling in another state, Phil posts something about Tom on Twitter that enrages Tom. While Tom does not intend to actually physically attack Phil, Tom wants scare Phil by making him believe that an attack is forthcoming. He sends Phil a private message on Twitter, saying "When I get back I am going to punch you so hard you won't even know what hit you." Do you agree that Tom's threat to Phil should be protected by the First Amendment?*

*Q11B: Tom and Phil live on the same street and know each other, but not particularly well. While Tom is away from home and traveling in another state, Phil posts something about Tom on Twitter that annoys Tom. In response Tom sends Phil a private message, saying "When I get back I am going to punch you so hard you won't even know what hit you." When sending this message, Tom assumes that Phil will know that Tom is venting and that Tom does not actually intend to physically attack Phil. Do you agree that Tom's threat to Phil should be protected by the First Amendment?*

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<sup>56</sup> That option is "consistent with" *Elonis* because while the Court wrote that what *Elonis* thinks does matter, the Court did not write that what the recipient of the threat thinks does not matter. Thus, another potential reading of *Elonis*, placed into the context of the options explored in question Q12 and tabulated in Table 5 above, is that the Court rejected options 1 and 2, but took a position that could be read to support either option 3 or option 4.

<sup>57</sup> More specifically, 751 of the respondents answered question Q11A and 749 of respondents answered question Q11B.

TABLE 6A: LEVEL OF PROTECTION WHEN SPEAKER HAS AN INTENT TO THREATEN

*Q11A: IF TOM INTENDS FOR PHIL TO BELIEVE AN ATTACK IS FORTHCOMING, SHOULD TOM'S THREAT TO PHIL SHOULD BE PROTECTED BY THE FIRST AMENDMENT?*

|          | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|----------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|          |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| Agree    | 36%   | 35%                   | 46% | 34% | 35%             | 40%     | 27%    | 49%  |
| Disagree | 64%   | 65%                   | 54% | 66% | 65%             | 60%     | 73%    | 51%  |
| N (unw.) | 751   | 347                   | 131 | 218 | 555             | 196     | 520    | 231  |

TABLE 6B: LEVEL OF PROTECTION WHEN SPEAKER DOES NOT HAVE AN INTENT TO THREATEN

*Q11B: IF TOM BELIEVES THAT PHIL WILL KNOW NO REAL ATTACK IS FORTHCOMING, SHOULD TOM'S THREAT TO PHIL SHOULD BE PROTECTED BY THE FIRST AMENDMENT?*

|          | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|----------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|          |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| Agree    | 41%   | 40%                   | 43% | 43% | 41%             | 41%     | 34%    | 51%  |
| Disagree | 59%   | 60%                   | 57% | 57% | 59%             | 59%     | 66%    | 49%  |
| N (unw.) | 749   | 350                   | 130 | 213 | 561             | 188     | 520    | 229  |

For most categories, the above answers show lack of a sizable numerical difference when comparing across the two tables. This suggests that, among the pool of respondents, there was little differentiation between the two types of intent conveyed in question Q11A and Q11B. This is also consistent with the observations from the responses to the prior question, in which different treatments of intent did not lead to dramatically different answers. Again, this is not surprising given that lower courts have also reached divergent conclusions on this issue. This has important implications for trials involving criminal threat statutes, suggesting, for example, that jury instructions need to be particularly clear about what standard is to be applied, and that in the absence of that clarity, jurors are likely to apply different standards.

## V. OTHER QUESTIONS RELATED TO OFFENSIVE SPEECH

*A. Shutting Down Speech Deemed Offensive*

One of the recurring stories on college campuses involves student groups preventing expression by speakers they deem offensive. In some cases, this involves pressuring the event hosts or university administrators to “disinvite” a previously invited speaker. In other cases, shutting down speech involves heckling a speaker so that he or she cannot be heard by the audience. On occasion students have resorted to physically blocking access to the event venue or committing acts of vandalism or violence to prevent a speech. To explore students’ views toward these sorts of actions, The Villasenor 2017 survey asked students to respond to the following vignette, which was used in identical form in four questions:

*A public university invites a very controversial speaker to an on-campus event. The speaker is known for making offensive and hurtful statements.*

Using this framing, the Villasenor 2017 survey presented a set of four questions, each of which pertained to a specific action aimed at preventing the speaker from delivering the speech:

TABLE 7: SILENCING SPEECH THROUGH SHOUTDOWNS

*Q7: A PUBLIC UNIVERSITY INVITES A VERY CONTROVERSIAL SPEAKER TO AN ON-CAMPUS EVENT. THE SPEAKER IS KNOWN FOR MAKING OFFENSIVE AND HURTFUL STATEMENTS. A STUDENT GROUP OPPOSED TO THE SPEAKER DISRUPTS THE SPEECH BY LOUDLY AND REPEATEDLY SHOUTING SO THAT THE AUDIENCE CANNOT HEAR THE SPEAKER. DO YOU AGREE OR DISAGREE THAT THE STUDENT GROUP’S ACTIONS ARE ACCEPTABLE?*

|          | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|----------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|          |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| Agree    | 51%   | 62%                   | 39% | 45% | 51%             | 51%     | 47%    | 57%  |
| Disagree | 49%   | 38%                   | 61% | 55% | 49%             | 49%     | 53%    | 43%  |
| N (unw.) | 1500  | 697                   | 261 | 431 | 1116            | 384     | 1040   | 460  |

TABLE 8: SILENCING SPEECH BY BLOCKING ACCESS TO THE EVENT VENUE

*Q8: A PUBLIC UNIVERSITY INVITES A VERY CONTROVERSIAL SPEAKER TO AN ON-CAMPUS EVENT. THE SPEAKER IS KNOWN FOR MAKING OFFENSIVE AND HURTFUL STATEMENTS. A STUDENT GROUP OPPOSED TO THE SPEAKER FORCES CANCELLATION OF THE EVENT BY PHYSICALLY BLOCKING THE SPEAKER'S ACCESS TO THE EVENT VENUE. DO YOU AGREE OR DISAGREE THAT THE STUDENT GROUP'S ACTIONS ARE ACCEPTABLE?*

|          | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|----------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|          |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| Agree    | 40%   | 48%                   | 30% | 36% | 40%             | 41%     | 35%    | 47%  |
| Disagree | 60%   | 52%                   | 70% | 64% | 60%             | 59%     | 65%    | 53%  |
| N (unw.) | 1500  | 697                   | 261 | 431 | 1116            | 384     | 1040   | 460  |

TABLE 9: SILENCING SPEECH BY COMMITTING VANDALISM

*Q9: A PUBLIC UNIVERSITY INVITES A VERY CONTROVERSIAL SPEAKER TO AN ON-CAMPUS EVENT. THE SPEAKER IS KNOWN FOR MAKING OFFENSIVE AND HURTFUL STATEMENTS. A STUDENT GROUP OPPOSED TO THE SPEAKER COMMITS VANDALISM TO PREVENT THE SPEAKER FROM SPEAKING. DO YOU AGREE OR DISAGREE THAT THE STUDENT GROUP'S ACTIONS ARE ACCEPTABLE?*

|          | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|----------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|          |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| Agree    | 23%   | 24%                   | 28% | 19% | 22%             | 26%     | 14%    | 35%  |
| Disagree | 77%   | 76%                   | 72% | 81% | 78%             | 73%     | 86%    | 65%  |
| N (unw.) | 1500  | 697                   | 261 | 431 | 1116            | 384     | 1040   | 460  |

TABLE 10: SILENCING SPEECH BY USING VIOLENCE

*Q10: A PUBLIC UNIVERSITY INVITES A VERY CONTROVERSIAL SPEAKER TO AN ON-CAMPUS EVENT. THE SPEAKER IS KNOWN FOR MAKING OFFENSIVE AND HURTFUL STATEMENTS. A STUDENT GROUP OPPOSED TO THE SPEAKER USES VIOLENCE TO PREVENT THE SPEAKER FROM SPEAKING. DO YOU AGREE OR DISAGREE THAT THE STUDENT GROUP'S ACTIONS ARE ACCEPTABLE?*

|          | Political Affiliation |     |     |     | Type of college |         | Gender |      |
|----------|-----------------------|-----|-----|-----|-----------------|---------|--------|------|
|          | Total                 | Dem | Rep | Ind | Public          | Private | Female | Male |
| Agree    | 19%                   | 20% | 22% | 16% | 18%             | 21%     | 10%    | 30%  |
| Disagree | 81%                   | 80% | 78% | 84% | 82%             | 79%     | 90%    | 70%  |
| N (unw.) | 1500                  | 697 | 261 | 431 | 1116            | 384     | 1040   | 460  |

Unsurprisingly, the percentage of respondents who answered “agree” declines as the actions become more severe. What is surprising is the percentages themselves, with fifty-one percent of respondents agreeing that “disrupt[ing] the speech by loudly and repeatedly shouting is acceptable (Table 7), and nineteen percent of respondents finding it acceptable for a student group to use violence to prevent the speech (Table 10). Additionally, among the four tables, the partisan divide between Republican and Democratic students is largest in Tables 7 and 8. The gender difference in responses increases as the questions ask about more violent actions. For example, ten percent of female respondents and thirty percent of male respondents agree that it is acceptable to use violence in the vignette associated with Table 10.

It is interesting to compare the Villasenor 2017 survey responses to this question to related questions from other surveys. The *Economist/YouGov* 2017 survey asked the same violence question of American adults, though, in contrast with the Villasenor 2017 question, the *Economist/YouGov* 2017 survey also included a “not sure” option. In the *Economist/YouGov* 2017 survey, in the 18-29 age group, which is the age group corresponding to most college students, the responses were as follows: Agree: fourteen percent; disagree: sixty-seven percent; not sure: nineteen percent.<sup>58</sup> Thus, in the *Economist/YouGov* September 2017 survey, in response to the violence question, fully a third of respondents in the 18-29 age group didn’t affirmatively *disagree* with the use of violence to silence speech. In addition, if the “not sure” responses are removed and only the responses among people in the *Economist/YouGov* survey who either agreed or disagreed in that

<sup>58</sup> *The Economist/YouGov* 2017 survey, *supra* note 10, at 90.

question are considered, the agree percentage in the 18-29 age group is slightly over seventeen percent of that subset of responses (obtained by dividing 14 by 81), which is close to<sup>59</sup> the nineteen percent number observed in the Villasenor 2017 survey.<sup>60</sup>

The Villasenor 2017 survey can also be compared to the McLaughlin 2017 and the FIRE 2017 surveys. McLaughlin 2017 asked whether students agreed or disagreed with the following statement: “If someone is using hate speech or making racially charged comments, physical violence can be justified to prevent this person from espousing their hateful views.” Thirty percent of respondents agreed with this statement.<sup>61</sup> Support for violence in the McLaughlin question spanned the political spectrum: Thirty-five percent of Democrats agreed, as did thirty-one percent of Republicans and twenty-six percent of Independents.<sup>62</sup> The FIRE 2017 survey asked a very different violence-related question,<sup>63</sup> finding that 1 percent of respondents, *themselves*, stated that they might conduct violent action to prevent a speech by an on-campus guest speaker “with ideas and opinions I strongly disagree with.”<sup>64</sup>

The variation in views regarding whether violence is acceptable among these four surveys is reasonable considering the variation in the questions. It is expected that a small number of respondents will admit to being willing to personally engage in violence to silence speech, so the FIRE 2017 responses are unsurprising. By contrast, both the Villasenor 2017 and *Economist/YouGov* 2017 surveys asked respondents whether they considered violent actions committed by a student group to be acceptable. This led to

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<sup>59</sup> The difference of two percent (i.e., the difference between nineteen and seventeen percent) is below the margin of error reported by *the Economist/YouGov*, which was three percent for the full sample of 1500 respondents, and would be larger for subsets. *Id.* at 204. For the violence question in the *Economist/YouGov* 2017 survey, the number of respondents in the 18-29 age group was 301. This means that if the “not sure” responses are excluded, the number of respondents aged 18-29 who either agreed or disagreed in this question is about 244. *Id.* at 90.

<sup>60</sup> The foregoing sentence addresses the percentages among the subset of respondents in the *Economist/YouGov* 2017 survey who either agreed or disagreed (i.e., removing the “not sure” respondents). As a separate question, it is possible to ask what the “not sure” respondents would have done if forced to choose either agree or disagree. Of course, it is impossible to know with any certainty. But, it is at least reasonable to hypothesize that if forced to choose, those “not sure” respondents (who number about 57, see *id.*) would have chosen agree or disagree in the same proportions as the respondents who did initially make one of those choices. If this were to occur, this would again lead to a 17% “agree” response rate.

<sup>61</sup> See McLaughlin *supra* note 9, at 19.

<sup>62</sup> *Id.*

<sup>63</sup> The FIRE 2017 survey included a question that stated: “If a guest speaker with ideas and opinions I strongly disagree with were invited to my college campus, I might do the following” and then listed a series of actions, and asked students to indicate all of the actions that apply. One of the actions listed was “Use violent or disruptive actions to prevent the event from occurring.” FIRE 2017, *supra* note 8, at 14-15.

<sup>64</sup> FIRE 2017, *supra* note 8, at 15 (stating 1% of survey respondents would engage in violent behavior), at 25 (giving the specific form of the question that was asked).



“agree” percentages in the teens as discussed above. Finally, McLaughlin 2017 used a different framing, asking whether “physical violence can be justified” to prevent expression of hateful views. This question led to the highest percentage of respondents— thirty percent—agreeing with the use of violence. In combination, these survey results the need for real concern about the potential use of violence to silence speech. Of course, the proper response to these results is not to preemptively cancel on-campus speeches that may lead to violence by protesters. After all, this would simply create a feedback cycle in which threats of violence would become a standard way for people to dictate who could, and could not, speak on college campuses.

*B. Is “Hate Speech” Constitutionally Protected?*

While hate speech is odious, provided that it steers clear of well-established First Amendment exceptions such as incitements to imminent lawless action and “true threats,” it is protected.

TABLE 11: HATE SPEECH

*Q15: DOES THE FIRST AMENDMENT PROTECT “HATE SPEECH”?*

|            | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|------------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|            |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| Yes        | 39%   | 39%                   | 44% | 40% | 38%             | 43%     | 31%    | 51%  |
| No         | 44%   | 41%                   | 39% | 44% | 44%             | 44%     | 49%    | 38%  |
| Don’t know | 16%   | 15%                   | 17% | 17% | 17%             | 13%     | 21%    | 11%  |
| N (unw.)   | 1500  | 697                   | 261 | 431 | 1116            | 384     | 1040   | 460  |

The relative consistency across different political affiliations in the responses to this question is notable, as is the difference in the responses by gender. In no category except males did the fraction of respondents who answered “yes” exceed fifty percent, and for males the number was barely over fifty percent.

It is interesting to compare the answers to this question to the same question asked in the FIRE 2017 survey. In the FIRE 2017 survey, 46 percent of students responded “yes,” twenty-nine percent responded “no,” and twenty-five percent responded “I don’t know.” Thus, in both the Villasenor 2017 and FIRE 2017 surveys, fewer than half of respondents correctly answered that hate speech is protected. The difference in the “yes” answers (forty-six percent in FIRE 2017 and thirty-nine percent in Villasenor 2017) is seven percentage points. Additionally, the FIRE 2017 results specific to the

subset of respondents at four-year colleges are as follows: forty-four percent of students responded “yes,” thirty percent responded “no,” and twenty-six percent responded “I don’t know.”<sup>65</sup> Thus, when four-year college student respondents are considered, the difference between the “yes” answers is five percentage points, i.e. thirty-nine percent of the respondents in the Villasenor 2017 survey, all of whom are four year college students, answered “yes,” while forty-four percent of the FIRE 2017 four-year college students answered “yes.”

However, there is a larger percentage point difference between the Villasenor 2017 and FIRE 2017 surveys when students who responded “no” and “I don’t know” to the question are compared. For example, in the FIRE 2017 survey, twenty-five percent of the respondents (and twenty-six percent of the four-year student respondents) answered “I don’t know,” and in the Villasenor 2017 survey sixteen percent of the respondents answered “I don’t know.” One possible explanation for this difference is that because data for Villasenor 2017 was collected immediately after the violent Charlottesville events, respondents may have had Charlottesville in mind as a “top-of-the-head” factor when answering questions.<sup>66</sup>

The McLaughlin 2017 survey also had a hate speech question, though in different form. That survey asked whether respondents agree or disagree with the statement “Hate speech, no matter how racist or bigoted it is, is still technically protected under the First Amendment as free speech.” Fifty-nine percent of the respondents stated they agree and thirty-one percent state that they disagree.<sup>67</sup> The McLaughlin 2017 publication did not state whether the other ten percent of respondents (who are not in either the “agree” or “disagree” category) declined to answer this question or specifically chose an answer such as “not sure”.

### C. Racist Speech

To explore views on racist speech, half of the Villasenor 2017 respondents were asked question 2A, and the other half were asked question 2B

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<sup>65</sup> Provided by Kelsey Ann Naughton, data analyst at FIRE.

<sup>66</sup> See, e.g., John Zaller & Stanley Feldman, *A Simple Theory of the Survey Response: Answering Questions versus Revealing Preferences*, 36 AM. J. POL. SCI. 579, 586 (1992) (citing Shelley E. Taylor and Susan Fisk, *Saliency, Attention, and Attribution: Top of the Head Phenomena*, 11 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 249, 252 (1978)) (discussing “answering on the basis of a single ‘top-of-the-head’ consideration”). Zaller & Feldman also provide what they term the “response axiom”: “Individuals answer survey questions by averaging across the considerations that happen to be salient at the moment of response . . .” *Id.* Zaller & Feldman further tie the response axiom to the “accessibility axiom,” under which “considerations that have been recently thought about are somewhat more likely to be sampled.” *Id.*

<sup>67</sup> McLaughlin 2017, *supra* note 9, at 17. McLaughlin 2017 does not state whether the 10% of respondents not included in either “agree” or “disagree” provided an answer such as “don’t know” or whether they simply declined to answer this question.

below.<sup>68</sup> While both of the vignettes describe a speaker who engages in racist speech, they differ in whether the audience includes members of the racial group being criticized by the speaker.

*Q2A: Addressing a group of people at a rally in a public park, a speaker says that many members of a particular racial group are “lazy” and have “terrible work habits.” The audience does not include any members of the racial group the speaker is describing.*

TABLE 12A: RACIST SPEECH WHEN NO MEMBERS OF THE TARGETED RACIAL GROUP ARE PRESENT

*VIEWS ON THE STATEMENT: “THE SPEAKER’S STATEMENTS SHOULD BE PROTECTED BY THE FIRST AMENDMENT.”*

|          | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|----------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|          |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| Agree    | 64%   | 62%                   | 75% | 63% | 62%             | 67%     | 58%    | 71%  |
| Disagree | 36%   | 38%                   | 25% | 37% | 38%             | 33%     | 42%    | 29%  |
| N (unw.) | 754   | 345                   | 124 | 226 | 556             | 198     | 520    | 234  |

*Q2B: Addressing a group of people at a rally in a public park, a speaker says that many members of a particular racial group are “lazy” and have “terrible work habits.” Some people in the audience are members of the racial group the speaker is describing.*

TABLE 12B: RACIST SPEECH WHEN NO MEMBERS OF THE TARGETED RACIAL GROUP ARE PRESENT

*VIEWS ON THE STATEMENT: “THE SPEAKER’S STATEMENTS SHOULD BE PROTECTED BY THE FIRST AMENDMENT.”*

|          | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|----------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|          |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| Agree    | 62%   | 54%                   | 76% | 67% | 63%             | 58%     | 57%    | 69%  |
| Disagree | 38%   | 46%                   | 24% | 33% | 37%             | 42%     | 43%    | 31%  |
| N (unw.) | 746   | 352                   | 137 | 205 | 560             | 186     | 520    | 226  |

The speech discussed in these vignettes, while odious, is protected by

<sup>68</sup> 754 of the 1500 respondents answered question Q2A and 746 of the respondents answered question Q2B.

the First Amendment. However more than one-third of respondents (thirty-eight percent) thought that this speech should not be protected. Interestingly, political affiliation, type of college a respondent attends, and gender did not result in sizable differences in attitudes toward racial speech. It is also interesting to compare the answers to the above questions with a FIRE 2017 survey question, which asked respondents “Should the First Amendment to the Constitution protect hate speech?” Thirty-five percent of the respondents to this FIRE 2017 question answered “yes”, forty-eight percent answered “no”, and seventeen percent answered “I don’t know.”<sup>69</sup> Of course, the questions in two surveys are different: FIRE was asking a general question about whether hate speech should be protected, while the responses in Tables 12A and 12B related to a Villasenor 2017 question reciting a specific example of hate speech and asking whether the speech in that example should be protected. These differences in the questions are an important caveat to any comparison. With that caveat, the differences in the answer percentages are notable.

#### *D. Does the First Amendment Require Counterpoints to Offensive Speech?*

The First Amendment does not require that hosts of on-campus events provide an opportunity to hear counterpoints.<sup>70</sup> This understanding, however, was not widespread among respondents, when asked the following question in Villasenor 2017:

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<sup>69</sup> FIRE 2017, *supra* note 8, at 17.

<sup>70</sup> In a different context, the issue of counterpoints has a complex history. For example, the “fairness doctrine” policy of the Federal Communications Commission was introduced in 1949, upheld by the Supreme Court as constitutional in *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), and then rescinded by the FCC in 1987. *See also* *Syracuse Peace Council v. FCC*, 867 F.2d 654, 655-56 (D.C. Cir. 1989) (upholding the FCC’s decision to revoke the “fairness doctrine,” though not on constitutional grounds).

TABLE 13: WHETHER COUNTERPOINTS ARE REQUIRED

*Q14: CONSIDER AN EVENT, HOSTED AT A PUBLIC U.S. UNIVERSITY BY AN ON-CAMPUS ORGANIZATION, FEATURING A SPEAKER KNOWN FOR MAKING STATEMENTS THAT MANY STUDENTS CONSIDER TO BE OFFENSIVE AND HURTFUL. A STUDENT GROUP OPPOSED TO THE SPEAKER ISSUES A STATEMENT SAYING THAT, UNDER THE FIRST AMENDMENT, THE ON-CAMPUS ORGANIZATION HOSTING THE EVENT IS **LEGALLY REQUIRED** TO ENSURE THAT THE EVENT INCLUDES NOT ONLY THE OFFENSIVE SPEAKER BUT ALSO A SPEAKER WHO PRESENTS AN OPPOSING VIEW. WHAT IS YOUR VIEW ON THE STUDENT GROUP'S STATEMENT?*

|          | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|----------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|          |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| Agree    | 62%   | 65%                   | 62% | 58% | 63%             | 60%     | 60%    | 66%  |
| Disagree | 38%   | 35%                   | 38% | 42% | 37%             | 40%     | 40%    | 34%  |
| N (unw.) | 1500  | 697                   | 261 | 431 | 1116            | 384     | 1040   | 460  |

Sixty-two percent of respondents overall (and in all categories, more than half of respondents) expressed a belief that a counterpoint was required. Some of the respondents who agreed with this question are likely confusing good event design, which can often benefit from providing attendees with opportunities to hear multiple viewpoints, with First Amendment compliance, which is of course silent on whether a single viewpoint, or multiple viewpoints, are offered.

#### *E. Should Colleges Shield Students from Offensive Speech?*

Villasenor 2017 also asked students to choose what an ideal learning environment would be. This question was identical to a question asked several other surveys.

*Q16: If you had to choose one of the options below, which do you think it is more important for colleges to do?*

*Option 1: create a positive learning environment for all students by prohibiting certain speech or expression of viewpoints that are offensive or biased against certain groups of people*

*Option 2: create an open learning environment where students are exposed to all types of speech and viewpoints, even if it means allowing speech that is offensive or biased against certain groups of people?*

TABLE 14: PREFERRED COLLEGE ENVIRONMENT

|                        | Total | Political Affiliation |     |     | Type of college |         | Gender |      |
|------------------------|-------|-----------------------|-----|-----|-----------------|---------|--------|------|
|                        |       | Dem                   | Rep | Ind | Public          | Private | Female | Male |
| Option 1<br>(positive) | 53%   | 61%                   | 47% | 45% | 53%             | 54%     | 52%    | 55%  |
| Option 2<br>(open)     | 47%   | 39%                   | 53% | 55% | 47%             | 46%     | 48%    | 45%  |
| N (unw.)               | 1500  | 697                   | 261 | 431 | 1116            | 384     | 1040   | 460  |

For comparison, the results from the Gallup 2016 survey on this question are as follows:<sup>71</sup>

|                        | Total | Dem | Rep | Ind | Public | Private | Female | Male |
|------------------------|-------|-----|-----|-----|--------|---------|--------|------|
| Option 1<br>(positive) | 22    | 28  | 15  | 18  | NA     | NA      | 28     | 16   |
| Option 2<br>(open)     | 78    | 72  | 84  | 81  | NA     | NA      | 72     | 83   |

And, yet another data source on this question is found in the *Economist/YouGov* September 2017 survey, which asked this question and for the 18-29 age group and had responses of: Option 1: thirty-two percent; Option 2: forty-seven percent; Not Sure: twenty-three percent.<sup>72</sup> Further, if the “not sure” answers are removed and the *Economist/YouGov* September 2017 answers are recomputed only for the subset of respondents who chose either Option 1 or Option 2, the percentages are: Option 1: thirty-nine percent; Option 2: sixty-one percent.

It is notable that the tabulations for this question vary so much between surveys. Gallup 2016 finds that twenty-two percent of students want to learn in the “positive learning environment, while the *Economist/YouGov* 2016 found that thirty percent of respondents in the 18-29 age group want this (and additionally twenty-three percent were not sure). And, as noted above, the among the Villasenor 2017 respondents, fifty-three percent made this choice. There are several possible causes for these divergences, including differences in methodology across the various surveys as well as differences in the target population (the *Economist/YouGov* 2017 survey was an adult sample, and the respondents in the 18-29 year age group likely

<sup>71</sup> Gallup 2016, *supra* note 6, at 12.

<sup>72</sup> *Economist/YouGov* 2017, *supra* note 10, at 95.

included respondents who were not college students). In addition, the different respective times of data collection for Gallup 2016, which took place in early 2016, the Villasenor 2017 survey, which collected data in August 2017, and the *Economist/YouGov* 2017 survey, which collected data in September 2017, may have impacted responses to this question (in particular through the “top of the head” phenomenon in August 2017, and perhaps to a lesser degree in September 2017),<sup>73</sup> though the precise extent of this timing effect is unknowable.

#### CONCLUSION

There are several conclusions suggested by the results presented above. In some respects, many respondents have an overly narrow understanding of the scope of expression that is protected under the First Amendment. For example, many respondents indicated a belief that hate speech, including racist speech, is unprotected by the First Amendment, and that the First Amendment requires the presentation of counterpoints. Relatedly, many respondents also consider it acceptable to silence offensive viewpoints through a variety of mechanisms, up to and including violence. Thus, on these issues many respondents have an overly narrow view of the scope of expression that is protected under the First Amendment.

Yet there are other respects in which a sizable percentage of respondents have an overly *broad* conception of freedom of expression, believing, for example, that incitements to imminent lawless action are constitutionally permitted, and that defamation is constitutionally protected when it is done in response to being treated rudely. Finally, in relation to “true threats,” the lack of clarity among respondents regarding subjective/objective evaluation criteria illustrates the complexity of this issue—and suggests that even if the Supreme Court eventually articulates an explicit constitutional (as opposed to statutory<sup>74</sup>) position, jurors in lower courts may find it difficult to apply.<sup>75</sup>

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<sup>73</sup> See *supra*, note 67 and accompanying text.

<sup>74</sup> The *Elonis* decision on this issue was limited to the statute in question, 18 U.S.C. § 875(c); as noted earlier in this Essay the Court did not reach the question of what the First Amendment itself requires in relation to the subjective/objective issue in the context of “true threats.” See *supra*, Part IV, at 15.

<sup>75</sup> An additional conclusion worth noting is that while type of college (public or private) was one of the categories presented in the tables herein, for most responses there was very little difference between the percentages shown for public college respondents and private college respondents (in nearly all cases the differences are no more than five percent and in most cases the differences are in the range from zero to three percent). Thus, while public and private colleges operate under very different legal frameworks with respect to the First Amendment (public colleges, as government entities, have First Amendment obligations), the results of this survey suggest that whether a student attends a private or public college has little impact on student views on the issues explored herein.

More generally, these results show that there is a divergence between what might be called theory and practice when discussing views among respondents regarding the First Amendment. (A related observation was provided in Gallup 2016, which noted that “[c]ollege students are supportive of First Amendment rights in the abstract, but many are comfortable with certain restrictions on those rights.”<sup>76</sup>) In the Villasenor 2017 survey, many respondents are, in theory, very supportive of the First Amendment. Consider the following two questions that were also asked in the survey, and the associated responses:

TABLE 15: CURRENT IMPORTANCE OF THE FIRST AMENDMENT RELATIVE TO THE PAST

*Q5: EVEN THOUGH THERE HAVE BEEN MANY DEVELOPMENTS IN COMMUNICATIONS AND TECHNOLOGY SINCE THE FIRST AMENDMENT WAS WRITTEN SUCH AS THE INVENTION OF THE INTERNET, TODAY THE FIRST AMENDMENT IS STILL AS IMPORTANT AS IT WAS IN THE LATE 1700S.*

|          | Total | Dem | Rep | Ind | Public | Private | Female | Male |
|----------|-------|-----|-----|-----|--------|---------|--------|------|
| Agree    | 91%   | 90% | 94% | 92% | 91%    | 91%     | 90%    | 92%  |
| Disagree | 9%    | 10% | 6%  | 8%  | 9%     | 9%      | 10%    | 8%   |
| N (unw.) | 1500  | 697 | 261 | 431 | 1116   | 384     | 1040   | 460  |

TABLE 16: THE FIRST AMENDMENT AS A RELEVANT AND IMPORTANT PART OF AMERICAN DEMOCRACY

*Q6: IN TODAY'S SOCIETY, THE FIRST AMENDMENT IS RELEVANT AND AN IMPORTANT PART OF AMERICAN DEMOCRACY.*

|          | Total | Dem | Rep | Ind | Public | Private | Female | Male |
|----------|-------|-----|-----|-----|--------|---------|--------|------|
| Agree    | 94%   | 95% | 95% | 93% | 93%    | 96%     | 94%    | 94%  |
| Disagree | 6%    | 5%  | 5%  | 7%  | 7%     | 4%      | 6%     | 6%   |
| N (unw.) | 1500  | 697 | 261 | 431 | 1116   | 384     | 1040   | 460  |

As these results when combined with the data presented earlier make clear, there is extremely strong theoretical support for the First Amendment among respondents, but (particularly with respect to offensive speech) substantially less support for specific expression that is protected under the First Amendment. Stated another way, many respondents lack sufficient understanding of what forms of expression the First Amendment

<sup>76</sup> Gallup 2016, *supra* note 6, at 12.



does and does not protect.

Part of the solution involves increased education—not only in college, but perhaps even more importantly, prior to college—regarding constitutional principles, including the Bill of Rights, and more specifically the First Amendment, and more specifically still, the nature of the freedoms it confers. However, education alone would be unlikely to resolve the divergences identified above between the actual and perceived scope of freedom of expression. Another factor is likely the view that opinions that might make some students uncomfortable have no place in on-campus dialogue. This creates censorship pressure,<sup>77</sup> and reduces the opportunity for debate on the many complex issues on which reasonable people can have divergent (and in some cases, as perceived by some people, potentially offensive) views. Efforts to increase tolerance for viewpoint diversity can be helpful in this regard. Furthermore, there is the interesting question of the role of university faculty and administrators in relation to on-campus views of freedom of expression. A survey of faculty and administrators would provide an additional important source of data on the broader question of the on-campus climate for free expression.

As both the survey that is the focus of this Essay as well as other surveys cited herein have made clear, free expression is an important challenge in today's colleges. College students, faculty, and staff can play a vital role in addressing this challenge by working to improve the campus climate for viewpoint diversity, and by emphasizing that the discussions that ultimately end up being the most valuable, enlightening, and informative are not always those that ensure that all participants stay in their comfort zones.

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<sup>77</sup> See, e.g., the Fire 2017 survey, *supra* note 8, at 9, stating that “At least half of students (54%) agree that they have stopped themselves from sharing an idea or opinion in class at some point since beginning college.” (parentheses in original).