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## YALE LAW & POLICY REVIEW

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### For Freedom of Expression, For Due Process, and For Yale: The Emerging Threat to Academic Freedom at a Great University

*José A. Cabranes\**

We have good news and bad news today. The good news is that we are printing in hard copy the *Woodward Report on Freedom of Expression at Yale*. The bad news is that we *need* to reprint the Woodward Report.

We are dealing today with interrelated developments at Yale that threaten freedom of expression and the institutions that protect it, including faculty due process rights, sometimes described as academic tenure.

Many writers on this subject understandably focus on the fate of students. But it is important to recognize that today's developments are also redefining the rights of *faculty*—and the role of faculty in the governance of this Universi-

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\* This is a lightly edited version of the remarks of José A. Cabranes, United States Circuit Judge for the Second Circuit, at the reception of the William F. Buckley Program at Yale to celebrate the republication in print of the Woodward Report on Freedom of Expression at Yale (1975). The reception took place at The Study at Yale in New Haven, Connecticut on October 1, 2016. This Essay was first published online at 35 YALE L. & POL'Y REV. INTER ALIA 23 (2017), [http://ylpr.yale.edu/inter\\_alia/freedom-expression-due-process-and-yale-emerging-threat-academic-freedom-great-university](http://ylpr.yale.edu/inter_alia/freedom-expression-due-process-and-yale-emerging-threat-academic-freedom-great-university) [<http://perma.cc/E5K9-UFLD>]. Judge Cabranes was Yale's first General Counsel when he was appointed to the federal bench in 1979, having served as legal adviser to Presidents Kingman Brewster, Hanna Holborn Gray, and A. Bartlett Giamatti. He later served as a Successor Trustee (Fellow) of the Yale Corporation for the maximum of twelve years (1987–1999) in the presidencies of Benno C. Schmidt, Jr. and Richard C. Levin, serving as Chair of several Corporation committees, including the Committee on Institutional Policies. He has written broadly on university governance, including the lecture published as *Myth and Reality of University Governance in the Post-Enron Era*, 76 FORDHAM L. REV. 955 (2007). He was sponsored for appointments to the federal bench by Senators Abraham Ribicoff and, later, Joseph I. Lieberman of Connecticut and Daniel Patrick Moynihan of New York. Before his judicial service he was Chair of two leading organizations of the Hispanic community, Aspira of New York and the Puerto Rican Legal Defense and Education Fund (now LatinoJustice), of which he was a founding member.

ty.<sup>1</sup> These are developments that, if not addressed, ultimately threaten Yale's place among the great universities of the world.

Some of the developments of which I speak are already familiar to you. Each may seem minor in isolation, but together they form a larger pattern threatening the academic enterprise. These include:

- The shaming of community members who hold “uncivil” views, or who invite speakers embracing “distasteful” causes, under the purported banner of free-speech rights—combined with the University administration's perfunctory genuflections before the Woodward Report with the absence of any meaningful effort to protect freedom of expression on campus;<sup>2</sup>
- Vocal demands for “safe spaces” and “trigger warnings,” lest students be exposed to ideas other than their own, combined with the hand-wringing apologies of university officials unable, or unwilling, to defend the institution they claim to lead;
- Yale's adoption of a system of surveillance and anonymous reporting, designed, in part, to track and punish behavior that deviates from various campus orthodoxies. Call it the emergence of the Surveillance University; and

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1. On the erosion, if not destruction, of Yale faculty due process rights, see *infra* note 3 for a discussion of new agreements with the federal government pursuant to Title IX that were enacted without faculty approval and supersede faculty rights as defined in the Yale Faculty Handbook; and *infra* notes 4, 32–36 and accompanying text for a discussion of a proposed code of faculty conduct that, much like the Title IX rules, lacks basic procedural safeguards and can be enacted without faculty approval.
  2. The absence of any meaningful effort by University officials to address physical intimidation on campus is notable. The Silliman College incident around Halloween 2015 is merely one such example. See, e.g., James Kirchick, *New Videos Show How Yale Betrayed Itself by Favoring Cry-Bullies*, TABLET (Sept. 22, 2016, 12:06 AM), <http://www.tabletmag.com/jewish-news-and-politics/213212/yale-favoring-cry-bullies> [<http://perma.cc/K3F6-Y42T>]; see also Eliana Johnson, *Yale's Fight for Free Speech*, NAT'L REV. (July 11, 2016), <http://www.nationalreview.com/magazine/2016-07-11-0100/yale-university-free-speech-problem> [<http://perma.cc/3NCV-UCAN>]; Victor Wang, *Faculty Divided on Free Speech*, YALE DAILY NEWS (Nov. 20, 2015), <http://yaledailynews.com/blog/2015/11/20/faculty-divided-on-free-speech> [<http://perma.cc/AKL6-9N8H>].

Another occurred during the 2015 William F. Buckley, Jr. Conference on Free Speech, an event that had been planned months before campus outrage erupted because of the incident at Silliman College. Despite the emergence of counter-narratives, it is clear that students protesting alleged discrimination outside of the conference spat on several participants as they were exiting the event. See Monica Wang et al., *Students Protest Buckley Talk*, YALE DAILY NEWS (Nov. 9, 2015), <http://yaledailynews.com/blog/2015/11/09/students-protest-buckley-talk> [<http://perma.cc/P4XB-XPMK>].

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- Perhaps most troubling of all, the combined efforts of governmental and university sexual misconduct bureaucrats to eviscerate, in the name of nondiscrimination, the due process protections of faculty that have long underpinned academic freedom.

The erosion, if not repeal, of the procedural norms protecting the faculty and students is a fact—and it has been accomplished by “voluntary” agreements of Yale officials with government agencies.<sup>3</sup> Enforcement of these agreements against faculty members, both tenured and non-tenured, stems from the growth of administration bureaucrats, who are themselves not equally subject to the rules nor responsible for the research and teaching at the heart of this University.<sup>4</sup>

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3. See Voluntary Resolution Agreement with Yale University, Complaint No. 01-11-2027 (Dep’t of Educ., Office of Civil Rights June 11, 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027-b.pdf> [<http://perma.cc/2VQK-AQCA>]. This voluntary agreement has since been incorporated into the Faculty Handbook. See YALE UNIV., OFFICE OF THE PROVOST, FACULTY HANDBOOK 162 (2016) [hereinafter Faculty Handbook], [http://provost.yale.edu/sites/default/files/files/Faculty%20Handbook\\_11-1-16.pdf](http://provost.yale.edu/sites/default/files/files/Faculty%20Handbook_11-1-16.pdf) [<http://perma.cc/FCF3-P2UJ>]. The new sexual misconduct procedures, referenced in the Faculty Handbook, can be found at Office of the Provost, *UWC Procedures*, YALE U. (Oct. 26, 2015) [hereinafter *UWC Procedures*], <http://provost.yale.edu/uwc/procedures> [<http://perma.cc/BX93-LMWD>].

It appears from the public record that the adoption of these rules and procedures was driven by President Salovey and appointed committees. There is no clear evidence that they were ever submitted for the consideration, or approval, of a broadly representative body of faculty such as the Faculty of Yale College. See Constance E. Bagley et al., *Implementing Yale’s Sexual Misconduct Policy: The Process of Institutional Change*, CHANGE MAG., Mar.–Apr. 2012.

For an overview of the faculties of the University, see Faculty Handbook, *supra* note 3, at 2–4.

4. In accordance with the 2012 Voluntary Agreement, *supra* note 3, the University-Wide Committee on Sexual Misconduct (UWC) has the authority to adjudicate a broad range of sexual misconduct complaints and enforce its decisions against faculty members. The UWC consists of students and administrative members in addition to faculty members. The UWC does not have equal authority in all complaints raised against a “staff member.” The UWC defines a “staff member” as “all Yale employees except Faculty members, members of a Yale collective bargaining unit, clerical and technical employees excluded from bargaining units, casual or temporary employees, or student employees.” See *UWC Procedures*, *supra* note 3. In addition, “[o]nly students and trainees may bring complaints to the UWC against staff members, and the UWC is not empowered to hear complaints made by or against members of Yale’s collective bargaining units or excluded clerical and technical employees.” *Id.*

The newly adopted faculty conduct code—“Faculty Standards of Conduct”—suffers from a similar defect: it does not apply to non-faculty administrators. Faculty Handbook, *supra* note 3, at 5–9; see also Faculty of Arts and Sciences (FAS) Senate, *Minutes of the FAS Senate Meeting on Nov. 19, 2015*, YALE U. 4 (Nov. 19,

Momentarily, I will explain some of these developments in greater detail, as well as what they have to do with the Woodward Report. But let me first note that what I have to say about threats to freedom of expression, and to due process rights of faculty accused of misconduct as well as students, is a source of personal sadness for me. As a lawyer, adviser, and trustee, I have spent several decades as a collaborator with, and defender of, successive Yale presidents and their administrations.

Yet I stand here today unable to defend developments that strike at the heart of freedom of expression and the faculty due process system created to protect it.<sup>5</sup>

We can toss our hands up and say that the malaise so palpably evident at Yale is simply part of larger cultural phenomena, national and international; “you can’t please everyone” is one common refrain, along with, “it’s happening everywhere, not just at Yale.”

Like most clichés, these have the ring of truth. But those who love Yale know that these clichés do *not* apply to all of our supposed peers. It is *not* happening “everywhere.”

And those who care about Yale will also recall that Yale is supposed to lead by example, not to be swept along by a national tide.

What I have to say is based entirely on factual statements that can be found in the public record. I do not have to rely on any particular episode. In describing the policies and governance of Yale, I am not commenting on federal or state law. I am commenting on *Yale University* law.

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Today’s event is an occasion not just for alarm, but also for celebration—celebration of the Woodward Report, and of the efforts of the Buckley Program and Encounter Books to defend its enduring values.

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2015), <http://fassenate.yale.edu/minutes> [<http://perma.cc/EMN5-VS8P>] (recording that Professor Ian Shapiro of the Department of Political Science “asked if there are standards of conduct for administrators. If so, what are they and how do they compare to the faculty standards? If not, why are there no standards of administrative conduct? [Professor Beverly Gage of the Department of History, and then-Chair of the FAS Senate] answered that faculty who have jobs as full-time administrators are covered by these standards of conduct, but these standards do not apply to non-faculty administrators”).

A draft of the proposed procedures for enforcing the faculty conduct code was reprinted in the Yale Daily News. Glenda Gilmore, *A Fair Trial for the Faculty*, YALE DAILY NEWS (Oct. 27, 2015), <http://yaledailynews.com/blog/2015/10/27/gilmore-a-fair-trial-for-the-faculty> [<http://perma.cc/NNF9-WMCY>]. The proposed procedures are described in further detail *infra* notes 32–36.

5. See, for example, RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955); the related volumes, RICHARD HOFSTADTER, *ACADEMIC FREEDOM IN THE AGE OF THE COLLEGE* (1961); and WALTER P. METZGER, *ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY* (1961).

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Let us also note a revealing irony: that this celebration of the Woodward Report is undertaken by a *conservative* student group.

As many of you know, it was President Kingman Brewster, the seventeenth President of Yale, who appointed the Committee on Freedom of Expression at Yale, better known as the Woodward Committee, in honor of its chairman, the eminent historian of the American South and race.

C. Vann Woodward was an old-fashioned liberal. He was also broad-minded and a person of complete rectitude. He would have been gratified that today's conservatives had come to appreciate his work, on free expression as well as on the history of race in America.

Professor Woodward was best known for his book entitled *The Strange Career of Jim Crow*, which Martin Luther King, Jr. quoted at the famous Selma March to Montgomery in 1965 in support of the Voting Rights Act and praised as “the historical Bible of the civil rights movement.”<sup>6</sup>

We rightly applaud the work of the Woodward Committee, but we should not forget that it was a response to efforts on campus to prohibit invitations to unpopular and truly obnoxious speakers, the effort to punish those who had invited the speakers, and (amazingly enough) to punish totally innocent conservative students on the assumption that they were the sort of students who must have been responsible for the invitations.<sup>7</sup> And we should not forget that

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6. Quoted in David Brion Davis, *C. Vann Woodward (1908–1999)*, N.Y. REV. BOOKS (Feb. 10, 2000), <http://www.nybooks.com/articles/2000/02/10/c-vann-woodward-19081999> [<http://perma.cc/W68X-HNAY>]. The Afterword by William S. McFeely in a later edition of *The Strange Career of Jim Crow* also describes C. Vann Woodward's participation in the Selma March. See William S. McFeely, *Afterword* to C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 221, 230–32 (4th ed. 2002).
  7. Section II “Of Trials and Errors” of the Woodward Report details the “campus upheaval” that prompted President Brewster to appoint the Woodward Committee on Freedom of Expression. See *Republication of the Report of the Committee on Freedom of Expression at Yale*, in *CAMPUS SPEECH IN CRISIS: WHAT THE YALE EXPERIENCE CAN TEACH AMERICA* 29, 35–39 (Buckley Program ed., 2016) [hereinafter Woodward Report].

For additional details on the circumstances surrounding the Woodward Report, including the invitations to Governor George Wallace and Professor William Shockley as well as the subsequent “round up” of those involved or those erroneously thought to have been involved, see Ralph K. Winter, *Coexistence and Co-Dependence: Conservatism and Civil Liberties*, 15 HARV. J.L. & PUB. POL'Y 1, 1–2 (1992). Judge Winter, United States Circuit Judge for the Second Circuit, was a full-time member of the Yale Law School faculty from 1962–1981 and continued to teach as an adjunct faculty member until 2015. At the time of his appointment to the federal bench in 1981, Judge Winter was the William K. Townsend Professor of Law.

See also Nathaniel Zelinsky, *Challenging the Unchallengeable (Sort of)*, YALE ALUMNI MAG., Jan.–Feb. 2015, <http://yalealumnimagazine.com/articles/4017-woodward-report> [<http://perma.cc/K4YC-FAJN>] (providing a secondary account of the history of the Woodward Report).

the success of the Woodward Report owed much to the courageous leadership of President Brewster, who appointed the Committee to examine freedom of expression at Yale, who charged the Committee to report to Yale's faculties, and who received and conveyed the Committee's report to the Yale Corporation, the University's governing board.<sup>8</sup>

One of the lessons of the Woodward Report is that while free expression depends in part on the work of students and professors, it cannot survive without vigorous and unequivocal protection from the University's most senior officials.

When President Brewster brought me back to Yale in 1975 as the University's first in-house legal adviser, the Woodward Report was less than a year old, but it had already achieved something akin to constitutional status. As a sign of its dignity and importance, the Yale Corporation printed it in the same format and handsome binding used for the University's charter and by-laws. The very sight of that printed report made obvious Yale's serious and enduring commitment to free expression.<sup>9</sup>

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8. Pam King, *Brewster Charges Expression Group*, YALE DAILY NEWS (Sept. 20, 1974), <http://digital.library.yale.edu/cdm/compoundobject/collection/yale-ydn/id/138242/rec/72> [<http://perma.cc/U4WV-DDSL>] (“Yale President Kingman Brewster Jr. yesterday charged the University Committee on Freedom of Expression at Yale ‘to examine the condition of freedom of expression and peaceful dissent at Yale, to draft recommendations for any measures it may deem necessary for the maintenance of those principles, and to report to the faculties of the University early next term.’”).

Indeed, President Brewster was not the only Yale leader who faced controversies involving freedom of expression. President Benno C. Schmidt, Jr. intervened in the “Wayne Dick incident,” encouraging the University to rehear and reverse its decision to punish a college sophomore for distributing fliers that satirized Yale’s gay and lesbian awareness days. See Matthew Silversten, *What’s Next for Wayne Dick? The Next Phase of the Debate over College Hate Speech Codes*, 61 OHIO ST. L.J. 1247, 1247–55 (2000). Several Yale professors, including C. Vann Woodward, were also forceful free-speech advocates during this “incident.” See *Professors Back Yale Student on Free Speech*, N.Y. TIMES (Sept. 28, 1986), <http://www.nytimes.com/1986/09/28/nyregion/professors-back-yale-student-on-free-speech.html> [<http://perma.cc/H2P2-YB97>].

President Schmidt later commissioned the 1989 Committee to Study Freedom of Expression at Yale (Adair Report) that reaffirmed the University’s commitment to the Woodward Report. The 1989 Committee was chaired by Robert Adair, Sterling Professor of Physics. See *The Report of the Committee To Study Freedom of Expression*, YALE U. (1989), <http://www.yale.edu/sites/default/files/files/freedom1989.pdf> [<http://perma.cc/D9ZR-KQTT>].

9. See José A. Cabranes & Kate Stith, *Free Speech in Our Universities: A Commentary on the Woodward Report*, in *CAMPUS SPEECH IN CRISIS: WHAT THE YALE EXPERIENCE CAN TEACH AMERICA*, *supra* note 7, at 55.

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Since that time, the Woodward Report has faded from view. I mean that quite literally. The Report has always been “available.”<sup>10</sup> But there is a difference between availability and visibility. As matters now stand, the Woodward Report is accorded no more prominence on Yale’s website than any other report or regulation. As a result, newcomers to Yale might be forgiven for thinking that the University administration views the Woodward Report as roughly equivalent in importance to the other reports and policies found on the website of the Office of the Dean of Yale College, for example the “Business Office Computing Policies” and the “Academic Field Trip Policies.”<sup>11</sup>

I do not mean to imply anything nefarious. Many of the vital documents of University life have, in recent years, disappeared from view, often as an unintended consequence of the effort to “go green.”<sup>12</sup>

To offer one example: the University used to print, every Friday, the *Yale Bulletin and Calendar*.<sup>13</sup> From its pages, members of the Yale community could learn everything from the dates of upcoming concerts to news of recent faculty promotions and publications. The great value of the *Bulletin and Calendar* was that, like a newspaper, it was likely to surprise its readers. The whole idea of reading it was that one was not looking for anything in particular, but merely to learn, in a general sense, what was going on. Of course, all of the information that was once in the *Bulletin and Calendar* can still be found. But it is far easier to filter out and to ignore.

This, I suggest, is why it is so vital that Encounter Books has reprinted in hardcopy the Woodward Report. It is, in a sense, what my father would have called *un acto de presencia*. Its reprinting makes the presence of the Woodward Report felt in a tangible way, and it will help to ensure that this vital document is encountered even by those who are not looking for it.

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Today it is as important as ever that we continue to feel the presence of the Woodward Report.

Woodward and his colleagues accorded free expression at Yale a degree of protection close to that afforded by the First Amendment in the public sphere.

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10. For instance, excerpts from it have appeared in Yale’s “Undergraduate Regulations,” and the full Report is posted on Yale’s website. *Id.* at 55 & n.2. An electronic version of the Woodward Report, *supra* note 7 is available at <http://yalecollege.yale.edu/deans-office/policies-reports> [<http://perma.cc/2ABU-RUDL>].
  11. See Office of the Dean of Yale Coll., *Policies & Reports*, YALE C. (2016), <http://yalecollege.yale.edu/deans-office/policies-reports> [<http://perma.cc/W7MR-R3LG>].
  12. “Going green” not only diminishes the visibility and availability of key documents and policies, it also undermines their permanence by allowing for more frequent changes and revisions that can go unnoticed. See *infra* note 37.
  13. The modern-day equivalent of the *Yale Bulletin and Calendar* can be found online. See *Calendar of Events*, YALE U., <http://calendar.yale.edu/cal/opa> [<http://perma.cc/SDF9-2TE3>].

That this principle of constitutional law should also be a principle of university law is explained by a simple syllogism. I quote from the Report: “The primary function of a university is to discover and disseminate knowledge.”<sup>14</sup>

“To fulfill this function a free interchange of ideas is necessary.”<sup>15</sup>

Therefore, “the university must do everything possible to ensure within it the fullest degree of intellectual freedom.”<sup>16</sup>

Since the First Amendment may not offer protection to speech at private universities,<sup>17</sup> the Woodward Report sought to establish a fundamental principle of similar force as a matter of *University* law. Because “the paramount obligation of the university is to protect [the] right to free expression,”<sup>18</sup> the Report asserted that the University has a responsibility to give priority to free speech over other values.

The Woodward Report acknowledged that other ideals must also be considered, including “friendship, solidarity, harmony, civility or mutual respect.”<sup>19</sup> Ultimately, however, the balancing of these competing values was an “ethical responsibility[y] assumed by” individual members of the University community,<sup>20</sup> rather than a task for the University itself, which has the primary and “overriding” obligation to protect free expression.<sup>21</sup>

Despite repeated invocations of freedom of expression, it is clear that the current University leadership has been poorly advised on the Woodward Report’s commitment to freedom of expression in accordance with its own terms. By its actions, Yale has effectively disavowed the Woodward Report’s fundamental premise that “[i]t may sometimes be necessary in a university for civility

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14. Woodward Report, *supra* note 7, at 30.

15. *Id.*

16. *Id.*

17. I do not comment on whether the state action doctrine could be applied to private universities like Yale, though others have discussed the question. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) (“[T]he conduct of private parties lies beyond the Constitution’s scope in most instances . . . .”); *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982) (“[I]t is fundamental that the First Amendment prohibits governmental infringement on the right of free speech.” (emphasis added)); *Evans v. Newton*, 382 U.S. 296, 299 (1966) (“Conduct that is formally ‘private’ may become so entwined with governmental policies . . . as to become subject to the constitutional limitations placed upon state action.”); see also Jed Rubenfeld, *Privatization, State Action, and Title IX: Do Campus Sexual Assault Hearings Violate Due Process?* (Yale Law Sch. Pub. Law Research Paper No. 588, 2016), <http://ssrn.com/abstract=2857153> [<http://perma.cc/974M-553W>].

18. Woodward Report, *supra* note 7, at 35.

19. *Id.* at 31.

20. *Id.* at 33.

21. *Id.* at 35.



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and mutual respect to be *superseded* by the need to guarantee free expression.”<sup>22</sup> It has thus qualified, if not repealed, the University’s First Amendment that Woodward and his colleagues so nobly asserted and defended during earlier moments of unrest on Yale’s campus.

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In recent years, a variety of social and political forces have challenged the commitment of Yale and other universities to the freedom of expression. Two developments are particularly worthy of mention.

First, some governmental agencies have developed broad concepts of “harassment” that encompass hitherto protected speech. For instance, the U.S. Department of Education and the U.S. Department of Justice have required universities to punish, as “sexual harassment,” “*any* unwelcome conduct of a sexual nature”—whether or not that conduct would be objectively offensive to a reasonable person.<sup>23</sup> Under this aggressive redefinition of antidiscrimination law, universities face significant pressure to discipline students and professors for speech and conduct, on or off campus, that runs afoul of the gender orthodoxy of a particular agency or individual.

For instance, tenured professors on some campuses have faced discipline merely because their teaching or research challenged prevailing views about sex or sexual misconduct.<sup>24</sup> Importantly, such discipline was imposed not through the ordinary procedures universities have long employed for disciplining faculty members, but through the specialized inquisitorial procedures that universities have developed for sexual-misconduct cases, often in response to the direction of the U.S. Department of Education.<sup>25</sup>

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22. *Id.* at 34 (emphasis added).

23. See Cabranes & Stith, *supra* note 9, at 59. Yale’s definition of sexual misconduct can be found online. Office of Equal Opportunity Programs, *Definition of Sexual Misconduct, Sexual Consent, and Sexual Harassment*, YALE U., <http://equalopportunity.yale.edu/policies-and-programs> [<http://perma.cc/8ZNX-NTKN>] (incorporating “a range of behaviors including sexual assault, sexual harassment, intimate partner violence, stalking, voyeurism, and any other conduct of a sexual nature that is nonconsensual, or has the purpose or effect of threatening, intimidating, or coercing a person . . . [Contact] is not a necessary component”). See source cited *infra* note 43 for more detailed information on the various definitions of sexual misconduct employed by Yale University officials over the past several years.

24. See AM. ASS’N OF UNIV. PROFESSORS, *THE HISTORY, USES, AND ABUSES OF TITLE IX 82* (2016), <http://www.aaup.org/file/TitleIXreport.pdf> [<http://perma.cc/U8FF-QRZV>]; see also Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 886 n.15 (2016) (“One professor at Northwestern University [Laura Kipnis] reports facing a Title IX investigation over an essay she had written about ‘sexual politics and campus’ and subsequent public statements on the topic.”).

25. Ironically, the imposition of specialized procedures “privileges” the University-defined right to be free of sexual harassment. It allows members of American universities to bring broad-ranging sexual misconduct claims that citizens outside the

A short anecdote will make my point clear. In 2000, the former Master of Saybrook College, Antonio Lasaga, was convicted of federal child pornography charges, which involved misconduct with a minor on Yale property.<sup>26</sup> As you might expect, after his conviction, the University sought to revoke Lasaga's tenure for misconduct, and it ultimately did so—but only after a formal proceeding before the disciplinary body known as the University Tribunal.<sup>27</sup>

Although Lasaga's guilt was clear to all, and Lasaga was already confined to a federal prison, Yale so valued the due process rights of a faculty member accused of misconduct that it refused to treat a serious felony conviction, absent its own independent proceeding, as sufficient grounds for dismissing a member of its faculty.

Lasaga's rights before the University Tribunal were basically those recognized by the American Association of University Professors, or "AAUP," as essential in any proceeding that might affect the protections of tenure. These due process rights included:

- The right to a public hearing and a record of the proceedings;
- The right to representation and advocacy by counsel;
- The right to confront and question adverse witnesses;
- The right to compel or present favorable witnesses; and
- The right to proof under the standard of clear and convincing evidence.<sup>28</sup>

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college campus cannot, deliberately circumventing the traditional criminal law processes for attaining justice.

26. *Lasaga Fired by Yale as Corporation Ends Appeals*, YALE DAILY NEWS (May 1, 2001), <http://yaledailynews.com/blog/2001/05/01/lasaga-fired-by-yale-as-corporation-ends-appeals> [<http://perma.cc/759Y-A372>].
27. See Faculty Handbook, *supra* note 3, at 169. The mandate, authority, and procedures of the University Tribunal are described in a mere two sentences: "The University Tribunal may be convoked by the President as an appropriate forum for addressing the most serious allegations of misconduct by a student or a member of the faculty. Copies of the procedures are available in the Office of the Secretary and the Office of the Provost." *Id.* The hyperlinks in the Faculty Handbook purporting to bring readers to "[c]opies of the procedures" lead readers only to the home pages of the Secretary's and the Provost's websites. *Id.* The Office of the Secretary has confirmed to the Author that the procedures are not available online.
28. See AM. ASS'N OF UNIV. PROFESSORS, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE 83–84 (2013), <http://www.aaup.org/file/RIR%202014.pdf> [<http://perma.cc/4KJF-S2X2>]; AM. ASS'N OF UNIV. PROFESSORS, THE USE AND ABUSE OF FACULTY SUSPENSIONS (2008).

It bears underscoring that AAUP regulations cover non-tenured faculty under a different set of protections. See AM. ASS'N OF UNIV. PROFESSORS, ACADEMIC DUE PROCESS: RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE 86–87 (2013), <http://www.aaup.org/file/RIR%202014.pdf> [<http://perma.cc/8DVV-XBTV>].

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Today, as a matter of Yale University law, *none* of these protections apply in a sexual-misconduct proceeding, even for an allegation of non-criminal conduct. There is:

- *No* right to a public hearing, or even to a complete record of the private hearing;
- *No* right to have counsel speak on one’s behalf;
- *No* right to call friendly witnesses, much less confront and cross-examine adverse witnesses; and
- To top it all off, *no* assumption of innocence until proven guilty—merely a finding of wrongdoing that rests on a preponderance of the evidence (the lowest standard of proof known to American law).<sup>29</sup>

Even more troubling, current procedures of the University Tribunal (not to be confused with the University-Wide Committee on Sexual Misconduct that I just described) are mysteriously unavailable online. To know one’s rights, the Faculty Handbook directs Yale faculty to the Office of the Secretary and the Office of the Provost—from whom they can *request* a copy.<sup>30</sup> The University’s procedures for trying “the most serious allegations of misconduct by a student or a member of the faculty” are deliberately hidden from view.<sup>31</sup>

There was recently an effort to impose new and broad ranging “Review Procedures for Complaints about Violations of the Standards of Faculty Con-

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29. *UWC Procedures*, *supra* note 3. On “preponderance of the evidence,” see generally FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE* § 7.8 (3d ed. 1985).

In a UWC hearing, both the accuser and the accused are invited to speak at the hearing, but may submit in writing only their opening remarks, which may be no longer than ten minutes each. If either does not want the other in the room, then the other party is provided another location with a real-time audio feed. “At its sole discretion, the panel may request the testimony of additional witnesses.” *UWC Procedures*, *supra* note 3, § 7.4. If there is only one party in interest, because the formal complaint has been brought by a Title IX coordinator, the accused may well be the only witness, unless the accused has requested that the underlying complainant (alleged victim) be called, the panel agrees to call that person, and he or she has agreed to appear. *Id.* n.16.

With respect to a record of the private hearing, the accused also receives “copies of the panel’s findings of fact and conclusions” as to whether the accused is guilty. *Id.* § 7.5. The accused does not receive a copy of the panel’s proposed sanctions. *Id.*; see also *id.* at *Summary of Changes Effective October 26, 2015*. The University does not retain a transcript of the proceedings for either party to use in the appeal process or future proceeding. See *id.* n.19 (“The minutes of a UWC hearing consist of a protocol annotated to indicate the time at which each phase of the process started and ended. The minutes do not record statements, testimony, or questions.”).

30. See discussion *supra* note 27.

31. Faculty Handbook, *supra* note 3, at 169; see also discussion *supra* note 27.

duct,”<sup>32</sup> which largely mimicked Yale’s sexual misconduct procedures and suffered from all the same procedural infirmities. The new procedures would have applied to *any* allegation of a faculty member failing to live up to newly adopted “Standards of Faculty Conduct.”

One faculty leader has explained that “[t]he Administration could adopt these procedures without faculty recommendation.”<sup>33</sup> Another faculty member said that the proposals “represent[] the most staggering usurpation of power of the faculty that I have seen in over 30 years at Yale.”<sup>34</sup> Still another is reported to have asked: “[I]f there are standards of conduct for administrators. If so, what are they and how do they compare to the faculty standards? If not, why are there no standards of administrative conduct?”<sup>35</sup> In response, it was made clear by the then-Chair of the Senate of the Faculty of Arts and Sciences that “these [proposed faculty conduct] standards do not apply to non-faculty administrators.”<sup>36</sup>

32. A draft of the proposed procedures for enforcing the faculty conduct code was reprinted in the Yale Daily News. See Gilmore, *supra* note 4. These proposed procedures have appeared with different titles: the Yale Daily News and University officials have called them the “Faculty Conduct Standards and Procedures,” whereas the October 1, 2015 leaked draft entitled them “Review Procedures for Complaints about Violations of the Standards of Faculty Conduct.” *Id.* It is worth noting that the new faculty conduct code itself had already been incorporated into the Faculty Handbook on September 18, 2015. See Faculty Handbook, *supra* note 3, at 5–9; Ad Hoc Comm. on Faculty Standards of Conduct, *Interim Report to the FAS Senate, Faculty Conduct Standards and Procedures*, YALE U., [http://messages.yale.edu/messages/attachments/w3\\_132361\\_Interim\\_Report\\_Standards\\_and\\_Procedures.pdf](http://messages.yale.edu/messages/attachments/w3_132361_Interim_Report_Standards_and_Procedures.pdf) [<http://perma.cc/MMQ2-3VX5>].

33. Victor Wang, *FAS Senate Calls for Increased Input on Governance*, YALE DAILY NEWS (Nov. 30, 2015), <http://yaledailynews.com/blog/2015/11/30/fas-senate-calls-for-increased-input-on-governance> [<http://perma.cc/XV2D-JRA2>] (quoting Professor Beverly Gage of the Department of History, then Chair of the Senate of the Faculty of Arts and Sciences, on the process of enacting the draft faculty conduct procedures).

In an earlier “Interim Report to the FAS Senate,” an FAS study group on “Faculty Conduct Standards and Procedures” suggested that the procedures should “rightly [be] subject to faculty deliberation as well as a faculty vote.” See *Interim Report to the FAS Senate*, *supra* note 32. However, at the time of this writing, the status of the proposed procedures is unclear.

34. Victor Wang, *Faculty Criticisms of Misconduct Procedures Released*, YALE DAILY NEWS (Feb. 18, 2016), <http://yaledailynews.com/blog/2016/02/18/faculty-criticisms-of-misconduct-procedures-released> [<http://perma.cc/E7EZ-BAAJ>] (quoting Professor Steven Smith of the Department of Political Science).

35. FAS Senate, *Minutes of the FAS Senate Meeting on Nov. 19, 2015*, YALE U. 4 (Nov. 19, 2015), <http://fassenate.yale.edu/minutes> [<http://perma.cc/Q62Y-XK4S>] (quoting Professor Ian Shapiro of the Department of Political Science).

36. *Id.*

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It has often been said that “in the government of Yale College, the Faculty legislates, the President concurs, and the Corporation ratifies.”<sup>37</sup> Yet the University-Wide Committee on Sexual Misconduct procedures have already become Yale law without prior approval of the faculty—undoing faculty rights and protections that took nearly a century to build.<sup>38</sup>

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A second recent development bears mention. Yale, along with other universities, has ostentatiously declared a commitment to “civility.”<sup>39</sup> This commitment to civility includes new “re-education programs” for university administrators, under the aegis of introducing them to expectations of inclusivity and sensitivity at Yale and preventing any deviationism from the newly established norms.<sup>40</sup>

“Civility” sounds innocuous enough, and, indeed, we can all agree that we should strive to be civil to each other. But problems arise when we are told that “uncivil” speech has turned the campus, or parts of the campus, into a “hostile environment”—and, more dangerously still, when we are told that university officials have a duty to make campus “safe” again by suppressing alleged incivil-

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37. This quote has been attributed to Yale President Arthur Hadley. Adrian Rodrigues, *Faculty Governance: A Power Within*, YALE DAILY NEWS (Apr. 22, 2014), <http://yale.dailynews.com/blog/2014/04/22/faculty-governance-a-power-within> [<http://perma.cc/S3UB-U8L4>]; see GEORGE W. PIERSON, YALE: A SHORT HISTORY 27–30 (2d ed. 1979), [http://www.library.yale.edu/mssa/YHO/Piersons/A\\_short\\_history.html](http://www.library.yale.edu/mssa/YHO/Piersons/A_short_history.html) [<http://perma.cc/N2D4-NH9Z>].

New procedures for faculty misconduct are effectively incorporated into the Faculty Handbook by passing reference to the UWC Website. See Faculty Handbook, *supra* note 3, at 162. An unintended consequence of “going green” is that it is easier to revise University procedures and for those revisions to go unnoticed by the governed parties. For example, the Faculty Handbook incorporates the Voluntary Agreements under Title IX by reference without having to reprint it in the Faculty Handbook (which exists in PDF form online). See Faculty Handbook, *supra* note 3.

38. See HOFSTADTER & METZGER, *supra* note 5.

39. See Peter Salovey & Jonathan Holloway, *Affirming Our Community Values: A Message from the President and Yale College Dean*, YALE U. (Nov. 10, 2015), <http://news.yale.edu/2015/11/10/affirming-our-community-values-message-president-and-yale-college-dean> [<http://perma.cc/3APZ-VA73>] (committing to “a campus that values civility and respect”).

40. Peter Salovey, *Statement from President Salovey: Towards a Better Yale*, YALE U. (Nov. 17, 2015), <http://news.yale.edu/2015/11/17/statement-president-salovey-toward-better-yale> [<http://perma.cc/3WVC-9VS9>] (promising to institute sensitivity and awareness “training on recognizing and combating racism and other forms of discrimination in the academy” for President Salovey, “vice presidents, deans, provosts, . . . other members of the administration, . . . department chairs, directors of graduate and undergraduate studies, masters and deans, student affairs staff, and others across the university”).

ity and by providing millions of dollars to support, among other aims, “an expanded program of training on implicit bias in faculty and leadership searches as well as the tenure and promotion process.”<sup>41</sup>

In the fight against incivility, university officials too easily morph into monitors of acceptable speech—and, ultimately, into the unhappy role of “Civility Police.”<sup>42</sup>

At the same time, various campus dramas conflate offensive speech with truly dangerous behavior. For instance, the broad rubric of “sexual misconduct” now encompasses everything from sexual assault to a passing remark that a woman is beautiful or a joke deemed to be prurient or insulting.<sup>43</sup> Campuses can be rendered “unsafe” not only by actual threats of violence, but also by unexpected personal offense at controversial ideas or passing remarks.<sup>44</sup>

As a result, in some universities, the “Civility Police” have started to adopt the tactics of the real police—to fight speech, not to fight crime. For instance, on some campuses, “Bias Response Teams” investigate professors’ online comments and the editorial choices of student groups.<sup>45</sup>

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41. Yale Office of Pub. Affairs & Commc’ns, *Yale Launches Five-Year, \$50 Million Initiative To Increase Faculty Diversity*, YALE U. (Nov. 3, 2015), <http://news.yale.edu/2015/11/03/yale-launches-five-year-50-million-initiative-increase-faculty-diversity> [<http://perma.cc/KC49-YKAK>]. News reports describe the impetus for this \$50 million initiative. *E.g.*, Editorial, *A Campus Mayhem Syllabus: The Grievance Protests Spread, and the Adults Keep Rolling Over*, WALL ST. J. (Nov. 22, 2015), <http://www.wsj.com/articles/a-campus-mayhem-syllabus-1448232933> [<http://perma.cc/ZJ5S-B4PX>]. While this money is earmarked to support faculty diversity, it is managed, in part, by campus diversity coordinators and enables their offices to increase programming.
42. See Cabranes & Stith, *supra* note 9, at 60–61.
43. DAVID CANTOR ET AL., YALE UNIV., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 13 (Sept. 21, 2015), <http://provost.yale.edu/sites/default/files/files/WestatReportYaleUniversity-1.pdf> [<http://perma.cc/J36Z-QEJD>] (surveying the prevalence of sexual harassment on campus by asking Yale students whether someone associated with Yale “told jokes or stories that were insulting” or “emailed, texted, phone[d] or instant messaged offensive sexual remarks, jokes, stories, pictures, or videos”).
44. This paragraph is a close paraphrase of Cabranes & Stith, *supra* note 9, at 63.
45. Over 100 colleges have “Bias Response Teams.” See Jeffrey Aaron Snyder & Amna Khalid, *The Rise of “Bias Response Teams” on Campus*, NEW REPUBLIC (Mar. 30, 2016), <http://newrepublic.com/article/132195/rise-bias-response-teams-campus> [<http://perma.cc/B3WL-KSZ3>]. For example, the University of Minnesota’s Equal Opportunity and Affirmative Action Office held a formal investigation over an “offensive” poster advertising a panel discussion on free speech, which featured a *Charlie Hebdo* cover illustration of the Prophet Muhammad. It concluded that “university members should condemn insults made to a religious community in the name of free speech.” *Id.* Yale does not have an officially constituted “Bias Response Team.” However, Yale does have a de facto “bias incident” reporting system: “[a]lthough current Yale policies do not use the term ‘bias incident,’ discrim-

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At Yale, the Surveillance University consists of eighteen Title IX Coordinators,<sup>46</sup> fifty-two Communication and Consent Educators,<sup>47</sup> the Office of Equal Opportunity Programs, and the Sexual Harassment and Assault Response & Education (SHARE) Center,<sup>48</sup> among other non-academic actors. This network of sexual misconduct monitors totals *at least* thirty faculty and staff members working part-time or full-time and over fifty volunteer undergraduate students. To put these figures in perspective, they total over half the size of the law school faculty.<sup>49</sup>

This Yale system of surveillance is all wonderfully reminiscent of the neighborhood watches that serve as the eyes and ears of totalitarian regimes, much like the *Comités de Defensa de la Revolución* in Castro's Cuba.<sup>50</sup>

Even more troubling, Yale, along with some other universities, is seriously considering anonymous reporting mechanisms, which enable users to report

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inatory or harassing acts motivated by a person's race, ethnicity, sex, or other characteristics enumerated in Yale's non-discrimination statement constitute violations of university policy, regardless of what terms are used to describe the incident. Such incidents should be reported to the Office for Equal Opportunity Programs . . . ." *Student Discrimination and Harassment Reporting & Response: FAQ*, YALE U., <http://student-dhr.yale.edu/faq> [<http://perma.cc/ML8G-V6XQ>].

46. See Office of the Provost, *Title IX Coordinators*, YALE U., <http://provost.yale.edu/title-ix/coordinators> [<http://perma.cc/7U2S-6PQC>]. These numbers are current as of October 1, 2016 and may vary with personnel turnover.
47. See Commc'n & Consent Educators, *Who We Are*, YALE U., <http://cce.yalecollege.yale.edu/who-we-are> [<http://perma.cc/UFM4-RZWE>]. These numbers are current as of October 1, 2016 and may vary with personnel turnover.
48. See Sexual Harassment & Assault Response & Educ. (SHARE) Ctr., *Contact Us*, YALE U., <http://sharecenter.yale.edu/contact-us> [<http://perma.cc/4LSD-9NTM>].
49. See Anemona Hartocollis, *Colleges Spending Millions To Deal with Sexual Misconduct Complaints*, N.Y. TIMES (Mar. 29, 2016), <http://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html> [<http://perma.cc/H9F7-KG3U>] ("At Yale, nearly 30 faculty and staff members work part time or full time in support of Title IX efforts, and twice as many faculty and staff members and students volunteer as advisers and committee members. In addition, Yale has trained 48 students who are paid to listen to students and intercede when they seem to be in distress."); see also *Sexual Misconduct Response*, YALE U. [hereinafter *Sexual Misconduct Response*], <http://smr.yale.edu> [<http://perma.cc/64V7-AGY2>]; Sexual Harassment & Assault Response & Educ. (SHARE) Ctr., *Filing a Complaint: University Wide Committee (UWC) on Sexual Misconduct*, YALE U. [hereinafter *Filing a Complaint*], <http://sharecenter.yale.edu/filing-complaint/university-wide-committee-uwc-sexual-misconduct> [<http://perma.cc/9RHF-REG7>]. These numbers are current as of March 26, 2016, as reported in the New York Times, and may have changed since.
50. See JORGE I. DOMÍNGUEZ, *CUBA: ORDER AND REVOLUTION* 261–67 (1978); HUGH THOMAS, *CUBA: THE PURSUIT OF FREEDOM* 1457, 1462 (1971).

offensive comments to university officials online or through a smartphone app without identifying themselves.<sup>51</sup>

At Yale, such an app would build on, and intensify, existing practices of secretly collecting reports of misconduct, which may not be brought to the attention of their targets for some time.

We are assured by Yale officials that such reports are retained indefinitely,<sup>52</sup> in order to enable University officials to look for “patterns” of behavior,<sup>53</sup> even if doing so means dredging up stale evidence of complaints (which, incidentally, are expressly not subject to *any* statute of limitation).<sup>54</sup>

51. See Cabranes & Stith, *supra* note 9, at 63–64; Maya Sweedler & Monica Wang, *Yale Considers Launching Harassment Site*, YALE DAILY NEWS (Apr. 22, 2016), <http://yale.dailynews.com/blog/2016/04/22/yale-considers-launching-harassment-site> [<http://perma.cc/6FLU-4CUZ>]; Message from Stephanie Spangler, Univ. Title IX Coordinator, Yale Univ., to All Yale Students (Apr. 22, 2016), <http://messages.yale.edu/messages/University/univmsgs/detail/136869> [<http://perma.cc/WF5Q-G8DM>].

In addition to the smartphone app, Yale has already established a “Yale University Hotline” that allows for the anonymous reporting of complaints. See Yale University Hotline, *It’s Your Yale*, YALE U., <http://your.yale.edu/work-yale/financials/auditing/yale-university-hotline> [<http://perma.cc/AS63-64HV>]. The Administration is encouraging community members to use this “resource” to report offenses by other members of the Yale Community. See Message from Ben Polak, Provost, Yale Univ., to All Yale Faculty and Students (Jan. 9, 2017) (on file with author). Complaints are not limited to sexual misconduct. *Id.* The proposed smartphone app would further diminish accountability around anonymous reporting, and the ability to investigate malicious or bad-faith complaints.

The apps and hotlines referenced here are not to be confused with services that improve emergency response time through real-time reporting of ongoing violence or apps that facilitate access to university medical or counseling services.

52. See *Sexual Misconduct Response*, *supra* note 49; *supra* notes 49, 51, and accompanying text (discussing the bureaucratic offices at Yale charged with processing complaints, both formal and informal, and retaining information, with varying levels of confidentiality, for use in future proceedings).

53. See Yale Coll. Programs of Study, *Resources on Sexual Misconduct: Title IX Coordinators*, YALE U., <http://catalog.yale.edu/dus/university-policy-statements/title-ix> [<http://perma.cc/74LA-WUX5>] (stating that one duty of Title IX Coordinators is to “track and monitor incidents, identify patterns and systemic issues, and take steps to address them”).

54. The authority to retain complaint records can be found on the UWC’s website. See *Filing a Complaint*, *supra* note 49. The website indicates that there are “[n]o time limitations” on informal complaints and the complaints may be “preserved in confidential university records” with the option to “reopen[] as necessary to address ongoing or emergent issues.” See also *UWC Procedures*, *supra* note 3, § 8 (“The Secretary keeps and retains records of UWC proceedings, storing them in a secure place. The Secretary will retain records of (i) all complaints received by the UWC; (ii) all actions taken by the UWC in response to informal complaints; (iii) all supplementary documents and evidence received by the UWC in relation



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Unlike the rules governing our state and federal systems of justice, the Yale monitoring rules expressly provide that an informal complaint is never truly closed.<sup>55</sup>

These are principles of (what we in the law call) “finality.” They are not mere “technicalities;” they are at the heart of a system of due process when a student or faculty member is accused of misconduct.

Ultimately, these tactics—they have not yet fully evolved into “Big Brother” tactics, so let us call them “Little Brother” tactics—threaten the freedom not only of students, but also of faculty members, whose due process rights are being subordinated to the demands of new campus creeds and to the dubious procedures created to enforce them.

None of this is to say that university officials, at Yale or elsewhere, must stand idly by while the members of their community face threats, harassment, or discrimination. The Woodward Report itself recognizes that University officials may also voice “other values,” as long as they do not censor or punish speech. Yale administrators, like all of us, retain the power of disapproval through the exercise of free speech itself.<sup>56</sup>

And, of course, universities have the duty to protect their members from actual or threatened violence, and to offer them the medical, emotional, and spiritual support necessary to navigate the conflict and discomfort that often accompanies vigorous debate and a dynamic academic environment. But if university officials prohibit offensive speech or speakers, they cross the line between endorsing “other values” and censoring viewpoints.<sup>57</sup>

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Fortunately, some universities continue to vigorously and unabashedly defend free expression.

I regret to say that in recent months, the leader in this respect has not been Yale, but rather, the University of Chicago. In 2015, that university powerfully reaffirmed its longstanding commitment to a “free and open discourse on cam-

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to a formal complaint; (iv) all fact-finder reports; (v) minutes from each UWC hearing session; (vi) the report of the hearing panel; (vii) the written notice provided to the complainant and the written notice provided to the respondent of the decision maker’s decision; and (viii) appeals and decisions regarding appeals.” (footnote omitted)).

55. See discussion *supra* note 54.

56. David Bromwich, *What Are We Allowed To Say?*, 38 LONDON REV. BOOKS 3, 9 (2016), <http://www.lrb.co.uk/v38/n18/david-bromwich/what-are-we-allowed-to-say> [<http://perma.cc/K43P-GN2H>] (discussing society’s “loss of confidence in the power of disapproval”).

57. This paragraph is a close paraphrase of Cabranes & Stith, *supra* note 9, at 64–65; see also Peter Salovey, Freshman Address on Free Expression at Yale (Aug. 23, 2014), <http://president.yale.edu/speeches-writings/speeches/free-expression-yale> [<http://perma.cc/8J4U-QQ4Q>] (differentiating protected “offensive” speech from unprotected “intimidati[ng],” “harassing,” or “threatening” speech).

pus” by issuing a document called—perhaps not coincidentally—the *Report of the Committee on Freedom of Expression*.<sup>58</sup> (The Woodward Report, you may recall, is formally titled the *Report of the Committee on Freedom of Expression at Yale*.)

The Chicago report, which is also included in the volume that we celebrate today, illustrates how universities can continue to defend the enduring values expressed in the Woodward Report, especially in light of recent events that have tested the commitments of universities to an open exchange of ideas.

We should all applaud Chicago’s commitment to free expression.<sup>59</sup> And we should treasure the hope that it may inspire all of us to preserve the “privilege of free speech” that we have inherited, as members of the Yale community—students, faculty, alumni, and administrators—from the Woodward Report.

What is at stake here is whether Yale will remain a great university.

Is it too late to forestall or roll back this erosion of due process rights of students and faculty accused of misconduct?

No, it is not too late—it is not too late so long as current political fashions do not trump the permanent interests of the Yale community in having a campus that protects the bedrock principles of freedom of expression.

It is not too late—but, let it be said, a faculty that does not vigorously assert its own interests, and the interests of the community, in safeguarding its historic due process rights for those accused of misconduct is not worthy of the support of others in protecting those interests.

Unlike students, whose time at Yale is limited, the faculty is the permanent steward of the University. It has the strongest interest in ensuring the survival of its role in governance, and the related survival of due process, at Yale. It is perhaps time to paraphrase Benjamin Franklin—a faculty that does not hang together shall surely hang separately.

As Professor C. Vann Woodward said in 1974: “The University is in danger of sacrificing principle to expediency.”<sup>60</sup> We cannot let that occur.

58. Available in *CAMPUS SPEECH IN CRISIS: WHAT THE YALE EXPERIENCE CAN TEACH AMERICA*, *supra* note 7, at 67–73; and at *Free Expression: Report of the Committee on Freedom of Expression*, U. CHIC., <http://freeexpression.uchicago.edu/page/report-committee-freedom-expression> [<http://perma.cc/2PW9-KV88>].

59. See, for example, University of Chicago President Robert Zimmer’s op-ed in the *Wall Street Journal* defending the importance of unfettered inquiry. Robert J. Zimmer, *Free Speech Is the Basis of a True Education*, *WALL ST. J.* (Aug. 26, 2016), <http://www.wsj.com/articles/free-speech-is-the-basis-of-a-true-education-1472164801> [<http://perma.cc/C38P-NQKC>].

60. Gaddis Smith, *What Can We Say?*, *YALE ALUMNI MAG.*, July–Aug. 2011, <http://yalealumnimagazine.com/articles/3236-what-can-we-i-say-i> [<http://perma.cc/UYS9-B96N>] (quoting Professor Woodward).

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## NEW DEVELOPMENTS AT YALE'S "SURVEILLANCE UNIVERSITY"

There have been several relevant developments since the January 13, 2017 online publication of this Essay, as well as continuing dubious practices that warrant attention. These include: (1) new bystander surveillance reporting, (2) continued anonymous apps development, (3) continued anonymous hotline use, (4) new bias intervention training, and (5) the growth of the "inclusion" bureaucracy. Attacks against those who hold allegedly offensive ideas—or even inoffensive ideas—appear to be ongoing.<sup>61</sup> It is not enough to say that problems of this sort afflict other institutions; what it means to be a leader in higher education is that Yale must develop the terms of discourse, as it did in issuing the Woodward Report nearly five decades ago.<sup>62</sup>

**(1) Bystander Surveillance Reporting:** Earlier this year, Yale held training sessions for graduate and professional students to teach "Bystander Intervention" workshops.<sup>63</sup> These training sessions seek to expand bystander intervention programming, which began at least as early as 2013 with the mandatory intervention training for all Yale sophomores.<sup>64</sup> While bystander intervention may be appropriate in certain instances, the expansion of these training sessions, jointly organized by Yale's Title IX Office and the Office of Gender and Campus Culture, raises yet another potential means of monitoring faculty and students.

**(2) Anonymous Complaints Apps:** There is no hard evidence, or public assurances, that Yale has stopped considering or implementing an anonymous

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61. See, e.g., Peter Berkowitz, *A Lawsuit Accuses Yale of Censoring Even Inoffensive Ideas*, WALL ST. J. (Apr. 2, 2017), <http://www.wsj.com/articles/a-lawsuit-accuses-yale-of-censoring-even-inoffensive-ideas-1491163998> [<http://perma.cc/Z58N-6XKK>].
62. Today, the nationally recognized leader in the upright defense of freedom of expression and the related system of academic freedom is most assuredly not Yale; it is the University of Chicago. See generally Editorial, *Hard To Say: A Statement at the Heart of the Debate over Academic Freedom*, ECONOMIST (Aug. 26, 2016), <http://www.economist.com/news/united-states/21689603-statement-heart-debate-over-academic-freedom-hard-say> [<http://perma.cc/W2UY-GWVC>]; Zimmer, *supra* note 59.
63. *G&P Bystander Intervention Workshop Facilitator Training*, YALE U., [http://messages.yale.edu/messages/attachments/w3\\_147685\\_BI\\_Workshop\\_Facilitator\\_Training\\_Flyer6.pdf](http://messages.yale.edu/messages/attachments/w3_147685_BI_Workshop_Facilitator_Training_Flyer6.pdf) [<http://perma.cc/UX8S-EHV6>].
64. Maya Sweedler & Monica Wang, *Administrators Launch Mandatory Intervention Training for Sophomores*, YALE DAILY NEWS (Jan. 23, 2013), <http://yaledailynews.com/blog/2013/01/23/admins-launch-mandatory-intervention-training-for-sophomores> [<http://perma.cc/8P68-2ZKY>].

reporting mechanism that it ostentatiously announced in April 2016,<sup>65</sup> which enables users to report “offensive” behavior to university officials online or through a smartphone app. Such an app would build on, and intensify, existing practices like the anonymous “Yale University Hotline” (see “(3) Anonymous Hotline” below) and the secret collection of reports of misconduct, which may not be brought to the attention of their target for some time. On January 9, 2017, Yale’s Provost encouraged the community to use these anonymous reporting mechanisms, which are available for any type of complaint—not just sexual harassment.<sup>66</sup> Unlike the rules governing our state and federal systems of justice, the Yale monitoring rules expressly provide that an informal complaint is never truly closed.<sup>67</sup>

**(3) Anonymous Hotline:** Yale has already established a “Yale University Hotline” that allows for the anonymous reporting of complaints.<sup>68</sup> The Yale administration is encouraging community members to use this hotline to report offenses by other members of the Yale Community.<sup>69</sup> Complaints are not limited to sexual misconduct.<sup>70</sup> The proposed smartphone app (see “(2) Anonymous Complaint Apps” above) would further diminish accountability in anonymous reporting, and the ability to investigate or punish false, malicious, or bad-faith complaints.

**(4) Bias Intervention Training:** Yale’s self-proclaimed commitment to civility includes new re-education programs for university administrators, in order to introduce them to expectations of inclusivity and sensitivity at Yale and preventing any deviationism from the newly established norms.<sup>71</sup> In 2015, Yale president Peter Salovey announced millions of dollars to support, among other aims, “an expanded program of training on implicit bias in faculty and leader-

65. See Sweedler & Wang, *supra* note 51; Message from Stephanie Spangler, *supra* note 51.

As noted in the body of this Essay and *supra* note 51, the anonymous complaint apps referenced here are not to be confused with apps that improve emergency response time through real-time reporting of ongoing violence or apps that facilitate access to university medical or counseling services.

66. See Message from Ben Polak, *supra* note 51.

67. See *Filing a Complaint*, *supra* note 49.

68. See Yale University Hotline, *supra* note 51.

69. See *supra* note 51.

70. *Id.*

71. The practice of “reeducation” programming has a long and unhappy history around the world, which should require no annotation for those with even minimal knowledge of the history of the past century. I avoid the obvious citations lest I be accused of hyperbole. See generally GEORGE ORWELL, 1984 (1949).

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ship searches as well as the tenure and promotion process.<sup>72</sup> News reports describe the impetus for this \$50 million initiative.<sup>73</sup> While this money is earmarked to support faculty diversity, it is managed, in part, by non-faculty diversity staff and enables their offices to increase “programming.”

(5) **Growth of the “Inclusion” Bureaucracy:** At Yale, the Surveillance University<sup>74</sup> consists of eighteen Title IX Coordinators, fifty-two Communication and Consent Educators, the Office of Equal Opportunity Programs, and the Sexual Harassment and Assault Response & Education (SHARE) Center, among other non-academic actors.<sup>75</sup>

Further developments will warrant continuing attention.

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72. See sources cited *supra* note 41.

73. *Id.*

74. See José A. Cabranes, *If Colleges Keep Killing Academic Freedom, Civilization Will Die, Too*, WASH. POST (Jan. 10, 2017), [http://www.washingtonpost.com/opinions/if-colleges-keep-killing-academic-freedom-civilization-will-die-too/2017/01/10/74b6fcc2-d2c3-11e6-9cbo-54ab630851e8\\_story.html](http://www.washingtonpost.com/opinions/if-colleges-keep-killing-academic-freedom-civilization-will-die-too/2017/01/10/74b6fcc2-d2c3-11e6-9cbo-54ab630851e8_story.html) [<http://perma.cc/5HAZ-V3RQ>]; see also José A. Cabranes, *For Free Speech, For Due Process, and For Yale*, YALE DAILY NEWS (Jan. 17, 2017), <http://yaledailynews.com/blog/2017/01/17/for-free-speech-for-due-process-and-for-yale/> [<http://perma.cc/G2R8-C388>].

75. See *supra* note 49.