

**FREE SPEECH IN THE AGE OF POLITICAL CORRECTNESS:
REMOVING FREE SPEECH ZONES ON COLLEGE CAMPUSES TO
ENCOURAGE CIVIL DISCOURSE**

Note

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“I disapprove of what you say, but I will defend to the death your right to say it.” –Voltaire¹

“The freedom of Speech may be taken away--and dumb & silent we may be led, like sheep, to the Slaughter.” –George Washington²

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1. S.G. TALLENTYRE, THE FRIENDS OF VOLTAIRE 199 (1906).

2. Jacob Lindenbaum, *The National Gazette*, MOUNT VERNON, <http://www.mountvernon.org/research-collections/digitalencyclopedia/article/national-gazette/>.

I. INTRODUCTION

In the fall of 2015, within weeks of each other, protests erupted on college and university campuses regarding controversial viewpoints and whether they should be tolerated.³ What has changed in this most recent uproar, is rather than the faculty and staff requesting students refrain from expressing controversial opinions, students are trying to prevent faculty, staff, and other students from voicing views they consider offensive.⁴ While these students were demanding “safe spaces,” these protests drew greater attention to the broader issue of free speech and ideological pluralism on college and university campuses.⁵ Most notably, controversy over appropriate boundaries for protests arose when a University of Missouri professor prevented reporters on campus from covering the protest and, along with a group of students, forced those reporters who would not agree with them off campus.⁶ Other colleges and university students have stated they will allow media coverage of their protests only by journalists who “support the movement,” effectively limiting not only on campus students’ free speech, but also freedom of the press.⁷

While the recent resurgence of the issue may have a different focus, the issue of free speech on college campuses has been debated for more than 50 years.⁸ One seemingly easy and common solution has been the establishment of free speech zones in which students may stage protest or voice controversial ideas in a limited geographical area and often only with

3. E.g., Nicholas Kristoff, *Mizzou, Yale and Free Speech*, N.Y. TIMES (Nov. 11, 2015), <http://www.nytimes.com/2015/11/12/opinion/mizzou-yale-and-free-speech.html>.

4. See Susan Mulligan, *From Megaphones to Muzzles: Free Speech Is under Fire on College Campuses – and the Attacks Are Coming from Students*, U.S. NEWS & WORLD REPORT (Nov. 25, 2015), <http://www.usnews.com/news/the-report/articles/2015/11/25/from-megaphones-to-muzzles-free-speech-safe-spaces-and-college-campuses>.

5. See, e.g., *id.*

6. See Callum Borchers, *These College Protesters Are Demanding the Media Who Cover Them Support Their Cause. Really.*, WASH. POST (Nov. 19, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/11/19/these-college-protesters-are-demanding-the-media-who-cover-them-support-their-cause-really/>.

7. See *id.*

8. See Michelle Goldberg, *Is ‘Free Speech’ Becoming the New ‘All Lives Matter’?*, SLATE (Nov. 17, 2015), http://www.slate.com/articles/double_x/doublex/2015/11/free_speech_on_campus_will_it_become_the_new_all_lives_matter.html.

prior permission.⁹ As of 2013, one in six colleges and universities had such a zone.¹⁰ These zones actually represent more restrictions and repression of student speech than encouragement of a free exchange of ideas, due to the limitations they place on students' free expression rights and discouragement of civil discussion of controversial ideas.¹¹ It is likely that, faced with increased protests, more campuses will consider increasing speech restrictions and creating free speech zones for fear of the kind of media coverage and student backlash seen this fall.

College students are adults and college and university campuses are supposed to be places where students can explore different ideas that may challenge their way of thinking. As one university president put it, "This is not a day care," and students should expect to have their thoughts and feelings challenged to prepare them for the real world.¹² However, free speech zones limit campus pluralism by creating restrictions on student expression of different or controversial viewpoints and violate students' First Amendment rights. To ensure that students and society continue to have free and open discourse, the law must step in to protect students' right to free speech on college or university campuses, both for these campuses to continue to serve their function of educating students with a variety of viewpoints and to ensure that the next generation of citizens are engaged in appropriate debate. The growing number of students and student organizations turning to litigation¹³ to guarantee their First Amendment rights shows that the lower courts'

9. *Free Speech Zones on America's College Campuses*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Sept. 19, 2013), <https://www.thefire.org/infographic-free-speech-zones-on-americas-campuses-2/>.

10. *Id.*

11. *See id.*

12. Alexandra Samuels, *Oklahoma Wesleyan Univ. President: "This Is Not a Day Care,"* USA TODAY (Dec. 1, 2015), <http://college.usatoday.com/2015/12/01/oklahoma-wesleyan-univ-president-this-is-not-a-day-care/>.

13. *See, e.g., Students Interrogated for Organizing Free Speech Event File First Amendment Lawsuit Against University of South Carolina*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Feb. 23, 2016), <https://www.thefire.org/students-interrogated-for-organizing-free-speech-event-fie-first-amendment-lawsuit-against-university-of-south-carolina/>; *Victory: Texas College Settles Free Speech Lawsuit After Telling Student That Gun Rights Sign Needs 'Special Permission'*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (May 4, 2016), <https://www.thefire.org/victory-texas-college-settles-free-speech-lawsuit-after-telling-student-that-gun-rights-sign-needs-special-permission/>.

rulings¹⁴ have been ineffective at protecting student speech rights from continued infringement by college and university administrators and there is a need for stronger protection, either through legislation or a Supreme Court ruling.

Part I of this note will examine the history and establishment of student free speech and expression on campus that have led to both the current protests and the establishment of free speech zones. Part II will examine the courts' current role in protecting students' First Amendment rights and balancing the conflicts between students and universities over such issues. Part III will examine potential statutory solutions for protecting students' free speech rights and the failure of such provisions as illustrated by recent issues at the University of Missouri. Part IV will conclude by briefly addressing concerns that free speech zones are necessary in this multicultural age to prevent unnecessary tension on campus.

II. ESTABLISHING STUDENT FREE SPEECH AND FREE EXPRESSION RIGHTS ON CAMPUS

In *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, the Supreme Court stated, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁵ However, this decision focused on the rights of students in K-12 schools.¹⁶ The tempest that led to establishment of free speech and expression rights on campus largely grew out of administrative attempts to quell student protests in the 1960s.¹⁷ At the same time, the politics that led to the protests were shifting the societal view of college students from that of children to adults.¹⁸ The result has placed college and university administrations in the

14. See, e.g., *McCauley v. Univ. of V.I.*, 618 F.2d 232, 250 (3d Cir. 2010) (holding that the prohibition on "offensive" and "unauthorized" speech displayed on signs was constitutionally overbroad and violated students' First Amendment rights); *Univ. of Cincinnati Chapter of Young Am. for Liberty v. Williams*, No. 1:12-cv-155, 2012 WL 2160969, at *1 (S.D. Ohio June 12, 2012) (holding that limiting demonstrations and rallies to a small "Free Speech Arena" on campus violates the First Amendment).

15. 393 U.S. 503, 506 (1969).

16. *Id.* at 504.

17. See Mulligan, *supra* note 4.

18. See Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over Students' First Amendment Rights*, 14 TEX. J. ON C.L. & C.R. 27, 29-30 (2008).

contorted position of needing to both preserve students' rights and act *in loco parentis*.¹⁹

A. *From Parents to Equals: The Evolving Relationship between Students and the University*

College and university campuses have traditionally been seen as the laboratories in which new ideas can be incubated and examined from diverse points of view.²⁰ Yet, that mindset was historically used to guard the exchange of ideas between professors, not students.²¹ Until the 1960s, colleges and universities were seen as acting *in loco parentis* for both educational and moral instruction, and therefore entitled to maintain strict regulations of their students' rights, including freedom of speech and expression.²² In the 1960s, the Court systematically established that colleges and universities were not allowed to act in place of students' parents, and that the students were entitled to participate fully in the exchange of ideas with the same freedom as their professors.²³

The passage of the Twenty-Sixth Amendment in 1971 changed the relationship between college and university administrators and their students, because 18-year-olds could no longer be viewed as anything less than full citizens.²⁴ At the time of its passage, many critics of the Amendment were concerned that earlier access to freedoms would not be accompanied by the appropriate restraint and maturity to exercise sound judgment when using such rights.²⁵ Student protests on campuses were seen not as an outcry for rights but as an example of how young adults would behave childishly if empowered and how they actually required stronger discipline.²⁶ However, with its passage, colleges and universities could not deny their students constitutional rights on many of the past grounds on which they had relied.

19. See *id.* at 60-61.

20. See Azhard Majeed, *Defying the Constitution The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481, 483 (2009).

21. See Sarabyn, *supra* note 18, at 31.

22. See *id.* at 65-67.

23. *Id.* at 67.

24. See *id.* at 56.

25. See *id.* at 60-61.

26. *Id.* at 62.

B. The Rise of Speech Codes and Other Restraints on Student Rights

Colleges and universities did not immediately react to the lessened restraint on student free speech rights, but in the 1980s and 1990s, they faced growing concerns about political correctness and intolerant speech.²⁷ In the late 1980s and early 1990s, more than 200 colleges and universities adopted student speech regulations in an effort to correct racist, sexist, or otherwise intolerant speech.²⁸ In their rush, many of these codes overcorrected the issue with vague or overly broad restrictions that courts struck down as unconstitutional.²⁹

While some colleges and universities attempted to restrict student speech through speech codes that limited what students could say, others enabled students to say anything but only within certain zones.³⁰ These zones supposedly allow for free exchange of ideas in a more manageable forum. Each campus has unique regulations; however, free speech zones typically require pre-registration and have restrictions on both length of use and geographic area.³¹ Additionally, many regulations allow only one speaker at a time, effectively prohibiting vigorous debate over controversial ideas.³² The courts have upheld campus free speech zones under the public forum doctrine when they are narrowly tailored, content neutral, and leave open other communicative channels, but such zones have increasingly become an issue for groups with marginal views.³³

III. THE COURTS RESPONSE TO FREE SPEECH ZONE CHALLENGES

Despite initially favoring students' rights, the courts have upheld college and university policies that significantly restrict students' freedom of speech and expression, including free speech zones. However, as students have become more assertive and student organizations have challenged restrictions on their points of view, many circuit and district courts have started to place greater limitations on such restrictions. Additionally, the

27. See Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), <http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>.

28. Majeed, *supra* note 20, at 486-87.

29. *Id.* at 494.

30. See FOUND. FOR INDIVIDUAL RTS. IN EDUC., *supra* note 9.

31. *Id.*

32. See *id.*

33. See Carol L. Zeiner, *Zoned Out! Examining Campus Speech Zones*, 66 LA. L. REV. 1, 17 (Fall 2005).

courts are recognizing the urgency of the situation and even granting students and student organizations temporary injunctions from enforcement of the restrictive policies in the interim.

While the Supreme Court initially established that students have a right to free speech on campus and struck down the university's power of *in loco parentis*, the Court has also upheld college and universities' power to restrict speech on campus. The precedent surrounding college and universities' ability to restrict student speech and expression arose from challenges by student organizations on both the left and the right.

Many of the clashes between student speech or protests and college and university regulations occurred when students sought to protest the Vietnam War.³⁴ In *Healy v. James*, the Supreme Court confronted the question of whether a university's refusal to recognize a student organization based on potential disruption and possible violence was a violation of the students' First Amendment free speech rights.³⁵ The Court recognized that just like their K-12 peers, higher education students do not leave their rights at the schoolhouse door and college and university campuses are not free to infringe on students' freedom of speech at will.³⁶ The Court also found that in denying recognition or in other ways limiting student organizations' ability to associate, schools could be in violation of students' rights if the school directly interfered with the students' ability to meet or to voice their viewpoints.³⁷ However, the Court held that like other state actors, colleges and universities could limit student activities or speech when it materially disrupts the work or business of the school or incites lawless action.³⁸ Such an exception allows schools to limit students' ability to discuss unpopular opinions.

The circuit and district courts have limited colleges and universities' ability to exclude or limit students' speech when such decisions are related solely to the unpopularity or controversial nature of the opinion.³⁹ Students have successfully engaged in a variety of challenges to the time, manner, and place restrictions placed on their speech by free speech zones.

In *Roberts v. Haragan*, the U.S. District Court for the Northern District of Texas found certain elements of Texas Tech University's speech

34. See Sarabyn, *supra* note 18, at 29.

35. 408 U.S. 169, 170-71 (1972).

36. *Id.* at 179-80.

37. *Id.* at 183.

38. *Id.* at 188-89.

39. See Lukianoff & Haidt, *supra* note 27.

regulations to be facially unconstitutional because they required students to get prior permission to engage in protected speech, limiting students' potentially controversial speech and printed materials to a designated area.⁴⁰ The court arrived at this decision on the basis that colleges and universities could not limit speech to specific areas of campus, because a public university would be considered a public forum.⁴¹ By establishing that public colleges and universities are public forums, it follows that regulations on students' speech would be subject to strict scrutiny.⁴²

Restrictions on freedom of speech may also impact other First Amendment rights such as freedom of assembly and freedom of religion.⁴³ In *Pro-Life Cougars v. Univ. of Houston*, the U.S. District Court for the Southern District of Texas examined whether a school policy restricting speech that could be considered "potentially disruptive" was a violation of the students' First Amendment rights.⁴⁴ The policy included no objective requirements for determining which speech or activities would be considered "potentially" disruptive, but rather left broad discretion to the dean.⁴⁵ The pro-life group had created an exhibit but was denied a permit because the sensitive nature of its content was deemed disruptive or disturbing to other students.⁴⁶ The court held that the university's policy was overly broad and left too much discretion for potential abuse by subjective administrators and thus was an unconstitutional violation of students' freedom of speech and assembly.⁴⁷

Unfortunately, students' rights to voice controversial opinions have prevailed mostly in trial courts, so students must bring challenges on a university-by-university basis.⁴⁸ Yet, by granting injunctions to students engaging in challenges to university policies, these lower courts play an important role in preventing further harm to the students or having the issue become moot.⁴⁹ Such injunctions allow students to pursue litigation without having to endure further violations of their rights by the university's

40. 346 F. Supp. 2d 853, 856 (N.D. Tex. 2004).

41. *Id.* at 858-63.

42. *Id.* at 860.

43. *See, e.g., id.*; *see also* Healy v. James, 408 U.S. 169 (1972).

44. 259 F. Supp. 2d 575, 577-78 (S.D. Tex. 2003).

45. *Id.* at 577-78.

46. *Id.* at 578.

47. *Id.* at 584.

48. *See id.*; *see also* Roberts v. Haragan, 346 F. Supp. 2d 853, 853 (N.D. Tex. 2004).

49. *See Pro-Life Cougars*, 259 F. Supp. 2d at 580-81.

policies.⁵⁰ These injunctions also prevent university administrators from retaliating against students seeking to exercise their First Amendment rights through internal disciplinary actions against the students.⁵¹ The Foundation for Individual Rights in Education has filed lawsuits against public colleges and universities restricting student speech in each of the circuits.⁵² However, due to the variety of speech restrictions on campuses, such cases may result in narrow holdings and universities may merely change their policies to comply, just as they have done when faced with past litigation.⁵³

IV. LEGISLATIVE AND NON-JUDICIAL ALTERNATIVES TO PROTECT STUDENTS' RIGHTS ON CAMPUS

A. Legislative Remedies to Free Speech Zones

One alternative to the piecemeal dismantling of speech zones by the courts would be to have legislatures ban the use of such zones on college campuses. Such decisions only impact public colleges and universities because private colleges and universities are considered private property and permitted to set wider restrictions.⁵⁴ It would be possible to ban free speech zones by Congressional statute, thereby eliminating the ability of all public college and universities to limit student speech rights beyond the normal public forum jurisprudence.⁵⁵ Yet a more likely scenario would be to use state legislatures to impact each states' college and university campuses.

Two states, Missouri and Virginia, have already enacted legislation banning free speech zones on college and university campuses.⁵⁶ Under such legislation, the outdoor spaces at public colleges and universities are treated no differently than other public spaces such as parks.⁵⁷ As such, speech is

50. See Univ. of Cincinnati Chapter of Young Am. for Liberty v. Williams, No. 1:12-cv-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012).

51. See C. Republicans v. Reed, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).

52. *Stand Up For Speech Litigation Project*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., <http://www.standupforspeech.com/about/> (last visited Mar. 18, 2017).

53. See *Roberts*, 346 F. Supp. 2d at 856.

54. See VA. CODE ANN. § 23-9.2:13 (2014).

55. See Robert Davis Edelman, *Experts Urge Congress to Protect Free Speech on Campus*, WASH. FREE BEACON (June 3, 2015), <http://freebeacon.com/politics/experts-urge-congress-to-protect-free-speech-on-campus/>.

56. See, e.g., VA. CODE ANN. § 23-9.2:13 (2014); MO. REV. STAT. § 173.1550.

57. See *id.*

treated just as it is in other off-campus, public forums and subject only to limited restrictions in time, manner, and place.⁵⁸ Not only does such legislation protect students' freedom of speech on campus, it provides greater clarity to both university administrators and the courts regarding how to handle any potential conflicts between student speech rights and the desire to maintain public order, by allowing the application of precedent related to restrictions in other public forums.⁵⁹ Additionally, such legislation sends the message that the government is committed to protecting freedom of speech for all, even those expressing dissenting or unpopular opinions.⁶⁰ The current climate of political correctness may make schools more likely to enact restrictions on student speech, but the situation in Missouri in many ways shows removing free speech zones allows students to voice dissident opinions that might otherwise be stifled.⁶¹

While the protests in Missouri may be requesting the university regulate speech on campus, their ability to have these protests free from the encumbrance of university policies is actually the result of the removal of restrictions on their speech.⁶² Shortly before the protests, Missouri enacted the "Campus Free Expression Act."⁶³ This legislation established, "[t]he outdoor areas of campuses of public institutions of higher education... shall be deemed traditional public forums."⁶⁴ Such legislation does not remove all restrictions on speech on college and university campuses, but rather subjects these restraints to the same time, manner, and place restrictions that students would encounter if attempting to use other public spaces.⁶⁵ Additionally, the law does not impact private universities, or the ability of public universities to regulate the reservation of indoor spaces such as classrooms or auditoriums.⁶⁶ This legislation has been hailed by many free speech

58. *See generally*, Ark. Educ. TV Comm'n v. Forbes, 523 U.S. 666 (1997) (regarding designation and restrictions of speech in public forum context).

59. *See generally* David S. Allen, *Spatial Frameworks and the Management of Dissent: From Parks to Free Speech Zones*, 16 COMM. L. & POL'Y 383 (2011) (exploring the interaction of property, place, and planning for spaces for dissent, and tracking the historical evolution of free speech zones to their current form).

60. *See Missouri Governor Signs Law Banning Campus 'Free Speech Zones,'* FOUND. FOR INDIVIDUAL RTS. IN EDUC. (July 15, 2015), <https://www.thefire.org/missouri-governor-signs-law-banning-campus-free-speech-zones/>.

61. *See* Lukianoff & Haidt, *supra* note 27.

62. *See, e.g.*, MO. REV. STAT. § 173.1550 (relaxing restrictions on free speech on college campuses).

63. *Id.*

64. MO. REV. STAT. § 173.1550(2).

65. *See id.*

66. *See* MO. REV. STAT. § 173.1550.

advocates as at least a first step in ensuring students' rights to express opinions that might otherwise be limited by school administrators.⁶⁷

Freedom of expression does not necessarily guarantee ideological diversity or even civil discourse, as the protests at the University of Missouri illustrate. The students at the University of Missouri experienced relative ease in their ability to use public outdoor space as part of a standoff with university administrators.⁶⁸ At other colleges and universities, the very act of staging a protest on the quad would have required the approval of the same administrators against whom the students were attempting to protest.⁶⁹ At the same time, the students and some faculty in the University of Missouri went so far as seeking to limit others' freedom by denying the media access to cover the protest—one professor went so far as to ask protesting students to remove a student journalist from covering it.⁷⁰ As one journalist covering the event noted, the protesters “had a chance to stick up for free expression . . . Instead, they stood up for coercion and darkness.”⁷¹ Ultimately, the leaders of the protest issued a statement to their allies on the quad emphasizing that the media played an important role in “tell[ing] [their] stor[ies] and experiences” and the incident should not be repeated.⁷² As the student reporter at the center of the controversial encounter initially told the protesters, “The First Amendment protects your right to be here *and* mine.”⁷³ This encounter illustrates that while legislation is a good first step, it must be

67. See, e.g., Elizabeth Hayes, *Victory: Missouri Governor Bans 'Free Speech Zones'*, YOUNG AM. FOR LIBERTY (July 16, 2015 12:22 PM), <http://www.yaliberty.org/posts/victory-missouri-governor-bans-campus-free-speech-zones>; see also FOUND. FOR INDIVIDUAL RTS. IN EDUC., *supra* note 60.

68. See MO. REV. STAT. § 173.1550.

69. See, e.g., Univ. of Cincinnati Chapter of Young Am. for Liberty v. Williams, No. 1:12-cv-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012); Pro-Life Cougars v. Univ. of Houston, 259 F. Supp. 2d 575, 583 (S.D. Tex. 2003).

70. See Erik Wemple, *University of Missouri Please Fire Immediately the Employee Who Taunted the Media*, WASH. POST (Nov. 10, 2015), <https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/11/10/university-of-missouri-please-immediately-fire-employees-who-taunted-media/>.

71. See *id.*

72. Jim Shur, *Missouri Protesters Change Tack and Welcome Media, Day After Shooing Journalist Away*, U.S. NEWS & WORLD REPORT (Nov. 10, 2015), <http://www.usnews.com/news/us/articles/2015/11/10/missouri-protesters-try-to-stop-photographer-from-doing-job>.

73. Wemple, *supra* note 70 (emphasis added).

accompanied by a change in attitude that re-embraces freedom of expression and diversity of ideas.

B. Allies and Settlements as Additional Non-Litigation Alternatives

Another non-judicial solution for the removal of Free Speech Zones may be for students and their organizations to ally themselves with faculty members engaged in broader academic freedom discussions. Recently, the University of Chicago drafted a statement enshrining the value of free expression on its campus.⁷⁴ This statement embraces both faculty and students' rights to discuss challenging and controversial ideas on campus.⁷⁵ The faculty of other colleges and universities has successfully adopted the statement on their campus reaffirming that colleges need not be safe spaces but rather engaging forums from which new, different, and perhaps controversial ideas can emerge.⁷⁶ Allying with current faculty members engaged in such debates may provide students with leverage to support more open discussions on campus.⁷⁷ Furthermore, statements from the faculty are more likely to be adopted in permanent university policy and may cause greater ripples in academic circles.⁷⁸

Finally, not only fully litigated cases can overturn campus speech zones; settlements can also result in significant policy changes.⁷⁹ Typically, as part of such settlements, colleges and universities are required to revise policies that either expand or eliminate free speech zones in addition to the monetary damages the student or student organization receive.⁸⁰ Such cases, however, lack the precedent-setting value of those that are litigated, and may lead to schools reinstating their restrictions at a later time.⁸¹ At the same time, settlements allow colleges and universities that may not have truly understood the implications of their policies to modify such policies without

74. *Report of the Committee on Freedom of Expression*, UNIV. OF CHI. (July 2014), <https://provost.uchicago.edu/FOECommitteeReport.pdf>.

75. *Id.*

76. *See* Laura Demanski, *Opening Inquiry*, UNIV. OF CHI. MAGAZINE (July-Aug. 2015), <http://mag.uchicago.edu/university-news/opening-inquiry>.

77. *See id.*

78. *See id.*

79. Jake New, *Settling Over Speech*, INSIDE HIGHER ED (Jan. 23, 2015), <https://www.insidehighered.com/news/2015/01/23/colleges-settle-free-speech-lawsuits-fire-promises-more-litigation>.

80. *Id.*

81. *Id.*

the negative publicity of a court battle.⁸² Such settlements should not only consist of monetary damages, but should also include meaningful and lasting change at the colleges and universities in question.⁸³ If the change is not lasting, a new student plaintiff could later force the college into litigation over the restrictive policy.⁸⁴ Settlements signal a victory for free speech on college campuses, but they are less lasting than the enforceable precedent of litigation.⁸⁵

V. ENCOURAGING FREE SPEECH PROMOTES DIVERSITY ON CAMPUS

One argument in favor of restrictions on student speech, including free speech zones, is that colleges and universities should shield young adults from ideas or interactions that may be psychologically damaging or difficult for them.⁸⁶ However, this undermines the role of colleges and universities as marketplaces of ideas, where both students and professors may explore ideas in a supportive but challenging environment.⁸⁷ By ensuring that students feel safe rather than encouraging them to challenge ideas that may make them uncomfortable, colleges and universities create a false sense of security on campus that results in students being ill-prepared for a diverse “real world.”⁸⁸ By limiting exposure to ideas and restricting student speech through use of free speech zones, colleges and universities are raising students’ anxieties rather than teaching them how to properly handle them.⁸⁹

Such conclusions are not without their critics. First, some critics point to evidence that there is a real and measurable mental health crisis among

82. See e.g., *id.* (discussing cases where universities decided to either settle or litigated free-speech lawsuits).

83. See *Settlement Agreement in ‘Sinapi-Riddle v. Citrus Community College District’*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Dec. 3, 2014), <https://www.thefire.org/settlement-agreement-sinapi-riddle-v-citrus-college/> (stipulating as part of the settlement that Citrus will not enforce the challenged procedures).

84. *Id.*

85. A settlement, being only enforceable by its parties, may not protect future students as to speech restrictions outside of the scope of the settlement. See e.g., *id.*

86. See Lukianoff & Haidt, *supra* note 27.

87. See Majeed, *supra* note 20.

88. See Lukianoff & Haidt, *supra* note 27.

89. *Id.*

today's college students.⁹⁰ Yet, ridding the limits of free speech could improve students' mental health both by exposing them to harmful stimuli in a controlled environment and by allowing them the freedom to express themselves without any concerns that they may violate university regulations or impinge on others' sensitivities.⁹¹

Additionally, free speech and safe spaces are not necessarily binary choices that cannot co-exist. In fact, expanding free speech by doing away with free speech zones on campuses may create a greater sense of a "safe space" since students' ability to voice their opinions and explore their identities would not be limited to a particular geographic area.⁹² As Suzanne Nossel wrote in an op-ed in *The New York Times*, "Without free speech, the 'safe spaces' students crave will soon suffocate them."⁹³ Like any market, a marketplace of ideas has the potential for failure, but regulating speech for fear of such a failure can result in further disenfranchisement and may prevent important discussions of difficult issues from occurring.⁹⁴

Finally, encouraging free speech by ridding campuses of free speech zones encourages dialogue in general. As a result, students feel more comfortable challenging their peers and professors, but at the same time this action protects professors and peers who may wish to discuss sensitive topics or controversial ideas.⁹⁵ Contrary to what critics say, this does not encourage professors to disregard student sensitivities, but rather to engage in a way that challenges students' mentalities and world views.⁹⁶ Without an environment that encourages free speech and academic freedom by not limiting such ideas to a specific time and/or geographic area as free speech zones do, professors and students may become further hindered by paranoia or fear of saying the wrong thing.⁹⁷

90. Aaron R. Hanlon, *The Trigger Warning Myth*, NEW REPUBLIC (Aug. 14, 2015), <https://newrepublic.com/article/122543/trigger-warning-myth>.

91. See Lukianoff & Haidt, *supra* note 27.

92. See Suzanne Nossel, *Who Is Entitled To Be Heard*, N.Y. TIMES (Nov. 12, 2015), <http://www.nytimes.com/2015/11/12/opinion/who-is-entitled-to-be-heard>

93. *Id.*

94. *See id.*

95. Cf. Edward Schlosser, *I'm a Liberal College Professor and My Liberal Students Terrify Me*, VOX (June 3, 2015), <http://www.vox.com/2015/6/3/8706323/college-professor-afraid> (presenting one teacher's experience with the changing culture of student sensitivity towards a modern trend of over-sensitivity)

96. Cf. *id.*, but cf. Hanlon, *supra* note 90.

97. See Schlosser, *supra* note 95.

VI. CONCLUSION

Free speech zones are not a reasonable alternative to holding colleges and universities to the same standard as other public spaces because such zones often are complicated by even more restrictions.⁹⁸ Limiting student free speech to a specific geographic purpose or time creates further harm to today's students both by creating an artificially coddled mindset and by creating greater risk for students who may already feel marginalized or excluded because of their ideas.⁹⁹ While legislation may be ideal, even it is not a panacea if students do not value their rights.¹⁰⁰ The 2015 events in Missouri show that such legislation achieves its purpose of allowing students to voice dissenting or unpopular opinions free from administrative veto.¹⁰¹ While commentators on the right often complain about the hyper-sensitivity of today's college students and those on the left are concerned about the possible further disenfranchisement of historically marginalized groups, both should recognize that encouraging free speech on campus would help remedy rather than further these concerns.¹⁰²

Students, professors, and administrators must grow to recognize that disagreement does not equal discord and differing opinions are not per se hateful.¹⁰³ Students and professors should grow to see each other as allies rather than foes in the battle to return campuses to a true marketplace of ideas by encouraging the adoption of academic freedom statements, such as the recent University of Chicago statement, rather than attempting to limit each other through free speech zones.¹⁰⁴

The ideal solution—ridding free speech zones from college campuses and providing students and faculty with a true marketplace for the free exchange of ideas—will require both judicial and legislative methods. Legislative solutions can reach only public colleges and universities in most cases, but show great success by allowing sweeping reform on a large geographic scale.¹⁰⁵ Since there are still limitations to such reform, it is important that students not currently impacted by such reforms, such as those

98. See FOUND. FOR INDIVIDUAL RTS. IN EDUC. *supra* note 9.

99. See Nossel, *supra* note 92; see Lukianoff & Haidt, *supra* note 27.

100. See Nossel, *supra* note 92.

101. See MO. REV. STAT. § 173.1550.

102. See Nossel, *supra* note 92.

103. See Lukianoff & Haidt, *supra* note 27.

104. See Demanski, *supra* note 76; see also Wemple, *supra* note 70.

105. See, e.g., VA. CODE ANN. § 23-9.2:13 (2014); MO. REV. STAT. § 173.1550.

in private schools, be courageous enough to challenge their silencing through a well-reasoned litigation strategy that should encourage other schools to consider reforms on a campus-by-campus basis.¹⁰⁶

The events of Fall 2015 have encouraged a national discussion of free speech on college campuses.¹⁰⁷ With this renewed attention, combined with current legislative and judicial solutions, hopefully fewer students will have their speech rights curtailed by free speech zones and lead to greater civil discourse on campus.¹⁰⁸

106. See *Stand Up for Speech Litigation Project*, *supra*, note 52.

107. See, e.g., Kristoff, *supra*, note 3.

108. See FOUND. FOR INDIVIDUAL RTS. IN EDUC., *supra*, note 9.