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A Room Without a View(point): Must Student-Housing Employees Trade Free Speech for Free Rent?

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ABSTRACT

The COVID-19 pandemic exposed the power that public university speech policies have to silence students. Although few people were better suited to provide a candid assessment to the media of student safety in on-campus housing than resident assistants, all too often these student employees were forbidden from speaking openly, or at all. To understand the scope of these prohibitions on speech, researchers using freedom-of-information law obtained employment manuals, policies, and guidelines from a wide cross-section of public universities. This Article analyzes the language used in a sample of these materials and concludes that while these speech policies often—and rightly—protect sensitive, confidential information that resident assistants learn on the job, they also indiscriminately sweep across a great deal of protected speech. As a result, access to information of public concern is restricted. This "gagging" phenomenon is amplified by the outsized coercive effect that even less-restrictive policies are likely to have on a resident assistant's speech. After all, speaking in a disfavored way may result in not only the loss of a paycheck, but of the roof over the student's head. With this in hand, the Article reviews the courts' treatment of the First Amendment rights of both public employees and public-school students in challenges to state action in this area. This Article predicts that whether analyzed under the Supreme Court's "employee" or

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"student" jurisprudence, many—if not most—of the speech policies typified in the sample probably flunk the test of First Amendment protection, given that more narrowly tailored options are available.

INTRODUCTION

As outbreaks of COVID-19 hit college campuses across the United States, attention turned to the communal housing that became both potential risk centers for transmission as well as refuges for safe quarantine.[1] Questions logically arose: How many people living in college campus housing are sick with COVID-19? Are colleges taking adequate precautions to limit the spread of the disease in homes with shared kitchens and bathrooms?[2]

1. *See* Natasha Singer, *College Quarantine Breakdowns Leave Some at Risk*, N.Y. TIMES (Sept. 9, 2020), https://www.nytimes.com/2020/09/09/business/colleges-coronavirus-dormitories-quarantine.html [https://perma.cc/J5R5-9DST] (explaining that colleges dealt with COVID-19 outbreaks by designating quarantine units in dormitories or renting external beds, but that precautions were inconsistently enforced).

2. *See* Shawn Hubler & Anemona Hartocollis, *How Colleges Became the New Covid Hot Spots*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/09/11/us/college-campus-outbreak-covid.html [https://perma.cc/RG89-3Q8G] (identifying college campuses as epicenters for viral transmission once students resumed attending face-to-face classes and living in shared housing).

The people in the best position to answer those questions—the student employees who reside in campus housing as "resident assistants" or "resident advisers" (RAs)—often were forbidden from doing so. At Louisiana State University, for example, RAs are prohibited from speaking to the media, even the on-campus student newspaper.[3] It was the same story at public university campuses from California to Missouri: Student housing employees wanted to voice their concerns about COVID-19 safety but were fearful of retaliation from the university.[4] At Maryland's Frostburg State University, the threat was explicit. The student newspaper reported that school officials tried to silence RAs who spoke against COVID-19 policies by threatening to cite "attitude" issues on future employment evaluations.[5]

As a result of highly controlling university policies, journalists reporting on campus news often are left to depend on unnamed sources. For example, at Southern Illinois University, student journalists quoted unnamed RAs expressing alarm that they found out only through a chance encounter that a COVID-19 patient was being quarantined on their floor of the dorm.[6] One RA told the student newspaper, *The Daily Egyptian*: "There are zero

3. Mark Ballard, *Is LSU Ready to House 7,000 Incoming Students on Campus? A Former RA Doesn't Think So*, THE ADVOCATE (Aug. 11, 2020, 6:30 PM), https://www.theadvocate.com/baton_rouge/news/education/is-lsu-ready-to-house-7-000-incoming-students-on-campus-a-former-ra-doesnt/article_35606f96-dc23-11ea-b194-4bc31fd3ddec.html) [https://perma.cc/DBC6-GXW3](noting that three RAs resigned, citing concerns over COVID 19 safeguards when classes resumed in person in fall 2020).

4. Omar Rashad, *Muir Hall's Third Floor in Quarantine After Two Coronavirus Cases*, MUSTANG NEWS (Sept. 30, 2020), https://mustangnews.net/muir-halls-third-floor-in-quarantine-after-two-coronavirus-cases/ [https://perma.cc/F6FJ-XF49] (citing unnamed RAs in a news story about failings in the university's COVID-19 precautions: "RAs asked that their names not be used since speaking with the media violates their contracts[,] and they said they feared retaliation from the university."); *see also* Galen Bacharier & Feiyu Su, *'This is a Deliberate Risk': MU Residential Assistants Worry as Move-In Begins*, COLUMBIA MISSOURIAN (Aug. 12, 2020), https://www.columbiamissourian.com/news/covid19/this-is-deliberate-risk-mu-residential-assistants-worry-as-move-in-begins/article_f1515ae8-db1b-11ea-b468-2f1db73ee8c9.html [https://perma.cc/V52N-M83Z] (reporting that RAs voiced misgivings about being forced to lead group activities that could spread COVID-19, and explaining: "Those who spoke with the *Missourian* were granted anonymity because they are not authorized by MU to speak with members of the media.").

5. Cassie Conklin, *FSU Attempts to Silence Students Who Speak Out About COVID-19, Says Resident Assistants*, THE BOTTOM LINE (Nov. 12, 2020), http://thebottomline-news.com/fsu-attempts-to-silence-students-who-speak-out-about-covid-19-says-resident-assistants/ [https://perma.cc/YCF8-884M].

6. Kallie Cox & Danny Connolly, *SIU Will Not be Informing the Public of COVID-19 Outbreaks on Campus; RAs Told to Keep Quiet*, DAILY EGYPTIAN (Aug. 19, 2020), https://dailyegyptian.com/101896/news/siu-will-not-be-informing-the-public-of-covid-19-outbreaks-on-campus-ras-told-to-keep-quiet/ [https://perma.cc/6GRL-FBEM].

precautions in place that keep us safe . . . ."[7] Similarly, the campus newspaper at New Hampshire's Keene State College was forced to rely on an unnamed RA to relate the story of how eleven others resigned in protest over COVID-19 safety concerns when their campus resumed face-to-face learning in fall 2020.[8] In North Carolina, an RA told the public radio station that she was "beyond stressed, always scared and oftentimes just confused" in being forced to serve as a pandemic first-responder under changing conditions—but refused to give her full name, because she "fears repercussions from her supervisors in the Office of Housing and Residence Life."[9] Building news coverage around anonymous sources can diminish its impact, so there are real credibility costs when employees cannot speak candidly without fear of retaliation.[10]

There is obvious public interest in knowing whether employees of state institutions feel safe doing their jobs, and whether government agencies are being truthful when they assure the public that health protocols are satisfactory. When workplace policies forbid sharing information learned in the course of employment—even personal impressions and observations—the public's access to information suffers.[11] Yet restrictive rules that prevent student employees from speaking publicly without approval are widespread

7. *Id.*

8. Hunter Oberst & Puja Thapa, *RAs Resign Over COVID*, THE EQUINOX, Sept. 10, 2020, at A1.

9. Liz Schlemmer, *Tired and Stressed, UNCW Students Watch COVID-19 Cases Rise on Campus*, N.C. PUB. RADIO (Sept. 11, 2020, 7:49 AM), https://www.wunc.org/education/2020-09-11/tired-and-stressed-uncw-students-watch-covid-19-cases-rise-on-campus [https://perma.cc/28CC-7945].

10. Liz Spayd, *The Risk of Unnamed Sources? Unconvinced Readers*, N.Y. TIMES (Feb. 18, 2017), https://www.nytimes.com/2017/02/18/public-editor/the-risk-of-unnamed-sources-unconvinced-readers.html [https://perma.cc/MJD2-QAT8] ("There is a wide and perilous gulf between the value journalists place on anonymous sources and the value readers do.").

11. *See* Frank D. LoMonte, *When a Leak Becomes a Lifeline: Reinvigorating Federal Labor Law to Protect Media Whistleblowing About Workplace Safety,* 19 SEATTLE J. FOR SOC. JUST. 693, 725 (2021) (making this point in the context of healthcare-industry regulations that forbid employees from speaking to the media: "Too often, journalists are shut out of access to employees with first-hand knowledge of newsworthy events.").

and have been on the books for years.[12] Some are unabashedly viewpoint based and appear calculated to suppress whistleblowing.[13]

Using state freedom-of-information law, researchers from the Brechner Center for Freedom of Information requested policies and handbooks that regulate the behavior of student-housing employees from a number of public universities across the United States.[14] Of those that responded, many of their rulebooks contained explicit prohibitions on speaking to the press or to the public about information learned on the job.[15] Others contained ambiguities that could be interpreted as implicit directives not to speak.[16] This means that across the spectrum of public higher education, students are being told that they are signing away their freedom of speech when they accept university employment.

In addition to restricting the public's ability to become informed about issues of concern, restrictive speech policies almost certainly violate the student employees' First Amendment rights. The Supreme Court has been

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12. *E.g.*, Richard Chumney, *New Resident Advisor Policy Causes Controversy*, COLLEGIATE TIMES (Sept. 24, 2015), http://www.collegiatetimes.com/news/new-resident-advisor-policy-causes-controversy/article_653348a2-6314- 11e5-8c3e-1f0133c7e4cc.html [https://perma.cc/A7MQ-4QGD] (reporting that "Virginia Tech resident advisors are contractually prohibited from speaking with the media").

13. *See* Montclarion Staff, *Editorial: Are ResLife Employees Being Silenced?*, MONTCLARION (Mar. 31, 2022), https://themontclarion.org/opinion/editorial-are-reslife-employees-being-silenced/ [https://perma.cc/N9QD-47AL] (quoting the job description for student RAs at New Jersey's Montclair State University, which states: "RAs must refrain from making statements to media outlets that would reflect negatively on the Office of Residence Life or Montclair State University."); Nick Frewin, *'It's a University-Mandated Monopoly': LSU RAs Speak out Against Working Conditions*, LSU REVEILLE (Aug. 27, 2020), https://www.lsureveille.com/news/it-s-a-university-mandated-monopoly-lsu-ras-speak-out-against-working-conditions/article_63c022aa-e4d4-11ea-8053-bf1b3931c02a.html [https://perma.cc/MG9F-R8KJ] (citing the Louisiana State University housing employee policy that, although permitting student employees to speak to the press as individuals, cautions them: "This is not an appropriate time to air your disagreements with Residential Life. . . . Any such disagreements should be discussed with the Residential Life staff followed by appropriate avenues of appeal on campus if necessary.").

14. Some of the schools that were notified included Arizona State University; Eastern Carolina University; Georgia Southern University; Michigan State; Kansas State; University of California Los Angeles; University of Nevada, Las Vegas; and the University of Washington. A perma.cc link to the original documentation received during the study will follow all citations in this Article.

15. *See, e.g.*, the policies of the University of Nevada; the University of Florida; the University of California Los Angeles; Texas A&M University; Georgia State University; Eastern Carolina University; and Arizona State University, discussed *infra* notes 65–75 and accompanying text.

16. *See, e.g.*, the policies of the University of Washington; Rutgers University; and Kansas State University, discussed *infra* notes 76–78 and accompanying text.

highly protective of the free-speech rights of both employees and students in public higher education.[17] Whether an RA is regarded in the eyes of the law as a "student" or as an "employee," in neither capacity could a speaker lawfully be prevented from speaking about issues of public importance.[18]

This Article looks at the practice of silencing RAs at public universities across the United States: how commonplace gag rules are, and whether those rules are legitimately enforceable under prevailing judicial interpretations of the First Amendment. Section I describes the importance of access to information about higher education, how the law protects that right of access, and how universities have asserted their authority to keep secrets. Section II summarizes the findings of a survey of college rulebooks demonstrating that universities routinely forbid RAs from saying anything publicly about their work, often without any qualification assuring students that they can share information about matters of public concern. Section III looks at how the courts have applied First Amendment standards to restrictions on college-student speakers and public-employee speakers, and how restrictions on campus housing measure up against those free-speech interpretations. Finally, the Article concludes that, because the RA–university relationship is an especially coercive one, it is important for university policies to clearly protect the ability to speak—especially about conditions within campus housing—and for courts to hold universities accountable when their policies fall short.

I. THE FREE FLOW OF INFORMATION ON CAMPUS

State colleges and universities are widely recognized as havens for the uninhibited exchange of ideas and information—places where sensitive discussions are uniquely welcomed and encouraged.[19] Nevertheless, these

17. *See generally* Lane v. Franks, 573 U.S. 228, 242 (2014) (holding that the First Amendment prohibited retaliating against a community college administrator who gave truthful testimony exposing no-work job offered to state politician); Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 671 (1973) (holding that the University of Missouri violated the First Amendment by disciplining a student for disseminating magazine that used profane language in harshly criticizing police).

18. *See* Frank D. LoMonte & Virginia Hamrick, *Running the Full-Court Press: How College Athletic Departments Unlawfully Restrict Athletes' Rights to Speak to the News Media*, 99 NEB. L. REV. 86, 139 (2020) ("Regardless of whether athletes occupy a legal status akin to 'employee' or to 'student,' there is no doctrinal support for categorically prohibiting unapproved communications with the news media.").

19. *See* Healy v. James, 408 U.S. 169, 180–81 (1972) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.") (internal quotes and citation omitted); *see also* Mary-Rose Papandrea, *The Free Speech*

institutions are among the most secretive of agencies when it comes to their own governance. They fiercely control the flow of information in the name of protecting a favorable image for donors, lawmakers, and prospective recruits.[20]

The fixation on image in higher education manifests itself in many invidious ways. For decades, colleges routinely filed falsified reports with the U.S. Department of Education to conceal how often sexual assaults were reported on their campuses.[21] Several universities have been caught furnishing exaggerated data to *U.S. News and World Report* in hopes of bolstering their standing in the magazine's influential rankings.[22]

Rights of University Students, 101 MINN. L. REV. 1801, 1825 (2017) (commenting that "universities are a place, like the public square, where students are supposed to confront ideas with which they disagree, sometimes vehemently").

20. *See* Joseph D. Herrold, *Capturing the Dialogue: Free Speech Zones and the "Caging" of First Amendment Rights*, 54 DRAKE L. REV. 949, 955 (2006) (describing how universities have used restrictive "free speech zones" to channel dissenters into remote parts of campus where protest will go largely unnoticed: "Though the Supreme Court has championed the idea that educational settings welcome the expression of all opinions, officials at educational institutions may not share such opinions, or may fear having the message associated in any way with the college or university."); *see also* Adam Willis, *Bureaucrats Put the Squeeze on College Newspapers*, ATLANTIC (Aug. 23, 2019), https://www.theatlantic.com/ideas/archive/2019/08/death-college-newspapers/595849/ [https://perma.cc/Y4PH-8M33] (commenting on colleges' widespread hostility toward independent student-run newspapers: "[I]mage-obsessed administrators are hastening the demise of these once-formidable campus watchdogs.").

21. *See* Collin Binkley et al., *Campus Insecurity*, COLUMBUS DISPATCH, Sept. 30, 2014, at 1A (stating that one-fifth of U.S. colleges claimed to have gone at least twelve years without a single sexual assault on campus, in data filed with federal regulators that the Department of Education acknowledges is inaccurate); *see also* Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCH., PUB. POL'Y, & L. 1, 6–8 (2015) (analyzing crime data reported by thirty-one large institutions before, during, and after U.S. Department of Education audits, and concluding that reports of campus sex offenses spiked temporarily while those colleges were under audit review but subsequently diminished to pre-audit levels, suggesting that under-reporting is the norm).

22. *See* Alyssa Lukpat, *Former Temple University Dean Found Guilty of Faking Data for National Rankings*, PHILA. TRIB. (Nov. 30, 2021), https://www.phillytrib.com/news/local_news/former-temple-university-dean-found-guilty-of-faking-data-for-national-rankings/article_7c77ab49-12c5-52f1-b37e-0e89e58dbcbb.html [https://perma.cc/A6MM-J5MT] (reporting on the criminal prosecution of a former Temple University administrator who submitted fraudulent data to *U.S. News* to secure a top national ranking for online business degree program); Christopher Rim, *UC Berkeley Removed from* US News *College Rankings for Misreporting Statistics*, FORBES (July 26, 2019), https://www.forbes.com/sites/christopherrim/2019/07/26/uc-berkeley-removed-from-us-news-college-rankings-for-misreporting-statistics/?sh=7b714f147578 [https://perma.cc/6W6S-EXFZ] (reporting that *U.S. News* removed five colleges from its rankings, including the second-ranked University of California-Berkeley, after UC-Berkeley

Administrators have censored journalistic publications, fired their editors and faculty advisers, withdrawn their funding and otherwise created a climate of intimidation that inhibits truthful news coverage.[23] Athletic departments rigidly control what athletes say to the public through restrictive anti-whistleblowing policies,[24] resulting in the concealment of scandals that come to light, if at all, years or decades too late.[25] Some of these instances

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acknowledged having repeatedly misreported alumni giving, a metric used in the magazine's ratings); Scott Jaschik, *Oklahoma Gave False Data for Years to 'U.S. News,' Loses Ranking*, INSIDE HIGHER ED (May 28, 2019), https://www.insidehighered.com/admissions/article/2019/05/28/university-oklahoma-stripped-us-news-ranking-supplying-false [https://perma.cc/89F2-LLSB] (reporting that the University of Oklahoma lost its *U.S. News* ranking after acknowledging having exaggerated its rate of alumni giving for at least ten years); Valerie Strauss, *Elite University Lies to College Rankers for Years*, WASH. POST (Aug. 23, 2012), https://www.washingtonpost.com/blogs/answer-sheet/post/does-it-matter-that-an-elite-university-lied-to-college-rankers-for-years/2012/08/22/e89b39d2-ec68-11e1-aca7-272630dfd152_blog.html [https://perma.cc/HS7J-FCQF] (reporting that Emory University acknowledged in 2012 to having provided inflated admission statistics and test scores to national rating authorities for at least twelve years).

23. *See* AMERICAN ASS'N OF U. PROF'S, THREATS TO THE INDEPENDENCE OF STUDENT MEDIA 5–9 (Dec. 2016) (enumerating instances of retaliation against student-run news organizations and observing that "[i]t has become disturbingly routine for student journalists and their advisers to experience overt hostility that threatens their ability to inform the campus community and, in some instances, imperils their careers or the survival of their publications").

24. *See* LoMonte & Hamrick, *supra* note 18, at 97–98 (describing findings of a survey of major-college athlete rulebooks, most of which explicitly restricted athletes from interacting with the news media without approval from the institution, and several of which explicitly forbade going public with any complaints about the athletic program).

25. *See* Ken Goe, *Women Athletes Allege Body Shaming Within Oregon Ducks Track and Field Program*, OREGONIAN (Oct. 25, 2021, 3:06 PM), https://www.oregonlive.com/trackandfield/2021/10/women-athletes-allege-body-shaming-within-oregon-ducks-track-and-field-program.html [https://perma.cc/J6UU-RRQY] (describing accounts of six former Oregon track-and-field athletes who complained of abusive coaching tactics, including pressure for women to use unsafe weight-loss methods); John Barr, *Florida Gators Women's Basketball Players Detail Alleged Abuse by Former Coach Cam Newbauer*, ESPN (Oct. 1, 2021), https://www.espn.com/womens-college-basketball/story/_/id/32313889/florida-gators-women-basketball-players-detail-alleged-abuse-former-coach-cam-newbauer [https://perma.cc/96SB-8WZ7] (quoting five former University of Florida women's basketball players who experienced "profanity-laced tirades" and other mistreatment from their head coach, who was pressured to resign when reports of abuse belatedly came to light); Rick Maese & Keith L. Alexander, *Report on Maryland Football Culture Cites Problems but Stops Short of 'Toxic' Label*, WASH. POST (Oct. 25, 2018, 8:42 PM), https://www.washingtonpost.com/sports/2018/10/25/report-maryland-football-culture-cites-problems-stops-short-toxic-label/ [https://perma.cc/M8B2-Z6EJ] (illustrating an investigation into the University of Maryland football program after the May 2018 heat-stroke death of a 19-year-old player, Jordan McNair, that found that the athletic department and coaching staff fostered "a culture where problems festered because too many players feared speaking out").

of long-concealed misconduct have become cautionary household names, including the molestation of hundreds of athletes by team doctors Larry Nassar at Michigan State[26] and Richard Strauss at Ohio State.[27]

It is perhaps no surprise that institutions of higher education are tempted to conceal or distort the truth in service of a favorable public image, because they operate in an increasingly competitive marketplace. State subsidies for higher education have generally been decreasing in real dollars, forcing institutions to scramble to find replacement funding through higher tuition and increased donor support.[28] Some historically public institutions receive 90% or more of their support from nongovernmental sources.[29] One byproduct of this decline in governmental support is that state institutions are increasingly competing to recruit out-of-state students, who pay premium tuition rates.[30] Colleges are spending at unheard-of levels to market and promote themselves to recruits as college enrollment nationally declines.[31] Alongside declining financial support, public esteem for higher

26. *See* Caroline Kitchener & Alia Wong, *The Moral Catastrophe at Michigan State*, ATLANTIC (Sept. 12, 2018), https://www.theatlantic.com/education/archive/2018/09/the-moral-catastrophe-at-michigan-state/569776/ [https://perma.cc/2FXE-KVTG].

27. *See* Sarah Buduson, *Betrayed: How Ohio Failed Hundreds of Male Athletes Abused by OSU's Dr. Richard Strauss*, NEWS5 CLEV. (June 24, 2021, 5:05 PM), https://www.news5cleveland.com/news/local-news/investigations/betrayed-how-ohio-failed-hundreds-of-male-athletes-abused-by-osus-dr-richard-strauss#: [https://perma.cc/2EFG-PJUL].

28. *See* Jon Marcus, *Most Americans Don't Realize State Funding for Higher Ed Fell by Billions*, PBS (Feb. 26, 2019), https://www.pbs.org/newshour/education/most-americans-dont-realize-state-funding-for-higher-ed-fell-by-billions [https://perma.cc/88HU-STH6] (reporting that, between 2007 and 2017, states collectively decreased their investment in higher education by $9 billion in inflation-adjusted terms).

29. The University of Pittsburgh, for example, receives about 6% of its general operating budget from state appropriations. *See* Susan Jones, *Lawmakers Scrutinize Funding for State-Related Universities*, UNIV. TIMES (Oct. 7, 2021), https://www.utimes.pitt.edu/news/lawmakers-scrutinize [https://perma.cc/Z9NV-RVXD]. Arizona's legislature took the drastic step of eliminating state funding for several large community colleges in 2015, leaving them largely reliant on tuition and property taxes. Ashley A. Smith, *Coping With Zero in Arizona*, INSIDE HIGHER ED (Jan. 27, 2017), https://www.insidehighered.com/news/2017/01/27/arizona-community-colleges-cope-state-disinvestment-and-declining-enrollments [https://perma.cc/7A4L-73UV].

30. OZAN JAQUETTE, STATE UNIVERSITY NO MORE: OUT-OF-STATE ENROLLMENT AND THE GROWING EXCLUSION OF HIGH-ACHIEVING, LOW-INCOME STUDENTS AT PUBLIC FLAGSHIP UNIVERSITIES 2 (Jack Kent Cooke Foundation) (May 2017).

31. *See* Jon Marcus, *From Google Ads to NFL Sponsorships: Colleges Throw Billions at Marketing Themselves to Attract Students*, WASH. POST (Oct. 3, 2021, 8:46 PM), https://www.washingtonpost.com/local/education/colleges-marketing-student-recruitment/2021/09/30/b6ddd246-2166-11ec-8200-5e3fd4c49f5e_story.html [https://perma.cc/QG3X-TM3Z] (reporting that as of late 2021, college marketing

education is in decline.[32] Some institutions have closed or faced the threat of closure in recent years due to declining enrollment and other financial pressures.[33] These factors have raised the stakes for universities to avoid or diminish controversy, and thus raised the temptation for administrators to use their authority to suppress disclosure of unfavorable news or unflattering opinions.

One manifestation of the growing obsession with image is the rise of highly controlling public relations offices that insist on intermediating all interaction between the news media and college employees. The growth of the "P.R. state" is in no way limited to higher education and has been widely observed across all levels of government.[34] One longtime Washington, D.C. journalist has decried government public information officers, or PIOs, as a "choke point" interfering with the public's ability to become

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expenditures were on pace to double year-over-year, as institutions sought to recoup enrollment lost to, among other causes, the COVID-19 pandemic that caused courses to go remote).

32. *See* Paul Fain, *Deep Partisan Divide on Higher Education*, INSIDE HIGHER ED (July 11, 2017), https://www.insidehighered.com/news/2017/07/11/dramatic-shift-most-republicans-now-say-colleges-have-negative-impact [https://perma.cc/YS24-UA2B] (explaining that 58% of Republicans surveyed say colleges have a negative impact on America, while only 36% say they have a positive impact, which is attributable to regular denunciation of higher education in right-wing media).

33. *See* Jessica Dickler, *More Colleges Face Bankruptcy Even as Top Schools Experience Record Wealth*, CNBC (Nov. 27, 2021, 9:00 AM), https://www.cnbc.com/2021/11/27/more-colleges-face-bankruptcy-but-top-schools-experience-record-wealth.html [https://perma.cc/7BUT-5W23] (observing that colleges experienced their steepest two-year enrollment decline in fifty years during the COVID-19 pandemic of 2020–21, forcing some smaller institutions into bankruptcy or closure); April McCullum, *The Unraveling of Jane Sanders' Burlington College Legacy*, BURLINGTON FREE PRESS (July 21, 2017, 12:27 PM), https://www.burlingtonfreepress.com/story/news/local/2017/07/21/unraveling-jane-sanders-burlington-college-legacy/486054001/ [https://perma.cc/JV3V-TYPW] (reporting that Vermont's Burlington College shuttered in 2016 after forty-four years of operation due to crushing debt from a disadvantageous $10 million real estate purchase).

34. Critics have decried, for instance, the millions spent by police departments to hire public-relations operatives, or even to contract with private P.R. firms, to create a more favorable public image. *See* Sofía Mejías Pascoe, *Public Agencies Are Spending More on PR to Boost Their Reputations*, VOICE OF SAN DIEGO (June 1, 2021), https://voiceofsandiego.org/2021/06/01/public-agencies-are-spending-more-on-pr-to-boost-their-reputations/ [https://perma.cc/94KM-THTF] (reporting that San Diego paid $500,000 to a private marketing firm for vaguely defined media-consulting services); John Ferrugia et al., *Denver Police Defend Public Relations Spending*, DENVER 7 (Feb. 16, 2016), https://www.thedenverchannel.com/news/investigations/denver-police-defend-spending-more-than-13-million-over-three-years-on-public-relations [https://perma.cc/U6M5-FM26] (describing how Denver, Seattle, and other cities are paying six-figure salaries to public-relations functionaries that can exceed the pay of senior police officers).

informed about critical public health concerns.[35] Agencies have been caught imposing anti-whistleblowing confidentiality policies in response to leaks that bring hidden controversies to public attention.[36] But it is perhaps uniquely discordant for a *university*—supposedly a bastion for the free exchange of ideas—to insist on muzzling those who dissent.[37] Yet universities regularly do so, requiring employees to obtain permission before speaking publicly about anything relating to their work.[38] For instance, at New York's Stony Brook University, a student editor described the "nightmare" of attempting to get uncensored information from employees who are instructed to send any inquiries from journalists to the campus media relations office, which predictably responds with a prepared statement rather than access to an expert with firsthand knowledge.[39] Comparable prohibitions restrain employees at campuses throughout the country.[40] Undoubtedly,

35. Katherine Foxhall, *The Growing Culture of Censorship by PIO*, COLUM. JOURNALISM REV. (Aug. 3, 2022), https://www.cjr.org/criticism/public-information-officer-access-federal-agencies.php [https://perma.cc/E4AV-VDVY].

36. *See, e.g.*, William Bender, *Good Government or 'Gag' Order? In Chesco, New Ethics Policy Muzzles County Workers*, PHILA. INQUIRER (Mar. 1, 2021), https://www.inquirer.com/news/good-government-or-gag-order-chesco-new-ethics-policy-muzzles-county-workers-20210301.html [https://perma.cc/MN7G-THJK] (describing how a suburban Philadelphia-area county issued a directive requiring county employees to refrain from discussing any information learned at work, even with their own families, immediately following unflattering news reports about flaws in the county's COVID-19 testing program).

37. *See* Erica Goldberg, *Must Universities "Subsidize" Controversial Ideas?: Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 GEO. MASON U. CIV. RTS. L.J. 349, 391 (2011) ("Universities tout themselves as places where faculty generate new ideas and students expand their knowledge and challenge their perspectives, yet administrators are often fearful of generating bad publicity and losing donations from alumni.").

38. *See* Frank D. LoMonte, *Putting the 'Public' Back into Public Employment: A Roadmap for Challenging Prior Restraints That Prohibit Government Employees from Speaking to the News Media*, 68 U. KAN. L. REV. 1, 42–45 (2019) [hereinafter LoMonte, *Roadmap*] (citing examples of questionably lawful policies at higher-education institutions that forbid speaking with the media or require supervisory approval before doing so).

39. Rebecca Liebson, *I've Spent the Past Four Years Covering Stony Brook—Their Media Relations is a Nightmare for Student Journalists*, STATESMAN (Apr. 28, 2019), https://www.sbstatesman.com/2019/04/28/ive-spent-the-past-four-years-covering-stony-brook-their-media-relations-is-a-nightmare-for-student-journalists/ [https://perma.cc/SAZ6-Z9EG].

40. *See, e.g.*, Claudia Yaw, *UWPD Gag Order: Interim Chief Prohibits Employees from Talking to Press*, DAILY (Oct. 28, 2019), https://www.dailyuw.com/news/uwpd-gag-order-interim-chief-prohibits-employees-from-talking-to-press/article_cda9c896-f921-11e9-90d6-736dc438406f.html [https://perma.cc/VQ32-UCG6] (reporting that University of Washington campus police officers were placed under a "strict gag order" that empowers only the police department's designated spokesman to furnish information to the media, an apparent backlash to a student-newspaper report revealing the arrest records of two officers).

public universities are under the impression that they have the authority to control the flow of information by requiring employees to clear all external communications through supervisory authorities. Student employees are no exception.

II. CAMPUS HOUSING POLICIES

A. The Role of Student Housing and the R.A.

Exact numbers vary by data source and by university, but millions of students across the country live in on-campus housing each year.[41] Student housing is, increasingly, an enormous business enterprise. Universities themselves benefit from assessing fees for on-campus residents to live in campus dorms and eat in campus dining facilities.[42] A study by the Urban Institute found that average room and board charges at four-year public institutions rose from $5,700 in 1990–91 to $9,800 in 2015–16, outpacing the overall rate of inflation in the economy by 71%.[43] While revenue from rent is sometimes earmarked only for universities' housing expenses, the money may sometimes be treated as "fungible" and available for other university purposes.[44]

Private industry has invested deeply in constructing and operating student housing; an estimated 78% of all student housing units built over the past two decades were built not by universities but by private developers.[45] "Public-private partnerships" are gaining popularity as methods to construct housing without waiting for the normal state governmental budgeting

41. *U.S. Student Housing-Statistics & Facts*, STATISTA (June 23, 2022) https://www.statista.com/topics/5120/housing-for-students-in-the-us/ [https://perma.cc/FH42-8PPG].

42. *See* Richard Vedder, *Why Are Universities in the Housing Business?*, FORBES (June 14, 2018, 9:00 AM), https://www.forbes.com/sites/richardvedder/2018/06/14/why-are-universities-in-the-housing-business/?sh=50f1049f3e9b [https://perma.cc/LW32-UTDV] (commenting that campus-housing rents have increased far more rapidly than the rate of inflation in the economy generally, and that "universities are hungry for revenues these days, and by forcing students to pay above market rates for housing that is generally less appealing for them, they can augment revenues without formally raising tuition fees").

43. Kristin Blagg et al., *The Price of Room and Board: Understanding Trends in On-Campus Living Charges*, URB. INST. 1 (2017), https://www.urban.org/sites/default/files/publication/94021/the-price-of-room-and-board.pdf [https://perma.cc/6GG9-333Q].

44. *Id.* at 18.

45. James Anthony, *47 Essential Student Housing Statistics You Must Learn: 2023 Data & Demographics*, FINANCESONLINE (Dec. 20, 2022), https://financesonline.com/student-housing-statistics/ [https://perma.cc/V5RH-PUWP].

process, and universities are increasingly privatizing elements of their housing programs.[46]

Often, one consequence of privatization of government services is the loss of public transparency. While the records of public agencies, including state colleges and universities, are accessible to the public under state freedom-of-information laws, the records of private contractors are not always as accessible.[47] As the public's ability to oversee the operations of campus housing erodes with this privatization trend, the perspectives of knowledgeable insiders become even more valuable to public accountability.

Campus housing is frequently a source of news of public importance. The public is intensely interested in whether campuses are safe, so crime in campus housing is understandably a source of considerable public attention.[48] Indeed, during 2023, ABC News launched a miniseries, *Death in the Dorms*, about six tragedies in which college students lost their lives (though not all of the crimes actually happened inside campus housing).[49] In particular, there is great concern over both sexual assaults on college campuses

46. *See, e.g.*, Liam Knox, *A Cash-Strapped Public University Turns to the Private Sector*, INSIDE HIGHER ED (Aug. 2, 2022), https://www.insidehighered.com/news/2022/08/02/emu-moves-forward-private-student-housing-partnership [https://perma.cc/BPR2-3G87] (reporting that Eastern Michigan University signed an agreement to surrender all of its student-housing revenues to a private developer that will invest in upgrading and maintaining the properties).

47. *See* Alfred C. Aman, Jr. & Landyn Wm. Rookard, *Private Government and the Transparency Deficit*, 71 ADMIN. L. REV. 437, 443 (2019) ("Private entities, even when wielding public authority, operate in nearly complete secrecy. . . . Holding the private government accountable, as well as the public officials who empower it, requires that its decisions be known and subject to political and, where appropriate, judicial review.").

48. *See, e.g.*, Cornelius Hocker, *IUPUI Students Continue to Push for Changes to Stop Sexual Assaults on Indiana College Campuses*, WRTV INDIANAPOLIS (Feb. 10, 2022, 12:18 PM), https://www.wrtv.com/news/working-for-you/iupui-students-continue-to-push-for-changes-to-stop-sexual-assaults-on-indiana-college-campuses [https://perma.cc/5FPG-TKSD]; Louis Krauss, *Two University of Oregon Students Held Hostage for Hours in Dorm Room by Armed Man*, REGISTER-GUARD (Nov. 4, 2021, 10:59 AM), https://www.registerguard.com/story/news/2021/11/04/heavy-police-presence-responds-uo-law-school-university-oregon-knight-law-center-eugene/6283749001/ [https://perma.cc/US3D-RU4A]; Erica Breunlin, *Third UT Rape Reported in Campus Dorm This Month, 5th Report on or Near Campus Since March*, KNOX NEWS (Sept. 26, 2018, 7:04 PM), https://www.knoxnews.com/story/news/education/2018/09/26/ut-knoxville-rapes-sexual-assault-dorms-campus/1418776002/ [https://perma.cc/UXU8-A2EB].

49. Samantha Olson, *What We Know About the Real-Life Victims in ABC News Studios' New True Crime Series,* Death in the Dorms, SEVENTEEN (Jan. 4, 2023), https://www.seventeen.com/celebrity/movies-tv/a42397874/death-in-the-dorms-victims-true-story-hulu/ [https://perma.cc/VLZ8-H3RL].

and the reliability of federally mandated crime statistics that notoriously undercount those assaults.[50]

The frontline employees who oversee the management of campus housing are often students themselves. These RAs live among their peers, tasked with managing late-night noise complaints, drug and alcohol violations, and even serving as first responders to reports of sexual violence.[51] The compensation is modest for a demanding and stressful job. A survey of RAs by the Syracuse University newspaper found that more than half were dissatisfied with their pay, and more than two-thirds were working additional jobs to make ends meet.[52] One RA told the newspaper: "Sometimes you just get into situations that could be scary or threatening . . . . You have the potential of that happening every single time you're on call, which is like a part of the job that they don't really tell you about during interviews."[53] Another said: "There's a lot of mental health issues and they put a lot of pressure on RAs to deal with it, when RAs are just students. We get training, but not enough to be an on-call counselor."[54] At times, RAs even become embroiled in court cases when they discover contraband and turn it over to police, raising Fourth Amendment questions about what constitutes

50. *See, e.g.*, Mary Katherine Wildeman & Peter Yankowski, *Were 9 Sex Assaults Reported at UConn in 2020? Or 80?*, CT INSIDER (Feb. 19, 2022, 8:42 AM), https://www.ctinsider.com/news/article/Were-9-sex-assaults-reported-at-UConn-in-2020-Or-16930823.php [https://perma.cc/X9WY-4ZA6] (reporting that, because of varying federal and state reporting standards, statistical reports of student victimization leave confusion as to how safe or unsafe campuses are); Shannon Najmabadi, *Texas State University Says It Misreported Campus Crime Numbers*, TEX. TRIB. (Sept. 14, 2019, 10:00 AM), https://www.texastribune.org/2019/09/14/texas-state-university-says-it-misreported-campus-crime-numbers-past-y/ [https://perma.cc/UD7N-U3JW] (reporting that the U.S. Department of Education, which enforces the federal Clery Act, detected anomalies in Texas State University statistics that led to discovery of years of underreporting).

51. *See* Kristen Grau, *'The Job Wasn't Worth It': The Stressful World of Resident Assistants*, UNIV. PRESS (Oct. 11, 2019), https://www.upressonline.com/2019/10/the-job-wasnt-worth-it-the-stressful-world-of-resident-assistants/ [https://perma.cc/68NX-UCL7] (quoting former RAs at Florida Atlantic University describing stress of responding to student suicides, fights, medical crises, and other emergencies); *see also* Wali Khan, *A True Tale of Freshmen Fright at MSU*, LANSING CITY PULSE (Sept. 1, 2022, 10:29 AM), https://www.lansingcitypulse.com/stories/a-true-tale-of-freshmen-fright-at-msu,22449 [https://perma.cc/2ALB-TS7J] (describing how Michigan State University RAs were called upon to deal with a dorm resident who talked obsessively about guns and violence and who was ultimately arrested for possessing a trove of weapons in his room).

52. Katie McClellan, *SU Resident Advisers Express Feelings of Being Overwhelmed, Overworked with Duties*, DAILY ORANGE (Feb. 17, 2022), https://dailyorange.com/2022/02/syracuse-university-resident-adviser-overwhelmed-overworked/ [https://perma.cc/KRU4-BR5E].

53. *Id.*

54. *Id.*

a government search.[55] Being an RA has been described as "an immersive job in a fishbowl role . . . ."[56] Increasingly, RAs also bear responsibility for campus diversity programming, which can constitute added emotional weight on the shoulders of students of color in particular.[57] Perhaps because RAs deal with so many sensitive situations implicating student confidentiality, universities have developed highly controlling policies—both official and unofficial—against discussing anything work-related outside the workplace.

B. The Code of Silence: University Speech Restrictions

To determine how commonly universities restrict student-housing employees from sharing information, researchers from the Brechner Center for Freedom of Information at the University of Florida sent requests under state freedom-of-information law to a number of public universities across the United States for any housing employee policies, handbooks, or training materials that address speaking about work-related matters.[58] The universities were chosen to reflect a wide cross-section of the country and based on large undergraduate enrollment, under the assumption that larger

55. *See generally* State v. Rodriguez, 529 S.W.3d 81, 92 (Tex. App. 2015) (holding that the Fourth Amendment applied to the search of a dorm room authorized by a campus-housing director, who alerted police after resident assistants found marijuana during routine room check); Medlock v. Trs. of Ind. Univ., 683 F.3d 880, 882 (7th Cir. 2012) (declining on mootness grounds to enjoin disciplinary action against a student whose room was searched by two RAs, who found marijuana and turned it over to campus police); Grubbs v. State, 177 S.W.3d 313, 321–22 (Tex. App. 2005) (denying a motion to suppress marijuana found by an RA, who had the authority to inspect dorm room and was not working in tandem with police); State v. Ellis, No. 05CA78, 2006 WL 827376, at *4 (Ohio Ct. App. Mar. 31, 2006) (finding that an RA's inspection of a dorm room where drugs were found was not a "search" under the Fourth Amendment).

56. Fernanda Zamudio-Suarez, *Race on Campus: When RAs of Color Take on Emotional Labor for Their White Residents*, CHRON. HIGHER EDUC. (Mar. 8, 2022), https://www.chronicle.com/newsletter/race-on-campus/2022-03-08?cid2=gen_login_refresh&cid=gen_sign_in [https://perma.cc/H46X-A8VS].

57. *Id.*

58. *See supra* note 14. To clarify the methodology of this study, if a policy contained language instructing RAs either that all communications with the news media were forbidden, or that all communications needed prior approval by a university supervisor, those policies were categorized as outright "gag rules." If the policies stopped short of that categorical language and either (a) requested, but did not expressly require, that RAs contact a supervisor before speaking or (b) limited only communication made in a "representative" capacity, without explaining what was meant by "representative," then the policies were categorized as unclear and potentially chilling. The survey found references to gagging language in many of the handbooks distributed by universities to their resident advisors.

universities would have more on-campus housing and more elaborate governance of housing employees.[59]

Of the institutions that were surveyed, some did not acknowledge the request at all, despite several reminders, or acknowledged receiving the request but refused to fulfill it.[60] Of the universities that did respond, some provided no documents and stated that they had no policy or contract language addressing RA communications with the press.[61] Still other universities did provide rulebooks or contracts for student housing employees, but those documents said nothing about restricting communication with the news media.[62] Of the remaining respondents,[63] some produced policies that banned RAs outright from speaking to members of the media and others produced policies that either partially restrain speech, or leave students unclear about their speech rights.[64] As will be discussed, the reality is that the sample of policies that either explicitly or implicitly forbade student employees from having unapproved communications with the news media almost certainly understates the extent to which speech is controlled, because

59. The survey was limited to public universities because private universities are not obligated to respond to requests for public records under state freedom-of-information law and hence would not be expected to make their employee speech policies available for inspection. It is worth noting, however, that private as well as public universities enforce rules that constrain employees from speaking publicly about their work. *See, e.g.*, Max Saltman, *University Employees Are Afraid to Speak to the Press. I Don't Blame Them.*, SEWANEE PURPLE (Oct. 3, 2020), https://thesewaneepurple.org/2020/10/03/university-employees-are-afraid-to-speak-to-the-press-i-dont-blame-them/ [https://perma.cc/35VX-3N89] (describing how regulation at the University of the South, a private institution, instructs all employees to refer media calls to the university marketing office to be answered). The speech rights of employees in the private sector are beyond the scope of this Article, but substantial protections do apply by way of the National Labor Relations Act (NLRA), which has been interpreted to protect the rights of employees in NLRA-regulated organizations, including private universities, to speak to the news media. *See* Frank LoMonte & Linda Riedemann Norbut, *Stopping the Presses: Private Universities and Gag Orders on Media Interviews*, AAUP J. OF ACAD. FREEDOM (2018), https://www.aaup.org/sites/default/files/LoMonteNorbut.pdf [https://perma.cc/5CXH-KJRV] (describing instances in which the National Labor Relations Board (NLRB) has applied NLRA protections to workers at private higher-educational institutions).

60. Some denials were based on the Florida residency of the requesters, as public records laws in several targeted states (Arkansas, Tennessee, Virginia) enable agencies to reject out-of-state requests.

61. *See infra* note 81 and accompanying text.

62. *See, e.g.*, UNIV. OF MICH., STUDENT LIFE HOUS., COMPLETE STUDENT STAFF DIVERSITY AND INCLUSION CONCERN AND CAMPUS CLIMATE INCIDENT REPORTING PROCEDURES 2 (2020) [https://perma.cc/5NRZ-QX4V].

63. *See supra* note 15.

64. Examples include policies from The University of Washington; Rutgers University, and Kansas State University, discussed *infra* at notes 76–78 and accompanying text.

of "unwritten rules" that can be as effective in silencing dissent as codified ones.

1. Policies That Explicitly Gag Employees

The broadest university policies categorically forbid providing any information to the news media in any capacity, whether on or off duty. Policies in this most restrictive category commonly speak of RAs as being "representatives" of their institutions, without making any distinction between on-duty and off-duty speech or giving any indication that student employees retain First Amendment rights when they speak in their "citizen" capacity. For instance, the University of Nevada, Las Vegas, explicitly forbids RAs from speaking in any capacity, even a personal one, by asserting that journalists cannot be trusted to understand the distinction between professional and personal:

> It is important that all staff members understand that it is impossible to give a personal opinion in the context of a role as a UNLV Housing and Residential Life staff member. Media representatives do not separate personal opinion from a role and therefore personal statements are likely to be represented as "official" statements on behalf of the Department. It can be very difficult to undo impressions created by this type of reporting.[65]

Some restrictions on speaking are phrased as an outright prohibition, without any indication that a student employee might ever be given permission to speak. For instance, at Arizona State University, one of the largest public colleges in the country, RAs are required to relay all media requests "to the Director of Residential Life/Education who will make all public statements."[66] The policy cautions: "Even when on duty, you are not to act as a representative of Res Life and relay information to the media[,]" which implicitly suggests that the prohibition extends to off-duty hours as well.[67] Similarly, the training handbook for resident assistants at the University of California, Los Angeles declares, without exception: "Do not address the media."[68]

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65. Email from Univ. of Nevada-Las Vegas to Frank D. LoMonte, Dir. of the Brechner Ctr. For Freedom of Info. (May 31, 2022, 7:55 PM) [https://perma.cc/PFW9-H75L].

66. ARIZ. STATE UNIV., CMTY. ASSISTANT MANUAL 22 (2018) [https://perma.cc/XTK8-NNVP].

67. *Id.*

68. UNIV. OF CAL.-LOS ANGELES RESIDENTIAL LIFE, RESIDENT ASSISTANT TRAINING MANUAL 20 (2018) [https://perma.cc/W699-CWMR].

In other instances, restrictions are phrased as a requirement to obtain permission to speak, which suggests that permission to speak might be granted. Georgia Southern University, for example, has a handbook that says approval is needed before speaking on "University-related issue[s]" and requires employees to "[l]et the Office of Marketing & Communications know of any conversations you may have had with the press."[69] Similarly, Texas A&M University tells student employees to report all media inquiries to the director of campus housing: "When appropriate, the Director may give approval for you to speak with the media, depending on the subject matter."[70]

In one case, a policy document produced by the University of Florida had previously been hand marked before it was produced in response to a Florida Public Records Act request. A highlighted portion of the document reads that an RA "is not allowed to speak to any member of the media unless requested or given permission to do so by a member of Senior Management."[71] Below that, handwriting indicates that the provision "has probably violated that person's First Amendment rights."[72] It is unknown who made the notes.[73] The university did not reply when a journalist asked "if the policy was still in place . . . ."[74]

Perhaps the most controlling policy was that of East Carolina University, where the RA contract says the director must be told of all media contacts, "always, at all times . . . ."[75] This essentially forecloses the possibility that an RA might speak with a journalist as a whistleblower or concerned student without supervisory approval, including speaking about topics of public concern wholly unrelated to RA employment.

69. GA. S. UNIV., UNIV. HOUS. MANUAL 87 (2018) [https://perma.cc/D53Q-6GTM].

70. TEX. A&M UNIV., 2018–2019 RESIDENT ADVISOR MANUAL 78 (2018) [https://perma.cc/6W3E-PKZU].

71. A version of the policy document with the handwriting reproduced in type is included at the perma.cc link below. *Resident Assistant Position Description*, UNIV. OF FLA. DEPT. OF HOUS. & RESIDENCE EDUC. 5 (2018) [https://perma.cc/V42G-G25A].

72. WHY DON'T WE KNOW?, *When Speech Isn't Free, but It Should Be*, BRECHNER CTR. FOR FREEDOM OF INFO. at 05:21–06:20 (Sept. 6, 2020), https://whydontweknow.com/2021/01/extra-why-dont-we-know-how-many-kids-are-attending-virtual-learning-2/ [https://perma.cc/26WK-23KY].

73. *Id.* at 06:20–06:23.

74. *Id.* at 06:27–06:34.

75. E. CAROLINA UNIV., *Media Guidelines*, *in* RESIDENT ASSISTANT MANUAL 190, 190 (2015) [https://perma.cc/2JYN-3Z7Q].

2. Policies That Exist in a Gray Zone

Some university rules stop short of a categorical prohibition on releasing information, yet still run the risk of chilling constitutionally protected speech. For instance, it is relatively common for universities to tell students not to speak to the press in an official or "representative" capacity, without clarifying what that means. For example, Kansas State University tells student RAs that it is a dismissible offense to provide information to the media "as a representative" of the university.[76] While such policies implicitly give assurance that students are free to speak when they are not speaking in a representative role, nothing defines what it means to be a "representative," and the fear of getting fired could predictably chill a speaker into over complying and remaining silent.

Other policies restrict only the disclosure of certain categories of information, such as the policy at Rutgers University in Newark, which instructs housing employees not to discuss "situations and events that occur in their residence hall" with the press.[77] This leaves open the opportunity to speak about tuition, campus safety, or other matters of public concern.

Some RA speech policies exist in a gray area because they are phrased in terms of a recommendation or expectation as opposed to a requirement enforceable by punishment. For example, at the University of Washington, the contract signed by students employed by the Residential Life unit states RAs are "expected to" refer media queries to a supervisor or the university communications office.[78] If understood literally, such a policy might be interpreted as a mere recommendation rather than an enforceable requirement. But a nonlawyer, student employee could be expected to behave as if the policy carried binding force, fearful of losing both a paycheck and a place to live.

3. Silent Policies

Several of the universities surveyed simply stated that they had no responsive documents setting forth policies on speaking to members of the

76. KAN. STATE UNIV., 2018–2019 RESIDENT ASSISTANT AGREEMENT AND EXPECTATIONS 2 (Feb. 19, 2018) [https://perma.cc/T5BS-42EW].

77. RUTGERS UNIV., *FAQ's*, *in* 2018–2019 RESIDENCE LIFE UNDERGRADUATE STAFF MANUAL 79 (2018) [https://perma.cc/2FWD-UYF7].

78. UNIV. OF WASH., HOUS. & FOOD SERV., RESIDENTIAL LIFE STUDENT STAFF CONTRACT 4 (2018) [https://perma.cc/R6RX-PAUC]. The contract identifies certain benign classes of information that may be provided to the news media, such as "policies and procedures," so it can be read as a less-than-complete prohibition on speaking. *See id.*

press or public and produced no documents.[79] Others produced handbooks or contracts governing RA-employment relationships with the university that said nothing about speech rights. Presumably, where no prohibition exists, a student employee should feel free to speak just as any non-employee student would. But the absence of a formal, written policy tells only part of the story, because unwritten—but powerfully effective—gag policies are known to exist within government agencies of all kinds.[80]

In an especially dramatic illustration of the disconnect between how universities responded to requests for policies versus how policies actually work in practice, Southern Illinois University responded to an Illinois Freedom of Information Act request for any policies governing RA speech by stating: "The University does not possess or control any records responsive to this request."[81] But just a few months earlier, when asked about its policy by the campus newspaper, the university stated: "If approached by the media to comment on Housing concerns, RAs are instructed to refer up to their supervisory team or to University Communications."[82] In other words, whether documented or not, a "gag rule" exists at the university that is understood to forbid student employees from publicly airing concerns about campus housing.

As with Southern Illinois, unwritten "watercooler policies" probably exist at some of the universities that failed to provide documents, or supplied incomplete sets of documents, in response to public-records requests. In one notable example, the University of Michigan produced a copy of a policy with relatively narrowly tailored restrictions that simply instructed RAs not to share information publicly about the students residing in their dorms, but did not otherwise restrict their speech.[83] Yet when reporters for the campus newspaper talked to current and former RAs about their experiences dealing with COVID-19, they insisted on anonymity because they were told that their employment contract "includes a clause stating they are

79. *See, e.g.*, Letter from Holly Rick, FOIA Officer, Southern Ill. Univ., to Dana Cassidy, Brechner Ctr. for Freedom of Info. (Mar. 16, 2021) (on file with author).

80. *Cf. SEJ Urges EPA to Make Science More Open to News Media,* SOC'Y OF ENV'T JOURNALISTS, (Sept. 8, 2011), https://www.sej.org/publications/watchdog-tipsheet/sej-urges-epa-make-science-more-open-news-media [https://perma.cc/TU4Q-5BL7] (describing the U.S. Environmental Protection Agency's "largely unwritten policy . . . that press officers must give permission for EPA scientists (and other staff) to speak to reporters—and that press officers must actually sit in on interviews").

81. Letter from Holly Rick, *supra* note 79.

82. Cox & Connolly, *supra* note 6.

83. *See* UNIV. OF MICH., STUDENT LIFE HOUS., COMPLETE STUDENT STAFF DIVERSITY AND INCLUSION CONCERN AND CAMPUS CLIMATE INCIDENT REPORTING PROCEDURES 2 (2020) [https://perma.cc/5NRZ-QX4V].

not allowed to publicly disagree with University Housing policies."[84] Without survey data on the actual perceptions and experiences of student-housing employees—a study beyond the scope of this Article—looking solely at colleges' self-produced written policies almost certainly understates the extent to which speech is inhibited.

Of course, the fact that a policy was not provided may simply signify a lack of diligence in fulfilling requests for public records. For example, one of the institutions that produced no policy when presented with a public-records request, the University of North Carolina, Chapel Hill, in fact has a detailed policy that was revised in recent years under pressure from free-speech advocates.[85] As revised in 2020, the policy clarifies that it "does not limit employees' ability to comment on their personal experiences, as long as the employee refrains from sharing confidential information about Carolina students or other University employees, including resident advisors."[86] With that relatively protective policy in place, an RA was able to give the campus newspaper a candid, on-the-record interview during the worst of the COVID-19 pandemic about her fear that the university put students' health at risk by reopening for face-to-face classes prematurely.[87] The public would lose the benefit of that perspective at a university with less-protective regulations.

4. Policies That Explicitly Recognize a Right to Speak

Other universities do, however, take the affirmative step of assuring student employees are free to speak when not speaking on behalf of the

84. Francesca Duong, *Pandemic Heightens Problems Between Resident Advisers and University Housing*, MICH. DAILY (Sept. 8, 2020), https://www.michigandaily.com/campus-life/pandemic-brings-light-problems-ras-have-had-university-housing/ [https://perma.cc/9DV2-8HV5].

85. *See* Praveena Somasundaram, *New Carolina Housing Media Policy Clarifies that Staff Can Discuss Personal Experiences*, DAILY TAR HEEL (Dec. 17, 2020, 8:40 PM), https://www.dailytarheel.com/article/2020/12/university-housing-revised-policy [https://perma.cc/5P84-KCTK] (describing how the UNC policy, which RAs interpreted as forbidding them from speaking, was revised after a complaint letter was received from the Foundation for Individual Rights in Education).

86. *See* UNIV. OF N. CAROLINA, *Photograph/Advertising/Public Relations Policies*, CAROLINA HOUS., https://housing.unc.edu/policies/photo-advertising-pr-policies/ [https://perma.cc/U6L3-DEYU].

87. *See* Claire Tynan, *Resident Advisers Question the Future of Their Positions as Students Move Off-Campus*, DAILY TAR HEEL (Aug. 30, 2020, 9:57 PM), https://www.dailytarheel.com/article/2020/08/ra-covid-check-in-0831 [https://perma.cc/5P84-KCTK].

institution.[88] For example, the University of Alaska, Anchorage permits speaking in the capacity of a resident or a student, but not in the capacity as a student staff member without first gaining permission from the resident life director.[89]

C. *The Recent Effects of RA Speech Restrictions*

After briefly abandoning face-to-face classes during the earliest days of the COVID-19 pandemic in March 2020, many U.S. colleges brought students back to campus for the fall 2020 academic term and hoped for the best.[90] With young people studying and socializing in close quarters, outbreaks were commonplace; as of the end of the spring 2022 academic term, *The New York Times* counted more than 700,000 COVID-19 cases across some 1,900 campuses, including at least 100 fatalities.[91] Students working in campus housing carried a heavy burden, as universities readjusted to a "new normal" of trying to enforce masking, vaccination, and distancing protocols in the close quarters of dormitories.[92] Though some contemplated quitting, financially needy students had no such luxury; one told a reporter with the *Chronicle of Higher Education*, "we're being forced to choose between basic necessities, like eating and having a roof over our head, and doing what's best for our health."[93]

At the University of Michigan, anxiety and frustration over safety conditions boiled over into a brief work stoppage, with more than 100 RAs going on strike to demand regular COVID-19 testing, enhanced protective equipment, and hazardous-duty pay.[94] Despite generous assurances from

88. *See, e.g.*, Email from Ryan J. Hill, Dir. of Residence Life, Univ. of Alaska-Anchorage, to Frank D. LoMonte, Dir. of the Brechner Ctr. For Freedom of Info. (June 1, 2022, 4:02 AM) [https://perma.cc/YPM2-TZFJ].

89. *See id.*

90. *See* Elinor Aspegren & Samuel Zwickel, *In Person, Online Classes or a Mix: Colleges' Fall 2020 Coronavirus Reopening Plans, Detailed*, USA TODAY (June 22, 2020, 5:00 AM), https://www.usatoday.com/story/news/education/2020/06/22/coronavirus-reopening-college-fall-2020/3210719001/ [https://perma.cc/K8PA-9NY6].

91. *Tracking Coronavirus Cases at U.S. Colleges and Universities*, N.Y. TIMES (May 26, 2020), https://www.nytimes.com/interactive/2021/us/college-covid-tracker.html [https://perma.cc/39QC-HNN6].

92. *See* Katherine Mangan, *Covid-19 Pushes RAs to the Breaking Point: Some Are Striking. Others Quit.*, CHRON. OF HIGHER EDUC. (Sept. 18, 2020), https://www.chronicle.com/article/covid-19-pushes-ras-to-the-breaking-point-some-are-striking-others-quit [https://perma.cc/N4PQ-BS7B].

93. *Id.*

94. Francesca Duong et al., *Resident Advisers Announce Strike in Protest of U-M COVID-19 Response*, MICH. DAILY (Sept. 9, 2020), https://www.michigandaily.com/campus-life/resident-advisers-announce-strike/ [https://perma.cc/HRX6-DXRC].

university administrators to resolve the strike, reporters for the *Michigan Daily* found that the promises went largely unfulfilled, and that RAs continued to feel unsafe and poorly supported by the university.[95] Among the unrealized promises: While the RA rulebook was streamlined and an explicit prohibition against talking to the media was removed, RAs said that their supervisors "continue to discourage interviews with the media."[96]

Students working in campus housing occupied a uniquely challenging position in the COVID-19 battle: They were vulnerable to disease themselves, but they were also charged by their college employers with being frontline responders to enforce safety protocols, sometimes putting them at odds with their classmates.[97] As the Emory University student newspaper put it: "For many, being an RA has become synonymous with policy enforcer, a position they didn't sign up for."[98] Forbidding these student employees from talking about their concerns makes the job all the more isolating.

Freedom of speech is understood to have value not just for its contribution to the development of an informed society, but also for self-actualization and fulfillment.[99] Even if a student employee is not in a position to influence public policy, allowing students to give voice to workplace stresses and anxieties has value for its own sake. At the University of Missouri, a former RA spoke out candidly about the traumatic experience of being accosted by a dorm guest who took advantage of a shared bathroom

95. Tate LaFrenier & Lola Yang, *Daily Investigation Finds University Housing Lacked Concern and Protocols for ResStaff Safety*, MICH. DAILY (Jan. 25, 2022), https://www.michigandaily.com/news/focal-point/daily-investigation-finds-university-housing-lacked-concern-and-protocols-for-resstaff-safety/ [https://perma.cc/YC52-CAJL].

96. *Id.*

97. *See* Anna Almendrala & Carmen Heredia Rodriguez, *Campus Dorm Resident Assistants Adjust to a New Role: COVID Cop*, U.S. NEWS (Sept. 29, 2020, 11:00 AM), https://www.usnews.com/news/healthiest-communities/articles/2020-09-29/covid-cops-campus-dorm-resident-assistants-adjust-to-new-role (describing how student RAs navigated confrontations with fellow students when enforcing requirements to wear masks in campus dorms and to produce proof of vaccination).

98. *See* Anjali Huynh, *Resident Advisors Overwhelmed by Newfound Obligations, University's Insufficient Response*, EMORY WHEEL (Aug. 31, 2020), https://emorywheel.com/resident-advisers-overwhelmed-by-newfound-obligations-universitys-insufficient-response/ [https://perma.cc/A6FQ-A5J4].

99. *See* Margot E. Kaminski & Shane Whitnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465, 510 (2015) ("A self-actualization theory of the First Amendment hypothesizes that the First Amendment protects an individual's participation in culture as part of the process of self-fulfillment.").

door to climb into her bed—a story, she said, that she could have been fired for sharing publicly:

> I want to emphasize that had I not dropped the residential advisor position this year, this column might not exist. Residential advisors are generally barred from speaking with any news outlets or media. I write about this issue because of my experiences and because peers of mine are affected by this but cannot speak publicly without risking their job with the university.[100]

Students are beginning to push back against restrictive university speech policies that adversely affect both student employees and the student journalists who rely on them for information. At the University of California, Davis, editors of the campus newspaper called out administrators for restraining student employees from speaking to the media, reporting: "Student Housing employees said that they feared they would lose their job if they agreed to speak . . . about miscommunication in their department and the lack of mental health support they received" during the pandemic.[101] In an unsigned group editorial, the editors wrote:

> [W]e believe employees should be able to comment on their work environment and their employment experience without fear of losing their job or jeopardizing professional relationships. Prohibiting or discouraging employees and student employees from speaking with the press or trying to control their message suggests, whether it is true or not, that the supervisors of these workplaces wish to keep information from the public.[102]

In recent years, similar sentiments have appeared in campus newspapers across the country. The University of Buffalo student newspaper questioned the legality of a mandatory "Student Code of Ethics" that tells RAs, without exception, that they need supervisory permission before speaking to the media because they are considered representatives of the

100. *See* Katie Taranto, *A Reckoning with Residential Life: My Experience with Harassment as a Former RA*, MANEATER (Sept. 27, 2022), https://themaneater.com/a-reckoning-with-residential-life-my-experience-with-harassment-as-a-former-ra/ [https://perma.cc/92P3-BQAV].

101. *See* The Editorial Board, *The University Must Do More to Promote a Culture of Transparency for Student Employees*, CAL. AGGIE (May 21, 2021), https://theaggie.org/2021/05/21/the-university-must-do-more-to-promote-a-culture-of-transparency-for-student-employees/ [https://perma.cc/6KN3-FKFB].

102. *See id.*

university.[103] And in New Jersey, student editors at Montclair State University decried their university's silencing of RAs at a time of heightened concern over sexual violence in student housing.[104] These cries for help reflect an industry-wide issue that institutions of higher education will be forced to address, whether by the courts or by pressure from student organizers.

At times, adverse publicity and fear of litigation has induced universities to change legally questionable policies. At the University of Utah, administrators rewrote a broadly worded gag policy—which banned RAs from "discussing policies, procedures, investigation details, or anything else that would associate the individual as an employee of the [housing] department or campus"—after being called out publicly by free-speech advocates.[105] The Texas State University student newspaper reported that, after constitutional questions were raised, the university was reviewing a gag rule imposed on RAs, which had stated: "At no point should you comment or grant an[] interview to the media on an event, policy, procedure or incident that happens on campus without prior approval of your Residence Director" —a restriction that was not even limited to the setting of campus housing or to information learned in an "employee" capacity.[106]

The pandemic proved to be a catalyst for nascent worker-rights organizing efforts among RAs nationwide.[107] At the University of Massachusetts, Amherst, union organizers demanded hazard pay, workers' compensation

103. *See* Benjamin Blanchet & Brenton J. Blanchet, *RA Agreement May Violate Students' Free Speech*, SPECTRUM, Mar. 29, 2019, at 1.

104. *See* Montclarion Staff, *supra* note 13.

105. *See* Aaron Terr, *University of Utah Lifts Restrictions on Ras Speaking to the Media*, FOUND. FOR INDIV. RTS & EXPRESSION (Mar. 23, 2021), https://www.thefire.org/university-of-utah-lifts-restrictions-on-ras-speaking-to-the-media/ [https://perma.cc/T4CX-PVEZ].

106. *See* Carrington Tatum, *Housing Department Silences RAs with Unconstitutional Policy*, UNIV. STAR (Nov. 28, 2018), https://www.universitystar.com/archives/housing-department-silences-ras-with-unconstitutional-policy/article_2514899f-4bb5-5d21-a8b3-7eaea7b4eca1.html [https://perma.cc/J3BV-3YUT].

107. *See* Sophie Hayssen, *Unions on Campus: How Some Undergraduates Are Organizing During COVID-19,* TEEN VOGUE (Mar. 29, 2021), https://www.teenvogue.com/story/unions-campus-undergraduate-students [https://perma.cc/K2W8-KPY5] (reporting that students were impelled into organizing when facing job losses and lack of transparency around COVID-19 safety precautions); Vimal Patel, *Sparked by Covid-19, Undergraduate Organizing May Be the Next Front in Campus Labor Relations*, CHRON. OF HIGHER EDUC. (Sept. 2, 2020), https://www.chronicle.com/article/sparked-by-covid-19-undergraduate-organizing-may-be-the-next-front-in-campus-labor-relations [https://perma.cc/AZ3F-MHPE] (stating that "[t]he uncertainty caused by the virus has led to a resurgence in labor organizing on campuses," with student employees pushing for more rigorous health safeguards and pay for time lost when the campus emptied during the height of the pandemic).

benefits, free COVID-19 testing, and other benefits, which their university resisted.[108] When the demands were refused, more than 150 student employees signed petitions insisting they would not accept contracts for spring 2021 without concessions in safety precautions and compensation.[109] The UMass activism is indicative of a larger phenomenon across the country, as a general resurgence of interest in joining labor unions makes itself felt on college campuses.[110] At the University of Utah, RAs took inspiration from a strike threat at Cornell University and similarly threatened to walk off the job until their university granted concessions including hazard pay for RAs who contracted COVID-19 and daily updates about positive cases in their housing units.[111]

Organizing efforts were buoyed by a 2017 decision from the NLRB recognizing that RAs at private colleges qualified for federal labor-law protections, including the right to organize.[112] Bootstrapping onto that ruling, student employees at Columbia University filed an unfair labor practices complaint with the NLRB, alleging that the university schemed to undermine NLRA protections by reclassifying student housing employees as "independent contractors . . . ."[113] These emerging clashes over labor

108. *See* McKenna Premus, *Resident Assistant/Peer Mentor Union Demands Safer Working Conditions for Fall Semester Amid Pandemic*, MASS. DAILY COLLEGIAN (July 26, 2020), https://dailycollegian.com/2020/07/the-resident-assistant-peer-mentor-union-demands-safer-working-conditions-for-the-fall-semester-amid-the-covid-19-pandemic/ [https://perma.cc/9NDA-XA9G].

109. *See* McKenna Premus, *RAs and PMs Refuse to Accept Unsafe Work, Demand UMass Uphold Employment Contract Ahead of Spring 2021*, MASS. DAILY COLLEGIAN (Dec. 4, 2020), https://dailycollegian.com/2020/12/ras-and-pms-refuse-to-accept-unsafe-work-demand-umass-uphold-employment-contract-ahead-of-spring-2021/ [https://perma.cc/6CC2-EVEG].

110. *See* Liam Knox, *Resident Assistants Fight for Union Representation*, INSIDE HIGHER ED (Oct. 7, 2022), https://www.insidehighered.com/news/2022/10/07/student-resident-assistant-unions-gain-traction [https://perma.cc/7QPU-57KJ] (reporting that Barnard College and Mount Holyoke College are part of "slowly growing trend" of student-housing employees petitioning to unionize).

111. *See* Courtney Tanner, *Dorm RAs Threaten to Strike over University of Utah's Handling of Covid-19 in Campus Housing*, SALT LAKE TRIB. (Aug 25, 2020, 8:33 PM), https://www.sltrib.com/news/education/2020/08/25/ras-say-theyre-not-being/ [https://perma.cc/6E7P-PHXR] (quoting unnamed student employees who insisted on anonymity because they "fear being fired for speaking out").

112. *See* George Washington Univ., N.L.R.B. No. 05-RC-188871, 13–14 (Apr. 21, 2017).

113. *See* Stella Pagkas, *CURA Collective Files Unfair Labor Practice Charges Against University*, COLUMBIA SPECTATOR (Sept. 14, 2022, 11:59 AM), https://www.columbiaspectator.com/news/2022/09/14/cura-collective-files-unfair-labor-practice-charges-against-university/ [https://perma.cc/HBU7-8UK3].

organizing on campus expose an internal contradiction in universities' relationship with student employees: when employee status suits the universities' interests, then the students are "employees," but when employee status confers greater rights and benefits to the students, they suddenly cease being "employees."[114] Perhaps ironically, since public employees are thought of as having greater free-speech protection than those working in the private sector, the NLRA protects only workers in *nongovernmental* workplaces. Thus, the NLRB's 2017 ruling directly benefits only private university employees, not those at state schools.[115]

III. STUDENT-EMPLOYEE SPEECH AND THE FIRST AMENDMENT

Knowing that restrictions on speaking to the press and public are commonplace at public universities, the question becomes: Are those policies legally defensible? Different strains of First Amendment caselaw apply to public-employee speakers and to student speakers. Whether an RA is viewed in the eyes of the law as having the "employee" level of rights or the "student" level of rights will influence how much protection that person enjoys. Ultimately, however, neither body of law suggests that a blanket restraint on speaking is constitutional.

Although different legal analyses will apply to First Amendment claims brought by students and by public employees, there is one significant commonality: A government agency cannot take away anything of value as punishment for constitutionally protected speech, even if there was no entitlement to receive it in the first place.[116] This principle applies both to employment at an institution of higher education as well as the right to enroll

114. *See* Adam Margolis, *K-SWOC Files Counter Motion Against NLRB Election Delay*, KENYON COLLEGIAN (Nov. 18, 2021), https://kenyoncollegian.com/news/2021/11/k-swoc-files-counter-motion-against-nlrb-election-delay/ [https://perma.cc/BA7N-54RC] (reporting that lawyers for Ohio's Kenyon College, opposing student-workers' efforts to convene a union election, asserted to the NLRB that "student employees are not statutory employees under the NLRA due to their brief and transient tenure as employees, because the conditions in which they work differ from typical employment relationships covered under the Act and because their employment is tied to their academic status").

115. *See* 29 U.S.C. §§ 152(2), (3) (defining an NLRA-covered "employer" as excluding federal government, state government, or any political subdivision thereof, and defining an NLRA-covered "employee" as excluding "any individual employed as a supervisor").

116. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972) (["E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.").

as a student.[117] While courts at one time declined to recognize a constitutional claim for deprivation of a purely discretionary benefit, that has not been the law for many decades. The Supreme Court swept away the last vestiges of this "rights-privileges distinction" in a higher-education case, *Keyishian v. Board of Regents*, holding that instructors could not be forced to sign anti-Communist loyalty oaths as a condition of continued employment.[118] Moreover, even a signed contractual waiver cannot alienate a student employee's core First Amendment rights, because the receipt of a government benefit—even a wholly discretionary one—cannot be conditioned on signing away all constitutional rights.[119] Thus, the First Amendment strictly constrains the authority of a university to take away a student's employment or housing as punishment for speech, regardless of whether the "student" or "employee" body of legal rights applies.

A. Free Speech (and its Limits) in the Workplace World

Outside of the workplace, the First Amendment forbids punishing speakers for what they say, aside from a narrow handful of well-recognized exceptions, such as obscenity.[120] And though First Amendment rights do not disappear on the job,[121] they do diminish to permit government supervisors to manage the workplace effectively.[122] Courts apply varying degrees

117. *See id.* at 598 (finding that there was a genuine dispute as to whether a college instructor's denial of continued employment was retaliatory for testimony before legislative committees and other criticism of state university system); Auburn All. for Peace & Justice v. Martin, 684 F. Supp. 1072, 1076 (M.D. Ala. 1988) (stating that "[a]ttending a state university is undoubtedly a privilege, but a student may not be deprived of that privilege because a university disagrees with the content of a student's speech").

118. Keyishian v. Bd. of Regents, 385 U.S. 589, 596 (1967).

119. *See* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, 570 U.S. 205, 213–15 (2013) (holding that the government could not condition receipt of federal grant on a broad waiver of free-speech rights not directly necessary for implementation of grant program); Ostergren v. Frick, 856 Fed. App'x 562, 571 (6th Cir. 2021) (citing *Sindermann* and stating that "the state usually may not condition a benefit on a recipient's waiver of constitutional rights").

120. *See* United States v. Stevens, 559 U.S. 460, 468 (2010) (identifying categories of speech—obscenity, defamation, fraud, incitement, and "speech integral to criminal conduct"—that are punishable on the basis of content because they have historically been regarded as outside the First Amendment's protection).

121. *See* Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) ("The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.").

122. *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of its Workers' Speech to Protect its Own Expression*, 59 DUKE L.J. 1, 8 (2009) (observing that

of rigor in scrutinizing speech-restrictive government decisions, depending on whether the decision is a blanket prohibition on speech affecting entire classes of employees, or a one-time punishment for what an employee has said or written.

In reviewing an individualized disciplinary decision, courts apply a well-established framework that begins with the Supreme Court's seminal decision in *Pickering v. Board of Education*.[123] In *Pickering*, an Illinois public-school teacher was fired for writing a letter-to-the-editor published in a local newspaper that urged the defeat of a funding referendum for the school district, which he accused of unwise spending.[124] The Illinois Supreme Court refused to hold that an actionable First Amendment claim had been raised, deferring to the district's judgment that *Pickering* acted contrary to his employer's best interests.[125] But the U.S. Supreme Court reversed, creating what has since become known as the "*Pickering* balancing test" for employee challenges to discipline for speech. "The problem in any case," Justice Thurgood Marshall wrote for the Court, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[126] The Court forcefully rejected the idea that statements addressing matters of public concern, even if inaccurate, lose their First Amendment protection if they are "sufficiently critical" of the employer.[127] *Pickering* thus recognizes a public employee's right to criticize the government—including the employee's own agency—without forfeiting First Amendment protection.[128]

The Court recognized some exceptions to the *Pickering* doctrine in subsequent cases. In *Connick v. Myers*, the Court sharpened the "public concern" aspect of *Pickering*, holding that speech loses First Amendment protection when its primary purpose is to advance the employee's personal workplace grievance rather than to address matters of broader public importance.[129] And in *Garcetti v. Ceballos*, the Court decided that speech "pursuant to . . . official duties[,]" such as writing a memo assigned by a

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"the Court has granted government more power to regulate the speech of its workers than that of its citizens generally").

123. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

124. *Id.* at 566.

125. Pickering v. Board of Educ., 225 N.E.2d 1, 6–7 (Ill. 1967), *rev'd*, 391 U.S. 563 (1968).

126. *Pickering*, 391 U.S. at 568.

127. *Id.* at 570.

128. *Id.*

129. Connick v. Myers, 461 U.S. 138, 147 (1983).

supervisor, is wholly unprotected because the speech effectively belongs to the employer.[130] Applying the *Garcetti* standard, courts have sometimes—though not always—allowed government employers to punish employees for making public statements unfavorable to the agency, when answering media questions can be considered part of the employee's official job responsibilities.[131]

But there is a legally decisive difference between punishing an employee whose speech disrupts the workplace versus gagging employees before they can speak at all. "Prior restraints" on speech are viewed with extreme skepticism because they prevent speech from ever reaching its audience, as opposed to waiting to see whether the speech actually produces any meaningful harm.[132] As the U.S. Supreme Court has emphasized: "Any system of prior restraint . . . 'comes to this Court bearing a heavy presumption against its constitutional validity.'"[133] This skepticism extends to prior restraints in the government workplace.[134] In *United States v. National*

130. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."). It is worth noting that, even in the restrictive *Garcetti* case, the Court pointed out that speaking in the capacity of a concerned citizen—such as writing a letter to a newspaper—remains constitutionally protected speech. *Id.* at 423. This distinction is instructive in evaluating policies that restrict speech without distinguishing between official-duty speech versus off-duty speech.

131. *See* Robert E. Drechsel, *The Declining First Amendment Rights of Government News Sources: How* Garcetti v. Ceballos *Threatens the Flow of Newsworthy Information*, 16 COMM. L. & POL'Y 129, 147–49 (2011) (collecting cases and describing how courts have reached diverging outcomes on First Amendment challenges to workplace discipline, depending on how broadly or narrowly *Garcetti*'s "statements pursuant to . . . official duties" standard is understood to apply).

132. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (finding that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"). *See also* Kenneth J. Arenson, *Prior Restraint: A Rational Doctrine or an Elusive Compendium of Hackneyed Cliches?*, 36 DRAKE L. REV. 265, 268 (1987) (commenting, in analyzing the prior restraint doctrine, that "a democratic society generally prefers to cope with the noxious effects of unprotected speech after it is uttered rather than run the risk of suppressing protected speech, however briefly, before it is uttered").

133. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

134. *See, e.g.*, Sizelove v. Madison-Grant United Sch. Corp., 597 F. Supp. 3d 1246, 1278 (S.D. Ind. 2022) (stating, in a case involving a school bus driver who was disciplined for criticizing the school district's reorganization plan and threatened with firing for any future "negative or unfavorable" comments, that school district would have to surmount a heavier burden to justify prior restraint forbidding future speech than after-the-fact discipline for past instances of speech).

Treasury Employees Union (hereinafter, *NTEU*), the Supreme Court decided that a more protective standard for speech than that announced in *Pickering* should apply when an entire class of employees is deterred from speaking.[135] In *NTEU*, the Court struck down a statute that forbade federal employees from accepting honorarium payments for speaking engagements. The government attempted to justify the statute as an attempt to curb influence-buying by special interests that might curry favor with policymakers through speaking fees.[136] But the Court viewed the policy as, effectively, a prior restraint, and thus subjected it to especially searching review, and found it unduly broad.[137] Distinguishing the relatively more employer-friendly *Pickering* standard, Justice John Paul Stevens wrote for the Court:

> [T]he Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action. The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's "necessary impact on the actual operation" of the Government.[138]

The *NTEU* principle—that a government agency may not enforce prior restraints broadly against its workforce, even if the agency can impose after-the-fact punishment on disruptive speech—has been applied repeatedly to invalidate workplace regulations forbidding unapproved communications with the news media.[139] A rich body of precedent holds that a government agency may neither require preapproval before employees speak to the press, nor mark wide categories of work-related matters as off-limits for discussion with the press.

In the former category, the principal case is the Second Circuit's *Harman v. City of New York*, in which the court invalidated a New York City

135. *See* United States. v. Nat'l Treasury Emps. Union, 513 U.S. 454, 476–77 (1995).

136. *Id.* at 472.

137. *Id.* at 476–77.

138. *Id.* at 468 (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 571 (1968)).

139. *See* LoMonte, *Roadmap*, *supra* note 38, at 14 ("Following *NTEU*, lower courts regularly struck down gag orders imposed by state and local agencies that purported to require employer approval of all contact with the media. Indeed, no 'prior restraint' on public employee speech, even outside the context of media interviews, appears to survive constitutional challenge once the strong medicine of *NTEU* is found to apply.").

human-resources policy restricting employees' communications with the media.[140] The policy stated, in part:

> All contacts with the media regarding any policies or activities of the Agency—whether such contacts are initiated by media representatives or by an Agency employee—must be referred to the ACS Media Relations Office before any information is conveyed by an employee or before any commitments are made by an employee to convey information.[141]

In the latter category, the Ninth Circuit held that the Nevada State Patrol violated its officers' First Amendment rights with a relatively narrow prohibition on speech that forbade only discussing matters relating to the agency's use of police dogs.[142] Although the policy was not the categorical prohibition at play in *Harman*, the circuit court still found it to be unjustifiably broad in light of the agency's proffered justifications.[143] The court went even further, stating that had the policy merely required supervisory approval before speaking—rather than prohibiting speech entirely—it "most likely" *still* would have been unconstitutional.[144]

Beneath the circuit level, nearly two dozen trial courts have likewise found that policies categorically forbidding public employees from communicating with the news media are unlawful.[145] In a recent illustrative case, a Mississippi trial court found in favor of a teacher fired for giving an interview to a local television station about health conditions within his school, in violation of a school-district prohibition against disclosing any information about the school to the press or public:[146]

> [T]he policy's language—on its face—goes much too far, requiring schoolteachers and other school employees to seek permission before disclosing

140. Harman v. City of New York, 140 F.3d 111, 115 (2d Cir. 1998). *See also* Swartzwelder v. McNeilly, 297 F.3d 228, 238–39 (3d Cir. 2002) (applying *NTEU* and concluding that a police bureau's directive requiring supervisory approval before officers could testify as experts in any proceeding was an overbroad encroachment on speech addressing matters of public concern).

141. *Harman*, 140 F.3d at 116.

142. Moonin v. Tice, 868 F.3d 853, 858 (9th Cir. 2017).

143. *See id.* at 871–72 (holding that clearly established caselaw provided that "such a broad restriction on employee speech could not survive First Amendment scrutiny").

144. *Id.* at 871.

145. *See* LoMonte, *Roadmap*, *supra* note 38, at 17–18 (cataloging instances in which courts have declared workplace policies unconstitutional when they forbid speaking to the press or require supervisory approval before doing so).

146. *See* Declaratory J. & Permanent Inj., 1:21-cv-00152 (Mar. 10, 2022).

> 'all information that pertains to the district, its employees, its students, its operations, and/or related matters . . . .' This sweeping language trespasses far into territory of protected speech. Accordingly, the court finds this policy to be vague, over-broad, and unconstitutional. The court further finds the policy's requirement that JPS's employees first obtain permission from the 'superintendent and/or board of trustees' to be an unconstitutional prior restraint on the employees' constitutional right to exercise protected speech.[147]

In another recent case in the education setting, a federal court in West Virginia applied *NTEU* and found that a school district violated the First Amendment rights of a teacher who was ordered not to speak to the news media about an ongoing controversy in which she was embroiled.[148] Even though the employer's directive applied to only one teacher, the court analyzed it as a prior restraint, and concluded that the directive was unduly broad because it prevented the teacher from defending herself against criticism of her offensive remarks that she posted to a personal Twitter account.[149] Thus, even though school authorities often benefit from deference in constitutional disputes, even that traditional measure of deference is insufficient to overcome the strong presumption against prior restraints.

While a preapproval requirement may seem less restrictive than an outright prohibition, in practice courts heavily disfavor them both.[150] Mandatory preapproval inflicts injury on free speech, if for no other reason than delay; even a brief government-imposed wait before engaging in discourse on matters of public concern is recognized as a cognizable First Amendment harm.[151]

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147. *Id.* at 17.

148. Durstein v. Alexander, No. 3:19-00029, slip op. at 5 (S.D.W.V. Feb. 28, 2022).

149. *See id.*

150. *See, e.g.*, Kane v. Walsh, 66 N.E.2d 53, 55 (N.Y. 1946) (invalidating a fire department policy that forbade employees from appearing in newspapers or magazines "without the written approval of the Chief of Department"); Steenrod v. Bd. of Eng'rs of Fire Dep't, 87 Misc. 2d 977, 978 (N.Y. Sup. Ct. 1976) (striking down a fire department policy that required prior approval before employees could discuss "matters concerning the department" for publication, or share any information "relative to" fire department business with anyone outside the agency).

151. *See, e.g.*, Providence Firefighters Local 799 v. City of Providence, 26 F. Supp. 2d 350, 354 (D.R.I. 1998) (striking down a fire department's policy requiring the chief to approve any public discussion of department-related matters because "[e]ven if the chief decided to approve every request for constitutionally-protected speech, plaintiffs would have to wait hours or even days for the permission[, and e]ven a temporary restraint on expression may constitute irreparable injury").

In addition to being inimical to the First Amendment's prohibition against prior restraints, workplace gag policies are also vulnerable to challenge if they confer unfettered discretion on the decisionmaker to grant or withhold permission to speak.[152] Unbridled discretion is disfavored because it invites government decisionmakers to pick and choose who may speak based on the speaker's intended message.[153] Any regime in which a speaker is required to obtain a government license or permit before speaking requires rigorous constitutional safeguards to guard against abuse.[154] As one federal court explained it: "Provision of clear and explicit standards to guide law enforcement officers and triers of fact in their application of [a permitting] ordinance are necessary to prevent arbitrary and discriminatory enforcement."[155] The U.S. Supreme Court has identified touchstones for a constitutionally adequate speech-licensing policy, including neutral and objective standards to guide the decision whether to grant or deny a permit to speak, and an opportunity for the speaker to appeal an adverse decision.[156]

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152. *See* Trey Hatch, *Keep on Rockin' in the Free World: A First Amendment Analysis of Entertainment Permit Schemes*, 26 COLUM. J. L. & ARTS 313, 320–21 (2003) (explaining that any licensing system requiring government permission before speaking "must not grant unbridled discretion to decision-makers, but rather must incorporate narrow, objective, and definite standards or limits to guide their decision").

153. *See* Saia v. New York, 334 U.S. 558, 562 (1948) (striking down an ordinance that gave a police chief total discretion to grant or deny permits to use sound-amplifying equipment for public speeches, because such a licensing system "sanctions a device for suppression of free communication of ideas"); *see also* Nathan W. Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits Are Permitted?*, 56 DRAKE L. REV. 381, 414–15 (2008) ("As a constitutional prerequisite, government may not delegate unduly broad discretion to a licensing official or body. By supplying a governmental authority with the capacity to approve or deny an individual or a group permission to speak—without universal standards to follow—equates to decisions that are unavoidably subjective in nature.").

154. *See* Staub v. City of Baxley, 355 U.S. 313, 322 (1958) (stating that an ordinance making the exercise of First Amendment rights "contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms").

155. Fratiello v. Mancuso, 653 F. Supp. 775, 790 (D.R.I. 1987).

156. *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 760 (1988) (stating, in adjudicating a constitutional challenge to a regulation requiring a permit to install newspaper racks along public thoroughfares, that "the Constitution requires that the city establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered"); Freedman v. Maryland, 380 U.S. 51, 58–59 (1965) (stating, in the context of a state licensure-system for distributing motion pictures, that the Constitution requires affording a speaker prompt opportunity to appeal an agency's refusal to grant a distribution permit and obtain final judicial recourse). *See also* Stacy v. Williams, 306 F. Supp. 963, 973 (N.D. Miss. 1969) (applying *Freedman* in a higher education setting,

B. *Higher Ed, Lower Rights? The First Amendment's Force in the Campus Context*

Students attending public colleges and universities have First Amendment rights enforceable against their institutions. But how much authority a college has to restrict or punish speech is a matter of vigorous ongoing debate.[157]

While public employees have clearly established protection against prior restraints by way of the Supreme Court's *NTEU* case and subsequent lower court rulings applying it, there is no comparably sweeping case on which college students can rely.[158] Cases construing the free-speech rights of students versus their institutions almost invariably take place in the context of after-the-fact challenges to disciplinary action, which is analogous to the *Pickering* line of employment cases rather than the *NTEU* line. As in the realm of public employment, the Court has been willing to consider relaxing—but not eliminating—traditional constitutional protections against content-based punishment when the speaker is a student, and the regulator is an educational institution.[159]

Because the Supreme Court has decided relatively few college-speech cases, courts often look for guidance to the somewhat analogous body of

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and holding that due process requires prompt opportunity for appeal if a public university rejects a permit for a student organization to bring a speaker to campus).

157. *See* Kai Wahrmann-Harry, *The Next Step in Student Speech Analysis? How the Eighth Circuit Further Complicates the First Amendment Rights of University Students in* Keefe v. Adams, 51 CREIGHTON L. REV. 425, 426 (2018) ("[C]ourts have struggled to determine the applicable legal standard for assessing the First Amendment rights of students at the university level and beyond. . . . To date, the United States Supreme Court has consistently refused to hear cases on this issue, offering no guidance on what standard is applicable and leaving courts mired in confusion regarding off-campus speech in a university setting.").

158. *See* Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 959 (2006) (observing the Supreme Court has not made broad pronouncements of the contours of First Amendment protections in higher education: "For nearly fifty years, the Supreme Court sporadically has made compelling statements about the importance of academic freedom, yet, it has been either unable or unwilling to develop a coherent framework for assessing the scope of constitutional academic freedom rights.").

159. *See* Papandrea, *supra* note 19, at 1815, 1831–32 (observing that "while the Court has not directly held that universities are entitled to a measure of deference when they restrict student speech on campus, in recent years the Court has expressly embraced deference in the affirmative action and freedom of association contexts[,]" and stating that, even in free-speech cases won by student-plaintiffs, several Justices have been receptive to the argument "that traditional First Amendment principles should not control in the higher education setting" because of deference to college administrators' discretion).

First Amendment caselaw from the K–12 school world.[160] At the K–12 level, the Supreme Court has made it abundantly clear that neither students nor teachers shed their rights to free speech at the schoolhouse gate. That right was codified in the Court's seminal 1968 *Tinker* case.[161] Siblings John and Mary Beth Tinker and three classmates were suspended for wearing black armbands to school in protest of the ongoing war in Vietnam, a decision which lower courts said was reasonable because school officials worried that the anti-war message might set off a disturbance.[162] The Supreme Court, overturning the district court's holding in favor of the school district, held that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[163] The Court made clear that—even inside a K–12 school during school hours—students retain substantial free-speech rights and are not merely mouthpieces for school-approved messages.[164]

The Court has since delineated a few narrow exceptions to *Tinker*, though none is analogous to the college workplace. In *Hazelwood School District v. Kuhlmeier*, the Court ruled that the *Tinker* standard "for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression[,]" in a decision upholding administrative censorship of student-newspaper articles about teenage pregnancy and divorce.[165] In *Bethel School District No. 403 v. Fraser*, the Court held the First Amendment does not prohibit K–12 administrators from disciplining a student for a "vulgar and lewd" speech if they determine the content "would undermine the school's basic educational mission[,]" even if the government could not censor the speech were it made by an adult.[166] And in *Morse v. Frederick,* the Court held that Morse, a school principal, did not violate the First Amendment by confiscating a sign that

160. *Id.* at 1828 (remarking that, because Supreme Court cases "leave open some important questions about the scope of a public university's authority to restrict or punish the speech of its students . . . some lower courts have used the courts' decisions relating to K-12 public education to provide this missing guidance").

161. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1968).

162. *See id.* at 504–05 (reciting the basis of the trial court's decision, which the Eighth Circuit affirmed).

163. *Id.* at 508.

164. *See id.* at 511 ("[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.").

165. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988).

166. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

read "BONG HiTS 4 JESUS" and suspending the student who made it because it advocated for illegal drug use.[167]

There is good reason to believe that the First Amendment applies more rigorously on college campuses than in K–12 schools. The Supreme Court has reliably ruled in favor of college-student speakers, most notably in the case of *Papish v. Board of Curators of the University of Missouri*.[168] There, the Court decided that the University of Missouri overstepped First Amendment boundaries by expelling a student for her self-published magazine profanely calling out police brutality.[169] The Justices stated that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech," strongly suggesting that constitutional free-speech protections apply with full force—not the diminished K–12 force—on college campuses.[170] This dichotomy makes logical sense: College students are typically legal adults, they are not compelled to attend by truancy laws, and they do not stand in an *in loco parentis* relationship with their institutions.[171] Similarly, for the most part, lower courts have been more protective as students attain majority and enter higher education. Illustratively, the Third Circuit struck down a broadly worded anti-harassment disciplinary code at Temple University, emphasizing that First Amendment rights apply more forcefully in college than in K–12 schools:

> [W]e must point out that there is a difference between the extent that a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school. . . . Discussion by adult students in a college classroom should not be restricted. Certain speech, however, which *cannot* be prohibited to adults *may* be prohibited to public elementary and high school students.[172]

167. Morse v. Frederick, 551 U.S. 393, 397–98, 409–10 (2007).

168. Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 671 (1973).

169. *Id.*

170. *See id.*

171. In its most recent foray into school speech, the Supreme Court grounded a school's authority to regulate speech squarely in the parental authority that a school, in effect, borrows from the family while the student is attending school functions or is under school control. *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021). Because parents do not control the speech of college students to nearly the same degree, the *Mahanoy* decision calls into question lower-court opinions that suggest college students are limited to the same free-speech rights as children attending K-12 schools. *Id.* This case is discussed *supra* notes 184–186 and accompanying text.

172. DeJohn v. Temple Univ., 537 F.3d 301, 315 (3d Cir. 2008).

A primary policy concern that justifies diminishing free-speech rights in the K–12 educational setting is the "captive audience" rationale, which is the notion that schools must protect impressionable young listeners, who are compelled to attend school, from speech that interferes with learning.[173] On occasion, courts have extended this rationale to postsecondary education, where the dispute involves in-class speech.[174] But the captive-listener justification plainly does not apply to communications between journalists and student-workers. No one is compelled by governmental authority to read an employee's remarks to the news media. Therefore, such voluntary communications should enjoy strong constitutional protection.

Notwithstanding college students' history of success at the Supreme Court, the status of student free-speech rights on college campuses has been muddled by recent caselaw suggesting that colleges can punish students for speaking in contravention of "professional standards" on social media.[175] In *Tatro v. University of Minnesota* the Minnesota Supreme Court ruled against student Amanda Tatro, who challenged discipline she received for off-color Facebook jokes she made about her experience in the University's embalming lab while studying to become a funeral director.[176] And the Eighth Circuit followed *Tatro* in *Keefe v. Adams*, ruling against nursing student Craig Keefe, who was expelled for coarse language in Facebook posts he made on his personal account.[177] Two fellow students showed an instructor Keefe's posts—one of which called a classmate a "stupid bitch" during an argument over Keefe's belief that male nursing students faced gender discrimination—and the college determined Keefe violated the

173. *See* Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007) (rejecting a First Amendment claim by a teacher who was denied reappointment because of political remarks made in an elementary-school classroom: "Education is compulsory, and children must attend public schools unless their parents are willing to incur the cost of private education or the considerable time commitment of home schooling. Children who attend school because they must ought not be subject to teachers' idiosyncratic perspectives.").

174. *See* Martin v. Parrish, 805 F.2d 583, 586 (5th Cir. 1986) (stating that a college instructor's repeated use of profanity toward students was constitutionally unprotected as "a deliberate, superfluous attack on a 'captive audience' with no academic purpose or justification").

175. *See* Elissa Kerr, *Professional Standards on Social Media: How Colleges and Universities Have Denied Students' Constitutional Rights and Courts Refused to Intervene*, 41 J. COLL. & U.L. 601, 625 (2015) (commenting on the anomaly that federal courts have generally been protective of off-hours speech rights of both K-12 students and public employees, yet courts have sided with college disciplinarians when students are perceived as speaking in contravention of professional standards).

176. Tatro v. Univ. of Minn., 816 N.W.2d 509, 523–24 (Minn. 2012).

177. Keefe v. Adams, 840 F.3d 523, 545 (8th Cir. 2016).

student handbook's policy regarding professional behavior.[178] In both instances, the courts deemed the speech to be unprotected by the First Amendment because the remarks were inconsistent with the standards of the students' intended future professions.[179]

These cases are almost certainly wrongly decided and have been rightly criticized by First Amendment scholars.[180] Among their faults, the cases fail to recognize that even if speech might be grounds for disciplinary action in a professional workplace, a state college is *not* a professional workplace. The First Amendment constrains the exercise of punitive authority in the public educational setting in a way that it does not in the private workplace. Private-sector professional standards cannot be imported wholesale into the public sector without independently inquiring whether those standards satisfy applicable First Amendment principles. After all, a great deal of speech that is constitutionally protected in the public sector could be grounds for punishment in the professional workplace; if *Tinker* plaintiff Mary Beth Tinker worked in a private hospital that required nurses to wear standardized uniforms, she could lawfully be fired for refusing to take off the very same anti-war armband that represents constitutionally protected political speech within a public educational institution. Indeed, if

178. *Id.* at 527–28.

179. *See id.* at 532–33 (concluding that supervisors of an academic program could constitutionally remove students from a course of study for speech that reflected a lack of professionalism). *See also Tatro*, 816 N.W.2d at 521 (stating that public universities may penalize students for social media speech that "violates established professional conduct standards").

180. *See, e.g.*, Wahrmann-Harry, *supra* note 157, at 442–44 (criticizing the *Keefe* court for expanding university punitive authority even beyond *Tatro* by relying on in-school-speech cases from K-12 context that are inapplicable to college students' off-campus speech); Clay Calvert, *Professional Standards and the First Amendment in Higher Education: When Institutional Academic Freedom Collides with Student Speech Rights*, 91 ST. JOHN'S L. REV. 611, 613 (2017) (calling the outcome of the *Keefe* case "profoundly problematic" for multiple reasons, including the Eighth Circuit's use of "aspirational" professional codes as if they were binding disciplinary rules without independently examining them for vagueness); Lindsie Trego, *When a Student's Speech Belongs to the University:* Keefe, Hazelwood, *and the Expanding Role of the Government Speech Doctrine on Campus*, 16 FIRST AMEND. L. REV. 98, 115 (2017) ("Scholars have expressed concern that the government speech doctrine is quickly expanding and threatens to swallow the First Amendment, and the professional student speech doctrine is further evidence of this expansion."); Ashley C. Johnson, *"Narrowly Tailored" and "Directly Related": How the Minnesota Supreme Court's Ruling in* Tatro v. University of Minnesota *Leaves Post-Secondary Students Powerless to the Often Broad and Indirect Rules of Their Public Universities*, 36 HAMLINE L. REV. 311, 343 (2013) (identifying the danger of allowing universities to declare that anything said on social media contrary to "the educational goals of the university" is a punishable offense).

the *Tatro* and *Keefe* courts were inclined to import workplace standards into the educational setting, the proper analog would be *government* workplace standards—where First Amendment safeguards could prevent, for instance, a person from being dismissed simply for using a coarse word like "bitch" on a social media page, as Craig Keefe did.[181] So the "professional standard" cases are, to say the least, wobbly First Amendment precedent—but even those instances represent individualized disciplinary decisions in response to purportedly disruptive speech, not a categorical prohibition against speaking.

Even at the K–12 level on school premises during school hours, it is not clear that a public school could enforce a blanket permission-to-speak rule. There is a split of authority among federal circuit courts whether a requirement to obtain school approval before distributing literature to other students on campus during school hours is a prior restraint reviewed skeptically under strict scrutiny,[182] or merely a content-neutral rule of property management that can be upheld under rational-basis review.[183] But importantly, these cases involve restricting minor children from using school premises to distribute speech—not restricting conversations between adult-aged students and the news media outside of instructional time. And even in that far more restrictive in-school K–12 setting, the First Amendment may prohibit a blanket preapproval requirement.

In no instance does it appear that any public educational institution at any level has attempted to enforce a blanket prohibition that constrains all students from speaking at all times, on campus or off, without permission. Whatever grounding school or college authorities might once have claimed for such a sweeping restraint crumbled with the Supreme Court's most recent student-speech ruling, *Mahanoy Area School District v. B.L.*[184] In the *Mahanoy* case, the Supreme Court curbed K–12 schools' ability to punish students for what they say on social media during their off-hours, cautioning that schools may have authority to regulate bullying directed at classmates, but generally will lack authority to regulate speech about religious or

181. *See, e.g.*, Marquardt v. Carlton, 971 F.3d 546, 551–52 (6th Cir. 2020) (holding that a public employee's profane and racially offensive rant on social media, indicating that a child killed by police deserved to be shot, was speech addressing a matter of public concern, so that constitutionality of his firing is properly evaluated under the *Pickering* balancing-of-interests standard).

182. *See* Burch v. Barker, 861 F.2d 1149, 1158–59 (9th Cir. 1988); Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973).

183. *See* Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 42–43 (10th Cir. 2013).

184. *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).

political topics.[185] With the Court's recognition that even K–12 schools—let alone colleges—have limited authority to punish off-campus speech, there would appear to be no tenable argument for the constitutionality of a "no interviews without permission" rule if applied to the entire student body.[186] Thus, after *Mahanoy*, if a university restricts RAs from speaking without prior approval, the university's defense of the restriction must necessarily rely on the RAs' "employee" status rather than their "student" status.

C. Legal Principles Applied to RA Speech Restrictions

The Supreme Court has never taken a First Amendment case involving a student employee challenging a university-employer's adverse action, nor is there much authority from the lower courts addressing that unique circumstance. Consequently, it cannot be said with certainty whether a court will pull the "employer" arrow or the "student" arrow from the quiver when asked to deal with a student-employee's free-speech challenge. When students are expelled from university practicum courses or externship placements as punishment for speech, courts typically adjudicate the cases in reliance on student, rather than employee, speech law.[187] That makes sense when the punishment is inability to complete an academic course and is handed down by those who supervise the student's academic progress. But when an RA is fired by campus housing authorities for breaking a

185. *Id.* at 2046 ("When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention."). *See also id.* at 2057 (Alito, J., concurring) ("Schools may assert that parents who send their children to a public school implicitly authorize the school to demand that the child exhibit the respect that is required for orderly and effective instruction, but parents surely do not relinquish their children's ability to complain in an appropriate manner about wrongdoing, dereliction, or even plain incompetence.").

186. Additionally, even the limited measure of authority that the Court recognized for K-12 schools to police off-campus speech was grounded in the notion that schools are exercising supervisory authority granted to them by parents. *See id.* at 2046 (citing doctrine of *in loco parentis* and observing, "[g]eographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility"). Plainly, if educational institutions have only the speech-policing authority that parents "loan" to them, that authority does not translate to the collegiate setting. *See id.*

187. *See, e.g.*, Oyama v. Univ. of Haw., 813 F.3d 850, 861 (9th Cir. 2015) (employing student-speech caselaw in a First Amendment challenge brought by a graduate student rejected from a student-teaching practicum because of disturbing statements that raised questions of his suitability for teaching); Ward v. Polite, 667 F.3d 727, 732–34 (6th Cir. 2012) (applying student-speech precedent to analyze the First Amendment claims of graduate student dismissed from a master's program in counseling because of her religious-based refusal to advise clients about same-sex relationships during counseling practicum sessions).

workplace rule, that firing does not disqualify the student from continuing her studies; the penalty is an "employment" penalty, just as if the student held a job at a non-university apartment complex. Thus, as between the two bodies of law, employment law is the more logical fit.

If public employment law applies, then the *NTEU* case and three decades of cases applying it inarguably supply the answer: No public employer, including an educational institution, may enforce a categorical prohibition against unapproved communications with the press and public. Any policy that fails to distinguish between speech in the course of employment (which the employer may control, under *Garcetti*) versus speech in the employee's citizen capacity (which, unless substantially disruptive to the workplace, is beyond the employer's control under *Pickering* and *Lane*) is an unconstitutionally overbroad policy. The fact that the policy is contained in a handbook that the student accepts as a condition of employment does not cleanse the unconstitutionality, as public employees may not be forced to accept blanket waivers of constitutional rights in exchange for a government paycheck.[188]

No public university would seriously consider enforcing a regulation that every one of its students is forbidden from giving an interview to the news media without prior authorization. Such a rule would be outlandishly overbroad, as there could be no overriding university interest in inhibiting 20,000 or 30,000 speakers from engaging in political or religious speech or addressing innocuous topics in a nondisruptive manner. The assertion of control over RA speech, then, must necessarily be based on the RA's "employee" status rather than the RA's "student" status, under the notion that RAs might be perceived as authorized university spokespeople, or might be entrusted with confidential information by virtue of their employment. Consequently, employment law is the better-suited tool for the job.

But even if a court adjudicating a challenge to RA gag rules were to view the relationship as primarily one of school and student rather than employer and employee, the analysis should end in the same place: Blanket prior restraints are unenforceable.

As a practical matter, there will not always be a clear distinction between information that an RA learns as a consequence of employment versus information that an RA learns as a consequence of being a dorm

188. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603–04 (1967) (holding that professors could not be compelled to sign a certification forswearing involvement in "subversive" organizations as a condition of continued university employment). *See also* Agency for Int'l Dev. v. All. for Open Soc'y Int'l,, 570 U.S. 205, 214 (2013) (stating that "the Government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit") (internal quotations and citations omitted).

resident. For instance, if the RA is awakened by a fire and observes that the fire sprinklers failed to activate, the RA's awareness owes nothing to her employee role; the failure would have been evident to any student-occupant. Thus, restrictions on "employee" speech invariably will also chill expression that an RA might wish to engage in while wearing her "student" hat.[189]

Regardless of whether gag policies are evaluated as restrictions on students or restrictions on employees, in neither case can a government agency assert unfettered discretion to grant or withhold permission to speak without neutral and objective criteria to guide the decision.[190] University rulebooks reliably lack such safeguards. In no instance did any policy produced in response to the Brechner Center's inquiries contain any constraints on a university's decision to deny permission to speak to the press or provide an appeal process by which a student employee could challenge a denial of clearance to speak.[191] In other words, universities reserve for themselves the authority to make subjective, content-based or even viewpoint-based choices as to whether a speaker may speak. This type of unfettered discretion is a hallmark of unconstitutionality.[192] It invites exactly the sort of viewpoint-based decision-making that is predictable in the RA-college context: A student who wishes to express dissent with university policies or concern over campus safety conditions is highly unlikely to obtain permission to speak and may be chilled from even attempting to speak by the requirement of obtaining clearance.[193]

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189. *See* Rene L. Todd, *A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants*, 88 MICH. L. REV. 1171, 1183 (1990) (recognizing, in context of judicially-imposed gag orders on trial participants, that people "may become excessively risk-averse" and self-censor even more severely than the breadth of a gag order, in fear of crossing a line and being penalized as a violator).

190. *See supra* notes 139–46 and accompanying text.

191. *See* Part III.B., *supra*.

192. *See, e.g.*, Kessler v. City of Providence, 167 F. Supp. 2d 482, 489 (D.R.I. 2001) (holding that a police department policy requiring officers to obtain permission before making public statements about any work-related matters was unconstitutional because it "sets no standards to guide the decision-making process, does not require any explanation for a denial of permission to speak, and proposes no time frame for such grant or denial"); Spain v. City of Mansfield, 915 F. Supp. 919, 922–24 (N.D. Ohio 1996) (holding that a fire department regulation requiring department officers to obtain the chief's permission before speaking publicly about fire department "rules, duties, policies, procedures and practices" was facially unconstitutional because it lacked standards to curb chief's decision-making discretion).

193. *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988) ("[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused.").

CONCLUSION

Resident assistants have knowledge about newsworthy events of interest to the campus community and, like any other public employee, they should be free to share that knowledge so long as they are not sharing information that invades privacy or is otherwise legally recognized as confidential. Courts have long recognized the value of the unique insider perspective that public employees can bring to the discourse about issues of public concern.[194] As a unanimous Supreme Court stated in its most recent foray into the realm of public-employee speech, *Lane v. Franks*, "public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights. There is considerable value . . . in encouraging, rather than inhibiting, speech by public employees."[195] It is especially important for public employees to have the right to blow the whistle publicly on adverse conditions because, since the Court's 2006 *Garcetti* decision, complaining internally through workplace channels is no longer reliably treated as constitutionally protected speech.[196]

When housing employees do not feel safe sharing information, news coverage suffers. If stories get told at all, they must be told in reliance on unnamed sources, which diminishes the stories' credibility and makes them more easily denied by hidebound authority figures.[197] For instance, when

194. *See* Drechsel, *supra* note 131, at 159 ("[G]overnment employees are differently situated than private sector employees. They are entrusted with and paid with tax dollars; their goal is public service, not making a profit; they are fundamentally responsible for public functions ranging from health and safety to education, transportation and national security; and they are ultimately accountable to the public and guided by public policy.").

195. Lane v. Franks, 573 U.S. 228, 236 (2014).

196. *See* Paul M. Secunda, Garcetti*'s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 126–27 (2008) (observing that "it appears that the *Garcetti* question is beginning to turn on whether one is an internal or external whistleblower" and noting the Fifth Circuit's 2008 ruling in *Davis v. McKinney*, 518 F.3d 304, in which a Texas university-system employee was permitted to go forward on her First Amendment retaliation claims only to the extent that she complained publicly, not internally). Justice Souter's dissent in *Garcetti* foretold exactly this result, cautioning that the logical result of the ruling would be to dissuade workers from using in-house dispute-resolution channels, exposing themselves to retaliation without constitutional recourse. *See* Garcetti v. Ceballos, 547 U.S. 410, 427 (2006) (Souter, J., dissenting) ("[I]t seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.").

197. *See* Miglena Mantcheva Sternadori & Esther Thorson, *Anonymous Sources Harm Credibility of All Stories*, 30 NEWSPAPER RSCH. J. 54, 62–63 (2009) (reporting results of an experiment with college journalism undergraduates, who were asked to review award-winning investigative news reports and who rated stories that relied on unnamed sources as less

hundreds of RAs at Stanford University called a strike to demand stronger COVID-19 safety protocols and other policy changes, the *Stanford Daily* newspaper was forced to cite unnamed student employees "who requested anonymity for fear of retribution."[198] At Syracuse University, the student newspaper reported on unrest among RAs who felt overwhelmed with unexpected work as they coped with the fall 2020 return to campus after a COVID-19 shutdown—relying on information supplied by three RAs who "asked to remain anonymous out of fear for their job security."[199] At Michigan's Ferris State University, the student-newspaper reported on an epidemic of cyberbullying by way of the chat app YikYak—relying on information from an unnamed student-housing employee, who, according to the newspaper account, "d[id] not feel comfortable sharing their identity for fear of losing their job . . . ."[200] No workplace—and particularly not an educational workplace—should foster a climate in which employees expect supervisory retaliation if they assert their own health and safety interests, or those of their colleagues.

The relationship between RAs and their university employers is an especially coercive one. Because "resident assistant" necessarily implies living in campus housing, an RA depends on her university not just for a paycheck but for the roof over her head. The threat of losing both one's livelihood and one's home is uniquely intimidating.

The impulse to control everything that RAs say about their work-related observations and experiences is, perhaps, understandable. Living and working within campus housing, RAs may become privy to all manner of confidences, including students' mental-health struggles, addiction

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credible than stories containing no unnamed sources); Ryan Pitts, *Readers: Anonymous Sources Affect Media Credibility*, POYNTER (June 16, 2005), https://www.poynter.org/archive/2005/readers-anonymous-sources-affect-media-credibility/ [https://perma.cc/HZ87-SM6P] (reporting that, in a sampling of comments from 1,600 newspaper readers nationwide, 44% said that use of unnamed sources "makes them less likely to believe what they read").

198. Cameron Ehsan, *Hundreds of RAs on Strike Indefinitely After Stanford Does Not Meet Demands*, STANFORD DAILY (Sept. 2, 2021, 9:15 PM), https://stanforddaily.com/2021/09/02/ras-strike-indefinitely-after-stanford-fails-to-meet-demand/ [https://perma.cc/W96S-XMW8].

199. Sarah Alessandrini, *Resident Advisers Wish SU Provided Them More Support, Communication*, DAILY ORANGE (Sept. 16, 2020), https://dailyorange.com/2020/09/resident-advisers-wish-su-provided-support-communication/ [https://perma.cc/BW8R-BKXV].

200. Rebecca Vanderkooi, *The YikYak Problem*, FERRIS STATE TORCH (Apr. 6, 2022), https://fsutorch.com/2022/04/06/the-yikyak-problem/ [https://perma.cc/9QGA-C4VG].

problems, or abusive relationships.[201] But many public employees handle comparably sensitive information—emergency-room doctors, police officers, school counselors—and yet the law does not force them to surrender all of their free-speech rights.[202] Indeed, it is because RAs deal with so many life-and-death matters that the public needs to hear their uncensored perspective on whether campuses are safe, and whether university policies and practices contribute to safety—or detract from it.[203] When the employee is a low-ranking student, the employer's interest in total 24/7 control over speech is especially minimal since the reasonable audience member has no difficulty distinguishing between a student worker's personal observation and an official statement of university policy.[204]

A blanket prohibition against speaking with the public and press is a presumptively unconstitutional prior restraint, carrying a heavy burden of justification because a prior restraint is such a blunt instrument.[205] Policies gagging government employees from saying anything to the media cannot surmount the employer's heavy burden because narrower and better-targeted policies could satisfy the employer's legitimate concerns just as well. Free-speech cases brought by public employees offer guideposts on what a constitutionally sound policy can look like. For instance, federal courts have found no First Amendment impediment to forbidding police officers

201. *See* Olivia Brunsting & Carolina Christensen, *R(A)eality of Being an RA*, N. IOWAN (Mar. 3, 2022), https://www.northerniowan.com/16491/showcase/raeality-of-being-an-ra/ [https://perma.cc/2ML3-2WHS] (summarizing interviews with fifteen current and former RAs at the University of Northern Iowa, who "expressed feeling unqualified and overwhelmed with the amount of responsibility required of them[,]" including dealing with students who express suicidal ideation).

202. *See* Frank D. LoMonte & Jessica Terkovich, *You Have the Duty to Remain Silent: How Workplace Gag Rules Frustrate Police Accountability*, 55 AKRON L. REV. 1, 16 (2021) (analyzing First Amendment cases brought by public-safety workers since the Supreme Court's 1968 *Pickering* decision and concluding that "police and firefighters have overwhelmingly prevailed when challenging the constitutionality of prohibitions against unapproved communications with the press and public").

203. *See* Lane v. Franks, 573 U.S. 228, 236 (2014) ("There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For government employees are often in the best position to know what ails the agencies for which they work.") (internal quotations and citations omitted).

204. *See* Rankin v. McPherson, 483 U.S. 378, 392 (1987) (weighing the employee-plaintiff's low-ranking status as a clerical worker in the *Pickering* First Amendment balancing test and concluding that her remark wishing harm on then-President Ronald Reagan was constitutionally protected political speech that could not be mistaken for the speech of her employer).

205. *See* In re Providence J. Co., 820 F.2d 1342, 1348 (1st Cir. 1986) (describing the presumption against prior restraints as "virtually insurmountable") ("In its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on pure speech.").

from disclosing confidential information about internal investigations or requiring law enforcement officers to obtain supervisory approval before holding themselves out as official agency spokespeople.[206]

Similarly, universities can enact and enforce narrowly tailored policies that forbid sharing only sensitive information learned in confidence as part of employment. For instance, if an RA learns that a student resident is suffering from a debilitating medical condition, the RA obviously cannot share the student's identity publicly without consequence (and indeed, sharing the information likely would be actionable under the common law of privacy, workplace policies aside).[207] Like any employer, a state university has a scope of legitimate confidences that can be protected under penalty of sanction, such as passwords for computer systems, or in the campus-housing context, alphanumeric passcodes that unlock doors. A narrow policy restricting only those potentially harmful disclosures would inflict no injury on core First Amendment values.

It is eminently possible to craft a narrowly tailored speech policy that protects only genuinely confidential information without inhibiting speech on matters of public concern. We saw this play out at the University of North Carolina, Chapel Hill, where regulators were able to craft a minimally restrictive policy that recognizes student-employees' rights to speak in their citizen capacity.[208] Because a narrower route to achieve the government's legitimate confidentiality concerns exists, college administrators must take that route—as a matter of First Amendment law, and as a matter of sound public policy.

206. *See, e.g.*, Hanneman v. Breier, 528 F.2d 750, 754 (7th Cir. 1976) (finding that a police department's policy forbidding officers from disclosing confidential information about internal investigations "is clearly valid on its face"); Zook v. Brown, 748 F.2d 1161, 1167–68 (7th Cir. 1984) (holding that a sheriff's department policy requiring preapproval when speaking as an official representative of the department was not an overbroad restraint).

207. *See, e.g.*, Doe v. Mills, 536 N.W.2d 824, 829–30 (Mich. Ct. App. 1995) (recognizing that a tort claim for public disclosure of private facts will lie when a defendant reveals confidential medical information about a person, such as her plans to have an abortion, which is of no legitimate public concern); Miller v. Motorola, Inc., 560 N.E.2d 900, 903–04 (Ill. App. 1990) (finding that a plaintiff stated an actionable tort claim for public disclosure of private facts based on an allegation that a company nurse shared information about an employee's breast-cancer surgery with the employee's co-workers, without consent).

208. *See* Somasundaram, *supra* note 85; UNIV. OF N. CAROLINA, *supra* note 86.