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## ***Doe v. University of Michigan: Free Speech on Campus 25 Years Later***

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## ***Doe v. University of Michigan:* Free Speech on Campus 25 Years Later**

LEN NIEHOFF\*

I would like to use as the launching pad for my remarks today the 1989 federal district court decision in *Doe v. University of Michigan*.<sup>1</sup> *Doe* is the seminal case on campus speech codes and it just recently passed its twenty-fifth anniversary.<sup>2</sup> I thought this symposium would be a good occasion to look back, see where we were, assess where we are, and ask whether we have made any progress. Spoiler alert: the news is not good.

As you will recall, in *Doe* a federal district court held that a policy that the University of Michigan had adopted in response to a number of racially charged incidents on campus ran afoul of the First Amendment.<sup>3</sup> As legal precedent, I do not think that *Doe* offers many extraordinary insights. The challenged policy was indeed overbroad and vague and it was “dead on arrival” at the federal courthouse in Detroit. We do not need to perform any elaborate autopsies to confirm the fact or cause of death.

So why should we care about *Doe*? I think there are several reasons. First, *Doe* was an early excursion into territories and tensions that have now become familiar. The case was therefore decided before these controversies had grown encrusted with some of the fram-

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\* Professor from Practice, University of Michigan Law School. B.A., J.D., University of Michigan. This article is a modestly revised and annotated version of remarks made during the February 2016 University of Miami Law Review Symposium titled “The Constitution on Campus: Do Students Shed Their Rights at the Schoolhouse Gates?” The author thanks the University of Miami Law Review for the invitation to participate and thanks Elana Zeide for her helpful suggestions regarding this presentation.

<sup>1</sup> 721 F. Supp. 852 (E.D. Mich. 1989).

<sup>2</sup> See generally *id.*

<sup>3</sup> See *id.* at 866–67.

ing, language, and concepts that burden them today. Like many preliminary experiments, *Doe* comes to us with a kind of purity—purity we have been unable to sustain.

Second, although the policy in question in *Doe* was badly flawed, it seems clear that the University of Michigan acted in good faith. The issues that the University faced were unsettling and significant, demanding some kind of response.<sup>4</sup> Similarly, it seems clear that the plaintiff acted in good faith. If I had been teaching at the University when that policy was in place, I would have had serious concerns as well. These days, when those on each side of the debate are so eager to caricature those on the other as clueless, or even villainous, it seems refreshing to consider a case where both sides had a point.

Third, the passing of twenty-five years provides an occasion to call the question: are we thinking about these issues *now* better than we thought about them *then*? Granted, progress in addressing conflicting values tends to come more haltingly than we would like. But it does seem fair to expect some forward movement over a quarter-century span. So I ask: have we seen any?

I have three theses. The first is that since *Doe* was decided, we have indeed seen significant change in how we think about and discuss the conflicting values of speech and equality on campus. The second is that the change is overwhelmingly for the worse. The third is that things are very unlikely to get better anytime soon.

It is a grim and discouraging assessment I bring you. Nor is it likely to win me any new friends or, perhaps, any additional invitations to symposia. As you will see, I believe that the blame for this situation lies with both sides of this debate. I think that everyone has had a turn at the switch in creating this train wreck. I think that everybody has tossed some fuel on this dumpster fire.

Before we get too far into our current disarray, however, let us remind ourselves what happened in *Doe*.

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<sup>4</sup> See *Doe*, 721 F. Supp. at 854.

I. WHAT HAPPENED IN *DOE*?

The University of Michigan community was rocked in the late 1980s when a number of racist incidents occurred on campus, culminating in a rash in early 1987.<sup>5</sup> In one of these incidents, an unknown person or persons distributed an anonymous flier around the campus that used a series of deeply offensive racial epithets regarding Blacks and declared “open season” on them.<sup>6</sup> In another, a student disc jockey at an on-campus radio station allowed racist jokes to be broadcast.<sup>7</sup> When members of the University community demonstrated in protest to these incidents, someone suspended a Ku Klux Klan uniform from a dormitory window.<sup>8</sup>

The University’s president issued a formal statement condemning these events.<sup>9</sup> The chair of the Michigan State House of Representatives Appropriations Subcommittee on Higher Education—the legislative body charged with overseeing the public funding of the University—conducted public hearings regarding these incidents and the problem of racism on the Ann Arbor campus.<sup>10</sup> In the course of those hearings, forty-eight speakers addressed the subcommittee before an audience of hundreds.<sup>11</sup> They had uniformly negative things to say about the University’s response to these incidents and about the campus climate for minorities more generally.<sup>12</sup>

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<sup>5</sup> *See id.* at 854. The community’s response was almost certainly shaped not just by the nature of the incidents, but by the community’s strong sense of progressive—even activist—identity. On May 22, 1964, President Lyndon Johnson had delivered his “Great Society” speech in Michigan Stadium. *See* HOWARD H. PECKHAM, *THE MAKING OF THE UNIVERSITY OF MICHIGAN: 1817–1992* 279 (Margaret L. Steneck & Nicholas H. Steneck eds., 175th anniversary ed. 1994). In the mid-1960s, faculty and student protests over the Vietnam War were common and the Students for a Democratic Society emerged on campus. *See id.* at 279–81, 291–94. In the late 1960s and early 1970s, the Black Action Movement was formed to advocate for the rights of African Americans. *See id.* at 294–95. The notion that overtly racist conduct could occur on the Ann Arbor campus seemed wholly inconsistent with this history.

<sup>6</sup> *Doe*, 721 F. Supp. at 854.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *See id.*

<sup>10</sup> *See id.*

<sup>11</sup> *See id.*

<sup>12</sup> *See id.*

The University came under tremendous pressure to do something and to do it promptly: the subcommittee chair threatened to hold up appropriations to the University;<sup>13</sup> a campus anti-discrimination group announced plans to sue the institution;<sup>14</sup> and a national civil rights leader weighed in on the controversy.<sup>15</sup> The University came forward with a detailed plan to address concerns about racism on campus, which included a commitment to adopt an “anti-racial harassment” policy.<sup>16</sup>

Adoption of the policy took more than a year, in part because of a transition in presidential leadership and in part because the document went through a dozen drafts with input from a variety of University constituencies.<sup>17</sup> Along the way, some individuals raised concerns about the impact such a policy could have on free speech.<sup>18</sup> But the interim president expressed the view that “just as an individual cannot shout ‘Fire!’ in a crowded theater and then claim immunity from prosecution for causing a riot on the basis of exercising his rights of free speech,” individuals within a university community cannot make “discriminatory remarks” that “detract from the necessary educational climate of a campus” and then “claim immunity from a campus disciplinary proceeding.”<sup>19</sup>

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<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

<sup>17</sup> *See id.* at 855.

<sup>18</sup> *See id.*

<sup>19</sup> *Id.* (internal quotation marks omitted). The reference to the permissible prohibition against falsely shouting “Fire!” in a crowded theater comes from Justice Holmes’s opinion in *Schenck v. United States* (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic.”). 249 U.S. 47, 52 (1919). A number of critics have observed that Justice Holmes’s analogy is flawed and has been overused and misapplied. *See, e.g.,* Trevor Timm, *It’s Time to Stop Using the ‘Fire in a Crowded Theater’ Quote*, THE ATLANTIC (Nov. 2, 2012), <http://www.theatlantic.com/national/archive/2012/11/its-time-to-stop-using-the-fire-in-a-crowded-theater-quote/264449/>; Alan M. Dershowitz, *Shouting “Fire!”*, THE ATLANTIC (Jan. 1989), <http://www.theatlantic.com/magazine/archive/1989/01/shouting-fire/376334/?preview=TC1KIGCWtDkccr6oMCz5YC0PfVI>.

The final version of the policy was complex and elaborate, reaching very broadly.<sup>20</sup> Among the various campus spaces, it applied to classrooms, libraries, laboratories, and recreational and study centers.<sup>21</sup> In these areas, persons were subject to disciplinary action on a number of grounds delineated by the policy, including engaging in speech that “stigmatized” or “victimized” someone based on a characteristic like race, ethnicity, gender, or sexual orientation.<sup>22</sup> Sanctions depended on the gravity of the offense and were potentially severe.<sup>23</sup>

The University also issued an “interpretive guide” that purported to be an authority on the policy and that offered examples of speech that the University deemed discriminatory or harassing.<sup>24</sup> The examples were troubling for a variety of reasons. A number of them involved speech that appeared to be protected under the First Amendment, such as making a negative comment about someone else’s “religious beliefs,” or expressing the opinion that women are not as capable as men in a particular field of endeavor.<sup>25</sup> Other examples did not seem to directly relate to the underlying policy, such as making a negative comment about someone else’s “physical appearance” apart from the person’s race, ethnicity, or gender.<sup>26</sup>

Indeed, the guide appeared to aggravate, rather than mitigate, the vagueness of the underlying policy.<sup>27</sup> Assume, for example, that a

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<sup>20</sup> See *Doe*, 721 F. Supp. at 856–58. A comprehensive description of the policy is set forth in *Doe*. See *id.* Because much of the detail about the policy is irrelevant to this discussion, I provide only a brief summary of the policy.

<sup>21</sup> See *id.* at 856.

<sup>22</sup> See *id.*

<sup>23</sup> See *id.* at 857. Sanctions, of which one or more could be imposed, included: “(1) formal reprimand; (2) community service; (3) class attendance; (4) restitution; (5) removal from University housing; (6) suspension from specific courses and activities; (7) suspension; [and] (8) expulsion.” *Id.*

<sup>24</sup> See *id.* at 857–58.

<sup>25</sup> See *id.* at 858.

<sup>26</sup> See *id.* (The example stated that a student would be considered a “harasser” when “You [the student] comment in a derogatory way about a particular person or group’s physical appearance or sexual orientation, or their cultural origins, or religious belief.”).

<sup>27</sup> See *id.* at 858 (“It was not clear whether each of these actions would subject a student to sanctions, although the title of the section suggest[ed] that they would.”). The interpretive guide was ultimately withdrawn in the winter of 1989. See *id.*

male student said to his male roommate: “You really should shave off that pathetic excuse for a beard.” Does this qualify as a “derogatory” comment about the “physical appearance” of a “particular person” that renders the student subject to discipline under the anti-harassment policy?<sup>28</sup> If it does, then does that make any sense? If it does not, then how would the student—or an administrator charged with applying the policy—know that the policy does not apply?

At the time the policy was adopted, “John Doe” was a psychology graduate student at the University.<sup>29</sup> Doe taught courses that explored controversial theories that he worried some students might view as “sexist.”<sup>30</sup> This included theories that men, because of biological differences between the sexes, may in general be better than women at certain kinds of mental tasks.<sup>31</sup> Doe was concerned that his teaching would violate the policy and result in disciplinary action.<sup>32</sup> As a result, he sued the University and the case was assigned to Judge Avern Cohn of the United States District Court for the Eastern District of Michigan.<sup>33</sup>

The University challenged Doe’s standing to sue on the basis that his concern was hypothetical, and accordingly, no actual case or controversy existed for the court to decide.<sup>34</sup> To engage in a bit of understatement, this argument did not sit well with Judge Cohn. Judge Cohn acknowledged that he might agree with the University if he had nothing before him except the language of the policy, but that was not the case.<sup>35</sup>

Judge Cohn pointed to the interpretive guide as a reason for believing that Doe’s concerns were not entirely speculative.<sup>36</sup> After all, the guide included an example of harassment—a student who opines about the superiority of men within a particular field—that seemed closely analogous to the classroom subject matter that worried Doe.<sup>37</sup> Judge Cohn noted that on three documented occasions, the

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<sup>28</sup> *See id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See id.* at 860.

<sup>32</sup> *See id.* at 858.

<sup>33</sup> *Id.* at 852.

<sup>34</sup> *Id.* at 858.

<sup>35</sup> *Id.* at 859.

<sup>36</sup> *See id.* at 860.

<sup>37</sup> *See id.*

University had in fact enforced the policy, or threatened to enforce it, against students based on their classroom speech.<sup>38</sup> Judge Cohn did not just reject the University's objection to Doe's standing—he declared that it “served only to diminish the credibility of the University's argument on the merits because it appeared that it sought to avoid coming to grips with the constitutionality of the policy.”<sup>39</sup>

Having disposed of the standing issue, Judge Cohn turned to the merits of the policy.<sup>40</sup> After a long and thorough analysis<sup>41</sup> (which I do not need to recount in detail here, but which I commend to your attention), he concluded that the policy was unconstitutionally overbroad and that a number of critical terms in the document—such as “stigmatize” and “victimize”—rendered the policy unconstitutionally vague.<sup>42</sup> In the course of the litigation, the University had withdrawn some provisions of the policy—and the guide in its entirety—but these maneuvers did not impress Judge Cohn.<sup>43</sup>

Indeed, Judge Cohn had several grievances with the University and cataloged them twice, once at the end of the *Doe* decision and again in a law review article he later wrote.<sup>44</sup> One contention may in retrospect strike you as ironic in light of recent events.<sup>45</sup> Toward the end of the *Doe* decision, Judge Cohn suggested that in thinking about its policy, the University might have learned a great deal by looking to the experiences of another great university—Yale University.<sup>46</sup> I am not sure that, today, anyone on either side of the debate thinks that the perfect solutions to these problems reside in New Haven.<sup>47</sup>

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<sup>38</sup> *See id.* at 861 (“At least one student was subject to a formal hearing because he stated in the context of a social work research class that he believed that homosexuality was a disease that could be psychologically treated.”).

<sup>39</sup> *Id.* at 858–59.

<sup>40</sup> *See id.* at 861–67.

<sup>41</sup> *See generally id.*

<sup>42</sup> *See id.* at 867.

<sup>43</sup> *See id.* at 858, 860.

<sup>44</sup> *See id.* at 867–69. *See generally* Hon. Avern Cohn, *Doe v. University of Michigan: A Somewhat Personal View*, 37 WAYNE L. REV. 1313 (1991).

<sup>45</sup> *See, e.g., infra* note 47.

<sup>46</sup> *See Doe*, 721 F. Supp. at 867–68.

<sup>47</sup> For a discussion of recent controversies on the Yale campus, *see, e.g.,* David Cole, *The Trouble at Yale*, N.Y. REV. OF BOOKS (Jan. 14, 2016), <http://www.nybooks.com/articles/2016/01/14/the-trouble-at-yale/>.



But here's the point. Although Judge Cohn found the policy unconstitutional and had a variety of grievances with the institution,<sup>48</sup> his opinion reflects genuine respect for the University's concerns and for the complexity of the problem before it.<sup>49</sup> Indeed, the first sentence in *Doe* reads: "It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values."<sup>50</sup> In the same spirit, the opinion concludes by recognizing the University's "obligation to ensure equal educational opportunities for all of its students" and expressing sympathy with that goal.<sup>51</sup> Indeed, the lawyer who represented Doe—Professor Robert Sedler of the Wayne Law School—voiced similar views in a law review article that he published about the case.<sup>52</sup>

So look at where *Doe* left us twenty-five years ago. It acknowledged the value of both free expression *and* equality.<sup>53</sup> It recognized that collisions between these two values were inevitable.<sup>54</sup> It understood that mediating the conflicts between these values was hideously complicated.<sup>55</sup> It grasped that people of good faith would make mistakes in trying to work through those tensions.<sup>56</sup> *Doe* was, in many respects, the perfect starting point for a civil, informed, respectful, productive dialogue, all toward the end of dramatically improved campus environments.

Well, so much for that.

## II. WHERE ARE WE NOW?

*Doe* arose from concerns about a racially hostile campus environment.<sup>57</sup> Some data strongly suggests that the situation nationally

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<sup>48</sup> See *Doe*, 721 F. Supp. at 867–69.

<sup>49</sup> See *id.* at 853, 868.

<sup>50</sup> *Id.* at 853.

<sup>51</sup> *Id.* at 868.

<sup>52</sup> See Robert A. Sedler, *Doe v. University of Michigan and Campus Bans on "Racist Speech": The View from Within*, 37 WAYNE L. REV. 1325, 1326, 1329, 1336–42 (1991).

<sup>53</sup> See *Doe*, 721 F. Supp. at 853.

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *id.* at 868.

<sup>57</sup> See *supra* notes 5–8.

has gotten considerably worse.<sup>58</sup> The number of race-based harassment incidents reported to the Department of Education rose dramatically from 2009 to 2014 and studies estimate that only about 13% of such incidents are reported to campus authorities.<sup>59</sup> Furthermore, studies suggest that the problem has grown worse as affirmative action policies have become less available as a tool, leading to stagnation or even declines in campus diversity.<sup>60</sup> There is some irony in this because one of the suggestions offered by Professor Sedler in response to the *Doe* decision was that universities should focus less on speech codes and more on using affirmative action policies to admit racially diverse student bodies.<sup>61</sup>

In any event, there is certainly an increased *awareness* of such incidents. Social media platforms have facilitated constant and widespread communication about these experiences. Consider, for example, the #BBUM movement at the University of Michigan, where Black students used Twitter to describe the challenges they faced on campus—a movement that drew national attention.<sup>62</sup>

This increased consciousness also has to do with a shifting understanding of how harassment, discrimination, and marginalization happen. For example, we have a better sense now than we did in

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<sup>58</sup> See Brandon Griggs, *Do U.S. Colleges Have a Race Problem?*, CNN (Nov. 10, 2015, 8:38 PM), <http://www.cnn.com/2015/11/10/us/racism-college-campuses-protests-missouri/>.

<sup>59</sup> See *id.*

<sup>60</sup> See, e.g., Press Release, Higher Educ. Res. Inst., Underrepresented Students Experience More Racial Discrimination at Low-Diversity Institutions, According to Study, <https://heri.ucla.edu/briefs/urmbriefpressrelease.pdf> (last visited Jan. 26, 2017) (“Underrepresented college students at low-diversity institutions reported more incidents of stereotyping, discrimination and harassment on campus . . . [T]he survey shows that more students reveal these experiences when asked about specific overt and subtle forms of discrimination on campus.”).

<sup>61</sup> See Sedler, *supra* note 52, at 1330 (“In regard to minority students, the university can best promote equality of educational opportunity by making a strong commitment to ‘affirmative action,’ thereby enrolling a ‘critical mass’ of minority students, and by hiring a reasonable number of minority faculty and administrators.”).

<sup>62</sup> See Rhonesha Byng, *#BBUM Hashtag Sparks Dialogue About Diversity at the University of Michigan*, HUFFINGTON POST (Nov. 20, 2013, 3:44 PM), [http://www.huffingtonpost.com/2013/11/20/bbum-university-of-michigan-black-students\\_n\\_4310790.html](http://www.huffingtonpost.com/2013/11/20/bbum-university-of-michigan-black-students_n_4310790.html).

1989 of how even inadvertent “micro-aggressions” can disrupt a student’s learning experience.<sup>63</sup> In 1987, we knew that the Ku Klux Klan uniform hung from the dormitory window at the University of Michigan was a racist act,<sup>64</sup> just as in 2015 we knew that the noose strung around the statue of James Meredith at the University of Mississippi was a racist act.<sup>65</sup> But today we also have a much more refined view of the scope of the problem, and it turns out to be even more daunting than we understood twenty-five years ago.

Nor are these dynamics exclusive to racial issues. The most recent data regarding the number of sexual assaults on our nation’s campuses are shocking.<sup>66</sup> In 1989, the concept of a “campus date rape” was still relatively new.<sup>67</sup> Twenty-five years later, we have a much better understanding of the extent of gender-based victimization. Around the issue of trigger warnings, we are engaged in a debate about how to deal pedagogically with the statistical reality that one or more of our students may still be suffering under the trauma of such an experience.<sup>68</sup>

Our universities have serious work to do and we need to have serious conversations to get it done. But serious, informed conversations on these topics are hard to come by. The groups and individ-

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<sup>63</sup> See Alexandra Svokos, *College Campuses Are Full of Subtle Racism and Sexism*, *Study Says*, HUFFINGTON POST (Jan. 12, 2015, 5:22 PM), [http://www.huffingtonpost.com/2015/01/12/microaggressions-college-racism-sexism\\_n\\_6457106.html](http://www.huffingtonpost.com/2015/01/12/microaggressions-college-racism-sexism_n_6457106.html).

<sup>64</sup> See *Doe v. University of Michigan*, 721 F. Supp. 852, 854 (E.D. Mich. 1989).

<sup>65</sup> Susan Svrlgva, *Former Ole Miss Student Pleads Guilty to Hanging Noose Around Statue Honoring the First Black Student*, WASH. POST (Mar. 24, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/03/24/former-ole-miss-student-pleads-guilty-to-hanging-noose-around-statue-honoring-the-first-black-student/#comments>.

<sup>66</sup> See generally, Alyssa Peterson & Ivy Yan, *Statistics on Gender-Based Violence*, KNOW YOUR IX, <http://knowyourix.org/statistics/> (last visited Jan. 16, 2017).

<sup>67</sup> See Deirdre Carmody, *Increasing Rapes on Campus Spur Colleges to Fight Back*, N.Y. TIMES (Jan. 1, 1989), <http://www.nytimes.com/1989/01/01/us/increasing-rapes-on-campus-spur-colleges-to-fight-back.html?pagewanted=all>.

<sup>68</sup> See Jesse Singal, *Is There Any Evidence Trigger Warnings Are Actual a Big Deal*, N.Y. MAG. (Dec. 6, 2015, 8:00 PM), <http://nymag.com/scienceofus/2015/12/are-trigger-warnings-actually-widespread-at-all.html>.

uals who raise these issues are belittled as wimps, weaklings, whiners, and snowflakes. Calls for greater awareness, sensitivity, and action are met with accusations of “political correctness,” a phrase that had not yet emerged into full use in 1989 and one that I would happily send into eternal perdition, being, as it is, a lazy-minded label that people substitute for an argument. We have come a long way from the balance and civility of *Doe*, and it is to nowhere good.

Furthermore, all too often *no* conversation about these topics can be conducted because discourse is shut down—in the name of free speech. A concern is raised about how to deal with speech that offends someone to the point of disrupting her ability to learn. We are told, however, that we cannot even air the concern and try to figure out how to address it because freedom of speech stands in the way. The First Amendment, the grand midwife of ideas, is now routinely used to abort them.

Of course, those on the other side of the issue have not served the conversation well, either. Social media platforms have played a role here, too, because they allow for the airing of grievances that are serious, thoughtful, and legitimate, but also for those that are petty, self-absorbed, or contrived. Those who “tweet” before they think may make themselves into easy objects of parody and discover they have become inadvertent co-conspirators in the trivialization of their concerns.

And we see on this side, too, the paradoxical impulse to silence people in the service of the First Amendment. When you think that someone has no right to photograph your protest because of freedom of speech, you are confused.<sup>69</sup> When you think freedom of speech gives you the right to physically block them from doing so, you are deeply confused.<sup>70</sup> When you think freedom of speech gives you the right to call for “muscle” to intervene, you are dangerously confused.<sup>71</sup>

Those who seek to restrict speech often fall subject to a pseudo-Newtonian principle that I call “Niehoff’s First Law of the First

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<sup>69</sup> See, e.g., Austin Huguélet & Daniel Victor, ‘I Need Some Muscle’: Missouri Activists Block Journalist, N.Y. TIMES (Nov. 9, 2015), <https://www.nytimes.com/2015/11/10/us/university-missouri-protesters-block-journalists-press-freedom.html>.

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

Amendment”: “For every action, there is an unequal and opposite overreaction.” We as human beings tend to think that big problems call for even bigger solutions. So *of course* the policy at issue in *Doe* turned out to be too broad and too vague—as do many such policies. After all, it is counter-intuitive to think you could address a significant and complicated problem in any other way. But that “other way”—that narrow and cautious way—is precisely how First Amendment jurisprudence requires us to think about our policy responses.

Perhaps you can see why I am skeptical that things will get better anytime soon. Both sides of the debate have settled into certain framings, narratives, and labels—and they appear to have become perversely comfortable there. Of course, a highly effective mechanism for making comfortable people *uncomfortable* does exist.

It is called freedom of speech.

But, as I say, whichever side you are on, the other side does not get to use it.