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## Article

# Academic Freedom To Deny the Truth: Beyond the Holocaust

Robert M. O'Neil<sup>†</sup>

### INTRODUCTION

Soon after the 2016 election, then-President-elect Donald Trump tapped Myron Ebell to lead the transition team at the Environmental Protection Agency (EPA), thus inviting outrage and indignation from the academic and scientific community. Although Ebell was described in media reports as “not a scientist,” he was widely known as an outspoken skeptic on issues of global warming and climate change.<sup>1</sup> Having held myriad roles in conservative organizations—most notably at the Competitive Enterprise Institute (a libertarian advocacy group<sup>2</sup>)—Ebell quickly became a target of criticism among reputable scientists and scholars who have expressed mounting alarm about rising temperatures and other harms posed by climate change.<sup>3</sup>

Despite nearly universal “scientific consensus that human activity is fueling unprecedented global warming,”<sup>4</sup> Ebell now

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1. Brady Dennis, *Trump Taps Climate-Change Skeptic To Oversee EPA Transition*, WASH. POST (Nov. 11, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/11/11/meet-the-man-trump-is-relying-on-to-unravel-obamas-environmental-legacy>.

2. Juliet Eilperin, *Anatomy of a Washington Dinner: Who Funds the Competitive Enterprise Institute?*, WASH. POST (June 20, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/06/20/anatomy-of-a-washington-dinner-who-funds-the-competitive-enterprise-institute>.

3. See Robin Bravender, *Trump Picks Top Climate Skeptic To Lead EPA Transition*, SCI. AM. (Sept. 26, 2016), <https://www.scientificamerican.com/article/trump-picks-top-climate-skeptic-to-lead-epa-transition>.

4. Dennis, *supra* note 1.

exemplifies a small but notable group of widely quoted and publicized “deniers.” That group includes, for example, a handful of widely discredited academics who consistently deny the existence of events such as the Holocaust and mass shootings. Such figures can incite controversy within the scholarly community over the scope of protection afforded by the concept of academic freedom.

Ebell undoubtedly merits the protection of academic freedom as a graduate of the London School of Economics and a graduate of the University of California at San Diego and a student of Cambridge University in the U.K.<sup>5</sup> Given Ebell’s credentials, one might assume that his public and prominent espousal of wholly discredited views about global warming and climate change might nevertheless warrant some deference due to his academic expertise. Yet, that is by no means a foregone conclusion.

Indeed, while some skeptics may merit respect within their established academic disciplines, they are permitted to proclaim what would be derided as “nonsense” in other disciplines. To cite one notable example, an electrical engineering professor who embraces Holocaust denial outside the classroom is protected by academic freedom so long as he never imposes his neo-Nazi views and values upon his students.<sup>6</sup> The concept of academic freedom is so widely accepted and well established that it may even subvert a commitment to truth, and this freedom cannot be casually dismissed despite a speaker’s dissonance with scientific precept.<sup>7</sup> So it is with then-President-elect Trump’s choice to lead the EPA transition, despite the nearly universal disdain for Ebell’s bizarre views on environmental issues.

This Article surveys truth denial in academic spaces, examining both instances of denial and the varied reactions to it by academic administrations. It then highlights several critical distinctions between these incidents of truth denial and concludes with an examination of several other troubling academic freedom scenarios.

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5. See Michael Shnayerson, *A Convenient Untruth*, VANITY FAIR (May 2007), <http://www.vanityfair.com/news/2007/05/skeptic200705>.

6. See *infra* notes 43–44 and accompanying text.

7. See generally ROBERT O’NEIL, *ACADEMIC FREEDOM IN THE WIRED WORLD* 1–15 (2008) (discussing the wide reach of academic freedom).

## I. TWO EXAMPLES OF DENIAL

Among the broad cast of outspoken college and university professors, the strangest case of all may be that of Florida Atlantic University faculty member James Tracy. In addition to achieving tenure as a professor of communications at the Boca Raton campus, Tracy also once served as the president of the university's local faculty union.<sup>8</sup> But then the professor's promising career veered off in a starkly different direction. According to Florida Atlantic University, it was Tracy's failure to timely report his outside work as required by university policy that would ultimately lead to his dismissal, and which prompted Tracy to file a lawsuit against the university as well as the faculty union which allegedly abandoned him in his hour of need.<sup>9</sup> Just days after the brutal slaying of twenty children and six adults at a Newtown, Connecticut elementary school<sup>10</sup> in December 2012, Tracy began posting bizarre claims on his blog that would earn him the singular title of "Sandy Hook Denier."<sup>11</sup> Despite the incontrovertible proof of these deaths, Tracy claimed that tragic loss of life never occurred.<sup>12</sup> Although police, parents, and community members could all readily attest to the lost lives, Tracy inexplicably continued to assert the contrary. Factually, of course, there was never the slightest doubt that twenty-year-old Adam Lanza savagely killed twenty elementary students in the Newtown school, after killing his mother earlier in the day.

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8. See Richard Pérez-Peña, *Newtown Conspiracy Theorist Sues University That Fired Him*, N.Y. TIMES (Apr. 26, 2016), <https://www.nytimes.com/2016/04/27/us/sandy-hook-newtown-conspiracy-theorist-sues-university.html>.

9. See Colleen Flaherty, *The Alleged Conspiracy Grows: James Tracy, Newtown-Shooting Denier and Ex-Professor at Florida Atlantic, Alleges in a Federal Suit That His Faculty Union Conspired with the Institution To Get Rid of Him*, INSIDE HIGHER ED (Apr. 27, 2016), <https://www.insidehighered.com/news/2016/04/27/sandy-hook-denier-alleges-union-conspired-florida-atlantic-u-fire-him>.

10. See Peter Schmidt, *Florida Atlantic U. Disciplines Professor Who Questioned Accounts of Newtown Shootings*, CHRON. HIGHER EDUC. (Apr. 11, 2013), <http://www.chronicle.com/article/florida-atlantic-u/138489>.

11. See, e.g., *Report: Sandy Hook Denier Launches First Amendment Lawsuit*, CBS NEWS (Apr. 26, 2016), <http://www.cbsnews.com/news/report-sandy-hook-denier-james-tracy-sues-fau-for-getting-fired>.

12. James F. Tracy, *The Sandy Hook Massacre: Unanswered Questions and Missing Information*, MEMORY HOLE BLOG (Dec. 24, 2012), <http://memoryholeblog.com/2012/12/24/the-sandy-hook-massacre-unanswered-questions-and-missing-information>.

Despite the truth, Tracy remained skeptical “whether the Sandy Hook shooting ever took place—at least in the way law enforcement authorities and the nation’s news media have described.”<sup>13</sup> Specifically, immediately after the tragedy he suggested that “evidence of multiple gunmen had been suppressed, and that parents seen outside the school might have been trained actors working under the direction of state and federal authorities,” all—according to Tracy—part of an elaborate plot to buttress the Obama administration’s case for stricter gun control.<sup>14</sup>

The Sandy Hook denial was in fact only one of Tracy’s many online assaults. Professor Tracy has made several similarly curious allegations. Specifically, he made comparable claims about events such as the mass shootings in an Aurora, Colorado movie theater in July 2012 and at the Washington Navy Yard in 2013, as well as the Boston Marathon bombing in 2013 and the San Bernardino, California shooting in 2015.<sup>15</sup> Tracy “suggested that the Obama administration had staged them” in order to further its own gun control agenda.<sup>16</sup>

Soon after Tracy’s recent postings, Sandy Hook parents began to demand Tracy’s dismissal from the Florida Atlantic University faculty. In late 2015, the parents of Noah Pozner (a six-year-old elementary student killed in Newtown) crafted a poignant op-ed in the *Sun Sentinel*, a South Florida newspaper. Therein they detailed Tracy’s demands for them to provide specific proof of Noah’s existence and tragic demise.<sup>17</sup> Eventually, in an attempt to halt the harassment they frequently suffered—including death threats in the days following Tracy’s dismissal—Leonard Pozner “posted his son’s birth and death certificates online, along with the medical examiner’s report.”<sup>18</sup>

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13. *Id.*

14. Pérez-Peña, *supra* note 8.

15. *Id.*

16. *Id.*

17. Lenny Pozner & Veronique Pozner, *Sandy Hook Massacre 3rd Anniversary: Two Parents Target FAU Conspiracy Theorist*, SUN SENTINEL (Dec. 10, 2015), <http://www.sun-sentinel.com/opinion/commentary/sfl-on-sandy-hook-anniversary-two-parents-target-fau-professor-who-taunts-family-victims-20151210-story.html>.

18. *Sandy Hook Family Haunted by Doubters*, SUN SENTINEL (Jan. 18, 2016), <http://www.sun-sentinel.com/opinion/editorials/fl-editorial-tracy-gs0115-20160118-story.html>.

Professor Tracy, they said, “personally sought to cause our family pain and anguish.”<sup>19</sup> Other families widely shared similar concerns in print and on social media.<sup>20</sup> Within a week, the *Sun Sentinel* editorial board wrote a piece condemning Tracy’s behavior, calling for his termination, and advocating for “a vigorous debate about the pros and cons of tenure.”<sup>21</sup>

Meanwhile, the Florida Atlantic University administration clarified its previously ambiguous position on Tracy’s status, although it did so not by citing Tracy’s errant blog posting but rather by focusing on wholly procedural grounds. In 2013, the university had disciplined Tracy, “saying that he had not taken enough care to distance [his] views from the university,” which drew some in academic and free-speech groups to his defense.<sup>22</sup> The letter of reprimand admonished Tracy, “[y]ou must stop dragging [the university] into your personal endeavors.”<sup>23</sup> Then in 2015, Tracy protested a university policy requiring that he submit paperwork listing his outside work, given that it was unpaid and did not reflect his academic expertise.<sup>24</sup> The university demanded that Tracy submit a form describing his outside (albeit uncompensated) employment and imposed a deadline to file three-year’s worth of such forms.<sup>25</sup> Tracy’s faculty union—of which Tracy was a former president—strongly advised him to comply with the disclosure rule and then later challenge the policy.<sup>26</sup>

Tracy heeded the union’s counsel and filed the paperwork but missed the deadline by a day.<sup>27</sup> Presumably because of this tardy filing, Florida Atlantic University went on to dismiss him in January 2016, citing only the disclosure and paperwork issues.<sup>28</sup> The university administration then announced in a

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19. Pozner & Pozner, *supra* note 17.

20. See, e.g., Rajini Vaidyanathan, *Sandy Hook: Victim’s Family Seeks Trademark Protection*, BBC NEWS (Mar. 10, 2013), <http://www.bbc.com/news/magazine-31669352>.

21. *Tenure Be Damned, Professor James Tracy Embarrasses FAU*, SUN SENTINEL (Dec. 17, 2015), <http://www.sun-sentinel.com/opinion/editorials/fl-editorial-tracy-gs1218-20151217-story.html>.

22. Pérez-Peña, *supra* note 8.

23. Schmidt, *supra* note 10.

24. See Pérez-Peña, *supra* note 8.

25. See *id.*

26. See *id.*

27. See *id.*

28. See Lizette Alvarez, *Florida Professor Who Cast Doubt on Mass Shootings Is Fired*, N.Y. TIMES (Jan. 6, 2016), <http://www.nytimes.com/2016/01/07/>

press release that “[a]lternative instructors will be assigned” to cover Tracy’s classes.<sup>29</sup>

By the spring of 2016, matters became even more complex. Tracy’s attorney at the Florida Civil Rights Coalition filed a suit against both Florida Atlantic University and the faculty union.<sup>30</sup> A forty-nine-page complaint claimed both abridgement of his free speech by the university and joined the union’s current leadership to the suit not only for failing adequately to support his cause, but for actively assisting the university in his removal.<sup>31</sup> Tracy’s legal team insisted that he had consistently added a disclaimer to his blog, where he “freely shares with the public his independent research and analysis on current events.”<sup>32</sup> Apparently in hopes of reinforcing the mandated detachment between the blog and his faculty position, Tracy also added that his “independent publications did not reflect the views or opinions of Florida Atlantic University.”<sup>33</sup>

The complaint—filed in federal district court in Miami—developed at length the claims that Tracy’s academic freedom and free expression had been directly abridged by the dismissal—in violation of principles espoused by the American Association of University Professors (AAUP) and other faculty organizations. Through his attorneys, Tracy argued that his dismissal violated his First Amendment rights as a professor in many ways:

Professor Tracy’s academic freedom and constitutionally protected speech included reporting about the incomplete national media coverage of the Newtown incident and how it has and continues to be used by politicians, legislators, lobbyists and others to misappropriate massive amounts of public tax dollars and charitable donations from sympathizers and unsuspecting Americans, and to promote and install irrational and unconstitutional reforms upon the American public.<sup>34</sup>

The complaint elaborated the alleged basis for Florida Atlantic University’s allegedly unlawful termination, as well as the required submission of the “Outside Activities” form and

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us/florida-professor-who-cast-doubt-on-mass-shootings-is-fired.html.

29. *Statement Regarding James Tracy*, FLA. ATLANTIC U. (Jan. 5, 2016), <http://www.fau.edu/newsdesk/files/statement-regarding-james-tracy.pdf>.

30. Complaint at 1, *Tracy v. Fla. Atl. Univ.*, No. 9:16-cv-80655-RLR (S.D. Fla. Apr. 25, 2016).

31. *Id.* at 2.

32. *Id.* at 11 (identifying the disclaimer).

33. *Id.* at 12.

34. *Id.* at 13.

the claimed conspiracy among the current union leadership.<sup>35</sup> Close observers of the pending litigation could hardly miss so cogent a—if novel—constitutional claim.<sup>36</sup> Academic freedom (especially that of a scholar at a publicly supported campus) clearly encompasses not only the right to be wrong, but also the right to espouse publicly such utter nonsense as Sandy Hook denial—so long as such views were not imposed in the classroom by a professor behind the podium. Mercifully, few academics ever espouse such misleading and blatantly erroneous views, but in cases such as that of James Tracy, they remain at liberty to do so.<sup>37</sup>

Along with the lawsuit that Tracy's lawyers filed in Miami, Tracy predictably engendered support for his cause from two other highly respected quarters. The American Association of University Professors (AAUP), a consistent and unwavering champion of academic freedom and free inquiry, sent a public letter to Florida Atlantic University officials seeking rescission of the disciplinary action. The letter argued that such a sanction set a precedent “chill[ing] the spirited exchange of ideas—however unpopular, offensive, or controversial—that the academic community has a special responsibility to protect.”<sup>38</sup>

Meanwhile, support for Tracy came from another welcome source.<sup>39</sup> The Foundation for Individual Rights in Education (FIRE) sent a similar letter to Florida Atlantic University asking that the disciplinary action be rescinded on academic freedom and free expression grounds. Both AAUP and FIRE

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35. *Id.*

36. The claim, though novel, recently withstood a motion to dismiss. Order Denying Defendants' Motion to Dismiss, *Tracy v. Fla. Atl. Univ.*, No. 9:16-cv-80655-RLR (S.D. Fla. Feb. 21, 2017). Both Defendants have now filed answers. Defendants Fla. Educ. Ass'n et al. Answer to Second Amended Complaint, *Tracy v. Fla. Atl. Univ.*, No. 9:16-cv-80655-RLR (S.D. Fla. Feb. 28, 2017); FAU Defendants' Answer and Affirmative Defs. to Plaintiff's Second Amended Complaint, *Tracy v. Fla. Atl. Univ.*, No. 9:16-cv-80655-RLR (S.D. Fla. Feb. 28, 2017).

37. Such questions as the alleged failure to submit required paperwork and the expected distancing of a faculty member from the views on his blog remained separate issues in the currently pending litigation.

38. Letter from Gregory F. Scholtz, Assoc. Sec'y & Dir., Dep't. of Acad. Freedom, Tenure, and Governance, Am. Ass'n of Univ. Professors, to Mary Jane Sanders, President, Fla. Atl. Univ. (Apr. 16, 2013), <https://www.aaup.org/news/aaups-letter-faus-president-saunders#.WlUeQrYrLGI>.

39. Letter from Will Creely, Dir. of Legal and Pub. Advocacy, Found. for Individual Rights in Educ., to Mary Jane Sanders, President, Fla. Atl. Univ. (Apr. 23, 2013), <http://memoryholeblog.com/2016/01/31/civil-rights-org-condemned-faus-discipline-of-prof-james-tracy-in-2013>.



properly avoided taking any position on the merits of the case, assuming instead an appropriate level of deference to a tenured professor despite patently outrageous public statements. Both groups also reminded colleagues and administrators that freedom of expression and academic freedom fully protect virtually all academic discourse, at least in publicly supported institutions.<sup>40</sup>

Despite the novelty of Sandy Hook denial, there has long existed an even more ominous and complex form of denial among university professors regarding the Holocaust. The most notable Holocaust denier has been Northwestern University electrical engineering professor Arthur Butz. Soon after achieving tenure in 1976, Butz began publishing works propounding his heretical view that during the 1930s and '40s some six million Jews, Gypsies, and others suffered inexplicable disease or took their own lives, despite the massive and unassailable historic truths of that international tragedy.<sup>41</sup> Such calumnies soon appeared most prominently in book form under Butz's name, entitled *The Hoax of the Twentieth Century*.<sup>42</sup>

Even when faced with the nearly unanimous disdain of his faculty colleagues, Professor Butz has continued to teach regular classes while still publicly disseminating his bizarre version of twentieth-century history.<sup>43</sup> Many were the demands both on and off campus for Butz's immediate dismissal.<sup>44</sup> Yet, no fewer than four consecutive Northwestern presidents have declined to initiate or impose any sanctions, much less initiating dismissal or termination.<sup>45</sup> Such remarkable impunity has persisted under two administratively imposed constraints: that Butz never mention Holocaust denial in his classroom or during student

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40. The district court denied Defendants' motion to dismiss, and the Defendants have filed answers. Order Denying Defendants' Motion to Dismiss, Tracy v. Fla. Atl. Univ., No. 9:16-cv-80655-RLR (S.D. Fla. Feb. 21, 2017). We are awaiting further developments in this case.

41. See ARTHUR R. BUTZ, *THE HOAX OF THE TWENTIETH CENTURY* 6–8 (1976) (arguing the Holocaust is the greatest hoax of the twentieth century and used to justify U.S. support of Israel).

42. *Id.*

43. See O'NEIL, *supra* note 7, at 175–77.

44. See *id.* at 176.

45. See *id.*; see also *The Presidents of Northwestern*, NW. U. ARCHIVES, (Apr. 3, 2017), <http://exhibits.library.northwestern.edu/archives/exhibits/presidents/index.html>.

discussions, and that he continue to adequately teach the subject matter of his assigned courses.<sup>46</sup>

Ironically, only one member of the Northwestern academic community seems to have ever incurred any sanction over Holocaust matters. A young adjunct instructor, Sheldon Epstein, who one day brought into the classroom copious Holocaust-affirming materials and placed them prominently at the back of the classroom as an invitation intended to engage undergraduate students.<sup>47</sup> When the engineering dean discovered this transgression, Epstein's appointment was dropped.<sup>48</sup> A curious Chicago reporter asked why Butz was permitted to continue teaching despite his visible off-campus heresy, while Epstein had been fired. The dean, obviously well prepared for such an inquiry, replied that if Butz errs by also addressing the Holocaust in an engineering class, "we would consider it grounds for bringing him up on charges for dismissal from the faculty."<sup>49</sup>

Northwestern's consistent deference was in fact quite remarkable given the public indignation over Butz's heretical views. President Henry Bienen, for example, repeatedly noted that Butz's statements reflected only his personal views and never those of the institution or its faculty.<sup>50</sup> Moreover, the administration repeatedly observed that "his reprehensible opinions on this issue are an embarrassment to Northwestern" while cautioning that "we cannot take action based on the content of what Butz says regarding the Holocaust—however odious it may be—without undermining the vital principle of intellectual freedom that all academic institutions serve to protect."<sup>51</sup>

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46. See O'NEIL *supra* note 7, at 175.

47. See *Defending Your Lies*, N.Y. TIMES (Feb. 2, 1997), <http://www.nytimes.com/1997/02/02/magazine/defending-your-lies.html> (telling the story of Sheldon Epstein's dismissal).

48. See *id.*

49. Denise K. Magner, *Northwestern U. Fires Adjunct Who Taught About Holocaust*, CHRON. HIGHER EDUC. (Jan. 17, 1997), <http://www.chronicle.com/article/Northwestern-U-Fires-Adjunct/77751> (explaining the firing of Sheldon Epstein).

50. See, e.g., Alan K. Cabbage, *Statement by Northwestern University President Henry S. Bienen Regarding Associate Professor Arthur Butz*, NW. U. (Feb. 6, 2006), <http://www.northwestern.edu/newscenter/stories/2006/02/bienen.html> ("Butz's opinions are his own and in no way represent the University.").

51. *Id.*

Among the many comments offered by media observers, one seems especially perceptive. *Chicago Tribune* columnist Steve Chapman opined at the height of the Butz controversy that people whose payments support Northwestern might well “think their money is being misused when it goes into the pockets of instructors like these.”<sup>52</sup> From a deeper base, however, Chapman added that:

[T]heir dollars are really going to a broader and entirely worthy purpose, namely open inquiry in the pursuit of truth. [Such outspoken professors] have reached crazy and offensive conclusions, but just as bad movies can heighten our appreciation for good ones, their errors can sharpen our perception of the truth.<sup>53</sup>

Chapman concluded his column with a pragmatic insight about the controversy:

Silencing them doesn't refute their arguments. You can't refute an argument without first hearing it. To remove them from teaching is to lend credence by suggesting we're afraid they may change minds. In fact, the best antidote to error is unbridled, vigorous and searching debate. When that sort of debate occurs, the truth has nothing to fear.<sup>54</sup>

Other eminently practical factors buttressed cautious reactions across the Evanston campus. Illustratively, the chair of Northwestern's German Department, Professor Peter Hayes, consistently urged uneasy colleagues not to “overreact” to Butz's latest tirade, because he clearly “loves the attention [since] this is how he publicizes his crazy views, and we should just treat them with the contempt they deserve.”<sup>55</sup> In a similarly pragmatic vein, a Northwestern student who had drafted an eloquent anti-Butz petition conceded wisely that no formal sanction would comport with the institutional commitment to academic freedom.<sup>56</sup> Instead, she quoted Professor Laurie Zoloth, stating, “[T]here's much that can be done in terms of taking moral and ethical stands against the lie.”<sup>57</sup> Northwest-

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52. Steve Chapman, *Antidote to Error Is Debate: Truth Emerges When Crazy Theories Are Refuted, Not Silenced*, CHI. TRIB. (July 30, 2006), [http://articles.chicagotribune.com/2006-07-30/news/0607300243\\_1\\_huey-long-academic-freedom-kevin-barrett](http://articles.chicagotribune.com/2006-07-30/news/0607300243_1_huey-long-academic-freedom-kevin-barrett).

53. *Id.*

54. *Id.*

55. Jasett Chatham, *Butz's Denial of Holocaust Irritates NU*, DAILY NW. (Feb. 6, 2006), <https://dailynorthwestern.com/2006/02/06/archive-manual/butzs-denial-of-holocaust-irritates-nu>.

56. Elizabeth Campbell, *Students, Faculty Oppose Butz with Petitions*, DAILY NW. (Feb. 16, 2006), <https://dailynorthwestern.com/2006/02/16/archive-manual/students-faculty-oppose-butz-with-petitions>.

57. *Id.*

ern student Zach Galin also added, “[W]e need to prove him wrong through long-lasting education and awareness.”<sup>58</sup>

Meanwhile, Northwestern’s administration was hardly alone in taking so firm and consistent a position in Butz’s defense. During an exchange on Fox News’ O’Reilly Factor, that program’s veteran host—a most unlikely champion of academic freedom—interviewed Emory University scholar Dr. Deborah Lipstadt, a forceful critic of Butz and other Holocaust deniers. When O’Reilly asked what institutional response she would deem most appropriate, Professor Lipstadt insisted that “the guy shouldn’t be allowed in the classroom” and he “shouldn’t be near the students.”<sup>59</sup> The Fox News anchor seemed troubled by this prospect, and immediately asked his guest, “Wouldn’t that be a violation of some kind of academic freedom?”<sup>60</sup>

O’Reilly then added his personal view that any such approach would be “punishing [Butz].”<sup>61</sup> The basis for that caution, in his words, bears close attention despite its informality: “You [Lipstadt] teach at a university and you know what a university is. That it’s a place where all views, even abhorrent views, are tolerated for the sake of freedom of expression. You don’t want to inhibit anybody.”<sup>62</sup> While such an exchange might seem a bit less balanced were the protagonists reversed, there seems little doubt that O’Reilly carried the day on this occasion.

Lipstadt and other critics who share her disdain clearly marshal an impressive and cogent case. For starters, persistent denial of the truth of the Holocaust is demonstrably false in every dimension where truth invariably and properly prevails. Moreover, such blatant denial of the truth is most hurtful to the millions of Holocaust victims and their families. Indeed, as Lipstadt and like-minded historians argue, if tolerance for Holocaust deniers continues, it “suggests that if correctly cast and properly camouflaged, a wide range of attacks on truth and history have a good chance of finding a foothold among coming generations.”<sup>63</sup> And as memories of the twentieth century’s horrors continue to fade, the potential risks of complacency are only likely to be compounded as right-wing ideologies in Austria

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58. *Id.*

59. O’NEIL, *supra* note 7, at 2.

60. *Id.*

61. *Id.* at 3.

62. *Id.*

63. DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY 208 (1993).

and elsewhere find renewed acceptance and currency. Corrective efforts and countervailing claims are likely to meet growing resistance as the vivid memories of prior generations recede.

## II. SEVERAL CRITICAL DISTINCTIONS

Several related distinctions deserve elaboration while we await Professor Butz's retirement from Northwestern's engineering faculty. First, a basic contrast invites attention between, on one hand, publicly supported institutions, like Florida Atlantic University and, on the other hand, private or independent institutions like Northwestern University or the University of Chicago. Quite simply, when a state university like Illinois, Wisconsin or Michigan receives the bulk of its funding from the government, its actions are fully subject to the constitutional constraints of the First Amendment and comparable state constitutional and/or statutory safeguards.<sup>64</sup>

While in fact a small group of private campuses (notably Ivy League schools, Stanford, and Johns Hopkins) may actually outdo their public peers in receipt of federal research subvention,<sup>65</sup> they are often regarded as quasi-public for constitutional purposes on the basis of their comparability to major independent private campuses.<sup>66</sup> Some hybrid institutions do in fact house both public and private programs side by side.<sup>67</sup> The basic constitutional guarantees of free speech and press apply only in the public sector; nevertheless, virtually all private institutions do observe the safeguards of academic freedom and many even exceed what the First Amendment requires. But the

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64. See *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (recognizing that a public university possesses many characteristics of a public forum).

65. See Samuel Weigley & Alexander E.M. Hess, *Universities Getting the Most Government Money*, 24/7 WALL ST. (Apr. 25, 2013), <http://247wallst.com/special-report/2013/04/25/universities-getting-the-most-government-money> (stating that ten universities receive the most federal funds).

66. *Action of Private Institution of Higher Education as Constituting State Action, or Action Under Color of Law, for Purposes of Fourteenth Amendment and 42 U.S.C.A. § 1983*, 37 A.L.R. FED. 601 (1978) (explaining that the courts are likely to examine the extent to which the state controls the college financially or by regulation when determining whether a private university acts under color of state law).

67. See, e.g., *Cornell University*, FOUND. FOR INDIVIDUAL RTS. EDUC., <https://www.thefire.org/schools/cornell-university> (last visited Apr. 3, 2017) (describing Cornell University as one such "hybrid" institution).

distinction between what institutions protect under their own policies and what the Constitution demands remain crucial.<sup>68</sup>

Second, we should note that not all proponents of academic freedom are equally committed to an unfettered notion of free inquiry within the American academic community. Indeed, some scholars would focus attention on statements made or views publicly expressed within the speaker's or writer's assigned field of expertise or academic specialty.<sup>69</sup> While those who lack such expertise are typically free to speak or write as they wish—especially at publicly supported institutions—under a narrower focus they would be entitled to substantially lesser deference than those who express views within their recognized academic specialty. This crucial distinction has been the subject of recent Supreme Court litigation.<sup>70</sup>

Third, we should also recognize and differentiate the rapidly emerging role of social media such as Facebook, Twitter, and other non-print media modes of speech. As recently as a generation ago, speakers and writers relied solely on print, oral statements, and symbolic expressions like flag burning. The digital age has dramatically changed such communication in ways that are increasingly varied and complex. Indeed, until quite recently full First Amendment protection was confined to books, magazines, and newspapers; broadcasting, cable, and even motion pictures received less than full protection.<sup>71</sup> Not until 1997 did the Supreme Court recognize full constitutional protection for the Internet and the messages it conveys.<sup>72</sup> A se-

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68. As an example of the autonomy of the independent sector, Hampshire College in Massachusetts is one of several institutions that does not recognize faculty tenure—much less impose sanctions for invasion of tenure guarantees. See Andrew L. Yarrow, *The Troubled Faculty; Tenure: A Variety of Alternatives*, N.Y. TIMES, Aug. 18, 1985, at A39.

69. See, e.g., Enrique M. Fernando, *Academic Freedom as a Constitutional Right*, 52 PHIL. L.J. 289, 291 (1977) (“It is different where educators are concerned . . . . In their field of specialization, they are expected to speak with detachment, objectivity, and expertise.”).

70. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 417–26 (2006) (holding that the First Amendment protections for citizens do not extend to public employees making statements in connection with their official duties).

71. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 727 (1978) (“Of all forms of communication, broadcasting has the most limited First Amendment protection.”).

72. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (“[T]he growth of the Internet has been and continues to be phenomenal. . . . The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”).

ries of later rulings has continually amplified and complicated the world of electronic and digital expression.<sup>73</sup>

The classic example of the burgeoning contrast between and among media comes from Professor Butz himself. He has, of course, scrupulously observed the two constraints that Northwestern University's administration imposed on him for decades. Myriad copies of *The Hoax of the Twentieth Century* have appeared in print, being widely sold even in the Evanston campus bookstore. But in the mid 1990s Butz went online, seeking new outlets for his Holocaust denial. Specifically, he created his own website and later a blog through which to enhance the force of his spiteful rhetoric.<sup>74</sup>

It was unlikely that such a shift from print to digital media would long go unnoticed by his critics, and inevitably a new round of controversy ensued. Perceptive critics like the Simon Wiesenthal Center—a vigilant watchdog of neo-Nazi activity and propaganda—promptly took note of Butz's online presence and cried foul.<sup>75</sup> Mark Weitzman, the director of the Center's Task Force Against Hate, charged that because the offending webpage appeared under Northwestern's digital auspices, "[i]n effect, [Butz is] using the university as a shield for hyping anti-Semitism and Holocaust denial."<sup>76</sup> Weitzman was hardly alone in noting this contrast in medium. A *Chicago Tribune* editorial argued that, by allowing Butz to add a university-based webpage to his array of Holocaust-related outlets, Northwestern was "metaphorically[] giving Butz free stationery with NU's letterhead on it" and "[i]n effect, it also is paying for Butz . . . to make his material denying the Holocaust available to millions of Internet users around the world."<sup>77</sup>

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73. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 660–61 (2004) (upholding a preliminary injunction for the Child Online Protection Act because the statute "likely violates the First Amendment"); *United States v. Am. Library Ass'n*, 539 U.S. 194, 214 (2003) (holding that a statute requiring "filtering provisions" for Internet terminals in public libraries did not violate patrons' First Amendment rights).

74. See ANTI-DEFAMATION LEAGUE, *HIGH-TECH HATE: EXTREMIST USE OF THE INTERNET* 14 (1997) (explaining that Butz created a website on the Northwestern Server in 1996).

75. See David L. Wilson, *Northwestern U. Urged To Bar Web Page Denying Holocaust*, *CHRON. HIGHER EDUC.*, May 24, 1996, at A21.

76. *Id.*

77. Pamela Cytrynbaum, *Web Site Entangles NU in Free-Speech Debate*, *CHI. TRIB.*, Dec. 29, 1996, at 1.

Once again, however, administrators on the Evanston campus were undeterred by such appeals. President Henry Bienen characterized Butz's views as a "contemptible insult to all who experienced the horrors of that time and to their families."<sup>78</sup> But he saw no occasion to vary Northwestern's firm policy on Internet access generally—as the university's computer rules stated, "[t]he network is a free and open forum for the expression of ideas, including viewpoints that are strange, unorthodox, or unpopular."<sup>79</sup>

Northwestern's online policy does, however, include a disclaimer: "Northwestern . . . does not review, edit, or endorse all items accessible from these pages. . . . [O]pinions expressed in personal or non-departmental home pages should be construed as those of its author, who is responsible for the information contained therein."<sup>80</sup> A report issued by the Anti-Defamation League (ADL) on extremist use of the Internet asked rhetorically whether such new digital media did not demand more restrictive policies: "What is lost and what is gained," inquired ADL, "when an Arthur Butz is allowed to publish his false, ideologically driven assertions with what appears to be the imprimatur of a respected institution of higher learning?"<sup>81</sup>

### III. POSITING A DIFFERENT SCENARIO

Finally, we should address a quite different, but especially intriguing question about Professor Butz, Holocaust denial, and academic freedom. How differently would his spiteful view of the Holocaust be treated if, instead of electrical engineering, his academic specialty were Modern European History or geography? Superficially, injecting such hateful rhetoric into a diverse academic community should be treated no better—and surely no worse—than the actual and abhorrent views of Professor Butz. The total disregard for factual and truthful accounts of Nazi extermination, for example, would seem equally untenable under such conditions.

As it turns out, a different presumption prevails within the academic community. The AAUP and other standard-setting faculty groups have long recognized that professors "are enti-

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78. ANTI-DEFAMATION LEAGUE, *supra* note 74.

79. Wilson, *supra* note 75.

80. *Disclaimer Regarding Web Content*, NW. U., <http://www.northwestern.edu/disclaimer.html> (last visited Apr. 3, 2017).

81. ANTI-DEFAMATION LEAGUE, *supra* note 74, at 15.



tled to freedom in the classroom in discussing their subject.”<sup>82</sup> However, there are limitations to this freedom. For example, an English scholar could proclaim that the Earth’s surface is manifestly flat. But, if that same person were instead an expert in geology, they would be held to a much higher standard—for a reason that lay observers might easily overlook. The AAUP has long posited that even tenured professors may be dismissed (albeit with full due process) when they demonstrate a clear lack of “fitness . . . in their professional capacities as teachers or researchers.”<sup>83</sup> While the full contours of “fitness” (or lack of it)—and thus the potential for dismissal or severance of a senior scholar—are varied and complex, this AAUP precept offers ample and fully accepted guidance to the academic community.<sup>84</sup> Thus a Holocaust-denying Modern European historian could claim no comparable degree of deference, and would (given due process and specific charges) be subject to the termination of even a tenured position on the basis of demonstrated incompetence.

So it is with regard to Professor Butz; his undoubted expertise in electrical engineering demands that he demonstrate the requisite degree of “fitness” to teach accepted principles of engineering. Yet in the field of twentieth-century European history—where he manifestly lacks such expertise—he may espouse and publicly declare manifestly erroneous views. At the same time, a Holocaust-denying Modern European historian merits no such comparable deference. The manifest inaccuracy of such views would be fully documented by all respected scholars; the claims would be fully recognized as erroneous within the academic community.

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82. *1940 Statement of Principles on Academic Freedom and Tenure*, AM. ASS’N U. PROFESSORS, <https://www.aaup.org/file/1940%20Statement.pdf> (last visited Apr. 3, 2017).

83. *Civility*, AM. ASS’N U. PROFESSORS, <https://www.aaup.org/issues/civility> (last visited Apr. 3, 2017).

84. *See* AM. ASS’N UNIV. PROFESSORS, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE 4 (7th ed. 2006) (“Adequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers.”).

IV. OTHER EQUALLY TROUBLING—IF DIFFERENT—  
ACADEMIC FREEDOM CASES

While Holocaust deniers like Butz may seem, in some respects, like trivial purveyors of sheer and utter “nonsense,” we now turn to the far more troubling case of Stanford Professor William Shockley. An internationally acclaimed Nobel laureate and an inventor of the transistor, he is widely lauded as the founder of Silicon Valley.<sup>85</sup> In his later years, however, Shockley became an outspoken proponent of eugenics. During a 1980 interview with *Playboy*, Shockley said “the major cause for American Negroes’ intellectual and social deficits is hereditary and racially genetic in origin and thus not remediable to a major degree by improvements in the environment.”<sup>86</sup>

Shockley also periodically proposed that women with IQs below 100 be paid to undergo voluntary sterilization.<sup>87</sup> Despite an abundance of honors reflecting his singular accomplishments in electrical engineering, by the end of his life he was “vilified, ridiculed,” and “completely estranged from all but his loyal wife.”<sup>88</sup> His children learned of his death only through obituaries in the national news media.<sup>89</sup> In retrospect, one might reflect on the dramatic and novel contrast between two different William Shockleys—the esteemed Nobel laureate and the sadly tarnished amateur geneticist.<sup>90</sup>

We may turn now to the relatively recent cases of two other controversial and outspoken university professors and the strikingly different treatment they received from their respective institutions. Soon after the terrorist attacks of September 11, 2001, Professor Ward Churchill of the University of Colorado posted a startling article on an obscure website. In the essay, he implicitly claimed that the victims of the World Trade Center bombing deserved their tragic fate since they labored in

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85. See Dawn Levy, *William Shockley, Still Controversial After All These Years*, STAN. NEWS SERV. (Oct. 22, 2002), <http://news.stanford.edu/pr/02/shockley1023.html>.

86. Edward J. Boyer, *Controversial Nobel Laureate Shockley Dies*, L.A. TIMES (Aug. 14, 1989), [http://articles.latimes.com/1989-08-14/news/mn-369\\_1-nobel-laureate-shockley](http://articles.latimes.com/1989-08-14/news/mn-369_1-nobel-laureate-shockley).

87. See *William Shockley*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/individual/william-shockley> (last visited Apr. 3, 2017).

88. *William Shockley*, PBS (1999), <http://www.pbs.org/transistor/album1/shockley/shockley3.html>.

89. *Id.*

90. See Boyer, *supra* note 86.

the financial services field.<sup>91</sup> They were, in Churchill's rhetoric, "little Eichmanns."<sup>92</sup> The hijackjers who drove two jets into the World Trade Center had, by contrast, "manifested the courage of their convictions."<sup>93</sup>

Indignation and outrage ensued. Colorado's governor, on learning of Churchill's posting, decreed his resignation—followed quickly by comparable demands from legislators and other officials.<sup>94</sup> Two University of Colorado Regents, however, urged caution, noting that Churchill held academic tenure and was thus entitled to broad protection of even the most outrageous and offensive rhetoric.<sup>95</sup> Despite the overwhelming demand for reprisal, the Boulder campus administration carefully heeded the Regents' caution. An extensive inquiry was promptly entrusted to a committee of senior scholars, which began at once to canvas Churchill's writings and statements.<sup>96</sup> Meanwhile, their outspoken colleague had voluntarily resigned his administrative post within the Ethnic Studies Department.<sup>97</sup>

After an elaborate review process, the faculty committee concluded that, despite the "[L]ittle Eichmanns" salvo and other postings, Churchill's statements fell clearly within the scope of his First Amendment freedoms.<sup>98</sup> In fact, as the campus's chief academic officer soon affirmed, Churchill's status deserved protection not only because of his academic freedom as a scholar and teacher but also as a public employee of a major publicly supported university.<sup>99</sup>

Never likely to pass up a chance to comment on current academic matters, Fox News' Bill O'Reilly promptly joined the debate. Once again he offered an unlikely view: "I don't think

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91. Ward Churchill, "Some People Push Back": *On the Justice of Roosting Chickens*, KERSPLEBEDEB (Sept. 12, 2001), <http://www.kersplebedeb.com/mystuff/s11/churchill.html>.

92. *Id.*

93. *Id.*

94. *Gov. Owens Letter Calls for Churchill To Step Down*, DENVER7 (Feb. 1, 2005), <http://www.thedenverchannel.com/news/gov-owens-letter-calls-for-churchill-to-step-down>.

95. See Robert O'Neil, *Limits of Freedom: The Ward Churchill Case*, 30 CHANGE 34, 37 (2006).

96. *Id.*

97. *Events Surrounding Colorado Professor Ward Churchill*, DENVER POST (July 25, 2007), <http://www.denverpost.com/2007/07/25/events-surrounding-colorado-professor-ward-churchill>.

98. *Id.* (mentioning protections of the Constitution, which under the circumstances, suggests First Amendment freedoms).

99. O'NEIL, *supra* note 7, at 27.

he should be fired,” adding that such a sanction “would send the wrong message to the rest of the world. America’s a strong enough country to put up with the likes of Professor Churchill. Punishing him further would just make him a martyr.”<sup>100</sup> O’Reilly then invited Churchill himself to join the dialogue, though the embattled teacher seems to have offered no comparably incendiary “Little Eichmann” comments on the air or elsewhere.<sup>101</sup>

Soon however, the embattled professor faced a more daunting and ultimately more ominous threat. A separate faculty group had been charged to examine closely the scope and quality of his published research.<sup>102</sup> The Boulder Campus Privilege and Tenure Committee initially imposed only a one-year suspension on Churchill because of his seemingly marginal research record.<sup>103</sup> But the university system’s president, former U.S. Senator Hank Brown, insisted on going further and urged the Regents to dismiss the errant professor.<sup>104</sup> “Professor Churchill,” wrote Brown, “is not qualified to hold a tenured position’ at Colorado,” adding that otherwise “the university could not maintain the integrity of its scholarly enterprise.”<sup>105</sup>

Evincing the volatility of the Churchill case, in no other recent faculty personnel matter has the academic community been so sharply divided. For example, the Foundation for Individual Rights in Education (FIRE) strongly supported the Boulder campus’s refusal to dismiss Churchill on academic freedom/free speech grounds.<sup>106</sup> Later, though, FIRE concluded

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100. Bill O’Reilly, *Hamilton College Folds*, FOX NEWS (Feb. 1, 2005), <http://www.foxnews.com/story/2005/02/02/hamilton-college-folds.html>.

101. See, e.g., Bill O’Reilly, *University of Colorado Professor Ward Churchill Speaks*, FOX NEWS (Feb. 2, 2005), <http://www.foxnews.com/transcript/2005/02/02/univ-colorado-professor-ward-churchill-speaks> (publishing a partial transcript of an interview with Professor Churchill on February 1, 2005).

102. *Events Surrounding Colorado Professor Ward Churchill*, *supra* note 97.

103. *University of Colorado President Recommends Firing Ward Churchill*, FOX NEWS (May 29, 2007), <http://www.foxnews.com/story/2007/05/29/university-colorado-president-recommends-firing-ward-churchill.html> (noting that Churchill was demoted and suspended without pay).

104. O’NEIL, *supra* note 7, at 84.

105. *Id.* (quoting Letter from Hank Brown, President, Univ. of Colo., to Patricia Hayes, Chair, Bd. of Regents of the Univ. of Colo. (May 25, 2007)).

106. Greg Lukianoff, *FIRE Letter to University of Colorado at Boulder Interim Chancellor Philip P. DiStefano*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Feb. 9, 2005), <https://www.thefire.org/fire-letter-to-university-of-colorado-at-boulder-interim-chancellor-philip-p-distefano-february-9-2005> (“From a legal standpoint, there can be little doubt that even Churchill’s most controversial

that, given extensive evidence of plagiarism which a different faculty committee had unearthed, “the [university’s] termination for academic fraud was constitutional.”<sup>107</sup>

Even more striking was the nearly unique contrast between two usually congenial faculty groups: the Colorado and national chapters of the AAUP. A formal report commissioned by the Colorado Conference of the AAUP reflected a highly critical view on the research misconduct-based dismissal by the Regents.<sup>108</sup> Yet the national AAUP at its annual meeting declined to follow its Colorado chapter’s imposition of censure on the administration and/or Board of Regents.<sup>109</sup> Any doubt about the visibility or the contentious nature of the Churchill saga should thus be put to rest.

Protracted litigation inevitably ensued. Soon after his dismissal, Churchill filed a lawsuit against the university, claiming unlawful termination.<sup>110</sup> In July 2009, a Denver jury found that Churchill had been fired unlawfully and awarded him \$1 in damages.<sup>111</sup> Nearly a year later the Colorado Court of Appeals sustained the trial court’s ruling,<sup>112</sup> as did the state Supreme Court in September 2012.<sup>113</sup> Finally, the U.S. Supreme Court declined on April 1, 2013, to hear the case.<sup>114</sup> A 2014 in-

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political statements are protected by the First Amendment.”).

107. *University of Colorado at Boulder: Investigation of Professor for Controversial Essay*, FOUND. FOR INDIVIDUAL RTS. EDUC., <https://www.thefire.org/cases/university-of-colorado-at-boulder-investigation-of-professor-for-controversial-essay> (last visited Apr. 3, 2017).

108. DON ERON ET AL., REPORT ON THE TERMINATION OF WARD CHURCHILL 121 (2011), <http://www.cu-aaup.org/wp-content/uploads/2013/05/Churchill-Report.pdf> (“The University of Colorado’s prosecution of Ward Churchill represents a betrayal of society on numerous levels.”).

109. See generally *AAUP 2011*, AM. ASS’N U. PROFESSORS, <http://www.aaupnet.org/events-a-conferences/annual-meeting/aaup-2011> (last visited Apr. 3, 2017).

110. *Churchill v. Univ. of Colo.*, No. 06-CV-11473, 2009 WL 2704509 (Colo. Dist. Ct. July 7, 2009), *aff’d*, 293 P.3d 16 (Colo. App. 2010), *aff’d on other grounds*, 285 P.3d 986 (Colo. 2012).

111. 293 P.3d at 24. However, the defendants argued after the jury verdict that the parties’ agreed-upon a stipulation that allows the defendant to take advantage of the doctrine of quasi-judicial immunity as a defense. The district judge granted the defendants quasi-judicial immunity. *Id.*

112. *Churchill v. Univ. of Colo.*, 293 P.3d 16, 24 (Colo. App. 2010) (“[T]he jury awarded Churchill \$0 in past economic damages and only \$1 in past economic loss.”), *aff’d on other grounds*, 285 P.3d 986 (Colo. 2012).

113. *Churchill v. Univ. of Colo.*, 285 P.3d 986 (Colo. 2012).

114. *Churchill v. Univ. of Colo.*, 133 S. Ct. 1724 (2013), *denying cert. to* 285 P.3d 986.

terview with Churchill included evidence that, after four decades in the northern plains region, he had relocated to Atlanta, stating that he planned to complete several pending book projects.<sup>115</sup>

Meanwhile, the bizarre case of Professor Steven Salaita stands in sharp contrast. An American of Palestinian ancestry, Salaita received his undergraduate education from Radford University and his doctorate in English from the University of Oklahoma.<sup>116</sup> After several years teaching at the University of Wisconsin at Whitewater, he joined the English faculty of Virginia Tech, where he received tenure and promotion to associate professor.<sup>117</sup> He focused on “immigration, American-ness, dislocation, cultural multiplicity, xenophobia and racialization.”<sup>118</sup> A *Los Angeles Times* account described him as a “respected scholar in American Indian studies and Israeli-Arab relations” as did other scholars within the discipline.<sup>119</sup>

In the spring of 2013, Salaita was invited to interview for a faculty position at the University of Illinois at Urbana-Champaign (UIUC).<sup>120</sup> While teaching at Virginia Tech he published an article which declared his opposition to the “Support Our Troops” slogan as evidence of “unthinking patriotism.”<sup>121</sup> Virginia Tech’s vice president for university relations, however, cautioned that Salaita’s views did not “remotely reflect the collective opinion of the greater university community”—a caution that evoked concern from forty faculty members who chastised the statement as “placing in doubt [the university’s] commit-

115. Joshua Frank, *In Search of Ward Churchill*, COUNTERPUNCH (Jan. 31, 2014), <http://www.counterpunch.org/2014/01/31/in-search-of-ward-churchill>.

116. John Foreman, *Salaita a Proficient Noisemaker These Days*, NEWS-GAZETTE (Oct. 18, 2015), <http://www.news-gazette.com/opinion/columns/2015-10-18/john-foreman-salaita-proficient-noisemaker-these-days.html>.

117. Christine Des Garennes & Julie Wurth, *Who Is Steven Salaita?*, NEWS-GAZETTE (Sept. 7, 2014), <http://www.news-gazette.com/news/local/2014-09-07/who-steven-salaita.html>.

118. *Id.* (quoting English Professor Virginia Fowler).

119. Michael Hiltzik, *Is US Academic Freedom a Casualty of the Israeli-Palestinian Debate?*, L.A. TIMES (Aug. 11, 2014), <http://www.latimes.com/business/hiltzik/la-fi-mh-us-academic-freedom-20140811-column.html>.

120. HENRY REICHMAN ET AL., ACADEMIC FREEDOM AND TENURE: THE UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN 6 (2015), [https://www.aaup.org/file/UIUC%20Report\\_0.pdf](https://www.aaup.org/file/UIUC%20Report_0.pdf).

121. Jennifer Kabbany, *Virginia Tech Professor Argues Against ‘Support Our Troops,’* COLLEGE FIX (Aug. 29, 2013), <http://www.thecollegefix.com/post/14441> (citing Steven Salaita, *No, Thanks: Stop Saying “Support the Troops,”* SALON (Aug. 25, 2013), [http://www.salon.com/2013/08/25/no\\_thanks\\_i\\_wont\\_support\\_the\\_troops/](http://www.salon.com/2013/08/25/no_thanks_i_wont_support_the_troops/)).

ment to academic freedom.”<sup>122</sup> Nonetheless, Virginia Tech expressed no doubt about the institution’s commitment to tenure.<sup>123</sup>

After the University of Illinois extended a seemingly unqualified offer of a tenured position, including a letter confirming this prospect (though noting that employment offers are not official or final until formally approved by the Board of Trustees) the process was apparently complete.<sup>124</sup> But the matter would remain in limbo for several contentious weeks, while the campus administration appeared to have second thoughts. Meanwhile, Chancellor Phyllis Wise was found to have exchanged emails with major donors to the university, who had disparaged Salaita’s views on the Middle East.<sup>125</sup> Accordingly, the Chancellor withdrew the seemingly firm offer to Salaita while the matter remained in limbo.<sup>126</sup> Having learned of the emails, University of Illinois officials in turn acted to terminate Chancellor Wise’s administrative appointment.<sup>127</sup>

Salaita immediately protested, insisting that despite the procedural confusion, the original conditional offer was in fact a legal offer of employment.<sup>128</sup> He added that the attempted with-

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122. Ananda Abeysekara et al., *Letter to the Editor: University’s Commitment to Academic Freedom in Doubt*, COLLEGIATE TIMES (Nov. 13, 2013), [http://www.collegiatetimes.com/opinion/letters\\_to\\_editor/letter-to-the-editor-university-s-commitment-to-academic-freedom/article\\_a502e4a0-3afa-5c84-8cd5-d46b4667661e.html](http://www.collegiatetimes.com/opinion/letters_to_editor/letter-to-the-editor-university-s-commitment-to-academic-freedom/article_a502e4a0-3afa-5c84-8cd5-d46b4667661e.html).

123. Tonia Moxley, *Former Virginia Tech Professor Steven Salaita Sues University of Illinois*, ROANOKE TIMES (Jan 29, 2015), [http://www.roanoke.com/news/education/higher\\_education/virginia\\_tech/former-virginia-tech-professor-steven-salaita-sues-university-of-illinois/article\\_3e903faf-8ce2-53a3-833a-9faee9fa747c.html](http://www.roanoke.com/news/education/higher_education/virginia_tech/former-virginia-tech-professor-steven-salaita-sues-university-of-illinois/article_3e903faf-8ce2-53a3-833a-9faee9fa747c.html) (suggesting that Virginia Tech did not punish Salaita because he chose to leave while he still had a tenured position).

124. REICHMAN ET AL., *supra* note 120 (noting that Chancellor Wise’s recommendation for tenure and the provost’s authorization occurred on September 26, 2013).

125. Joseph Erbentraut, *Donor Complaints May Have Prompted Controversial Professor To Lose University of Illinois Job*, HUFFINGTON POST (Sept. 5, 2014), [http://www.huffingtonpost.com/2014/09/05/steven-salaita-university-of-illinois-donors\\_n\\_5774032.html](http://www.huffingtonpost.com/2014/09/05/steven-salaita-university-of-illinois-donors_n_5774032.html).

126. REICHMAN ET AL., *supra* note 120, at 7 (“On August 1, Chancellor Wise . . . wrote to Professor Salaita informing him that the chancellor had decided not to submit the appointment to the board . . .”).

127. *Id.* at 8 (describing actions taken by Chancellor Wise, the Board of Trustees, the Hiring Policies and Procedures Review Committee, and the Committee of Academic Freedom and Tenure (CAFT)).

128. *Id.* (noting that Salaita sued the University of Illinois on January 29, 2015 after the board rejected the CAFT report and announced its decision as final on January 16, 2015); *see also* Jodi S. Cohen, *Prof Threatens Suit If U. of*

drawal of the offer infringed his academic freedom, and demanded that the university follow through on its original commitment.<sup>129</sup> With one Trustee dissenting, the governing board approved the rescission of the offer.<sup>130</sup> Meanwhile, no fewer than sixteen campus department chairs expressed their indignation at the manner in which the offer had been rescinded, though the board's action appeared to be final.<sup>131</sup>

In the spring of 2015, an extensive report by the AAUP's Committee on Academic Freedom and Tenure (CAFT) conveyed a sharply critical view of the case, faulting both process and substance.<sup>132</sup> At the ensuing AAUP Annual Meeting in June, this report presumably led directly to the censure of UIUC's administration.<sup>133</sup> Several months later, the university approved an \$875,000 settlement with Salaita, of which he received \$600,000 with attorneys' fees accounting for the balance of the settlement.<sup>134</sup> Salaita termed the settlement "a vindication" for himself and a "victory for academic freedom and the First Amendment."<sup>135</sup> Professor Salaita, anxious to move on, now holds the Edward W. Said Chair of American Studies at the American University of Beirut.

Coming full circle, one further and even subtler distinction invites closer attention. Actual "denial" of the Tracy and Butz variety should not be confused with even outrageous exaggeration—even though both novel forms of expression may well be comparably protected under the First Amendment. The manifestly false and misleading claims of the deniers were not simply extreme, excessive or exaggerated; they openly defied truth. The contrast with the exaggerators or extremists reflects a

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*I. Withholds Post: He Lost Job Offer After Inflammatory Tweets on Israel*, CHI. TRIB., Sept. 10, 2014, at 1 (noting that Salaita asked for his job back, which implies that he believes it was in fact a legal offer of employment).

129. Cohen, *supra* note 128 at 8 ("[T]he administration's actions threaten the principles of free speech, academic freedom, and critical thought . . .").

130. REICHMAN ET AL., *supra* note 120, at 8 (approving the rescission by a vote of eight to one).

131. *Id.* (noting that sixteen departments voted no confidence).

132. *See, e.g., id.* at 14 ("CAFT has described the chancellor's concern over Professor Salaita's classroom conduct as 'pure speculation.'").

133. John K. Wilson, *AAUP Censures University of Illinois and Three Other Institutions*, ACADEME BLOG (June 13, 2015), <https://academeblog.org/2015/06/13/aaup-censures-the-university-of-illinois-and-three-other-institutions>.

134. Jodi S. Cohen, *U. of I. Ends Case, Gives Prof \$600K: Instructor Sued After Losing Job Offer over His Anti-Israel Tweets*, CHI. TRIB., Nov. 13, 2015, at 1.

135. *Id.* at 9.



fundamental difference. One might first analyze the excessive rhetoric of Ward Churchill, including the “Little Eichmanns” essay—which all observers agreed could not properly be sanctioned despite its unwelcome effect. Clearly Churchill’s abusive exaggerations regarding workers at the World Trade Center fell within the scope of plausibility. Similarly, Steven Salaita’s extreme views about Middle East policy and especially the status of the Gaza Strip were clearly biased but also well within the range of permissible discourse. In both cases, stretching the truth or displaying extreme bias stands in sharp contrast to outright denial.

That leaves the Shockley case as the most troubling, if only because of the author’s eminence in engineering on one hand—in stark contrast to his shocking lack of expertise about race, intelligence and eugenics. Thus at least in view of the stark difference between Shockley as consummate scientist and Shockley as ignorant critic of the nexus between race and intelligence, his case differs dramatically. Whether his disdain for racial equality or advancement could properly be termed “denial” remains a puzzling issue because his unconscionable disparagement of African intelligence also differs sharply from “denial” of the Butz and Tracy variety.

#### CONCLUSION

Now that the Trump administration has embraced a classic “denier” in the person of Myron Ebell as (putative) EPA Administrator, we have come full circle. Historically, the persistent Holocaust deniers like Butz and Irving claim the most attention in the media. Yet the Ebell case now promises to claim a substantial share of credit in the coming years, if only because it rejects the nearly universal teachings of established environmental and climate science. Yet as an academic—although not a scientist—Ebell’s views are arguably entitled to a quite different sort of deference within the scope of academic freedom than common sense or the pursuit of truth. And lest we forget, the Shockley case remains in certain respects the most perplexing of all. Indeed, were there not a real William Shockley to engage our attention, we should need to hypothesize such a scholar to complete the roster.