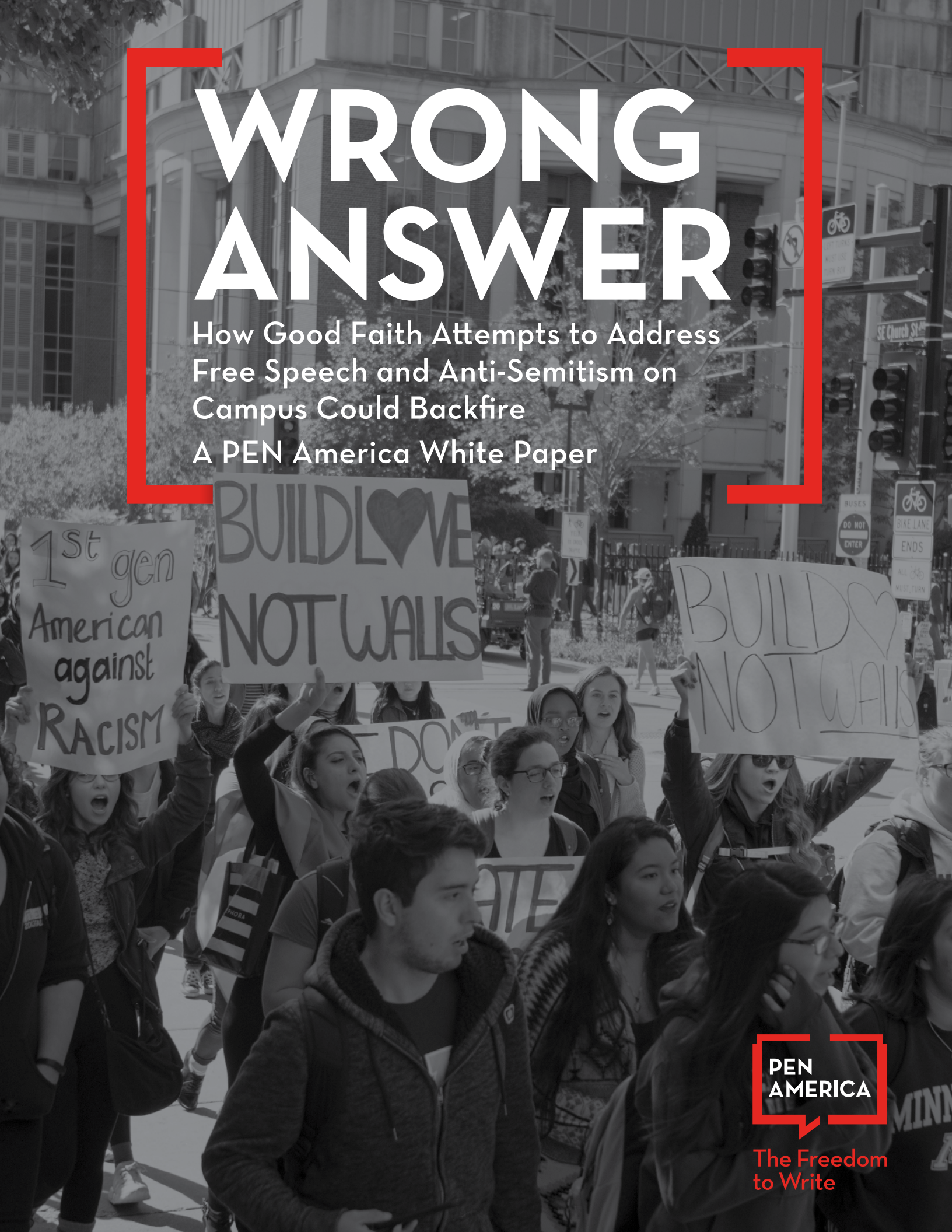

WRONG ANSWER

How Good Faith Attempts to Address Free Speech and Anti-Semitism on Campus Could Backfire

A PEN America White Paper

PEN AMERICA

The Freedom to Write

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How Good Faith Attempts to Address Free Speech and Anti-Semitism on Campus Could Backfire

November 7, 2017

PEN America stands at the intersection of literature and human rights to protect open expression in the United States and worldwide. We champion the freedom to write, recognizing the power of the word to transform the world. Our mission is to unite writers and their allies to celebrate creative expression and defend the liberties that make it possible.

Founded in 1922, PEN America is the largest of more than 100 centers of PEN International. Our strength is in our membership—a nationwide community of more than 5,000 novelists, journalists, poets, essayists, playwrights, editors, publishers, translators, agents, and other writing professionals. For more information, visit pen.org.

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EXECUTIVE SUMMARY

The past year has been a busy one for the debate over campus speech.

Conservatives have been up in arms after February protests at Berkeley against right-wing provocateur Milo Yiannopolous turned violent. A similar incident in March at Middlebury College involving political scientist Charles Murray led to a physical assault against the professor who organized Murray's appearance.

The left has also faced harassment and intimidation on college campuses. In early May, a professor at Texas A&M received death threats after discussing violence against whites in the context of a podcast about the movie *Django Unchained*. A "professor watchlist" continues to name and shame educators who, for instance, criticize the Trump administration. And numerous other liberal professors have been threatened or intimidated for other comments on campus.

Following on PEN America's 2016 report "And Campus for All: Diversity, Inclusion, and Free Speech at U.S. Universities," PEN America surveyed these state campus speech bills, the model bill drafted by libertarian think tank the Goldwater Institute, and the federal "Anti-Semitism Awareness Act." Our analysis of all of these follows in this white paper.

Over the summer, a march by white nationalists on the University of Virginia campus in Charlottesville turned murderous, when police charged a white supremacist with driving his Dodge Challenger into a crowd of counter-protesters, killing 32-year-old Heather Heyer.

In this volatile environment, a number of state legislatures have proposed or adopted legislation that would force public university systems to adopt system-wide policies that proponents claim would better protect free speech on campus. And we understand that Congress may again seek to address anti-Semitism on university campuses through the overbroad "Anti-Semitism Awareness Act," which could sweep in criticism of Israeli policies as "anti-Semitic" speech subject to federal civil rights laws.

Following on PEN America's 2016 report "And Campus for All: Diversity, Inclusion, and Free Speech at U.S. Universities," PEN America surveyed these state campus speech bills, the model bill drafted by libertarian think tank the Goldwater Institute, and the federal "Anti-Semitism Awareness Act." Our analysis of all of these follows in this white paper.

With respect to state campus speech legislation, PEN America strongly supports measures that would ban so-called "free speech zones" on campuses. Many schools have limited activities such as pamphleteering or spontaneous demonstrations to certain physical areas on campus, which may violate the First Amendment.

PEN America does not, however, support many other elements of these bills, or of the Goldwater proposal, which PEN America fears could be used to actually censor or chill speech, and may become overtly politicized through interference from the state legislature. In particular, provisions in the Goldwater bill and state legislation that would impose a "mandatory minimum" (that is, suspension for longer than three weeks or expulsion for a student who violates the "expressive rights" of others twice) are overly punitive. Overall, we have significant concerns that these laws and bills may have the purpose and result of limiting protests and counter-speech, a critical element of campus discourse that is protected by the First Amendment.

With respect to "free speech zones," most of the state bills analyzed in this white paper would apply "traditional public forum" doctrine to all public areas on campus (or to non-public areas that the school has opened for student or faculty speech). Doing so would permit the school to restrict speech only to keep noise levels down or protect school property but, in no instance, would let the school discriminate against speakers because of the content of their speech.

PEN America does not oppose this approach, nor take issue with certain other provisions, including those that reinforce existing First Amendment rights. We strongly support the provisions contained in some bills requiring training and orientation on principles of free speech.

Our primary concern with these bills lies in their approach toward interference with "expressive rights," applying principally to counter-speech or protests that may interfere with or even drown out other speech. The laws call for severe punishments for such speech based on loose definitions of "expressive rights" that could open the door to significant restrictions on protests and even open debate.

We are also concerned that the mechanisms for oversight of the implementation of these laws are subject to politicization and polarization, posing the risk that decisions on the permissible scope of campus speech may be colored by viewpoint-specific concerns.

In sum, while PEN America strongly supports legislation to do away with free speech zones on public college campuses—and urges private campuses to follow suit—PEN America is skeptical that more aggressive legislative measures are warranted, and that they will protect more speech than they chill.

The federal "Anti-Semitism Awareness Act," which passed the Senate in December 2016, would require the federal government to adopt an overly expansive definition of "anti-Semitism" that is centered on speech critical of Israel when determining whether schools have violated civil rights laws by failing to protect students from anti-Semitic speech.

Relatedly, PEN America also opposes campus speech efforts that would adopt a definition of anti-Semitism that targets a broad range of speech related to Israel as the basis for civil rights investigations by the U.S. Department of Education. The federal "Anti-Semitism Awareness Act," which passed the Senate in December 2016, would require the federal government to adopt an overly expansive definition of "anti-Semitism" that is centered on speech critical of Israel when determining whether schools have violated civil rights laws by failing to protect students from anti-Semitic speech.

While anti-Semitic harassment, including harassment that may reference criticisms of Israel, can certainly rise to the level of a civil rights violation, vigorous debate about Israel and its policies is protected by the First Amendment and an important subject for public debate. The white paper explains why the Anti-Semitism Awareness Act would impair free expression rights.

Summaries of PEN America's main findings follow.

The Goldwater Proposal and Related State Legislation

Following a series of high profile incidents where controversial speakers on campuses faced attempts by opposing groups to deny them a speaking platform (so-called "no-platforming," that is, denying a speaker the ability to speak, either by pushing to rescind an invitation or by disrupting the speech), the Goldwater Institute, an Arizona-based libertarian think tank, issued a 2016 report on the problem including a proposed model bill.[1]

There are a number of provisions in the Goldwater bill that PEN America does not oppose, though they do not outweigh the potential danger to free speech in the other elements of the legislation. These positive aspects include:

- A preamble with a strong articulation of the importance of free speech on campus;
- Mandating a system-wide policy that protects free speech as a "fundamental right," bars free speech zones, recognizes the right of students to spontaneously gather and protest, opens campus to any speaker that students or faculty would want to hear from, bars higher security fees because of controversial speakers, and requires security for speakers;
- Protects faculty, administrators, students, and staff when they speak about public controversies;
- Requires training and the dissemination of the free speech policy in orientation materials;
- Bars discipline for speech protected by the First Amendment;
- Provides students and staff with the ability to sue the school for violations of speech rights.

PEN America strongly opposes the following provisions, however:

- Overbroad and vague definitions of "expressive rights" that could cover protests that do not pose physical danger to speakers or prevent speakers from speaking or being heard;
- Overly punitive disciplinary measures that could result in a lengthy suspension or expulsion of students who haven't broken any law, denied a speaker the right to be heard, or otherwise exercised a "heckler's veto;"
- The approach taken to the establishment of committees to oversee implementation of the law, which appears to be subject to significant political influence and the risk of politicization (by, for instance, having the governing board of the school system, which is usually appointed by the legislature and governor, appoint the oversight committee); and
- A prohibition on the institution itself taking a position taking a position on public policy issues that may prevent it from acting ethically as an institution of higher learning.

The Goldwater proposal deserves plaudits for addressing growing threats to free expression, deriving from all side of the political spectrum, on public college campuses. But it goes too far. Its discipline would be visited on precisely those young students who society should encourage to aggressively question authority, think critically, and discuss public policy without constraint. Of course no one should deny a campus speaker the ability to speak, and certainly no one should engage in physical violence. Existing laws, however, are adequate to deal with these offenses, and should be deployed to do so.

When calibrating campus policies, however, to preserve both free speech and campus safety, the last thing the schools should be doing is defining "speech crimes" in vague or overbroad ways, and permitting draconian punishments that could severely impair an academic or professional career.

In the white paper, PEN America analyzes in detail the Goldwater proposal, and also surveys state legislation and enacted laws based on the proposal.

The Anti-Semitism Awareness Act

Section II of the white paper analyzes the federal "Anti-Semitism Awareness Act," (the "AAA") which passed the Senate in December 2016, but was not taken up in the House of Representatives. Congress has not yet reintroduced the bill, and if members plan to do so, PEN America urges certain changes to the bill to prevent it from sweeping in speech that is critical of Israeli policies (but is not anti-Semitic).

A prevailing theme in PEN America's white paper is the importance of giving students in higher education, at all points on the political and ideological spectrum, sufficient "breathing room" to develop skills such as critical thought, judgment with respect to academic and political discourse, and the persuasive arts—not to mention the space to figure out what they believe.

The AAA would require the Department of Education to consider in civil rights cases a definition of anti-Semitism that has been adopted by the State Department as guidance and was adapted from a European definition used by data gatherers to identify anti-Semitism with respect to speech about Israel. In particular, the definition uses the "3D" framework suggested by Israeli politician and former Soviet dissident Natan Sharansky, in which speech that "demonizes," applies a "double standard," or "delegitimizes" Israel should be considered anti-Semitic.

In practice, the AAA would require the Department of Education to consider this definition when determining whether speech critical of Israel on college campuses has created a "hostile environment" for Jews sufficient to violate federal civil rights law (which bars discrimination against Jews when based on perceived ancestry, ethnicity, or nationality).

As discussed in detail in the white paper, PEN America fears that this expansive definition would lead to a number of unintended consequences. These include overenforcement on college campuses because of the breadth of the definition, including censoring speech that is merely critical of Israeli policies, or of the historical justification and means of the creation of the state of Israel. It could also include self-censorship by students concerned about facing discipline, or aggressive investigations by the Department of Education, which could themselves chill robust discourse and debate.

The white paper also includes a discussion of a First Amendment "savings clause" in the legislation that purports to exclude from its reach any speech protected by the First Amendment. The white paper notes that these savings clauses are of limited utility (and are, accordingly, quite rare in legislation) because they can only be invoked as a defense after action has been taken against a student or faculty member. In those cases, the student or faculty member must retain counsel and expend time and money to challenge any disciplinary action on First Amendment grounds. Such savings clauses can also encourage aggressive investigations by schools and government officials secure in the knowledge that any overreach will be tempered by a court applying the First Amendment carve-out.

Conclusion

A prevailing theme in PEN America's white paper is the importance of giving students in higher education, at all points on the political and ideological spectrum, sufficient "breathing room" to develop skills such as critical thought, judgment with respect to academic and political discourse, and the persuasive arts—not to mention the space to figure out what they believe.

The Goldwater proposal; the various state laws that take a heavily punitive approach to the heckler's veto, but fail to carefully define what that is; and the Anti-Semitism Awareness Act all would constrict rather than insulate that breathing room.

INTRODUCTION

Hardly a day goes by without another op-ed, editorial, or column decrying the sorry state of free speech on college campuses. PEN America shares that concern, noting that we are also concerned about new and legitimate disquiet about campus safety, hostility to inclusion, and attacks, both physical and rhetorical, on historically marginalized groups and women, all of which can impair campus' openness to all views and experiences.

Further to that concern, PEN America released a report in 2016 titled *And Campus for All: Diversity, Inclusion, and Free Speech at U.S. Universities*, which combined extensive reporting and thorough analysis of all sides in this emerging debate.[2] Shortly after the release of our report, the Senate passed the Anti-Semitism Awareness Act.[3] While it did not pass the House of Representatives, we understand that the bill is still under consideration. It was the subject of an early November 2017 hearing convened by the House Judiciary Committee.[4]

In the year since publication of the PEN America report, we have also seen the introduction and passage in several states of legislation that would "mandate" free speech on campuses. Many of these bills would eliminate "free speech zones," policies where a school limits pamphleteering, demonstrations, or other expression only to certain designated areas on public school campuses, which PEN America supports. Many, however, go too far, and may chill speech on both the right and the left.

Amid a growing number of incidents of hate speech and hate crimes across the country, and serious threats to free speech on campus, it is critical that lawmakers and universities take steps to ensure a more diverse, inclusive, and equal campus environment without compromising robust protections for free speech and academic freedom.

To put both creeping censorship and bona fide safety concerns in context, in February 2017, protests against right-wing provocateur Milo Yiannopoulos at the University of California at Berkeley turned violent, leading President Trump to threaten to pull federal funding from the university in a tweet.[5] In March 2017, protests at Middlebury College against Charles Murray, the controversial libertarian political scientist, also turned violent, resulting in injury to the professor sponsoring Murray's talk.[6]

Left-wing faculty and guests also face threats and intimidation.[7] The website "Professor Watchlist" aims to catalogue liberal bias and "leftist propaganda" by naming and shaming professors who, for instance, cite statistics showing that right-wing terrorism poses a greater threat domestically than Islamic extremist terrorism, or who criticize Trump supporters during class.[8]

In early May, philosophy professor Tommy J. Curry at Texas A&M faced death threats for talking about violence against whites during a podcast about the Quentin Tarantino movie Django Unchained, after his comments were taken out of context.[9] Keeanga-Yamahtta Taylor, an assistant professor of African-American studies at Princeton, had to cancel several public appearances earlier this year after she received death threats for criticizing President Trump at a commencement speech.[10]

In the same period, incidents of hateful speech and incidents of hate crimes on U.S. campuses increased.[11] These included an increase in incidents involving anti-Semitic bigotry.[12] Then, in August, white nationalists marched on the University of Virginia's campus in Charlottesville to protest the removal of a statute of Confederate General Robert E. Lee.[13] The march and subsequent protests involved widespread anti-Semitic and racial slurs and devolved into violence. Police charged a white supremacist with driving his Dodge Challenger into a crowd of counter-protesters, killing 32-year-old Heather Heyer.[14]

President Trump initially refused to condemn the white nationalists, suggesting equivalence between counter-protesters and violent white supremacists. He laid blame on "both sides," drawing widespread, bipartisan condemnation.[15]

In the midst of, and in response to, these developments, politicians at the federal and state levels have stepped into the fray. At the federal level, a series of hearings have been held on the topic of campus free speech, and the Anti-Semitism Awareness Act in particular. At the state level, legislation has been introduced and passed that would require public school systems to better protect free speech.

All of these measures are avowedly aimed to uphold free speech and open discourse, and many have some salutary elements. But most also include vague or inapposite definitions and could foster punishments for speech that is protected by the First Amendment. In many cases, these flaws could make these bills more of a threat to free expression on campus than a solution to genuine concerns about infringements on campus speech.

In Section I of this white paper, PEN America analyzes the array of state campus "free speech" bills. Section II discusses the draft federal Anti-Semitism Awareness Act.

Many of the state campus speech bills borrow elements from a 2016 proposal by the Goldwater Institute, a libertarian think tank, which we look at

first.[16] As discussed in detail below, the Goldwater proposal goes too far in numerous important areas. PEN America urges states seeking to address free speech on campus to ensure that any steps that are taken adhere to the following principles:

- Ensuring an emphasis on academic freedom and freedom of speech for all members of the campus community;
- Barring delimited "free speech zones" from campus;
- Leaving discipline to the discretion of school administrators who understand the context in which events have occurred;
- Avoiding overbroad definitions that could curtail free speech and render legitimate topics of academic deliberation effectively off-limits;
- Avoiding mandatory penalties and emphasizing due process rights;
- Creating checks on any system-wide oversight mechanisms that are sufficient to limit the risk of politicization;
- Clearly defining "expressive" violations or any other violations that may be subject to discipline;
- Appropriating adequate funds for orientation and education on the importance of free expression;
- Ensuring that requirements that public institutions maintain neutrality on matters of public interest do not demand institutional silence when it comes to affirming and articulating the values of open discourse, academic freedom, diversity and inclusion, and other principles integral to the institutional role of the university in society; and
- Preserving the ability of public schools to prevent discrimination based on race, ethnicity, religion, or other protected class by publicly funded student organizations.

SECTION I

STATE LEVEL CAMPUS SPEECH LEGISLATION

The Goldwater Proposal

Following a series of high profile incidents where controversial speakers on a variety of campuses faced attempts by opposing groups to deny them a speaking platform (so-called "no-platforming"), the Goldwater Institute, a libertarian think tank based in Arizona, issued a 2016 report on the problem, which included a proposed model bill.[17]

That bill has been introduced or passed, in whole or with minor modifications, in four states: Illinois, Louisiana, Michigan, and Wisconsin. Another eight states have introduced or passed campus speech legislation, which address many of the same issues, but takes different approaches than Goldwater. Several of these are narrowly limited to barring the establishment of so-called "free speech zones."

The Goldwater Institute proposal itself has both positive and negative elements. On the one hand, it has important language that would force public universities to prioritize free speech protections, would limit when and how schools could disinvite controversial speakers, and would prevent schools from imposing content- or, worse, viewpoint-based restrictions on speech in public areas of campus, or areas that have been designated by school officials as forums for speech.

On the other hand, it includes severe punishments for vaguely defined free speech violations, including a "mandatory minimum" punishment of a one-year suspension or expulsion for a student who has been twice convicted of "infringing the expressive rights of others"—"expressive rights" being undefined. It also would only require assistance of counsel for students facing suspensions of longer than 30 days or expulsion.

In this part, we survey the strengths and weaknesses of the Goldwater Bill.[18] Following this, we discuss each of the state bills or laws of which we are aware as of this drafting, and compare them to the Goldwater proposal.

Strengths

The Preamble—The Goldwater proposal, titled the "Campus Free Speech Act," does an excellent job of framing the legislation as a call for administrative neutrality and academic freedom. It cites the

The preamble would communicate to the state legislature and courts that free expression violations on state college campuses should be treated as any First Amendment violation, and that restrictions based on the content or viewpoint of the expression are prohibited.

watershed report by the Commission on Free of Expression at Yale in 1974, and the 1967 Kalven Report at the University of Chicago, both of which grappled with issues as fraught as any today in the midst of campus protests over civil rights and the Vietnam War. It also cites a more recent 2015 University of Chicago study that reiterated this approach, and noted that "it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive."[19] Importantly, all of the studies it includes as guidance for the proposed legislation emphasize the importance of faculty and student intellectual autonomy as a key ingredient in preserving campus free speech, and also note the importance of civility to a healthy and open discourse.[20]

The preamble also helpfully provides that "state institutions of higher education officially recognize freedom of speech as a fundamental right."[21] Although legislative findings of this nature would not impose new binding requirements, they nonetheless could provide a valuable guidepost for campuses, and for courts faced with adjudicating alleged infringements on speech, especially by college administrators. The preamble would communicate to the state legislature and courts that free expression violations on state college campuses should be treated as any First Amendment violation, and that restrictions based on the content or viewpoint of the expression are prohibited.

Mandatory State Policy—The Goldwater proposal would require a state school system to adopt a formal policy protecting free expression on campus. PEN America supports this call and the elements suggested for such a mandated policy, including:

- Recognition of intellectual freedom and freedom of expression as central to the university's mission;[22]
- Articulation of the appropriate legal test for reasonable time, place, and manner ("TPM") restrictions on speech, which would, among other things, prohibit "free speech zones," where a school limits pamphleteering, demonstrations, or other expression to certain physical areas;[23]
- Affirmative recognition of the right of students and faculty to spontaneously gather and protest so long as it does not "substantially and materially" disrupt school functions;[24]
- A provision that any person "lawfully present" on campus may protest or demonstrate, subject to reasonable limitations to protect the expressive rights of others and order in the classroom;[25]
- Similar to the TPM provision above, a statement that the public areas of a campus are traditional public forums, subject to appropriate legal protections, and, crucially, viewpoint neutrality in any restrictions;[26]
- A requirement that the campus be open to any speaker invited by students, student groups, or members of the faculty;[27]
- A prohibition on the school imposing security fees based on the "content" of the invited speaker's speech—which is especially important to prevent schools from pretextually charging high security fees to discourage controversial speakers from being invited;[28]
- Recognition that the school bears the responsibility of providing appropriate security for speakers (as we note below, however, the same provision should also recognize that the school bears the responsibility for preserving the security of *protesters* as well) [29]; and
- Recognition that individual students, faculty, and staff, including, presumably, administrators and senior staff, are free to take public positions

on "public controversies of the day" while recognizing that "the institution" itself maintains neutrality when appropriate.[30]

Materials and Training—The Goldwater proposal includes a requirement that schools include a copy of the free expression policy in freshman orientation materials.

Limitations on Discipline for Speech—Perhaps most significantly, the Goldwater proposal would bar punishment for speech protected by the First Amendment, and articulates narrow exceptions. The proposal helpfully lists these "unprotected" categories of speech: violations of federal or state law[31]; defamation; legitimate TPM violations; true threats[32]; and an "unjustifiable" invasion of privacy not involving a matter of public concern.

One category of exception articulated in the proposal, however, may raise concerns with respect to civil rights laws. The Department of Education is empowered to enforce civil rights laws barring discrimination against certain groups, which can include harassment, threats, or intimidation that are so acute as to deny a student the equal opportunity to participate in school activities.[33]

In describing the acuteness of harassment that would trigger a potential violation of civil rights laws, the Department of Education adopts the disjunctive phrasing "severe, pervasive, *or* persistent," so as not to preclude egregious but isolated incidents of harassment from rising to a potential violation.[34] By contrast, when defining "peer-on-peer harassment," the Goldwater proposal adopts the conjunctive language from *Davis v. Munroe County*, the Supreme Court case governing when schools can face legal liability for failure to address acute sexual harassment.[35] That case described the relevant conduct as "severe, pervasive, *and* objectively offensive."[36]

In plain terms, the Goldwater proposal may be read to preclude a finding of harassment if a school fails to address a severe but isolated incident (for instance, burning a cross in front of an African-American fraternity) because it is not "pervasive." PEN America takes no position on the propriety of the Department of Education's use of the formulation "severe, persistent, or pervasive," but does recognize that sufficiently severe and objectively offensive one-off acts of harassment, even if they contain an expressive component, may violate civil rights laws.

Opening the Courthouse Door—The Goldwater proposal includes an express waiver of sovereign immunity by public universities, which would ensure that students, faculty, or administrators who allege a violation of their First Amendment rights can get a day in court. Other aspects of this section, however, including an express civil right of action by the state authorities against students or faculty accused of violating the expressive rights of individuals on campus and mandatory fee shifting when a plaintiff wins a free expression case, may encourage frivolous or harassing suits by state attorneys general seeking to limit free speech by critical students or faculty. At a minimum, PEN America would urge that forthcoming legislation clarify that a state attorney general may file suit on behalf of a student, faculty member, or administrator who alleges *specific* First Amendment rights violations, such as being arrested at a peaceful protest, or who has been blocked from filming police activity in public areas of campus.

Weaknesses

Discipline—The disciplinary provisions are probably the most troubling part of the Goldwater proposal in that they violate precepts of academic freedom by taking discretion away from administrators and faculty in deciding on appropriate discipline. Accordingly, PEN America addresses them first, before surveying the rest of the proposal.

Precisely because post-secondary education is meant to be a time for robust, uninhibited debate on issues of public importance, students are liable to push the boundaries of such discourse. Whether it's a bake sale with different prices for black and white customers to protest affirmative action[37] or a demand for safe spaces or trigger warnings, post-secondary education is meant to be a place for students to engage vigorously in political and public debate, and to think critically about how to do so and what they ultimately believe. It should be a place where the consequences for errors of judgment should be commensurate, and geared toward the possibility of learning and future improvement. Such commensurate discipline necessarily depends upon context-specific assessments of motives, behavior, and intent. Administering campus discipline is a core responsibility of the university, reflecting the unique and interlocking responsibilities of university administrators to provide education, guarantee academic freedom, and foster a vibrant community. Efforts to curtail the discretion of campus administrators in this regard are unwarranted, and risk imposing inappropriate punishments that are harmful for the individuals concerned and inimical to healthy campus life, and intensify polarizing divisions on campus.

Accordingly, there are four issues with the current

Creating an overarching, heavily punitive system of institutional discipline could deter peaceful protests by students, who fear being disciplined for infringing the "expressive rights" of speakers.

proposal. One, the lack of a definition of "expressive rights" raises concerns of overbreadth and vagueness, especially when a student would face suspension or expulsion for violating these rights.[38] Offenses against expressive rights should be specific and carefully articulated; boisterous protests that do not rise to the level of making it virtually impossible for a speaker to give their lecture and be heard should still be protected and immune from suit. Two, students should have the right to assistance of counsel in any disciplinary proceedings (the Goldwater proposal would only require assistance of counsel in cases carrying a penalty of suspension longer than 30 days or expulsion). Three, the burden of proof, which is not articulated in the proposal, should be carefully considered and spelled out. And, four, the "mandatory minimum" procedure requiring a one-year suspension or expulsion after "two strikes" is inappropriate in a law that could potentially end the academic careers of public university students.

Moreover, in two of the most high profile recent "no-platforming" instances, at the University of California at Berkeley and at Middlebury College, there are reports that some of the protesters, and especially those who turned violent, came from off campus.[39] In those cases, existing criminal law should be more than sufficient to deal with offenders. Creating an overarching, heavily punitive system of institutional discipline could deter peaceful protests by students, who fear being disciplined for infringing the "expressive rights" of speakers, but do little to tamp down on outside provocateurs who may assume an even more prominent role in instigating speech-related conflicts on campus.

Failure to Define "Expressive Activity" or "Free Expression"—The Goldwater proposal rightly attempts to give teeth to its free speech protections by, among other things, sketching out disciplinary measures, and permitting public officials and victims to sue. However, and particularly when it comes to the measures permitting suit by the attorney general or an aggrieved party for "any violation" of the proposed bill, the absence of definitions for certain key terms is troubling.

For instance, in the "mandatory minimum" provision, the triggering offense is an infringement on the "expressive rights" of others. "Expressive rights" is undefined, which, ironically, could open the door to an overbreadth or vagueness challenge under the First Amendment. For example, state attorneys general or disinvited speakers could bring frivolous suits against participants in aggressive, but constitutionally protected, protests. While the Goldwater model bill is laudably geared to deterring "no-platforming," "shout-downs," or other forms of the heckler's veto, it's not explicit and tailored enough to do so. Under its formulation, loud or otherwise disruptive protests that still permit a speaker to speak and be heard could be targeted as violations of "expressive rights," without a more specific definition. This could have a widespread chilling effect on individuals' willingness to participate in protests against particular speakers, even if those protests are not intended to deprive the speaker of her ability to speak.

A more appropriate approach, especially with mandatory discipline such as is envisioned here, would be to specifically articulate the offenses subject to punishment, to ensure that students have appropriate notice about what actions will lead to disciplinary measures. An example of more tailored language could be "a student, faculty member, or other individual on campus grounds who, with the intent to prevent a scheduled speaker from being able to speak, takes or attempts to take such action that in fact prevents willing listeners of the speaker from hearing the speech, will be punished [by no more than X punishment]." Such actions could include, but are not limited to: barring a speaker from entering the campus through physical assault, threats, or intimidation; physically blocking willing listeners from entering a hall or meeting room; shouting down a speaker to the point where his or her remarks cannot be heard by listeners; or issuing threats against a campus that leads it to cancel a speaker because of security concerns.

Politicizing Accountability for the State School System—The Goldwater proposal would require the governing body of the state university system to appoint a committee of no less than 15 members to provide oversight of implementation of the law. The committee would be responsible for producing a report on September 1 of every year, including (1) a description of barriers or disruptions to free expression on campuses; (2) a description of the administrative handling and discipline related to these barriers or disruptions; (3) "a description of substantial difficulties, controversies, or successes in maintaining a posture of administrative and institutional neutrality with regard to political or social issues"; and (4) assessments, criticisms, commendations, or recommendations the committee sees fit to include.

PEN America has no objection in principle to the concept of centralized oversight. That said, the recent controversy in North Carolina (see the discussion of that state's campus speech bill in section II.g below) shows how easily a Board of Trustees (or regents, visitors, etc.) can become politicized. Following the victory of the Democratic candidate for state governor, the North Carolina legislature sought to remove the governor's ability to name key university trustees and give it to key Republican lawmakers instead.[40] Without independence from state politics, an oversight body may push a state school system in one ideological direction or another, with principles of free speech and ideological openness being subordinated to political interests.

One solution to this problem would be to involve faculty and have a shared committee: one half elected by university faculty or some representative committee thereof, and another half by the Board of Regents or equivalent. The chair could be appointed by the board, but, in the event of a tie-breaking vote by the chair to release an annual report, the minority side would have the opportunity to issue a minority report. Checks and balances of this sort would insulate the oversight body from undue politicization. Michigan's pending legislation takes such an approach, described in more detail below.

Institutional Neutrality—Section 1(K) of the model bill would laudably protect the right of students, faculty, staff, and administrators to speak out on issues of the day. It would, however, require the "institution itself [to] stay neutral, as an institution, on the public policy controversies of the day, except insofar as administrative decisions on such issues are essential to the day-to-day functioning of the university."[41]

We fear this may be too limited, for two related reasons. One, the explanatory notes clearly indicate that this proposal is intended to get at divestment by universities. There may be instances where a government entity should be free to divest from certain investments for ideological reasons. Two, and relatedly, there could be "hybrid" situations where a company has suffered reputational harm because of a political position and it would be economically rational to divest. Goldwater's institutional neutrality provision would bar that.

Again, the University of Chicago's Kalven report recognized the possibility that corporate action by a university could appropriately, in "extraordinary" circumstances, be non-neutral (indeed, one of the signatories of the Kalven report wrote separately to explicitly acknowledge as much, saying the caveat should state that the university, as a corporate entity, should "conduct its affairs with honor").[42]

We are also concerned about potential interpretations of this provision that could interfere with the ability of university leaders and administrators to articulate essential institutional values, including a commitment to diversity and inclusion, opposition to hateful speech, or even an affirmation of free speech itself. A critical dimension of recent successful university efforts to defuse conflicts associated with the appearance of politically controversial speakers on campus has entailed statements by esteemed university leaders that the university's decision to provide a forum for a particular speaker does not signify approval of the contents of the speech itself, nor of the ideas and principles with which the speaker may be associated. It is vitally important that campus leaders be able to assert the university's values and governing principles, and provisions that could be construed to constrain this latitude should be rejected.

Protecting Discriminatory Student Groups—Section 1(L) appears to be an attempt to address the holding in the Supreme Court's decision in *Christian Legal Society v. Martinez* ("CLS"), which held that a policy at the public Hastings School of Law in California that student groups receiving school money accept all comers was consistent with the First Amendment.[43] In that case, the Christian Legal Society required aspiring participants to sign an oath attesting to their belief in various Christian doctrines, which Hastings said violated its discrimination policy. The Court found that the Hastings' policy was viewpoint-neutral and reasonable.

The Goldwater proposal would prohibit a school from denying "a student organization" (presumably, official or unofficial, even if using school facilities) any benefit or privilege accorded other groups based on the content of the group's expression.

It is vitally important that campus leaders be able to assert the university's values and governing principles, and provisions that could be construed to constrain this latitude should be rejected.

That provision is fine. It goes on to say, however, that a school cannot deny a benefit or privilege if the organization requires members to "affirm and adhere to the organization's sincerely held beliefs," "comply with the organization's standards of conduct," or "further the organization's mission or purpose, as defined by the student organization."[44]

Such a policy would permit student groups funded with taxpayer dollars to do exactly what Hastings found impermissible in the CLS case: require the signing of an attestation to certain religious beliefs as a condition of participation in the student group.

It would also permit the group to exclude members based on conduct that has nothing to do with the organization's mission. A taxpayer funded space lab group could require participants to sign a form rejecting the existence of a deity. A medieval book club could exclude anyone who refuses to attest to belief in Catholic dogma. A youth business leadership group could exclude a member after finding out about a romantic liaison at a party. The examples are endless.

Heightened Public Forum Protections—Finally, Section 5 of the Goldwater proposal purports to set out the legal standard for restrictions on expressive conduct in public areas of campus. It would require that the school have a "compelling" government interest, that the restriction be the least restrictive means of furthering the interest, that there be ample other avenues to engage in the expressive conduct, and that the policy provide for the spontaneous assembly and distribution of literature. The section does not specify whether the restriction can be content-based.

Traditional public forum doctrine, by contrast, permits content-neutral restrictions when they further a *significant* government interest (a standard lower than compelling), are narrowly tailored to do so (does not require the least restrictive alternative), and when there are ample other avenues for the same speech.[45]

PEN America does not object to the formulation as such. If the intent is to apply strict scrutiny under the assumption that the restriction will be content-based, however, it may be worth spelling that out (or if the intent is to increase scrutiny in traditional public forums on college campuses to require a compelling government interest for any restriction). If the authors anticipate that colleges will be able to engage in some content-based restrictions, they should explain what those could look like. Conversely, if the intent is to apply strict scrutiny to content-neutral regulations (to apply stronger protections than currently exist under the First Amendment), the authors should make that clear as well. Furthermore, the text should note that viewpoint-based restrictions are totally disallowed.

Goldwater Compared to Other State Bills and Laws

Arizona

Arizona passed two bills in 2016 both of which, like those passed in Missouri and Virginia, discussed below, prohibit schools from limiting student speech to "free speech zones" on campus.[46] Technically, the Arizona bills mandate that all public areas on campus are to be treated as traditional public forums, subject only to reasonable TPM restrictions, which is positive. (Oddly, the second bill, H.B. 2548, appears to impose a different legal standard for content-neutral TPM restrictions—requiring a "compelling" government interest, rather than the "significant" interest in the first bill.[47] The bills appear to do the same thing, but one would impose a higher standard of protection than the other.)

The second bill, H.B. 2548, also includes a provision creating a class 1 misdemeanor for individuals who intentionally interfere with passage on a highway, public thoroughfare, or entrance into a public forum that prevents another person from gaining access to a governmental meeting, a governmental hearing, or a political campaign event.[48] Although police and prosecutors could abuse the provision, we understand "intentionally" to require a showing of specific intent. Specific intent in this case (requiring a showing that the offender intentionally sought to block a thoroughfare, highway, or entrance) should act as a check against using the provision to conduct,

for instance, mass arrests of protesters.

The Arizona bills do not have any mandated disciplinary measures, though they *do* include an express public and private right of action for violations by universities of the free speech zone provisions.[49]

Colorado

Colorado passed S.B. 17-062 in April 2017, which is also limited to applying public forum doctrine to prevent universities from limiting speech to designated free speech zones.[50] The bill defines "student forum" as any open area of campus, or any section of campus that has been opened by the school to student expression,[51] and then clarifies that a school may only apply reasonable time, place, and manner restrictions (without regard to the content or viewpoint of speech).[52] The law text says that expression in a student forum may only be limited in a narrowly tailored, content-neutral manner, to further a significant government interest, and where there are ample alternative avenues of communication.[53]

The law helpfully states that a student may not be disciplined because "of his or her expression, because of the content or viewpoint of the expression or because of the reaction or opposition by listeners or observers to such expression."[54] The law also notes that nothing in its provisions would permit a student to "materially disrupt" planned activities (that is, it bars shout-downs).[55]

Finally, the Colorado law includes a reasonable cause of action for any student improperly denied access to a student forum for expressive purposes.[56] The bill mandates that the student, if she wins, receive court costs and fees (which, as noted above, should be discretionary to avoid frivolous litigation).[57]

In sum, the Colorado bill would serve as a good model for an "anti-free speech zone" state law, and avoids some of the overreach of bills more closely modeled on the Goldwater proposal.

Illinois

The Illinois bill, H.B. 2939, which is currently pending in committee, is identical in substance to the Goldwater proposal.

Louisiana

In 2017, the Louisiana legislature passed a bill very similar to the Goldwater proposal, H.B. 269, but it was vetoed by Gov. John Bel Edwards, a Democrat, who called it "a solution in search of a problem" when doing so.[58] Notably, the bill would not have guaranteed effective assistance of counsel in a disciplinary proceeding (though it also did not have the mandatory minimum of the Goldwater bill).[59] The bill also would have created a committee on free expression, without appropriate safeguards against politicization.[60]

That said, it would have also included some of the best provisions of the Goldwater proposal, including clarification that public areas of campus qualify as traditional or designated public forums, policies barring hecklers' vetoes and a cause of action for students whose rights are violated.[61]

Michigan

The Michigan legislation, S.B. 350, is pending in committee at the time of writing (in the fall of 2017). It also is largely identical in substance to the Goldwater proposal.[62]

Interestingly, however, it has a novel approach to constituting a committee on free expression, which may serve to check politicization of that body, were this to become law. The bill would add § 210G to the "State School Aid Act of 1979," requiring any community college or public university receiving money under the law to participate in a free speech committee. Instead of being appointed directly by the governor or board of regents, appointees would be split: five appointed by the community colleges, four by public universities, one by the governor, one by the speaker of the Michigan House of Representatives, and one by the Senate Majority Leader. Problematically, the Michigan bill would include the "mandatory minimum" for any student twice "convicted" of violating the free expression rights of others, and would only guarantee assistance of counsel in the limited circumstances envisioned in the Goldwater proposal.[63]

Missouri

Like Arizona and Virginia, the Missouri "Campus Free Expression Act"—which passed in 2015 and received broad support from across the political spectrum—is narrow and simply clarifies that public areas of campus are traditional forums where speech may only be restricted in a content-neutral manner that furthers a significant government interest, is narrowly tailored to do so, and leaves open ample alternate avenues for speech.[64]

For states looking to limit free speech zones on campus, Missouri, like Colorado, is also a good model.

North Carolina

The North Carolina bill, H.B. 527, which became law in July 2017, avoids many of the drawbacks of the Goldwater proposal while retaining most of its positive features.[65] For instance, it does not mandate any discipline, or include a mandatory minimum punishment for violations, though it does require

the state school system to develop a range of disciplinary options for individuals who substantially disrupt school functioning, or who infringe on the "protected" free expression rights of others. This formulation, while still not specific enough, is more limited than the Goldwater formulation.[66] It also provides for the active assistance of counsel (at the student's expense) in all cases under the statute, unless the disciplinary proceeding is administered by a student-composed "honor board."[67]

The North Carolina bill also requires the board of governors to appoint a committee, per the Goldwater proposal, but appears not to include appropriate checks against politicization. The 11-member committee is to be appointed by the Board of Governors of the University of North Carolina System from among its members, and members of the committee serve at the pleasure of the board.[68] The provision also requires all employees of the North Carolina university system, and state agencies, to "cooperate" with committee requests for information, without elaboration.[69]

The North Carolina law also appropriately limits the Goldwater's "institutional neutrality" provision. It simply, and rightly, states that the "constituent institution may not take action, as an institution, on the public policy controversies of the day *in such a way* as to require students, faculty, or administrators to publicly express a given view of social policy."[70]

Finally, the bill accurately articulates the relevant public forum and TPM doctrines, and ensures that public spaces on campus are treated under law as traditional public forums.[71]

The bill does not waive sovereign immunity, and expressly immunizes any chancellor, officer, employee, trustee or member of the state Board of Governors from suit.[72]

Taken as a whole, however, the North Carolina bill is a significant improvement on the Goldwater proposal, and a good model for states that want to go further in protecting campus free speech than just barring "free speech zones."

Tennessee

Tennessee Gov. Bill Haslam, a Republican, signed that state's bill, S.B. 723, into law in May 2017.[73] The Tennessee law is arguably the best of the various proposals. It focuses aggressively on promoting student and faculty academic freedom, without the punitive provisions in the Goldwater bill. It also includes several Goldwater provisions, but with the improvements suggested above. For instance, it bars a school from denying funding to a student group based on the viewpoint of the group, but does not include the Goldwater language that would overturn *Christian Legal Society* (meaning that a school could impose an "all-comers" policy on groups receiving funding).[74]

The only possible drawback of the Tennessee bill is the adoption across the board of the standard for when schools can be legally responsible for not doing enough to stop sexual harassment, which may not be strong enough to cover egregious cases. As noted, in the Supreme Court case, *Davis v. Munroe County*, 526 U.S. 629 (1999), the Court said that schools receiving federal money could be sued if they fail to address harassment that is so "severe, pervasive, *and* objectively offensive" as to deny a student equal enjoyment of the educational opportunity.[75] There is concern that, as applied outside the context of that case, the *Munroe* standard may not capture harassment that is sufficiently severe—though not necessarily "pervasive"—to deny a student equal protection.

Texas

Texas had two bills introduced in the 2017 session, H.B. 2527 in the House, and S.B. 1151 in the Senate. The House bill is limited to barring schools from imposing free speech zones; it applies public forum doctrine to public areas of the school, and provides for a private right of action. It also has an interesting provision protecting "students and student groups and organizations, regardless of whether the group or organization is recognized by or registered with the institution of higher education."[76]

The Senate bill goes slightly further. In addition to prohibiting free speech zones, the bill would prohibit schools from disciplining students for speech. Universities would not be able to raise or lower a student's grade for engaging in expressive activity, for instance, and the bill would require a grievance procedure for addressing violations of the section.[77] The bill would also broadly prohibit a school from punishing "a student or employee in any manner for engaging in expressive activities."[78]

Unique among the other bills circulating in the states, the Senate bill has a severability clause, which would preserve the remainder of the bill in the event that any provision were struck down in court.[79] Such a clause would be advisable, especially for those bills and laws that follow the Goldwater proposal closely (as it would protect the positive, constitutional aspects of the bill, while permitting targeted challenges to those provisions that go too far).

Utah

In March 2017, Gov. Gary Herbert, a Republican, signed H.B. 54, the Campus Free Speech Amendments, which narrowly targets free speech zones. It

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applies public forum doctrine to all outdoor public areas of Utah schools, and creates a cause of action for violations with cost and fee shifting.[80]

Virginia

The Virginia bill, signed by Gov. Terry McAuliffe, a Democrat, in March 2017, effectively restates First Amendment protections for state school campuses. It reads: "Except as otherwise permitted by the First Amendment to the United States Constitution, no public institution of higher education shall abridge the constitutional freedom of any individual, including enrolled students, faculty and other employees, and invited guests, to speak on campus."[81]

Wisconsin

Wisconsin's state assembly passed its controversial student speech bill in June 2017 along almost exclusively party lines. The assembly passed its bill, A.B. 299, by a vote of 61 to 39 with one Republican joining Democrats in voting no. The Senate has yet to take up the bill.

The Wisconsin bill is identical in substance to the Goldwater proposal. There are two exceptions, one positive, one quite negative. On the plus side is the process for appointing the 15 member committee on free expression, which is made up of 13 members from each of the state's universities, and one member from the assembly and Senate committees of jurisdiction.[82]

In a step backward from the Goldwater proposal, the Wisconsin bill's disciplinary provisions are even more punitive and overbroad. Not only does the bill not define "free expression," it mandates that the school system "free speech" policy include a range of punishment for anyone who "engages in violent, abusive, indecent, profane, boisterous, obscene, unreasonably loud, or other disorderly conduct that interferes with the free expression of others."[83]

Unique among the various state campus speech laws, the Wisconsin formulation could allow more severe punishments for "indecent," "profane," or "obscene" speech even if it does not silence other speech. Signs with profanity, for instance, would be profane or indecent and thus potentially subject to greater punishment. Indeed, unlike the other bills that aggressively target content- or viewpoint-based restrictions, the Wisconsin bill, by targeting profanity, indecency, and obscenity, would actually enshrine an unconstitutional content-based restriction (that is, one could argue that a sign protesting a visiting speaker would be rendered a violation of the law merely for including "profane" language, or a protest featuring adult toys could be a violation while a protest without that content would not be).[84]

In short, rather than protecting free expression on campus, the Wisconsin bill would give school and state authorities more power to clamp down on student protests, and to punish students severely for protected speech activities.

Conclusion

Part of the reason for protecting free speech on public college campuses is precisely because they are arguably the most important forums where students can form, challenge, define, refine, and even change their views of the world, and opinions on crucial matters of the day. The biographies of political intellectuals often feature the narrative of intellectual awakening on campus, on the right or the left.

Lest we forget, however, part of that awakening is *growing up*. And part of growing up is making mistakes, being offensive, being strident, or perhaps going too far in service of one's developing convictions. School discipline isn't criminal law, but lengthy suspensions and expulsion have real consequences academically and professionally.

Any campus free speech law should endeavor to strike the appropriate balance between deterring and disciplining attempts to deny speakers the ability to speak (an actual "heckler's veto"), and recognizing that 18-year old undergraduate students make mistakes. The emphasis on discipline in the Goldwater proposal fails to strike that balance, and could actually chill more speech than it vouchsafes.

SECTION II

THE ANTI-SEMITISM AWARENESS ACT

Introduction

In 2016, Congress introduced the Anti-Semitism Awareness Act (the "AAA" or the "Act").[85] The Senate passed its bill by unanimous consent just before the end of the year. The House did not take up the legislation.

As it has yet to be reintroduced in the current Congress, PEN America urges members to make significant changes to the legislation if it is to be brought up again. While combatting anti-Semitism—or discrimination against any religious group—is a worthy goal, the bill as introduced last Congress poses significant concerns for free expression in higher education.

Title VI of the Civil Rights Act of 1964, as amended, ("Title VI") prohibits discrimination on the basis of race, color, or national origin.[86] In the educational context, the Department of Education's Office of Civil Rights enforces Title VI to ensure that students in schools do not face incidents of harassment, intimidation, or threats based on those characteristics that are so severe, persistent, or pervasive as to deny students the ability to participate in or benefit from the services, activities, or opportunities provided by the school.[87]

Although Title VI does not bar discrimination on the basis of religion, the Department of Justice and Department of Education have both found that Title VI does prohibit discrimination against Jews, Muslims, Sikhs, and members of other religious groups when the discrimination is based on perceived ancestry or ethnicity.[88] Specifically, the Department of Justice found that discrimination "based on a group's actual or perceived shared ancestry or ethnic characteristics, rather than its members' religious practice" or "based on actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity" can violate Title VI.[89]

Neither department, however, has offered a definition of anti-Semitism (or other religious discrimination) that specifies what would qualify as a Title VI violation. The Anti-Semitism Awareness Act would do that. (Specifically, Section 4 of the Act would require the Department of Education to take into consideration the definition discussed below when determining whether an alleged discriminatory practice was motivated by anti-Semitism.)

The bill would require the Department of Education to adopt the definition of anti-Semitism set forth by the Special Envoy to Monitor and Combat Anti-Semitism of the Department of State, which is based on the "Working Definition of Anti-Semitism" promulgated by the European Monitoring Center on Racism and Xenophobia (the "EUMC"). The EUMC has since been replaced by the European Union Agency for Fundamental Rights (the "FRA").[90]

Notably, the EUMC definition was drafted by Kenneth Stern, the former director on anti-Semitism, hate studies, and extremism at the American Jewish Committee and the current executive director of the Justus & Karin Rosenberg Foundation. Stern has publicly opposed the adoption of his definition for the purposes of defining anti-Semitism as a matter of civil rights law.[91]

The Definition

Section 3 of the AAA specifies the "definition of anti-Semitism" that the Department of Education must take into account when assessing whether an allegedly discriminatory practice was based on an individual's actual or perceived Jewish ancestry or Jewish ethnic characteristics. For the purposes of the AAA, the Department of Education is directed to adopt the definition of anti-Semitism promulgated by the Special Envoy to Monitor and Combat Anti-Semitism. The AAA also specifically directs the Department of Education to consider the examples included in that definition.

The State Department definition has three parts.

It starts with the EUMC's working definition. That reads "[a]nti-Semitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of anti-Semitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities."[92]

- It then includes five contemporary examples of anti-Semitism. They are (verbatim):

- Calling for, aiding, or justifying the killing or harming of Jews (often in the name of a radical ideology or an extremist view of religion);

- Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as a collective—especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions;

- Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, the state of Israel, or even for acts committed by non-Jews;

- Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust;

- Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interest of their own nations.

The definition then sets out examples of anti-Semitism relative to Israel, which draws on the "3D test of anti-Semitism" articulated by Soviet dissident and Israeli statesman Natan Sharansky.[93] Those three "Ds" are "demonizing" Israel, applying a "double standard" to Israel, and "delegitimizing" Israel. Under each of these sub-headings, the State Department offers examples of speech critical of Israel that would qualify as anti-Semitic. They are (verbatim):

Demonize Israel

- Using the symbols and images associated with classic anti-Semitism to characterize Israel or Israelis;

- Drawing comparisons of contemporary Israeli policy to that of the Nazis;

- Blaming Israel for all inter-religious or political tensions.

Double Standard for Israel

- Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation;

- Multilateral organizations focusing on Israel only for peace or human rights investigations.

Delegitimize Israel

- Denying the Jewish people their right to self-determination, and denying Israel the right to exist.

The definition concludes with the caveat: "However, criticism of Israel similar to that leveled against any other country cannot be regarded as anti-Semitic."

Analysis

The Anti-Semitism Awareness Act poses a number of challenges for free expression. Both prudentially and constitutionally, it paints with far too broad a brush. Even the Justice Department letter, which agreed that discrimination against a member of a religious group based on perceived ancestry, ethnicity, or nationality could violate Title VI, emphasized that the "inquiry into whether a particular act of alleged discrimination falls within the purview of Title VI's prohibitions will, *in every case*, involve a detailed analysis of the allegations to determine whether jurisdiction is appropriate."[94]

Even assuming that anti-Semitic occurrences involving "pure" speech (that is, speech unaccompanied by threats, harassment, or intimidation) could constitute a Title VI violation, which PEN America does not address in this white paper, using the State Department definition clearly invites schools to look at speech that is merely critical of Israeli policies as a possible violation of civil rights law. As written, the definition would cover an individual critical of Israeli settlement policies in the occupied territories who does not also criticize similar policies by other countries. Similarly, it would cover an individual who disagrees with the historical justification for the creation of the state of Israel.

In each of these cases, an individual making such statements could be motivated by bigotry—or not. Precisely for this reason, the 2010 Department of Justice letter articulates the importance of a case-by-case inquiry. By requiring the Department of Education to consider the specific examples articulated in the State Department definition, which may or may not be anti-Semitic, depending on the context, the AAA invites false positives at the Department of Education. Further, as has already occurred under existing civil rights guidance, some schools may clamp down on First Amendment protected speech out of fear that even borderline anti-Israel rhetoric could invite a federal investigation.[95]

As a constitutional matter, the Department of Education itself has acknowledged that "hostile environment" cases involving even blatant bigotry on campus may violate the First Amendment:

> Harassment of students, which can include verbal or physical conduct, can be a form of discrimination prohibited by the statutes enforced by OCR. Thus, for example, in addressing harassment allegations, OCR has recognized that the offensiveness of a particular expression, *standing alone*, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR. In order to establish a hostile environment, harassment must be sufficiently serious (i.e., severe, persistent or pervasive) as to limit or deny a student's ability to participate in or benefit from an educational program.[96]

Constitutionally, unless the speech in question

By forcing schools to consider criticism of Israeli policies as possible "crypto" anti-Semitism, the likely outcome here will be schools overreacting and being overly censorious toward speech on this particular topic.

denies another student the ability to equally participate in school activities, any speech covered by the definition—regardless of motivation—is entitled to full First Amendment protection. The First Amendment covers even hateful speech.[97] The only exceptions, where the government can restrict speech based on its content or the message conveyed, are those narrow categories that receive diminished First Amendment protection such as incitement to lawless activity or true threats, or the exceptionally rare cases where the government can establish a compelling reason and where the restriction is the least restrictive option, such as cancelling a campus speaker in response to a credible bomb threat.[98]

Accordingly, even speech that is indisputably anti-Semitic is protected by the First Amendment, and the government may not either directly restrict that speech because of its content or, as here, deny federal funds to schools that fail to silence it, other than in circumstances where it denies other students equal access to education.

Practically, this legislation will have the effect of restricting speech in ways that do little or nothing to address anti-Semitism on college campuses. It is certainly the case that critiques of Israel can be inflected by bigotry against Jews. But it is also true that academic or humanitarian critiques of Israeli policy in the occupied territories, or even historical questions about the justification and means for the creation of the country, are legitimate subjects of public and academic discussion. By forcing schools to consider criticism of Israeli policies as possible "crypto" anti-Semitism, the likely outcome here will be schools overreacting and being overly censorious toward speech on this particular topic. Such an approach would impair free expression, and open the door to efforts to curtail other forms of speech that specific groups may regard as inherently offensive.

First Amendment Carve-Out

Section 5 of the AAA states that "[n]othing in this Act, or an amendment made by this Act, shall be construed to diminish or infringe on any right protected under the First Amendment to the Constitution of the United States." Such a constitutional rule of construction actually poses additional problems.

One, savings clauses in the First Amendment context are of limited utility. They only "kick in" after, in this case, the school or the Department of Education has decided to take action against allegedly discriminatory speech. The speaker then must go to court and establish that the school or government infringed on a right protected under the First Amendment, which requires resources, time, and the assistance of counsel.

Two, and relatedly, having the savings clause may create an incentive for schools and the government to "over-enforce" the AAA, safe in the knowledge that any overreach will be corrected by the courts down the road. When legislating in areas of constitutional sensitivity, the approach should be to calibrate a law as narrowly and specifically as possible as to avoid problems of vagueness or overbreadth.[99] This takes the opposite approach.

Finally, three, in practice such savings clauses are exceedingly rare (largely because they are of diminished utility in protecting First Amendment rights), and have failed to guard against infringements of First Amendment rights.[100]

Conclusion

That anti-Semitism is a real and growing problem is incontrovertible. According to the Anti-Defamation League, which tracks anti-Semitic incidents such as cemetery vandalism, assaults, and graffiti in schools or synagogues, anti-Semitic incidents have spiked in the last three years, surging almost 90 percent in 2017 compared to 2016.[101]

We must do more to confront anti-Semitism and religious bigotry against Muslims, Sikhs, and other religious minorities in the United States. But we must do so within the bounds of the Constitution, and without collateral damage to the pedagogical mission of our institutions of higher education. The AAA would unfortunately do exactly that, and may even exacerbate the problem by forcing truly insidious anti-Semitic activity on campuses underground. For all of these reasons, we urge Congress to reject the Anti-Semitism Awareness Act.

ENDNOTES

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13 Richard Fausset & Alan Feuer, *Far Right Groups Surge Into National View in Charlottesville*, N.Y. Times, Aug. 13, 2017, https://www.nytimes.com/2017/08/13/us/far-right-groups-blaze-into-national-view-in-charlottesville.html.

14 Jonah Engel Bromwich & Alan Blinder, *What We Know About James Alex Fields, Driver Charged in Charlottesville Killing*, N.Y. Times, Aug. 13, 2017, https://www.nytimes.com/2017/08/13/us/james-alex-fields-charlottesville-driver-.html.

15 Glenn Thrush & Rebecca R. Ruiz, *White House Acts to Stem the Fallout from Trump's First Charlottesville Remarks*, N.Y. Times, Aug. 13, 2017, https://www.nytimes.com/2017/08/13/us/charlottesville-protests-white-nationalists-trump.html.

16 *See* Stanley Kurtz et al., Campus Free Speech: A Legislative Proposal (2017), https://goldwater-media.s3.amazonaws.com/cms_page_media/2017/9/29/_Campus%20Free%20Speechsystem-wide%20Paper_%20Download.pdf [hereinafter *Goldwater Proposal White Paper*].

17 *See id.* at 3.

18 The Goldwater Institute's materials on their proposal are inconsistent in how they identify sections and paragraphs of the model bill. The model bill uses numerals for section, and letters for paragraphs, similar to federal convention in the United States Code. The explanatory material uses numerals for paragraphs and appears to skip some that are in the bill. For instance, I cannot find an explanatory passage on § 1(L), which would appear to address the Supreme Court's ruling in *Christian Legal Society v. Martinez*. In the discussion below, we refer to the section and paragraph identification in the model bill. *See* Campus Free Speech Act, *available at* https://goldwater-media.s3.amazonaws.com/cms_page_media/2017/9/5/_Campus%20Free%20Speech%20Model%20Legislation%20final.pdf [hereinafter *Goldwater Proposal*].

19 University of Chicago, Report on the Committee on Freedom of Expression 2 (2015), https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf.

20 *Id.* ("It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose."); Report of the Committee on Freedom of Expression at Yale (1974) ("In addition to the university's primary obligation to protect free expression there are also ethical responsibilities assumed by each member of the university community, along with the right to enjoy free expression."); Kalven Committee: Report on the University's Role in Political and Social Action (1967) ("The instrument of dissent and criticism is the individual faculty member or the individual student.").

21 *Goldwater Proposal*, *supra* note 17, § 1.

22 *Id.* § 1(A).

23 *Id.* §§ 1(C), 5. But note that the Goldwater proposal actually articulates a strict scrutiny standard that would normally apply to a *content-based* restriction—that the restriction be necessary to achieve a compelling governmental interest, that it be the least restrictive means of furthering that purpose, and that it leave open ample alternative avenues for speech (it also adds a requirement that the forum be open to spontaneous assembly and the distribution of literature, which PEN America supports). Given the centrality of free expression to higher education, the more rigorous standard may be appropriate.

24 *Id.* § 1(C).

25 *Id.* § 1(D).

26 *Id.* § 1(E).

27 *Id.* § 1(F).

28 *Id.* § 1(G).

29 *Id.* Any campus free speech bill should also recognize that the state legislature bears the responsibility of ensuring that schools have appropriate resources to, for instance, establish an effective cordon between groups of protesters, and have appropriate tools and training to monitor controversial events and prevent violent confrontation. PEN America is concerned that part of the problem with Charlottesville was a breakdown in the ability of law enforcement to effectively separate counter-protesters from white supremacist marchers. *See, e.g.*, David A. Graham, *Could Police Have Prevented Bloodshed in Charlottesville?*, The Atlantic, Aug. 14, 2017, https://www.theatlantic.com/politics/archive/2017/08/could-the-police-have-prevented-bloodshed-in-charlottesville/536775/; Jaweed Kaleem et al., *Charlottesville Police Face Critics as a Tense City Tries to Regroup from Deadly Weekend*, L.A. Times, Aug. 13, 2017, http://www.latimes.com/nation/la-na-charlottesville-rally-20170813-story.html.

30 *Id.* § 1(K). PEN America understands, and hopes, that the intent here is to also expand the scope of free speech protection under state law afforded to university administrators and staff as government employees, as (possibly) constrained by *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Administrators, in particular, are often required to take positions on controversial issues as part of their job. They should be allowed to do so without fear of undue discipline. Note, that PEN America, consistent with the findings of the Kalven report, recognize that when a public university is acting as a corporate entity, there may be extraordinary instances where "neutrality" is actually incompatible with the institution's mission. *Kalven Report*, *supra* note 19, at 2.

31 Subject to the caveat that many federal or state laws on the books are facially unconstitutional, or easily unconstitutional as applied, but just have not been enforced or challenged. As just a few examples, take 10 U.S.C. § 771 (2012), barring anyone other than a servicemember from wearing the uniform *or a distinctive part* of the uniform of the Army, Navy, Air Force, or Marine Corps, which would, on its face, prohibit someone from dressing up as Maverick from the movie Top Gun for Halloween; or Art. VI, § 8 of the North Carolina state constitution, which disqualifies anyone who has "den[ied] the being of Almighty God" from state office.

32 The definition in the proposal is worded slightly differently than the articulation in Elonis v. United States, 575 U.S. _, (2015). But we understand it to mean a threat made with the subjective intent to put another person in fear of bodily harm to be consistent with *Elonis*. In other words, punishing a "true threat" in the college campus context still would require the school to show specific intent to threaten.

33 See Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Dep't of Educ. 2 (Oct. 26, 2010), https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201010.html ("Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.") (emphasis added).

34 *Id.*

35 526 U.S. 629 (1999).

36 *Id.* at 633.

37 Malia Wollan, *A 'Diversity Bake Sale' Backfires on Campus*, N.Y. Times, Sept. 26, 2011, http://www.nytimes.com/2011/09/27/us/campus-diversity-bake-sale-is-priced-by-race-and-sex.html.

38 *See* United States v. Stevens, 559 U.S. 460, 472 ("[T]his Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep'" (quoting Washington State

Grange v. Washington State Republican Party, 552 U.S. 442 n.6 (2008))); Chicago v. Morales, 527 U.S. 41, 52 (1999) ("[E]ven if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.").

39 *See, e.g.*, Katharine Q. Seelye, *Protesters Disrupt Speech by 'Bell Curve' Author at Vermont College*, N.Y. Times, Mar. 3, 2017, https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html?_r=2 ("There, several masked protesters, who were believed to be outside agitators, began pushing and shoving Mr. Murray and Ms. Stanger, Mr. Burger said. 'Someone grabbed Allison's hair and twisted her neck,' he said."); Doug Lederman & Scott Jaschik, *Amid Violence, Yiannopoulos Speech at Berkeley Canceled*, Inside Higher Educ., Feb. 2, 2017, https://www.insidehighered.com/news/2017/02/02/violent-protests-visiting-mob-lead-berkeley-cancel-speech-milo-yiannopoulos.

40 Rick Seltzer, *Trustee Appointment Takes Political Turn*, Inside Higher Educ., Dec. 19, 2016, https://www.insidehighered.com/news/2016/12/19/faculty-object-legislators-take-trustee-appointments-away-north-carolina-governor.

41 *See Goldwater Proposal*, *supra* note 19, §§ 1(K), 2(C).

42 *See Kalven Report*, *supra* note 18, at 2-3.

43 561 U.S. 661 (2010).

44 *See Goldwater Proposal*, *supra* note 19, § 1(L)(1)-(3).

45 *See* Perry Educ. Ass'n v. Perry Educators' Ass'n, 460 U.S. 37, 45 (1983) (articulating tests for content-based restrictions on speech in quintessential public forums, content-neutral time, place, and manner restrictions, and the appropriate test for designated or limited public forums).

46 H.B. 2615, 52d Leg., 2d Reg. Sess. (Ariz. 2016); H.B. 2548 52d Leg., 2d Reg. Sess. (Ariz. 2016).

47 *Compare* H.B. 2615 § 1 (amending Ariz. Rev. Stat. § 15-1864(B)(2)(a)-(d) (2016)), *with* H.B. 2548 § 3 (amending Ariz. Rev. Stat. § 15-1864(B)(1)-(2) (2016)).

48 H.B. 2548 § 1 (creating a new Ariz. Rev. Stat. § 13-2906(A)(3), (B) (2016)).

49 H.B. 2548 § 3 (amending Ariz. Rev. Stat. § 15-1864(C)-(D) (2016)).

50 S.B. 17-062, 2017 Gen. Assemb., Reg. Sess. (Colo. 2017).

51 S.B. 17-062 (adding new Colo. Rev. Stat. § 23-5-144(2)(d) (2017)).

52 S.B. 17-062 (adding new Colo. Rev. Stat. § 23-5-144(5)(a)-(d) (2017)).

53 *Id.*

54 S.B. 17-062 (adding new Colo. Rev. Stat. § 23-5-144(3)(a) (2017)).

55 S.B. 17-062 (adding new Colo. Rev. Stat. § 23-5-144(3)(b) (2017)).

56 S.B. 17-062 (adding new Colo. Rev. Stat. § 23-5-144(6) (2017)).

57 S.B. 17-062 (adding new Colo. Rev. Stat. § 23-5-144(7) (2017)).

58 H.B. 269, 2017 Leg., Reg. Sess. (La. 2017); *see also* Letter from Gov. John Bel Edwards to Hon. Taylor F. Barras, Speaker of the Louisiana House of Representatives, Regarding Veto of House Bill 269 of 2017 Regular Session (June 26, 2017), https://www.legis.la.gov/legis/ViewDocument.aspx?d=1052479.

59 H.B. 269 (creating La. Stat. Ann. § 3399.31(8) (2017)).

60 H.B. 269 (creating La. Stat. Ann. § 3399.32 (2017)).

61 H.B. 269 (creating La. Stat. Ann. § 3399.33 (2017)).

62 S.B. 350, 2017 Leg., Reg. Sess. (Mich. 2017), which would amend Mich. Comp. Laws §§ 388.1601 to 388.1896 (2017) to add new sections 210f, 210g, and 275c.

63 S.B. 350 (creating Mich. Comp. Laws § 210F(A)(ix)-(x) (2017)).

64 S.B. 93, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015).

65 H.B. 527, 2017-18 Sess. (N.C. 2017), Sess. Law 2017-196.

66 H.B. 527, § 116-300(7) ("The constituent institution shall implement of range of disciplinary sanctions for anyone under the jurisdiction of a constituent institution who substantially disrupts the functioning of the constituent institution . . . including protests and demonstrations that infringe upon the rights of others to engage in and listen to expressive activity when the expressive activity has been scheduled pursuant to this policy or is located in a nonpublic forum.").

67 H.B. 527, § 116-300(8) (guaranteeing the right to assistance of counsel).

68 H.B. 527, § 116-301(a).

69 H.B. 527, § 116-301(b).

70 H.B. 527, § 116-300(3).

71 H.B. 527, § 116-300(5).

72 H.B. 527, § 116-304.

73 S.B. 723, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017), Pub. Ch. 336.

74 S.B. 723 (creating new 49 Tenn. Code Ann. § (6)(13) ("An institution shall not deny student activity fee funding to a student organization based on the viewpoints that the student organization advocates.")).

75 S.B. 723 (creating new 49 Tenn. Code Ann. § (7)(b)).

76 H.B. 2527, 85th Gen. Assemb., Reg. Sess. § 1 (Tex. 2017) (adding new Tex. Code Ann. § 51.9315(f)).

77 S.B. 1151, 85th Gen. Assemb., Reg. Sess. § 1 (Tex. 2017) (adding new Tex. Code Ann. § 51.9315(b)).

78 S.B. 1151 (adding new § 51.9315(d)).

79 S.B. 1151, § 2.

80 H.B. 54, 2017 Gen. Assemb., Reg. Sess. (Utah 2017) (enacting Utah Code Ann. 53B-27-101-205).

81 H.B. 1401, 2017 Gen. Assemb. (Va. 2017), Va. Acts Ch. 506.

82 A.B. 299, 2017 Gen. Assemb., Reg. Sess. (Wis. 2017) (creating new Wis. Stat. § 36.02(5)).

83 A.B. 299 (creating new Wis. Stat. § 36.02(4(b)).

84 Mark D. Wilson, *UT Students Use Sex Toys to Protest Campus Carry Law*, Austin Am. Statesman, Aug. 24, 2016, http://www.statesman.com/news/local/students-use-sex-toys-protest-campus-carry-law/48cIn8dCy\JZpGl3rkMsSTJ/.

85 S. 10, 114th Cong. (2016); H.B. 6421, 114th Cong. (2016).

86 42 U.S.C. §§ 2000d-2000d-7 (2012).

87 *See* Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Dep't of Educ. 2 (Oct. 26, 2010), https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201010.html.

88 *See* Letter from Thomas E. Perez, Assistant Sec'y for Civil Rights to Russlynn Ali, Assistant Sec'y for Civil Rights, Dep't of Educ. (Sept. 8, 2010), https://www.justice.gov/sites/default/files/crt/legacy/2011/05/04/090810_AAG_Perez_Letter_to_Ed_OCR_Title%20VI_and_Religiously_Identifiable_Groups.pdf [hereinafter *Perez 2010 Letter*].

89 *Id.* at 2-3.

90 *See* Dep't of State, Special Envoy to Monitor and Combat Anti-Semitism, Defining Anti-Semitism, Fact Sheet (June 8, 2010), https://2009-2017.state.gov/j/drl/rls/fs/2010/122352.htm [hereinafter *2010 State Dep't Fact Sheet*]; Dep't of State, Office of Religion and Global Affairs, Defining Anti-Semitism (Jan. 20, 2017), https://www.state.gov/s/rga/resources/267538.htm; Eur. Parl. Working Group on Anti-Semitism, Working Definition of Anti-Semitism, http://www.antisem.eu/projects/eumc-working-definition-of-antisemitism/. Note that the 2010 and 2017 definitions from the State Department are identical.

91 *See* Letter from Kenneth Stern, Exec. Dir., Justus & Karin Rosenberg Found., to the House of Representatives (Dec. 6, 2016), http://www.tikkun.org/tikkundaily/2016/12/14/kenneth-sterns-letter-to-the-house-on-the-antisemitism-awareness-act/.

92 *2010 State Dep't Fact Sheet*, *supra* note 89.

93 *See* Natan Sharansky, *Antisemitism in 3-D*, The Forward, Jan. 21, 2005, http://forward.com/opinion/\4184/antisemitism-in-3-d/.

94 *Perez 2010 Letter*, *supra* note 87 (emphasis added).

95 Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec'y for Civil Rights, Dep't of Education (July 28, 2003) ("Some colleges and universities have interpreted OCR's prohibition of 'harassment' as encompassing all offensive speech regarding sex, disability, race or other classifications."), https://www2.ed.gov/about/offices/list/ocr/firstamend.html.

96 *Id.*

97 United States v. Schwimmer, 279 U.S. 644 (1929) (Holmes, J., dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.").

98 United States v. Stevens, 559 U.S. 460 (2010) (refusing to recognize new historically unprotected categories of speech); Burson v. Freeman, 504 U.S. 191 (1992) (applying "exacting" scrutiny to geographic ban on electioneering near polling places).

99 *See* Chicago v. Morales, 527 U.S. 41 (1999) (holding that laws that leave the public uncertain as to what they prohibit are unconstitutionally vague).

100 *See, e.g.*, Letter from N.Y. State Bar to Hon. John Conyers et al. (July 22, 2009) ("[A]t best, [the Animal Enterprise Terrorism Act's] savings clause provides insufficient guidance to a citizen and, at worst, is itself unconstitutionally vague."); *see also* Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 575-76 (1987) (disregarding city's savings clause as unduly vague); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (finding that, even after lower court limited group libel prohibition to speech unprotected by the First Amendment such as "fighting words," state could still not discriminate against speech based on content).

101 Press Release, Anti-Defamation League, U.S. Anti-Semitic Incidents Spike 86 Percent So Far in 2017 After Surging Last Year (Apr. 24, 2017), https://www.adl.org/news/press-releases/us-anti-semitic-incidents-spike-86-percent-so-far-in-2017.

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