



# CHASM IN THE CLASSROOM

Campus Free Speech in a  
Divided America



The Freedom  
to Write



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to Write

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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 7,000 novelists, journalists, poets, essayists, playwrights, editors, publishers, translators, agents, and other writing professionals. For more information, visit [pen.org](http://pen.org).

Design by Pettypiece + Co.

Cover image: Protesters chant during Richard Spencer's speech at the University of Florida in October 2017. Photograph by Evelyn Hockstein.



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## From Our Chief Executive Officer

# LETTER



This report is informed by PEN America's tracking of speech-related incidents and controversies on college and university campuses for the past 3 years. Our analysis has been particularly shaped by four convenings we organized in the 2017-2018 academic year on campuses that had

been the sites of particularly pitched controversies: the University of California at Berkeley, Middlebury College, the University of Maryland at College Park, and the University of Virginia at Charlottesville. We express deep gratitude to the participants in these convenings and are indebted to the countless campus leaders and student affairs professionals who made these important partnerships and searching conversations possible: Matt Banfield, Susan Baldrige, Bill Burger, Carol Christ, Gina Banks Daly, Adrian Diaz, Michael Emerson Dirda, Maya Goehring-Harris, Khira Griscavage, Archie Holmes, Tom Katsouleas, Jenny Kwon, Dan Mogulof, Laurie Patton, Alexandra Rebhorn, Tim Spears, Elyse Smith, Timea Webster, and Roger Worthington. We also thank the dozens of students, faculty, staff, and administrators involved in the convenings who agreed to speak privately with PEN America and helped ensure accuracy as we recounted events on their campuses.

We are grateful to the countless campus leaders, commentators, student affairs professionals, faculty members, and students who have heightened our thinking, analysis, and understanding of these issues through close partnerships and honest feedback. These individuals include: Floyd Abrams, Erik Bleich, David Campt, Erwin Chemerinsky, Jelani Cobb, Michael Goodman, Will DiGravio, Jonathan Holloway, Jerry Kang, Sarah Kenny, Michele Minter, Dan Mogulof, Ishaan Parikh, Robert Post, Marissa Reynoso, Carol Rose, Michael Roth, Elizabeth Siyuan Lee, Tim Spears, Geoffrey Stone, Sarah Stroup, Nadine Strossen, Joan Wallach Scott, W. Bradford Wilcox, Roger Worthington, and Robert Zimmer.

In August 2018 Jonathan Friedman joined PEN America to lead our Campus Free Speech Program and spearhead the research and drafting of this report. Without his hard work, acumen, patience and insight this report would not have been completed. Jonathan wrestled with enormous volumes of material, contradictions, nuances, and roadblocks with

wisdom, perseverance, and ingenuity. PEN America is also indebted to Adeline Lee, PEN America's Campus Speech Coordinator, who played an indispensable role in both the campus convenings, the drafting and editing of this report, and the balance of our work in this area. Her aplomb, communication and interpersonal skills, warmth, and analytic prowess have contributed immeasurably to our work. PEN America's Senior Director of Free Expression Programs, Summer Lopez, provided leadership, support, a keen eye, sharp editing skills, and dogged determination that were essential to seeing the project through. PEN Free Expression experts James Tager and Nora Benavidez provided extensive support in the researching, writing, and editing of key sections. Special thanks also are extended to the consultants who contributed to its formation, Soraya Ferdman who contributed in numerous, critical ways, to legal extern Marc Walkow for his research and legal support, to Noah Kippley-Ogman, for contributing to early drafts, and to past PEN America staff including Katy Glenn Bass who spearheaded our four campus convenings and Laura Macomber who conducted initial research. The report could not have come together without the assistance of many interns, including Mary Akdemir, Mansee Khurana, Jessica Brofsky, Eli Miller, Erin Neil, Adam Panish, and Inika Sahney.

We are especially grateful to Amy Binder and Jeffrey Kidder for allowing us to quote from their interviews with college students in Section IV of this report, and to the many external readers who reviewed the report in full or in part in the lead-up to publication. Thanks to Jeffrey Adam Sachs, Ulrich Baer, Sigal Ben-Porath, Nana Brantuo, Joe Cohn, Jonathan Haidt, Robert Post, Nadine Strossen, and Jonathan Zimmerman for your helpful feedback. We also extend thanks to Pettypiece & Co. for graphic design, and to Susan Chumsky whose careful editing and proofreading made the report tighter and clearer.

PEN America takes responsibility for this report and any errors are our own. We are publishing the report online and reserve the right to make corrections and edits as necessary. If significant and substantive post-release edits are made they will be marked as such.

A handwritten signature in black ink, appearing to read 'Suzanne Nossel'.

**Suzanne Nossel**  
*Chief Executive Officer*





## INTRODUCTION

The main campus of the University of Minnesota Twin Cities is bisected by the Mississippi River. Straddling the water and stretching over a thousand feet is the Washington Avenue Bridge, which carries motor vehicles, light rail trains, bicycles, and pedestrians. Built in 1965, the bridge is a central artery for campus traffic, with thousands of students, faculty, and administrators crossing daily.<sup>1</sup> In the past three years, the bridge has also become the site of annual controversy on the Minneapolis campus.

In a tradition dating back to the mid-1990s, student groups gather every fall to paint the panels that line the bridge's pedestrian walkway to showcase the diversity of clubs at the university and share information about how to get involved.<sup>2</sup> The painted images and slogans vary each year; according to one student article about the bridge, "All that matters is that you catch the attention of passersby."<sup>3</sup> In 2016, the university's College Republicans set out to do just that, choosing to devote one panel to the phrase "Build the Wall"—associated with Donald Trump's presidential campaign—and another to the phrase "Trump Pence 2016." Within 24 hours, the group's panels were graffitied over with multiple tags, and the only legible message was "Stop White Supremacy," rendered in gold.<sup>4</sup>

The next day, the university's president, Eric Kaler, sent a campus-wide email defending the right of the College Republicans to voice their opinion. "Build the Wall" was to be protected as "free, political speech," he said, and those who found it distasteful should "engage in more protected speech" to counter it.<sup>5</sup> That afternoon, nearly 150 students gathered on the bridge to protest these messages. A coalition of academic departments released a statement saying that the university's response did not recognize the "inherent violence within this slogan," which they said was a form of "barely covert" racism.<sup>6</sup> They called for the university to "actively take responsibility for the racist and xenophobic climate that is being fostered in this public space."<sup>7</sup> The College Republicans, meanwhile, issued a statement thanking the president for his support but expressing their own dismay: "We find it highly disturbing that someone would vandalize a simple statement such as 'build the wall.'"<sup>8</sup>

In the ensuing days, the bridge uniting the two halves of the campus became a locus of division. As one journalist wrote, the campus experienced a "confluence of frustrations and opposing viewpoints."<sup>9</sup> Some 200 student protesters interrupted a

*Failures of political leadership, persistent racism and bigotry, the weaponization of speech on digital platforms, and gaps in civic education are combining to undermine the consensus for an open marketplace for ideas.*

conversation with the university president on "campus climate," which had been planned weeks earlier, to voice concerns about the treatment of students of color at the institution. They carried signs reading, "I Don't Feel Safe Here" and "Build Love Not Walls."<sup>10</sup> The Department of Chicano and Latino Studies organized a teach-in on immigration, free speech, and the role of the university that was well attended.<sup>11</sup> One College Republican student leader told Fox News that the episode was "the latest instance of conservative students being targeted because of their support of Trump."<sup>12</sup>

To one camp, the paint wars were just another example of how college campuses had become inhospitable to free speech, with left-leaning populations ready to censor conservative ideas. On the other side were students and faculty who, amid a pitched presidential campaign marked by charges of sexism, racism, and xenophobia, were acutely sensitive to bigoted overtones in messages manifesting on campus. "Both sides feel their own sense of voicelessness," one journalist wrote on November 4, adding that everyone seems to agree on one thing: "The 2016 campaign is exhausting."<sup>13</sup>

Within a week, Donald Trump was elected the 45th president of the United States. In the nearly two and a half years since, the panels on the Washington Avenue Bridge at the University of Minnesota have been a consistent flashpoint, the site of an annual tit-for-tat between warring student groups. In 2017, a College Republicans panel that read, "Least Popular Minority on Campus" was covered with "You're Not a Minority; You're the Oppressors."<sup>14</sup> Other panels, with messages from conservative groups like Turning



Protesters outside Sproul Plaza, UC Berkeley on September 24, 2017

Point USA and the student-run newspaper *Minnesota Republic*, were painted over entirely in white, and then with “Racists Not Welcome,” and “Can’t Paint Over Hate.”<sup>15</sup> When a student tried to tape signs over the Republican groups’ messages, an altercation broke out.<sup>16</sup> In response, a week later three student groups combined to splash the lone word “Censored” across nine panels.<sup>17</sup> A year later, the tug-of-war played out once again as Republican students wrote, “Make the U Great Again” and “The Proposed Pronoun Policy Mocks Real Social Issues”—a reference to the university’s new draft policy promoting the use of individuals’ preferred gender pronouns. These were quickly written over with large black letters spelling out “Queer Power.”<sup>18</sup>

The struggles at the University of Minnesota reflect both campus politics and national mood. In recent years, there has been a new wave of provocative speakers stirring up massive student protests, a constant stream of news stories about professors making controversial comments, and a rise in political scrutiny leading to new efforts to reform campuses through both legislative, judicial, and executive channels. The controversy over one bridge is instructive because it highlights how campuses have become a proxy for national political and social conflicts writ large in which speech has taken on great significance,

and in which neither side is willing to cede an inch—or a mural—to the other.

Similar incidents have been reported at universities nationwide. At Sonoma State University in June 2017, anger erupted when a student read a poem at commencement that referenced police violence against African Americans and contained expletives and some derogatory references to Trump.<sup>19</sup> At the University of California at Riverside in September 2017, a student allegedly removed a “Make America Great Again” hat from a classmate’s head and accused him of “promoting ‘genocide.’”<sup>20</sup> In April 2018, there were calls to remove a new mural at the University of Southern California that read, “Dismantle Whiteness and Misogyny on this Campus,” with some calling the statement racist.<sup>21</sup> At the University of Maine in December 2018, a group of Republican students faced public criticism for a “Deck the Wall” party that some considered insensitive.<sup>22</sup>

As at the University of Minnesota, each of these incidents is emblematic of a national political debate over free speech, hateful speech, and the values of diversity and inclusion. At stake is the question of which ideas, values, and messages will be championed and which will be considered out of bounds. Numerous campuses have endured more extreme protests and conflicts, but these incidents have all



been underpinned by the same set of tensions between how to uphold America's founding principles and freedoms in an increasingly demographically diverse country, grappling with persistent legacies of racism and bigotry. This tension has animated progressive students' protests of controversial far-right speakers, cries from conservative media for liberal faculty members to be fired for their remarks online, and even attempts to assess the climate for free speech on campuses as a whole. And these conflicts have become ever more polarized and ever more volatile following the election of President Trump and the heightened societal anxieties that accompanied it.

### Campus Speech in the Trump Era

In October 2016, PEN America released *And Campus for All: Diversity, Inclusion, and Free Speech at U.S. Universities*, a comprehensive report examining the free speech controversies then roiling campuses.<sup>23</sup> We examined the challenges of reconciling free speech with diversity while debates raged over concepts like microaggressions, trigger warnings, safe spaces, and disinvitations to campus speakers. We tried to give both sides in these conflicts their due, reviewing their evidence and acknowledging the merits of each argument. The controversies typically pitted those concerned about the impact of hateful expression against those asserting that the real danger lay in deterring, suppressing, or punishing speech. We stated vociferously in that report that the imperative for universities to become more open, inclusive, and equal for students of all races, genders, nationalities, and backgrounds can and must be pursued without compromising robust protections for free speech and academic freedom. We affirm the analysis published in *And Campus for All*, and maintain a fervent view that these dual sets of objectives must coexist for the university to fulfill its role.

We also set out the PEN America Principles on Campus Free Speech in the 2016 report as a set of guidelines to help university presidents, administrators, faculty, and students handle speech-related controversies in ways that advance diversity and inclusion without compromising free speech. In the ensuing two and a half years, PEN America has been deeply engaged in advancing our unique approach to these issues through dozens of op-eds, speeches, written pieces, interviews, and consultations with stakeholders. We have convened symposia bringing together university presidents and provosts, First Amendment scholars, faculty members, and student leaders for two-day, closed-door intensive sessions to examine how these sometimes competing interests can be reconciled. We have done so at

the national level in partnership with the National Constitution Center in Philadelphia, and through leading four campus-based events from 2017-2018—at the University of California at Berkeley, Middlebury College, the University of Maryland at College Park, and the University of Virginia, all sites of explosive controversies that are recounted in this report. PEN America CEO Suzanne Nossel has twice testified before Congress on campus free speech.<sup>24</sup> In the fall of 2017, we issued *Wrong Answer: How Good Faith Attempts to Address Free Speech and Anti-Semitism on Campus Could Backfire*, addressing legislative attempts to deal with campus speech.<sup>25</sup>

In recent years, the chasm over these issues has deepened, exacerbated by tensions in the wider society. Overt racism on campus has become more common, as have hateful incidents, some of them violent. Groups on the left and right have become more aggressive in their efforts to pressure universities to police the speech of students, faculty, administrators, and invited guests. Key to understanding the developments of the last two years is the candidacy and presidency of Donald Trump. Controversies over racially charged Halloween costumes, Confederate flags and statues, and the naming of buildings after historical figures with ties to slavery were swirling on college campuses in the last years of President Barack Obama's second term. Still, there was hope in some quarters that these reckonings represented progress, with universities taking vital steps towards the unfinished business of addressing entrenched institutional racism.

But Trump's emergence in the Republican primaries of 2016 began to jeopardize these hopes. His embrace of hateful rhetoric seemed to quickly bring to the fore racist views still present in American society. Trump began his campaign by denouncing Mexican immigrants as "rapists" and has since approached his statements and policies in ways previously understood as being outside the bounds of responsible civic discourse.<sup>26</sup> In particular, he is credited with emboldening white supremacist hate groups, some of which marched through Charlottesville, Virginia, in the summer of 2017 as part of a "Unite the Right" rally. When given the opportunity to separate himself from them, Trump insisted that the marchers were not all bad—that some were "very fine people"—and that they had been mischaracterized by the media.<sup>27</sup> Meanwhile, several Trump Administration policy proposals, including efforts to repeal Deferred Action for Childhood Arrivals (DACA),<sup>28</sup> the promise to build a wall on the southern border, and the memo to narrowly define gender as biologically immutable,<sup>29</sup> have fueled deep and genuine anxiety nationally and especially among



today's diverse student population.

The rise in documented incidents of bigoted speech and hate crimes since 2016 has understandably intensified the push on campus to curb offensive and denigrating speech. While discussions of so-called safe spaces may once have referred principally to the notion of psychological safety or comfort, it is now clear that the weakening of taboos against bigotry has put students' and faculty's physical safety at risk. With political rhetoric and policy proposals that undercut the rights, autonomy, and opportunities of transgender and undocumented individuals, some students legitimately feel as if their very identities and presence on campus—and in the United States—are under attack. Their heightened sense of vulnerability can raise the stakes of hateful speech, and of mere political speech associated with policies considered menacing. Given that nearly all colleges and universities profess a profound commitment to diversity and inclusion, expectations have arisen that they will serve as a bulwark against such threats.

At times, calls to protect vulnerable students from objectionable speech cross over into calls to punish and censor expression. It is no longer uncommon for the prospective invitation of a controversial speaker, or the insensitive statement of a faculty member, to lead to calls for discipline. When speech is incendiary, some protesters believe that they are within their rights to protect its targets by silencing it. With hateful speech unleashed in society at large, there is an impulse to police it more forcefully within domains that can be controlled, including the college campus.<sup>30</sup>

While understandable, these developments risk the chilling of free speech and academic freedom. A recent survey of college students by FIRE (the Foundation for Individual Rights in Education) shows that many are supportive of free speech in the abstract but eager for their institutions to restrict speech that might be "intolerant, hurtful, or offensive."<sup>31</sup> This finding reflects a worrying trend: that a sizable portion of college students do not fully understand the protections afforded speech by the First Amendment or agree with the value of protecting even noxious speech for the sake of maintaining an open and democratic society.

The most high-profile campus confrontations—including those at UC Berkeley, Middlebury, UVA, and Evergreen State—appear to have peaked in 2017, with far fewer dominating headlines in 2018.<sup>32</sup> But the intermittent earthquakes of the past few years have been replaced by a near constant—if less sensational—rumble. Today colleges and universities that are not reeling from speech controversies are working hard to head them off before they arise.

Few weeks pass without national headlines about one campus-speech-related controversy or another. And many student and faculty report self-censoring in class discussions or on campuses generally. To administrators, battles over speech seem unavoidable, the inevitable byproducts of our current political polarization to which they must be better prepared to respond.

### Is This a Crisis?

One of the most cited claims in PEN America's 2016 report was the assertion that the spate of documented campus speech controversies did not amount to a crisis. Most of the "crisis" talk has been driven by conservative voices alarmed by the academy's leftward ideological tilt and the lack of appreciation for free speech precepts among some on the left. They have raised concerns that identity politics and political correctness are orthodoxies that exclude contrary views and foreclose debate. In the 2018 book *The Coddling of the American Mind*, Greg Lukianoff, the president and CEO of FIRE, and Jonathan Haidt, a professor of psychology at New York University, write: "The culture on many college campuses has become more ideologically uniform, compromising the ability of scholars to seek truth, and of students to learn from a broad range of thinkers."<sup>33</sup> The problems they see range far beyond academic matters, as they present the rising generation as victims of a culture of "safetyism"—"coddled" and overprotected from harm as children and now unable to handle offense, easily "triggered," and "fragile." Other commentators use the same concepts to mock liberal students as "snowflakes" and label any sign of emotion as a "meltdown."<sup>34</sup>

Critics of this perspective accuse Haidt and Lukianoff of proffering an alarmist caricature of student attitudes. Matthew Yglesias, a senior correspondent at Vox, disputes claims of crisis by pointing to survey data that suggests that college students are "less likely than the overall population to support restrictions on speech on campus."<sup>35</sup> Aaron Hanlon, a professor of English at Colby College, claims that a handful of events involving "overzealous" protesters do not necessarily reflect the attitudes of an entire generation.<sup>36</sup> Some have argued that the controversies of recent years are not new and have historical antecedents.<sup>37</sup> Others, like Sanford J. Ungar, director of the Free Speech Project at Georgetown University, point out that protests have not targeted conservatives alone and that the conservatives they did target tended to be the same set of high-profile speakers and are actually few in number.<sup>38</sup> As Chris Ladd maintained in a 2017 piece in *Forbes* that "thanks to a carefully orchestrated campaign, the notion that universities





*The University's College Republicans painted a pro-Trump mural during Paint the Bridge on the Washington Avenue Bridge that was later vandalized in October 2017*

are hostile to the free exchange of ideas is slipping into mainstream opinion.”<sup>39</sup> These assessments of the climate for speech on campus remain contested, and there has been much nuanced analysis and debate.<sup>40</sup>

At PEN America, we do not believe that campuses are experiencing a unique crisis separate from the tensions and fissures pulling apart American society at large. However, we do see a looming danger that our bedrock faith in free speech as an enduring foundation of American society could give way to a belief that curtailing harmful expression will enable our diverse population to live together peaceably. Failures of political leadership, persistent racism and bigotry, the weaponization of speech on digital platforms, and gaps in civic education are combining to undermine the consensus for an open marketplace for ideas. These forces imperil the foundational precept of First Amendment jurisprudence: that government must not be empowered to regulate speech. The implicit societal bargains that make free speech possible—taboos, social norms, respectful modes of discourse, effective retractions and corrections, contextualization—are being pulled at and eroded from various sides. Only by doubling down on the underpinnings of free speech both on campus and throughout society will we be able to save this cherished ideal.

### **Outrage at the Ready**

As a result of heightened anxiety and deepening polarization, campuses have become flashpoints of umbrage. Social media has fed this sensationalism as armies of like-minded digital citizens foment public pressure on universities to react to supposed outrages. We have all seen the videos: the shouting student, the offensive professor, the accosted administrator. Short clips catch fire, eliciting outraged comments, viral shares and retweets—all the while making it difficult for those involved to correct the record.

As the journalist Steve Kolowich described it, “Modern technology has turned campus politics into a circus, and audiences come to see the freaks: the professor who thinks white-marble statues are racist, the one who wants white genocide for Christmas, the one who wants to see President Trump hanged.”<sup>41</sup> Amid the glare of social media, YouTube, and a plethora of websites now devoted to documenting campus, nuance, patience, and tolerance have given way to the dueling forces of fear and opportunism as a national audience rushes to scrutinize every utterance. Many faculty have reported receiving online death threats and other forms of harassment in the wake of making controversial statements, and many others have been demoted, disciplined, or dismissed,

leading to widespread concerns about the repercussions of speech and the state of academic freedom. But regarding campus free speech we have all been deputized to help correct any perceived wrongs, and self-anointed as judge, jury, and executioner.

The high visibility of these incidents and their permanent afterlife on the internet mean that campus leaders face unprecedented pressure to react properly when controversies arise. They must get their messaging pitch-perfect so they can assuage students, uphold free speech, and avoid triggering unrest, governmental scrutiny, lawsuits, and donor defections.

In this way, the national debate over free speech on campus has become, in the Trump era, a deeply partisan feud, with each side trying to catch the other in transgressive acts that can be amplified to rile up the faithful. It is at once a territorial conflict over which values will prevail on campus and a proxy for a much larger political battle over the future of American society. And if there are legitimate concerns about whether there is still space for patience, good faith, and reasoned debate on campus, it bears recognizing that there is little evidence of such values in our national discourse at this moment either.

### **The Danger of a Single Story**

In her famous TED talk, the acclaimed Nigerian author and PEN America Member Chimamanda Ngozi Adichie discusses what she calls ‘The Danger of a Single Story.’ “The single story creates stereotypes,” Adichie says, “and the problem with stereotypes is not that they are untrue, but that they are incomplete. They make one story become the only story.”<sup>42</sup> In analyzing today’s campus controversies, this point is crucial, for most accounts of these incidents tend to be partial, and in privileging one view, details relevant from another vantage are left out. As Adichie explains: “That is how to create a single story: show a people as one thing, as only one thing, over and over again, and that is what they become.”<sup>43</sup> A string of truly sensational confrontations, buttressed by a steady flow of more minor incidents, have provided the necessary conditions for a set of singular narratives to develop and take hold among segments of the public. These narratives have been pushed by organizations and commentators from competing points in the political spectrum, who blame current tensions around free expression on campus alternatively on the excesses of liberal dogma, or on the insensitive provocations of outrageous conservatives.

We see the object of moving beyond a ‘single story’ of recent campus free speech controversies as an essential goal. In PEN America’s campus convenings we have insisted on including students and faculty with diverse political leanings so that they can hear

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directly from one another. When an individual student recounts how racist speech or graffiti contributes to feelings of social unease or physical insecurity, her personal account is vivid and compelling in ways that make it more difficult to dismiss the harms of speech. When a conservative student recounts being shunned by professors and unable to find a faculty adviser for a thesis project, even liberal students of color express sympathy. When administrators can open up about the dilemmas they face in balancing between the free speech rights of those who embrace President Trump’s political agenda and those who look to the campus itself as a haven from an America that seems suddenly menacing to their family or community, students on both sides can appreciate the delicate quandaries involved. When students of all sides talk about how their backgrounds and upbringings influence the ideas, expectations and insecurities they bring with them to campus, they become human beings to one another, rather than strawmen on the opposing sides of a debate.

But short of such intimate, face-to-face dialogue, so entrenched are the distinct narratives of complicity in campus speech controversies that any effort to harmonize them, or contradict them, is likely to be met with skepticism on all sides. Such stories of reasoned, civil engagement don’t make headlines or energize funders; but they will be an essential part of the reconciliation necessary to restoring a shared reality about these incidents, and essential if colleges and universities are to find their way through this mire.

These challenges were well-illustrated in a reflection by Will DiGravio who was a sophomore at Middlebury College when a protest over a speech by scholar Charles Murray erupted into violence in early 2017. DiGravio wrote:

“Most of the coverage does not capture the conversations and soul-searching here at



Middlebury. National coverage presents a big picture, but what we are learning here is that the big picture obscures its own truth, for it is actually made up of many contrasting points of view... As a young journalist who strives to be objective, watching my peers have these conversations has been eye-opening. It has made me understand in a visceral way that no story can truly cover every angle, not every view can be reported.”<sup>44</sup>

We take Adichie and DiGravio’s remarks as a necessary framing for embarking on a discussion of a wide range of incidents that have occurred on college campuses in the past two and a half years, many of which have been fraught with misinformation, polarization, and outrage. Our effort is to encompass the competing narratives that have framed each of these incidents, striving to reconcile, align, and find areas of convergence.

### Moving Forward

While some campus speech controversies can be averted or swiftly resolved with greater empathy, insight, or resolve, many pose genuine dilemmas for well-intentioned university leaders. The boundary between satire and bigotry can be in the eye of the beholder. Sometimes questionable speech or actions are fed by genuine ignorance rather than malicious intent. Some youthful indiscretions warrant forgiveness, while others warrant discipline.

Efforts to improve the climate for free expression on campus should begin by educating students about both the legacy of free speech and its value to the causes they hold dear, and by explaining how censorship—even of abhorrent speech—can distort discourse and impair individual freedom. Arguments that the imperative of countering racism may sometimes warrant curbs on free speech should be engaged, rather than dismissed. Free speech must be taught and framed in ways that make sense and are compelling to racially, ethnically, and ideologically diverse students, lest a rising generation come to believe that speech protections are at odds with their treasured values.

There are indications that college administrators are learning how to balance these competing obligations. The so-called “Chicago Principles” on free speech, developed by a University of Chicago committee in 2015, help articulate how colleges can instill a common culture of free speech and openness to debate.<sup>45</sup> But they do not offer clear principles that college leaders can follow to ward off or resolve speech-related controversies or to address

the complex questions of race and inclusion that so often underpin them. This report endeavors to provide a perspective on campus free speech controversies that recognizes these complexities. It also includes an update to the PEN America Principles on Campus Free Speech, first compiled in 2016 and now revised to reflect newer controversies in these broader debates.

### The Role of PEN America

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. PEN America’s work centers on freedom of speech and a profound commitment to open intellectual inquiry. We work to defend those principles through research, advocacy, and campaigning on behalf of individuals whose rights are threatened and denied. PEN America’s purpose also encompasses elevating unheard voices and fostering dialogue across geographic, racial, ethnic, and religious boundaries.

As summarized in *And Campus for All*, today’s campus speech debate raises pressing concerns over how to reconcile the imperative of creating inclusive, equal societies in which all voices can be heard with the bedrock principle of protecting free speech. Our point of departure is that both of these objectives are compelling and worthy of respect and that, through reasoned efforts and dialogue, more can be done to help them comfortably coexist. Our aim is to shed light and spur thinking on how to nurture a campus community that allows for academic and social discourse that is truly inclusive and transcends boundaries while also protecting speech to the utmost extent.

News coverage of campus speech incidents is often fleeting and rarely addresses all the nuances at work. Many of the more than 100 speech-related incidents discussed in this report have been polarizing and emotional. Because we cite these cases for illustrative purposes, our discussions of each of them are necessarily abbreviated and incomplete. We have tried to be fair and even-handed and assume responsibility for any errors of omission or commission. Further, while providing a robust analysis of speech controversies on numerous public and private campuses, this report does not cover the issue of free speech at religious institutions in great detail. This is an area deserving of extensive analysis of its own. We also focus largely on controversies



surrounding speech about political and social issues and debates, rather than on controversies about speech related to issues such as faculty or graduate student unionization, administrator salaries, or administration policies.

We offer our conclusions and recommendations in a spirit of humility and openness, hoping that this report serves above all as an impetus for campus discussions about how best to address the challenging issues that students, faculty, and administrators confront.

### **Report Content and Structure**

Following this introduction, the report has five main sections and one special section.

Section I discusses the rise of hateful expression and intimidation on campuses in the Trump era. We explain how new examinations of the connections between speech and harm, particularly against the background of a national rise in hate incidents, have helped shape students' expectations of how universities should respond to hateful speech. We explore how Trump's divisive rhetoric and policies have obscured the lines between hateful speech and appropriate civic discourse in ways that pose new challenges for campus administrators. We discuss how campus leaders can best respond to hate speech or bias in ways that both foster inclusion and respect free speech principles.

Section II summarizes and analyzes controversies surrounding efforts to shutdown or shout-down speakers invited to campus in the past two years. We explain how these incidents came to a remarkable crescendo in 2017, with many high-profile incidents leading to speaker cancellations and even violent confrontations. We discuss the rise, and seeming fall, of a group of professional provocateurs and how students' intense reactions were often motivated by concern for racial injustice and by the heightened anxieties of the Trump era. We offer advice on how these situations can best be mitigated and discuss how colleges and universities can take care in how they bestow their imprimatur on guests, fulfilling a dual role of maintaining an ethical voice and serving as an open platform for all ideas.

Section III examines attacks on faculty in 2017 and 2018 because of their speech, spurred by outrage

on the left and the right. We explain how speech by faculty became drawn into the conflict over Trump, as a proxy for broader political jostling over the core values of American society. We discuss the increase in online harassment of faculty and the rise of new challenges concerning the nature of social media and professors' public personae—issues related to academic freedom and universities' duty of care for their students. We offer advice on how faculty and their institutions can respond to different kinds of challenges to faculty speech.

Section IV reviews survey research on college students' attitudes toward free speech and reports on qualitative interviews with students that add nuance to oversimplified understandings of their views. We discuss liberal students' support for free speech and their concerns with fostering inclusion and minimizing harm, as well as conservative students' feelings of alienation that have sometimes fueled turns to provocation. We discuss the dynamics at play as the two sides have seen their own cause as most righteous, and how this gap has led to increasingly extreme conflict in the year following the election of Trump. We emphasize that college is a time for education, exploration, and growth, suggesting that commentators and researchers bear this in mind when examining speech-related incidents on campus.

Section V discusses federal and state efforts to introduce legislation related to campus speech. We review the role of the Justice Department in 2017 and 2018, under former Attorney General Jeff Sessions, in raising alarms over free speech that were consistently politicized and one-sided. We summarize state-level bills related to campus speech that were introduced or passed during this time.

In a Special Section, we look at other countries where campus speech issues are playing out in ways that echo developments in the United States, including Australia, Canada, and the United Kingdom. We discuss attacks on academic freedom in countries around the world and caution that campus speech debates in the United States can have unintended global ramifications.

The report concludes with the revised PEN America Principles on Campus Free Speech.



## Section I

# HATE AND INTIMIDATION ON CAMPUS

Campuses nationwide have experienced a marked rise in reports of hateful expression since 2016, including racist screeds, hate-motivated violence,<sup>46</sup> anti-Semitic symbols,<sup>47</sup> and white supremacist propaganda.<sup>48</sup> Before this surge, many campuses already faced widespread calls to reckon with legacies of racism, including historic ties to slavery, as PEN America documented in 2016.<sup>49</sup> As a result, many campuses exist in a climate of heightened anxiety around any issue related to diversity, inclusion, or race.

At the same time, worries about the psychological toll of hateful speech and the relationship between speech, harm, and violence have been voiced more widely, resulting in increased demands for hateful speech to be strongly opposed and sometimes censored. Whereas robust defenses of free speech have long been predicated on the necessity of protecting noxious ideas, the escalation of blatant racism and white supremacist ideology, coupled with greater concern for harm to those targeted by hateful speech, have produced a contemporary environment in which traditional defenses of speech seem insufficient.<sup>50</sup> This context has prompted a renewed urgency to address campus manifestations of inequality and racism and put college leaders under tremendous pressure to respond to hateful incidents while upholding the principle of free speech, striking a balance that can withstand scrutiny from both aggrieved students and free speech watchdogs.

Donald Trump's campaign and presidency have been closely tied to these trends. Many hold Trump directly responsible for giving license for racism, hate, and white supremacy to emerge in the mainstream from their prior place in the shadows.<sup>51</sup> Beyond his retweets of hateful online material<sup>52</sup> and his penchant for inflammatory statements, some criticize the president for blurring the boundary between legitimate political speech and hateful expression, imbuing everyday statements with insidious messages or threatening overtones that give license for racism, hate, and white supremacy to enter the mainstream.<sup>53</sup> In the Trump era, a white student shouting "Make America Great Again" at a student of color can be seen as a deliberate act of intimidation or as an expression of everyday patriotism.<sup>54</sup> With concerns over race and inclusion

***College officials must be supported in their efforts to defend free speech on campus and must be equipped with the legal and moral arguments to confront the challenges that the Trump era presents.***

already heightened on campuses in 2015, Trump's ascent appears to have significantly upset whatever strides were being made, prompting a newer and deeper existential crisis for many students, faculty members, and administrators. Recognition that the president is egging on rather than opposing hateful speech has led to a view that it falls to the rest of society to take more assertive action.<sup>55</sup>

Public health experts, legal theorists, and scholars continue to explore the effects of harmful words in the social media age. As discussed at length in *And Campus for All*, the fact that words do not equal physical violence should not obscure their significant potential to cause harm.<sup>56</sup> College officials must be supported in their efforts to defend free speech on campus and must be equipped with the legal and moral arguments to confront the challenges that the Trump era presents. It is critical, too, that students working to advance social justice and inclusion understand why over-corrective measures aimed at containing hateful speech can have the unintended effect of chilling free speech for all, including especially for social justice activists and people whose rights they champion.<sup>57</sup> Intensive debate and urgent action to tackle persistent racism are essential, but solutions must not abridge freedom of expression.

### **Hatred, Politics, and the Presidency**

A wide range of organizations have raised alarms about the rise in extremist groups and hate crimes since 2016. According to the Southern Poverty Law Center (SPLC), hate groups have proliferated nationwide, growing from 917 in 2016 to 954 in 2017, and to a record high of 1,020 in 2018.<sup>58</sup> In 2017, SPLC reported that the number of neo-Nazi groups had "soared" by

22 percent, while the number of anti-Muslim groups had increased for the third year in a row, growing by 13 percent in 2017 after having tripled from 2015 to 2016.<sup>59</sup> Data from the FBI shows that in 2017 hate crimes rose by 17 percent from a year earlier, showing a 16 percent rise in anti-black crimes, a 37 percent rise in anti-Jewish crimes, a 66 percent rise in crimes against people with disabilities, and a 48 percent rise in crimes motivated by gender bias.<sup>60</sup> As reported by the Anti-Defamation League (ADL), anti-Semitic incidents also surged almost 60 percent in 2017, “the largest single-year increase on record and the second highest number reported since ADL started tracking incident data in the 1970s.”<sup>61</sup> This was *before* the October 2018 massacre of 11 congregants at the Tree of Life Synagogue in Pittsburgh—the deadliest attack ever on Jewish Americans.<sup>62</sup> The ADL has also reported a spike in white supremacist propaganda in 2018, rising to over 1,100 reported incidents from 421 in 2017, an increase of 182 percent.<sup>63</sup> If these statistics were not alarming enough, in 2017 the Department of Justice also reported that the majority of hate crimes that occur in the United States go unreported.<sup>64</sup> (As of this writing, neither the FBI nor the ADL had yet compiled trend data reflecting 2018 hate crimes.)

It is important to distinguish between hate crimes and hateful speech. For the purposes of data collection, the FBI defines hate crimes as “criminal offense[s] against a person or property motivated in whole or in part by an offender’s bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.”<sup>65</sup> Hate crimes differ from “hate speech” in that all hate crimes are punishable criminal acts that are treated with high priority by the federal government due to their extreme impact on groups and society.<sup>66</sup> As the FBI articulates, “a hate crime is a traditional offense like murder, arson, or vandalism with an added element of bias... Hate itself is not a crime.”<sup>67</sup> Meanwhile, there is no consensus around a legal definition of “hate speech” in the United States. Rather, the extent to which “hate speech” is protected under the First Amendment remains fiercely debated in our court system.

Nonetheless, the documented escalation of crimes with an element of bias, and of speech widely characterized as hateful, has led to much national soul-searching over its cause. Many have cited President Trump’s conduct as a meaningful factor in emboldening and mainstreaming bigots. Whether it was calling Mexican immigrants “rapists,” falsely alleging that he saw thousands of Muslim Americans cheer as the World Trade Center fell, bragging about sexual harassment, repeatedly attacking prominent women and African-Americans, or retweeting statements by racist groups, Trump made offensive and

discriminatory language a common occurrence.<sup>68</sup>

In the words of the NAACP, Trump’s campaign “regularized racism, standardized anti-Semitism, de-exceptionalized xenophobia and mainstreamed misogyny.”<sup>69</sup> His election contributed to a heightened feeling of vulnerability among marginalized groups and people of color. This perception has been underlined by findings from anti-extremist monitors and the FBI that in the days after Election Day, reported hate crimes and other acts of hate rose significantly.<sup>70</sup> The SPLC documented nearly 900 hate crime reports in November and December of 2016, most occurring after the election.<sup>71</sup> *Education Week*, in collaboration with *ProPublica*, found that from 2015 to 2017, the largest number of hate and bias incidents in K-through-12 schools took place on the day after the election—from a Latina student finding a note in her backpack reading “Go back to Mexico” to a rise in swastikas and slurs.<sup>72</sup>

Few incidents of the past two years better illustrate the gravity of this concern than the Unite the Right rally in Charlottesville, Virginia, and President Trump’s ensuing response. After the rally, which was reported to be the largest gathering of white supremacists in at least a decade,<sup>73</sup> Trump held a news conference from his resort in Bedminster, New Jersey, in which he condemned “hatred, bigotry, and violence on many sides. On many sides.”<sup>74</sup> He later described the white nationalist rally-goers as including “some very fine people,” adding, “The press has treated them absolutely unfairly.”<sup>75</sup>

In the minds of many, Charlottesville confirmed a long-standing fear that Trump emboldened white supremacists to become more public and audacious. In the wake of the rally, which resulted in the death of one female counter protester and two state troopers, and the injury of dozens of others, Ibram X. Kendi, Professor and Director of the Antiracist Research & Policy Center at American University, asserted that the “Trump political brand has more or less become a symbol for bigotry in America.”<sup>76</sup> Interviewed by *The New York Times* on the day of the main rally, David Duke, former imperial wizard of the Ku Klux Klan, said that attendees were “going to fulfill the promises of Donald Trump” to “take our country back.”<sup>77</sup>

This fear runs alongside the common criticism that key Trump policies, like the Muslim travel ban, the effort to nullify DACA, and the proposal to build a wall along the U.S.-Mexico border are manifestations of his racist ideology. Many of his public and private statements—from his self-avowal as a “nationalist”<sup>78</sup> to his dismissal of African, Latin American, and Caribbean nations as “shithole countries”<sup>79</sup>—have fed a perception that his bigotry is essentially second nature.





*Psychology sophomore Melody Colón speaks during a protest on the Washington Avenue Bridge in September, 2016. During the Paint the Bridge event, College Republicans at the University of Minnesota painted a panel with a Donald Trump slogan that angered students*

### Hate on Campus

These trends have also played out on college campuses. In 2017, nearly 280 hate crimes were reported by select campus police departments to the FBI, up from 257 in 2016 and 194 in 2015.<sup>80</sup> Across the United States, stories have abounded of campuses confronting hate and vandalism. Macalester College in Minnesota discovered nine swastikas drawn on campus during the fall 2017 semester.<sup>81</sup> A year later, in the span of about a month, anti-Semitic vandalism was found on almost a dozen campuses across the country.<sup>82</sup>

There have been reports of homophobic and transphobic messages in a residence hall at Spelman College,<sup>83</sup> anti-Asian statements on the Facebook group of a dorm at Washington University in St. Louis,<sup>84</sup> and the racist defacement of an online public letter from the Latinx Student Alliance at UVA, with the authors of the letter later directly targeted with “racist and violent messaging.”<sup>85</sup> At Kansas City’s Metropolitan Community College in Missouri, a female Muslim student was pushed down a flight of stairs as part of Punish a Muslim Day, an event that encouraged violence against Muslims.<sup>86</sup> At American University, the day after the election of the first black female student-body president, bananas were found hanging from nooses around campus, inscribed with the

initials AKA, presumably standing for Alpha Kappa Alpha, a historically black sorority.<sup>87</sup> At Cornell University, a black student was hospitalized after an altercation with a group of fellow students as attackers yelled a racial slur at him.<sup>88</sup> The list of such incidents on college campuses, unfortunately, goes on.

White supremacist propaganda has also spread, with almost 300 instances of flyers, stickers, banners, and posters bearing hateful messages reported during the 2017-18 academic year, a 77 percent jump from the prior year.<sup>89</sup> Hateful slogans and symbols, even if not directly targeting a specific individual, have created a deep sense of unease that has destabilized many campuses’ efforts to support diversity and inclusion. These incidents have contributed to a climate in which many students from historically marginalized backgrounds have felt anxious, under threat, and often unwelcome.<sup>90</sup>

### The Gray Area Between Politics and Hatred

“Make America Great Again” is at once a slogan that makes some students feel deeply unwelcome and an anodyne statement of patriotism. Whether they condemn attacks that spring from this slogan, protect students’ right to voice it, or both, campus administrators risk alienating a sizable chunk of their community.

During the 2016 presidential campaign, slogans were written in chalk on walkways at Emory University and elsewhere, provoking an uproar.<sup>91</sup> Sometimes referred to collectively by commentators as “the chalkening,” the incidents were often caricatured as the overreaction of snowflakes. Rich Lowry, writing for *National Review*, explained:

What has become known on social media as “the chalkening” demonstrates how some college kids can’t be exposed to the simplest expression of support for a major presidential candidate without wanting to scurry to the nearest safe space. By this standard, a “Make America Great Again” hat is a hate crime waiting to happen. It’s not clear how any of these students can turn on cable TV or look at the polls for the Republican nomination these days without being triggered.<sup>92</sup>

In the days and weeks after Trump’s election, a spate of events seemed to confirm students’ fears of the kinds of sentiment that the campaign had fomented. On numerous campuses, the lines between hateful expression and hateful, sometimes violent incidents began to blur:

- At Wake Forest University, several students were investigated for reportedly bursting into residence halls and shouting the N-word after learning the results of the election.<sup>93</sup>
- At Baylor University, a black, female student was reportedly shoved off the sidewalk by a white, male student who yelled the N-word at her. As she was defended by a witness, the assailant reportedly yelled, “What? I’m just trying to make America great again.”<sup>94</sup>
- At Wellesley College, two white, male students from nearby Babson College reportedly drove through the campus of the women’s college in a pickup truck, displaying a Trump flag and shouting, “Trump 2016,” “Make America Great Again,” and homophobic slurs.<sup>95</sup> They later parked outside the black cultural center on campus and reportedly spat on a black student when she approached asking them to leave.<sup>96</sup>
- At NYU’s Tandon School of Engineering, Muslim students awoke to find that an anonymous vandal had scrawled “Trump!” in black marker on the door of a room used for Muslim prayer.<sup>97</sup>
- At the University of Virginia a day after the

election, a female student received a “menacing” phone call from an anonymous man. As soon as she picked up, the man reportedly hurled misogynistic comments at her, calling her a “cunt” and claiming that Trump’s victory had given him the right to do so. Similar calls were later reportedly made to Newcomb Hall—the university’s student center—among other places on campus.<sup>98</sup>

- At Lindenwood University at roughly the same time, Maria Sanchez, a Latina student, returned to her dorm room to see that her roommate had constructed a makeshift wall between their beds with a note reading: “HEY Maria, Trump won so here is a little preview of what’s to come. #wall.”<sup>99</sup> The “wall” consisted of stray clothes hangers, shoes, toiletries, and other small objects.
- At Texas State University, flyers made by a group called the Texas State Vigilantes were found glued to buildings and restroom mirrors.<sup>100</sup> One read, “Now that our man Trump is elected and republicans own both the senate and the house—time to organize tar & feather vigilante squads and go arrest & torture those deviant university leaders spouting off all this Diversity Garbage.”<sup>101</sup> Another warned that “‘multiculturalism’ and ‘diversity’ are code words for ‘white genocide.’”<sup>102</sup>

While the name of the president of the United States can hardly be considered a slur worthy of punishment, it’s undeniable that purportedly innocuous words and phrases can take on a menacing cast in certain circumstances.<sup>103</sup> Graffiti on campuses that has obscured the line between hateful expression and political slogan includes: “Deport Dreamers” and “#Trump2020” at the University of Maryland<sup>104</sup>; “Hasta Luego Dreamers” at NYU;<sup>105</sup> “Build a Wall Deport Them All” and “Illegals, ICE Is Coming” at UC Berkeley;<sup>106</sup> and “They Have To Go Back #Trump” and “Trump Deportation Force” at the University of Illinois at Urbana-Champaign.<sup>107</sup>

These instances have proved challenging for campus leaders, as they present a form of intimidation that masks itself as core political speech. In response, campus administrators need to engage in fact-specific inquiries into the intent of the speaker. When there is evidence of animus, bigotry, and an intent to harass on the basis of gender, race, national origin, or other characteristics, the fact that the specific words used might be innocent in another context should not matter, and appropriate disciplinary measures should apply. On the other hand, when students are expressing their views or voicing support for a candidate or policy—such as “Trump 2020” or “Make America



Great Again”—the fact that the chosen words, slogans, or hats may come across as offensive must not be used to justify the curtailment of free expression. While it may be appropriate for administrators to express support for students who feel menaced or to point out how particular statements may be heard in negative ways, they should do so while affirming speech rights. If the intent of the speaker cannot be examined, those affected or offended by these multilayered statements should be encouraged to exercise their own right to speak out against them.

### Speech, Harm, and Violence

Given the recent rise of hateful incidents both on and off campus, it is not surprising that some have been pushing for authorities—from the campus to the capitol—to reexamine the protections accorded to hateful speech. Laura Beth Nielsen, director of the legal studies program and a professor of sociology at Northwestern University, has pointed to research on how speech can cause negative physical and mental health outcomes, contending that these “tangible harms” mean that racist or sexist speech should not be treated by courts and legislatures as “just speech.”<sup>108</sup> A number of other published studies have likewise found that hateful speech has a measurable impact on the human psyche.<sup>109</sup> Some have gone further, arguing that the tangible harms from speech mean that it can be construed as a form of violence, suggesting that hateful speech does not deserve First Amendment protection.

As Lisa Feldman Barrett, a professor of psychology at Northeastern University, explained in a 2017 op-ed piece in *The New York Times*: “If words can cause stress, and if prolonged stress can cause physical harm, then it seems that speech—at least certain types of speech—can be a form of violence.”<sup>110</sup> She added that being offended or listening to opposing ideas is not the kind of speech that she sees as harmful. Rather, she is referring to speech that causes prolonged worry about one’s safety, like rampant bullying or the hurling of hateful words. Key, in her view, is the duration of exposure and the levels of stress that take a toll on the body. “There is a difference,” she explained, “between permitting a culture of casual brutality and entertaining an opinion you strongly oppose. The former is a danger to a civil society (and to our health); the latter is the lifeblood of democracy.”<sup>111</sup> In closing, she wrote: “By all means, we should have open conversations and vigorous debate about controversial or offensive topics. But we must also halt speech that bullies and torments. From the perspective of our brain cells, the latter is literally a form of violence.”<sup>112</sup>

In a 2017 piece for *The Washington Post*, PEN

America’s Suzanne Nossel outlined the problems with this proposal for treating ugly speech as tantamount to acts of violence, arguing that:

[T]he power that speech holds to visit serious harm does not make it, in itself, violent. It is risky even to make this comparison, because it helps give cover to the idea that noxious speech may be answered with brute force....in societies governed by the rule of law, the answer to a perceived threat of violence should not be to brandish a club but rather to call the police. But because the First Amendment bars the government from silencing speech, dubbing it “violence” is a summons for vigilantism.... In a democracy, the state is supposed to hold a monopoly on violence. If speech is violence, the state could extend its monopoly to control expression as well.<sup>113</sup>

Nossel acknowledged, however, that:

Certain forms tug at the bounds of our legal definitions. When an Internet troll publishes an ideological opponent’s street address or phone number, it can be terrifying for the target.... As the Supreme Court did in 2003, when it upheld states’ rights to prohibit cross burning done with the intent to intimidate, courts may soon adjudicate whether these new scare tactics cross a legal line. Self-proclaimed free speech advocates who cite constitutional protections to terrorize others risk obscuring the distinction between speech and violence. They blur a crucial boundary on which the protection of free speech depends and, in so doing, invite new limitations on speech.<sup>114</sup>

As a legal matter, speech and violence are not equivalent, and most hateful speech is protected by the First Amendment. Only strictly defined categories of speech, such as incitement and true threats, fall outside this protection. Even Title VI and Title IX of the Civil Rights Act, which charge universities with preventing a hostile educational environment, require that harassing speech would need to be “so severe, pervasive, and objectively offensive” so as to jeopardize a student’s equal access to the university before it could be actionable.<sup>115</sup> This approach dictates that the First Amendment’s protection extends to even heinous speech, no matter if some find it deeply offensive.

In *Free Speech on Campus*, Erwin Chemerinsky, dean of the UC Berkeley School of Law, and Howard Gillman, chancellor of UC Irvine, explain how



distinctions between hateful speech and harassment are interpreted legally:

Under this approach, a noose placed on a tree on a campus cannot by itself be deemed harassment, but a noose tacked to an African American student's door in a dormitory could be regarded as harassment (or a true threat) unprotected by the First Amendment. Singing a highly offensive racist song on a bus, as occurred at the University of Oklahoma,<sup>116</sup> is protected by the First Amendment, but repeatedly yelling racist epithets at minority students on campus is not. Saying hateful things to a general audience in a public place is protected by the First Amendment, but a person who adds African American students to a group text message with racially charged images and threats of lynching can be punished.<sup>117</sup>

One of the most notable and oft-cited conclusions of polls of college students in the past few years has been that a large segment support efforts to limit offensive speech.<sup>118</sup> As Chemerinsky describes it, "Students' desire to restrict hurtful speech came from laudable instincts.... They know that hate speech causes great harm."<sup>119</sup> But, as legal scholars and civil rights leaders have warned for decades, there are inherent risks in giving the government or judiciary power to enforce hate speech laws. In her book *HATE: Why We Should Resist It with Free Speech, Not Censorship*, former ACLU president and New York Law School's John Marshall Harlan II professor of law Nadine Strossen writes:

Unleashing government's power to silence ideas that are disfavored, disturbing, or feared not only undermines liberty and democracy; it also subverts the equality goals that animate "hate speech" laws. Such laws are predictably enforced to suppress unpopular speakers and ideas, and too often they even are enforced to stifle speech of the vulnerable, marginalized minority groups they are designed to protect.

These problems follow from the premises of "hate speech" law proponents themselves. They contend that our society institutions, including the criminal and civil justice systems, reflect entrenched racism and other types of discrimination. They also point to the implicit or unconscious biases that our culture has ingrained in us. Given these realities, it is predictable that the institutions and individuals enforcing "hate speech" laws will not do so in

a way that is helpful to minorities.<sup>120</sup>

Henry Louis Gates, Jr., the Alphonse Fletcher, Jr. University Professor at Harvard University, noted something similar in a seminal essay published in 1992 entitled "Let Them Talk": "Once we are forbidden verbally to degrade and to humiliate, will we retain the moral autonomy to elevate and to affirm?... To suggest... that equality must precede liberty is simply to jettison the latter without securing the former. The First Amendment may not secure us substantive liberties, but neither will its abrogation."<sup>121</sup>

Shortly after the Charlottesville clashes in the summer of 2017, Nossel, too, spelled out the dangers of breaking from the First Amendment to ban or punish hateful speech:

Even if they were constitutionally permissible, legal restrictions on hate speech would create more problems than they would solve. The most egregious and harmful forms of hateful speech—threats, harassment, and incitement to violence—are already unlawful. When it comes to less definable forms of abhorrent speech, there is no single standard for what qualifies. Some in Congress maintain that criticism of Israel is anti-Semitic hate speech. Others would argue that drawing a link between terrorism and Islam would cross the line.... But if hate speech became the basis of convictions and jail sentences, such ambiguities and subjectivities would be untenable. If individuals cannot be sure what might be judged hate speech they will have no choice but to avoid all manner of legitimate speech for fear of legal jeopardy.<sup>122</sup>

She added:

Countries that do aggressively police hate speech offer a cautionary tale: Rwandan President Paul Kagame just won reelection to a third term with 99 percent of the vote, securing his rule for a tenure of at least 30 years in a political environment where all opposition is squelched. A leading political opponent, Victoire Ingabire, is serving a 15-year prison sentence for "divisionism"—for simply having pointed out that Rwanda's genocide had Hutu as well as Tutsi victims. Facebook is hiring hundreds of staffers in Germany to comply with a new law that offensive speech must be pulled down from the site within 24 hours, empowering a cadre of office workers to



reshape the national discourse by determining what opinions are out of bounds.<sup>123</sup>

Given these concerns, and the likelihood that the censorship of some ideas easily leads to calls for the censorship of others, PEN America believes that it is better to permit the expression of noxious ideas than to create an opening for repression. Even so, students are right to demand that hateful speech be met with a strong response from campus leaders, who have an ethical responsibility to uphold values like equity and inclusion. Strong responses are possible without running afoul of the First Amendment.

### Responding to Hate

Campus leaders should forcefully condemn hate crimes, slurs, and the display of manifestly hateful symbols or slogans, making clear that such expression violates their institutional values of inclusion. They should also offer support and assistance to those affected by the incidents in question.

Many campus leaders have done just that. At Colorado State University, President Tony Frank consistently responded strongly to a series of hateful incidents during the 2017-18 academic year. After a fake noose was found in a dorm, Frank sent a campus-wide email about the incident, noting that “this sort of after-the-fact response, while important, doesn’t change the reality that the impact on students, particularly students of color, was serious.”<sup>124</sup> In the fall, he spoke out when “Heil Hitler” was written on the whiteboard of a Jewish student’s door and reached out to the affected student directly.<sup>125</sup> After a Middle Eastern student was intimidated on a local bus, Frank affirmed that the campus community had a duty to speak out against it, stating: “While allowing hateful speech to occur as required by law, we can still publicly and strenuously disdain it when there is evident harm to our institution and its people.”<sup>126</sup> The following March, when white supremacist literature was found on the campus, he again took a strong stand against it, leading a solidarity walk and community gathering with the title “CSUnite: No Place for Hate.”<sup>127</sup> He wrote to the campus about the spate of hateful incidents on campus that year:

While none of this is unique to CSU, it is happening here, and silence will not wish it away. We need to stand up to it... We believe it is important for all of us to understand that these assaults on members of our community are happening, that we have an opportunity as a university to condemn these acts as they occur, and that those who are directly targeted by such acts know that they do not stand alone

against this hatred and that the university has resources, support services, and reporting mechanisms to help support their safety and well-being.<sup>128</sup>

Other campus leaders have similarly taken swift and admirable action to speak out in the face of hate and express solidarity with those most affected. At Duke University in November 2018, when a swastika was spray-painted over a memorial to the victims of Pittsburgh’s Tree of Life synagogue massacre, President Vincent Price released a statement that unequivocally criticized the “craven and cowardly act of vandalism” that is “a matter of grave concern to us all.”<sup>129</sup> The same month, Thomas Bailey, president of Teachers College at Columbia University, spoke out when spray-painted swastikas were discovered on the walls of the office of Elizabeth Midlarsky, a Jewish faculty member, stating that such hatred has “no place in our society.” Bailey added: “We are outraged and horrified by this act of aggression and use of this vile anti-Semitic symbol against a valued member of our community.”<sup>130</sup>

In other instances, though, campus leaders have responded to such acts without forcefully condemning the hate involved. When a white nationalist group posted flyers at the University of Texas at Austin that attacked Muslims, blacks, and immigrants, the university’s initial responses focused on campus policies delineating where and how such flyers may or may not be posted and ignored their noxious content.<sup>131</sup> Some leaders have shied away from offering strong denunciations of a hateful act even in the face of requests to do so. At the University of Tennessee at Knoxville, the interim chancellor, Wayne Davis, stated that the university did not “condone” the appearance of a swastika on a prominent rock long used as a venue for free expression on campus, but he resisted saying that he “condemned” it, telling the faculty senate that he was “taught at a young age that there were only two people who can condemn and those were judges and God.”<sup>132</sup> Disappointed in this wan statement, a group of faculty and staff signed an open letter calling on Davis to reject the act more unequivocally.<sup>133</sup> In a separate statement, the university did acknowledge that the act was “hurtful and threatening to many members of our community.”<sup>134</sup> But both responses could have gone further in showing solidarity with those most unsettled by the swastika, asserting that a bigoted attack on one group is of grave concern to the university as a whole.<sup>135</sup> Perceptions of the adequacy of administrative responsiveness tend to harden quickly in the aftermath of such an incident, placing a premium on speedy and forceful rhetoric out of the gate.

***PEN America believes that it is better to permit the expression of noxious ideas than to create an opening for repression. Even so, students are right to demand that hateful speech be met with a strong response from campus leaders, who have an ethical responsibility to uphold values like equity and inclusion.***

These challenges were readily apparent to PEN America during conversations with students at the University of Maryland at College Park, some of whom drew a link between what they saw as the university's failure to adequately denounce a string of racist acts and a subsequent hate-motivated murder that occurred on-campus. In the early spring of 2017, following sightings of hateful posters around campus, students found a noose hanging in the kitchen of a fraternity house; some students expressed frustration that the administration did not communicate with students in the wake of these incidents or take student concerns seriously.<sup>136</sup> To some, these incidents of racial intimidation played a contributing role in the subsequent fatal stabbing of Lieutenant Richard Collins III by Sean Urbanski, who was later found to have ties to online white supremacist organizations.<sup>137</sup> Urbanski is now awaiting trial for first-degree murder and a hate crime after prosecutors sifted through evidence indicating that the murder of Collins, who was black, was "a result of his race."<sup>138</sup> As one student related to us, "There are problems of hate and bigotry on campus, and it is leading to actual violence."<sup>139</sup>

In the wake of Collins's murder, university leaders were also criticized for muddling their response with ill-timed commentary on free speech. In an

op-ed written ten days after the murder and circulated to the campus as an email, University of Maryland President Wallace Loh summarized some hateful incidents that occurred on campus prior to the murder, stating that he had condemned them, but that "even the strongest denunciations of hate speech feel wholly insufficient."<sup>140</sup> In the wake of the incidents, Loh explained, many groups had made requests for changes related to safety and inclusiveness, and the administration had "declined some and implemented others."<sup>141</sup>

Loh then went on to discuss free speech:

The First Amendment was intended as a shield to safeguard dissent against the government. However, those who denigrate people solely because of their race, faith, gender or sexual orientation argue that their hateful speech is permissible as free speech.... Still, reasonable people disagree over where to draw the line. As marketplaces of ideas, universities prepare the next generation of citizens and leaders to wrestle openly with these ideas, so central to our democracy.<sup>142</sup>

While Loh had some reason to raise speech issues, as students were themselves linking incidents of hateful speech to the horrific crime, many at the university nonetheless took issue with Loh's message, questioning why the First Amendment was even brought in to a piece addressing a grave violent crime. T. Donté McGuire, a PhD student in Higher Education and former education and training specialist in university's the Office of Diversity and Inclusion, outlined the critique:

I've seen a lot of unprompted defenses of free speech recently in response to students expressing their concerns about hateful incidents.... To be frank, I really don't know why free speech is centralized in these conversations. It's contributing to the constant pitting of racial, ethnic, and gender inclusion against free speech. And a lot of what we [students] talk about on campus isn't even about free speech—it's about climate, diversity, racial inclusion.<sup>143</sup>

When a hate crime has been committed, striking fear in the hearts of a campus community, ruminations on the importance of free speech, if brought up at all, should take a backseat to expressions of sympathy, solidarity, and resolve to hold those responsible accountable and ensure campus safety.





By bringing free speech into the conversation, Loh was, even if inadvertently, implying a link between Urbanski's hateful or felonious action and protected speech rights.

Even short of hate crimes, when it comes to manifestly malicious and intimidating speech—such as hateful posters or nooses—campus administrators should emphasize expressions of outrage, empathy with those targeted, creative educational approaches, and potential disciplinary actions. As McGuire stated: “We know that there will be people who will do and say hateful things. We know the university administrators cannot solve every problem related to hate and bias. We just don’t want their inability to hear and respond to students’ concerns to create new ones.”<sup>144</sup>

Responding properly to these situations is not without challenges. Administrators must be conscientious about when to simply denounce hate and when to touch on the nuances of protected speech. This dilemma arises particularly when there are calls for discipline for offensive speech. When speech violates an anti-harassment policy or includes a threat, legal recourse may apply. In other instances, though, the noxious speech may be fully protected by the First Amendment or the free speech policies of a private university. In those cases, genuine and forceful messages of condemnation and solidarity can go a long way toward blunting calls for punishments that may be legally prohibited or inconsistent with university rules. In some instances, offensive but protected speech, followed by calls for harsh reprisals, may force the university to both condemn the offensive speech and vociferously defend the rights of the speaker. Campus personnel have to be prepared to respond on multiple fronts: in internal campus emails, press releases, and public statements as well as through presidential communications with board members, donors, and concerned alumni. Through such multipronged strategies, administrators can help ease tensions, reassure stakeholders that the administration is mounting an appropriate response, and avoid a situation where university board members or other leaders inadvertently send mixed messages.

### **Bias Response Teams**

One mechanism that many campuses have adopted to respond to hateful incidents are “bias response teams” (BRTs). Though BRTs can vary in structure, composition, and approach,<sup>145</sup> they generally consist of an online system to report incidents of bias to an appointed committee as well as a protocol that allows each complaint to be acknowledged, tracked, and addressed in a timely manner.<sup>146</sup> These systems have been hailed by some as useful for bringing

accountability in handling incidents, informing policy, and ensuring an adequate response to incidents that, while troubling, do not rise to the level of criminal acts or policy violations.<sup>147</sup> Others, however, view the creation of these teams as itself a cause for alarm.<sup>148</sup> The crux of these concerns is that the teams might form a kind of “speech police” on campuses.<sup>149</sup> As Jeffrey Aaron Snyder and Amna Khalid write in *The New Republic*:

BRTs are fatally flawed. Adjudicating “he said, she said” incidents is a logistical nightmare, if not downright impossible for thinly stretched administrators. There will no doubt be examples of injustice where the “accused” are investigated—even penalized—over paltry evidence, or where the discipline meted out is far too harsh for the alleged “crime.” What’s more, BRTs will result in a troubling silence: Students, staff, and faculty will be afraid to speak their minds, and individuals or groups will be able to leverage bias reporting policies to shut down unpopular or minority viewpoints. BRTs will substitute diktats for debate when what we need most is constant, frank conversation. By almost any measure, colleges and universities are more diverse today than they have ever been, and that’s the paradox: BRTs will turn the genuine, transformative educational power of diverse voices into a farce.<sup>150</sup>

These concerns have also been taken up by Speech First, a watchdog organization, which sued the University of Michigan in May 2018, arguing that the work of the university’s bias response teams represented an unconstitutional prior restraint on speech and that their definitions of *bias* and *bias incidents* were overbroad and vague to comport with the Constitution.<sup>151</sup> The case is ongoing in federal court.

FIRE conducted an extensive analysis of BRTs in 2017, surveying them at 231 public and private campuses. Amongst its extensive findings were that:

- Fourteen percent of the surveyed institutions included “political affiliation” as a potential category of bias. In addition, FIRE found campuses that included bias against “intellectual perspective” or “political expression.”
- FIRE could only locate one BRT, at Louisiana State University, where members of the team received substantial training on First Amendment concerns.
- More than one-quarter of universities with BRTs do not publicly disclose who reviews and

responds to bias reports. Overall, FIRE reported a “worrisome” lack of transparency over how BRTs operate and the decisions they make.

Only 167 universities made information about the composition of their BRTs public or provided FIRE with information about their composition. Of those universities:

- Almost half of their BRTs included members of law enforcement or campus security, even though bias reports could include noncriminal behavior.
- Twelve percent of their BRTs included public relations administrators, “raising the possibility that a team’s decisions, including about whether to seek discipline for those displaying bias, may be made on the basis of an institution’s desire to avoid public embarrassment.”

Additionally, FIRE identified a series of bias reports that had been filed at universities across the country, among them:

- A student at Appalachian State University filed a report claiming to be “offended” by on-campus chalkings stating that “Trump Is Racist.”
- A complaint was filed against the Black Student Association at Texas Tech University after the group tweeted: “All lives don’t matter...White lives don’t matter...Blue lives don’t matter...#BlackLivesMatter.” The complaint asked that the Black Student Association be characterized as a “hate group.”
- A complaint filed against a group of students at Ohio State University, for sharing memes comparing Hillary Clinton to Hitler, led to a mandatory meeting convened by a university employee on “triggering events.”

FIRE concluded that “the reality is that it is extremely difficult to have a system in place for the reporting of protected speech without creating a risk that speech and expression on campus will be chilled as a result.... Universities must be cognizant of the risks created by broad definitions, anonymous reporting systems, unclear policies, and lack of training, and must take steps to minimize or eliminate these risks.” FIRE encouraged universities to emphasize “prompt, fair, and impartial discipline for instances of physical misconduct, true threats, and harassment” and responses to bias incidents that “avoid uninvited intervention with the speaker and instead focus on

providing resources to the reporting student.”

In response to these concerns, some scholars and practitioners have defended BRTs. Kevin Kruger, president of the National Association of Student Personnel Administrators (NASPA), argues:

The intent of these bias response teams is not to constrain free speech or infringe upon academic freedom in the classroom. The real value of a bias response team, comprised of faculty and staff from around the campus, is that incidents can be investigated and that one person is not making a judgment about possible outcomes. In some cases, the most appropriate action may only be to check in and provide support to the student affected. The worst thing would be to abandon these processes and leave students with no avenue to report their experiences.<sup>152</sup>

Neijma Celestine-Donnor, a trauma clinician and the creator of the University of Maryland’s Hate-Bias Response program, explained to PEN America that BRT members can support targeted students while affirming free speech rights:

To me, my job is not to take away anyone’s free speech. Our role is trauma-informed response to hate-bias incidents.... If I come to you, and I say, “I’m really hurt and upset because someone said this to me,” and your response, first thing is, “There’s nothing I can do, because that’s free speech”—automatically, my experience has been invalidated. As opposed to your response being: “I’m so sorry” and “I can tell this has really impacted you; I want to hear you and provide support to you in any way I can.”<sup>153</sup>

Celestine-Donnor cautioned her fellow administrators against picking inopportune moments to educate students on free speech, suggesting that they carefully consider when traumatized students will be most receptive to such messages. She said that at many universities there have been instances in which free speech has been emphasized with traumatized students too soon after an experience with hate or bias, and that the message failed to come across effectively:

When someone has been hurt or impacted and they’re actively in pain, I don’t know that that’s the best time to have a lecture on free speech, so that someone who has experienced hate or bias can know if what that person did was free speech. When something huge happens



on campus and you have community trauma where people are experiencing racial and identity trauma and their executive functions have shut down—is that the best time to have that conversation? No. You want them to hear what you have to say; even if on a basic level, you’re just trying to have an all-around conversation, they can’t hear you, not because they don’t want to, but because they are operating in trauma mode. Even if they wanted to, they can’t.<sup>154</sup>

PEN America shares several of the concerns about BRTs that others have already registered. Even if they are intended primarily to support students who feel slighted or victimized, formal institutional responses to bias incidents that exclusively involve speech could force the university into discipline that penalizes certain viewpoints—a particular risk when the offensive speech is political in nature, and murky questions of motive enter the equation. Especially to the extent that BRTs determine or recommend discipline, they need to include specially trained personnel who understand the intricacies of free speech protection, whether at a public or a private university. Officials who take part in bias response should recognize that they convey the imprimatur of the university in every decision that they make.

Even when a BRT is intended not as a disciplinary body but as a community resource, the prospect of being subject to a bias complaint may cause students and faculty alike to self-censor. (Such chilling effects could ensue at any campus that accepts complaints of bias or harassment, as nearly all do, and are not a function of the existence of BRTs.) One useful approach may be to delineate the role of a BRT so that it provides support to community members in need while leaving discipline to another campus body. This may help avoid the perception that merely instituting a bias response program involves inherent infringements on free speech. Transparent processes and reporting can also help ensure that BRTs are not wrongly suspected of impairing speech.

Still, it is clear to us from our conversations with professionals like Celestine-Donner that it is possible to have thoughtful approaches to bias response that offer genuine assistance to students in emotional need. Campuses that find a way to balance unstinting speech protections with adequate infrastructure to address hate will be better positioned to protect the full breadth of speech. Accordingly, free expression advocates must continue to mount visible and substantial university responses to incidents of bias and bigotry while ensuring that these efforts do not come at the expense of free speech.

### Striving Toward Greater Inclusion

In *Free Speech on Campus*, Sigal Ben-Porath, a professor of education, philosophy, and political science at the University of Pennsylvania, writes that when campus speech impugns the dignity of others, it is not necessary to focus only on defending the rights of the speakers. Taking an approach that she calls “inclusive freedom” can also aid administrators in valuing the impact of words on numerous members of marginalized groups, thereby reinforcing an environment of “free and equal community of inquiry,”<sup>155</sup> in which all feel encouraged to voice their opinions.

A diverse campus does not automatically lead to an inclusive spirit—that has to be actively nurtured. As Nitin Nohria, dean of the Harvard Business School, explains:

When diversity advances without inclusion, when we do not create environments where people feel like they fully belong and thrive, tensions can follow. More important, we fail to realize the benefits of diversity. On campuses ... some of the most prominent protests of recent years have been about racial inclusion. While the specifics of each case differ, the underlying grievance is that even though greater numbers of minority students are being granted admission, they often feel alienated—perhaps because they walk to class past monuments and buildings dedicated to slaveholders, perhaps because they’ve been the targets of racist threats, perhaps because professors repeatedly mistake them for other students of color.<sup>156</sup>

Tensions around inclusion have been evident on numerous campuses, where many students have expressed particular dismay at the symbols and traditions associated with the country’s racist past: buildings named after known bigots or controversial leaders,<sup>157</sup> plaques commemorating Confederate leaders,<sup>158</sup> mascots with racist overtones,<sup>159</sup> traditions associated with expressions of hate.<sup>160</sup> Even some national figures once viewed as beyond reproach have become controversial. At the University of Virginia, the institution’s history and identity are deeply intertwined with founding father (and founder of the university) Thomas Jefferson, who has become a focus of revised thinking.<sup>161</sup>

The challenges of reckoning with these legacies were clearly evident on campuses in the final years of the Obama presidency. But they have attracted heightened focus with the election of Trump and his seeming injection of hate into the mainstream. With pro-Confederate groups reasserting a defense



*The murals for Turning Point USA, UMN College Republicans and the Minnesota Republic seen after they were repainted by the groups on the Washington Avenue Bridge in October, 2017*

of symbols and statues,<sup>162</sup> they have become yet another flashpoint in a national contest over whose values will prevail, on campuses and in the broader society. Universities' approaches to these questions can loom large in determining whether students from diverse backgrounds feel a full sense of belonging and believe that they enjoy an equal opportunity to express themselves.

These issues came to a head in recent years at Yale, where in 2015 student activists campaigned for the renaming of Calhoun College, named after John C. Calhoun, a prominent proponent of slavery before the Civil War. As we discussed in *And Campus for All*, Yale president Peter Salovey initially denied this request, asserting that it would be akin to erasing American history and that it would not advance the "tough conversations" around race and inclusion that need to take place.<sup>163</sup> But in light of continued concerns raised by students, staff, faculty, and alumni, Salovey reversed his decision, stating in August 2016 that Yale "would have benefited from a set of well-articulated guiding principles according to which a historical name might be removed or changed."<sup>164</sup> Salovey announced that a 12-member committee, composed of faculty, alumni, staff, and one undergraduate and graduate student, would

be tasked with generating such a set of principles.

The committee held dozens of meetings, listening sessions, and public forums with students, alumni, staff, and faculty; pored over hundreds of comments solicited from the campus community; and worked with University Archives to understand the campus's historic approach to naming buildings. The committee studied similar efforts to reckon with historic legacies at Georgetown University, Harvard Law School, Princeton University, the University of Richmond, and the University of Texas at Austin. And, drawing on faculty expertise on the committee, the group examined scholarship on historical debates on theories of naming and renaming. After four months, they released a report, stating that they had "made every effort to understand the many facets of the question before" them.<sup>165</sup> The report was thorough and rich, encompassing a vast range of viewpoints and the complexity of sentiment behind the issue. Summarizing their findings about Calhoun College, they wrote:

No part of the University community spoke with a single voice. Alumni expressed a wide diversity of views. Many alumni of Calhoun College, for example, told us of the feelings of camaraderie they had experienced around





the name of their College.... Others, including some African-American alumni, recounted being critical of the Calhoun legacy, but nonetheless said that they had not advocated a change in the name ... that the name had served as a useful reminder to them of the history of slavery and discrimination.... Many observed that residential college names were distinctive because the University assigns students to colleges and encourages them to identify with the college names in everything from the shirts they wear to the songs they sing and the intramural athletic teams on which they play.... [Another theme] voiced by many was that a special problem arises when the offense given by a particular name is not evenly distributed across the demographic diversity of the campus.... As we worked, protests against the Calhoun name took place on a weekly basis.... We would be remiss if we did not observe that some of the input from members of the University community produced challenging and difficult conversations.<sup>166</sup>

In December 2016, Salovey tasked three advisers with reviewing the Calhoun case with the committee's report in mind. By February 2017, Yale announced that it would rename Calhoun College to honor Yale Ph.D. Grace Murray Hopper, a pioneering computer scientist and rear admiral in the U.S. Navy. After the fits and starts and heated debate, the university could fairly claim that in the end its renaming process was multipronged, thorough, and inclusive.

Other campuses have initiated similar processes when faced with calls for grappling with a university's history. In 2017, as a result of the report of the University of Mississippi's Chancellor's Advisory Committee on History and Context,<sup>167</sup> the institution moved to rename Vardaman Hall, which had commemorated Governor James K. Vardaman—a staunch public advocate of lynching—and installed five plaques throughout the campus to better describe the history of prominent campus landmarks.<sup>168</sup> In 2018, after Stanford University President Marc Tessier-Lavigne had appointed a similar committee, the school announced that it was renaming two buildings and a mall named for Father Junipero Serra in response to student concerns that the 18th-century Roman Catholic missionary had “inflicted great harm and violence on Native Americans” in the process of forming California's mission system.<sup>169</sup>

In our previous report, *And Campus for All*, we concluded that such debates should not be wrongly conceived as free speech controversies, writing:

“There is nothing sacrosanct about the name of a building, nor is there any right to a particular name. The same is true of campus crests and symbols ... neither the campaigns for name changes nor the decisions of whether or not a change is warranted impinge in any way on speech.”<sup>170</sup> But the processes undertaken at Yale the University of Mississippi, and Stanford deserve praise for setting the standard for how to thoughtfully solicit a diversity of viewpoints from a campus community, and they should be emulated by other campuses as they strive for greater inclusion. Shifting cultural norms demand that institutions respond thoroughly to calls for change, but they can do so in ways that also recognize the past. Such engagements can catalyze deep reflections on institutional values, historical legacies, and the state of inclusion on campus today.

In some instances though, the push for greater inclusion has resulted in calls for censorship or discipline as remedies for harm or offense. At Mary Baldwin University in Virginia, an art exhibit about the legacy of Confederate monuments titled “Relevant / Scrap” was closed within two days after a group of students complained that it was racist.<sup>171</sup> At the University of Colorado at Boulder, a senior fine arts student was told by his department that he would have to move an exhibit of his work from a building lobby to a basement room after some people complained about a painting of a noose.<sup>172</sup>

These cases reflect a particularly thorny set of challenges pitting free expression against inclusion, and in each case PEN America has stood resolutely against censorship as a way of promoting greater inclusion. While the campus actors could have exercised a greater degree of sensitivity to potential offense or harm from these expressive acts, it is often the precise purpose of public art or classroom pedagogy to be provocative, to pose uncomfortable questions, and to spur dialogue and debate. As Jonathan Friedman, PEN America's project director for campus free speech, stated about the exhibit at Mary Baldwin: “Teaching students that censorship is the solution to provocative material is a dangerous lesson, one which not only goes against the spirit of hallowed artistic traditions, but also creates a wide opening for others to call for censorship in response to content that provokes or offends, no matter the grounds.”<sup>173</sup>

In each of these instances, campus leaders had an opportunity to define the contours of the community conversation in ways that defend free expression but also make a clear commitment to addressing issues of inclusion. Such efforts will go a long way toward combating contemporary incidents of hatred, assuring vulnerable communities that the value the institution places on inclusion is not up for debate.

## FRAMING THE LEGACY OF THOMAS JEFFERSON AT UVA

Over many years, a debate has swirled around UVA's reverence for its founder, Thomas Jefferson. Beloved for his clear-eyed and ardent articulations of America's foundational principles of freedom, inalienable rights, liberty, and equality, Jefferson also enslaved over 600 individuals in his lifetime.<sup>174</sup>

Although the Jefferson debate at UVA has persisted for years, it took on renewed significance in the days before the 2016 general election, when UVA President Teresa Sullivan emailed the campus with a call for respect and civility. Sullivan urged community members look to Jefferson's actions in the aftermath of the "bitterly contested" election of 1800, which "rapidly devolved into mudslinging and name-calling," for inspiration. She wrote: "A civil society begins with civil individuals.... I encourage every member of the UVA community to place our common bonds above our political differences in the days ahead. As individuals ... our capacity to respect and even celebrate those differences is essential to the cohesiveness of our communities and the integrity of our democracy." Sullivan later echoed that message the day after the election, writing: "By coincidence, on this exact day 191 years ago—November 9, 1825, in the first year of classes at U.Va.—Thomas Jefferson wrote to a friend that University of Virginia students 'are not of ordinary significance only: they are exactly the persons who are to succeed to the government of our country, and to rule its future enemies, its friendships and fortunes.' I encourage today's U.Va. students to embrace that responsibility."

Sullivan's emails adhered to a long UVA tradition of referencing Jefferson in its official communications. But many in the UVA community interpreted the emails as an egregious misstep in light of the avid campus debate over the use of Jefferson as a "moral compass" and especially given a series of incidents that had occurred in the days and weeks before. The same week as Sullivan's first email, two Muslim students at UVA found their shared dorm room door defaced with a hand-drawn arrow and the word "terrorist." The week prior, the word "Juden" and an orange Star of David had been spray-painted on the side of

a student apartment complex. These incidents followed yet another bias event on September 2, when several floors of rooms in a student dorm were vandalized with the N-word, anonymously spelled out in permanent marker on students' doors, walls, and whiteboards.

On November 11, 2016, Noelle Hurd, an associate professor at UVA, sent an open response to Sullivan, signed by almost 500 faculty members and student. The letter offered "constructive and respectful feedback" in response to Sullivan's invocations of Jefferson:

Other memorable Jefferson quotes include that Blacks "are inferior to the whites in the endowments of body and mind," and are "as incapable as children of taking care of themselves."... In the spirit of inclusivity, we would like for our administration to understand that although some members of this community may have come to this university because of Thomas Jefferson's legacy, others of us came here in spite of it. For many of us, the inclusion of Jefferson quotes in these e-mails undermines the message of unity, equality, and civility that you are attempting to convey. We understand the desire to maintain traditions at this university, but when these traditions threaten progress and reinforce notions of exclusion, it is time to rethink their utility.<sup>175</sup>

Clarifying the intention of the joint letter, UVA politics professor Lawrie Balfour noted, "The point is not that he is never appropriate, but the point is that the move that says, he owned slaves, but he was a great man, is deeply problematic."<sup>176</sup>

A year later Hurd, reflecting on the deadly 2017 Charlottesville white supremacist rally, which occurred partly on the UVA grounds, wrote in *The Cavalier Daily*, the university's independent newspaper:

We have the opportunity to leverage our position as an institution of higher education to tackle white supremacy within the



### FRAMING THE LEGACY OF THOMAS JEFFERSON AT UVA (cont'd)

classroom. This must start with a more accurate portrayal of our country's and university's history. Our country was founded on the exploitation of black and brown people, and racist ideologies were employed to further enable and enhance this exploitation.... In concert with curricular changes, it is time to more responsibly contend with Jefferson's legacy at this institution.... When we refuse to acknowledge the atrocities Jefferson committed, treat those atrocities as a minor detail or attempt to trivialize those actions—e.g., “everyone owned slaves back then”—we undermine notions

of inclusivity at our university.<sup>177</sup>

Although Jefferson's stature had been contested at UVA for some time, the election of Trump and the Unite the Right rally heightened these concerns. These difficult questions warrant a conscientious review of the role of Jefferson's legacy at UVA. An inclusive, multistakeholder process akin to what other campuses have undertaken regarding the legacies of slavery and the Confederacy could serve as a powerful example of how a university can evolve in ways that reconcile the facts of history with the contemporary realities and values of the university.

### The Urgency of Reclaiming Free Speech

From our work on U.S. campuses, PEN America has seen that many debates that appear to center on censorship actually have strong roots in racism and inequity.<sup>178</sup> Rising hate, feelings of vulnerability among some student groups, and perceptions of unequal ownership and belonging all serve as critical context through which students interpret the concept of free speech. Reflecting on PEN America's findings for *The Washington Post*, CEO Suzanne Nossel wrote:

Campus protesters sometimes conflate truly threatening speech with ideas that, while discomforting, objectionable or even insulting to some, are precisely the sort of thing that ought to be aired and debated.... But while youthful inexperience and overreach can make college-age protesters easy to caricature, casting student campaigners for racial justice as entrenched enemies of free speech is not only a distortion but also a risk. When students hear the First Amendment invoked time and again to safeguard the speech of those determined to provoke and offend, it is not hard to understand why some question whether free speech principles are relevant to their own priorities or struggles.<sup>179</sup>

Indeed, hiding behind the First Amendment in response to students' deeper demands to reckon with growing hate, intimidation, and racism risks alienating a rising generation of activists, leaders, and scholars from the fundamental tenets of free expression.

Speaking to dozens of students and staff members at four major U.S. campuses, PEN America has repeatedly observed that terms like *free speech* and *diversity* were increasingly perceived to be mutually exclusive. While free speech can often be understood, wrongfully, as championing or justifying only the most heinous forms of expression, some also wrongfully interpret advancements in diversity and inclusion as necessarily coming at the expense of free speech and open inquiry.

Randall Kennedy, the Michael R. Klein Professor of Law at Harvard Law School, recounts this history well in “The Forgotten Origins of the Constitution on Campus”:

Recent conflicts on campus have featured as antagonists proponents of racial justice versus proponents of civil liberties. Many in both camps identify as liberals. A dose of recollection might help dissipate this avoidable and politically destructive strife.

We should recall that in order to more militantly battle Jim Crow segregation, black high school and college student activists in the Deep South brought the federal Constitution to campus. They initiated the lawsuits that prompted judges to recognize that students at public schools are entitled to federal constitutional rights to due process and free speech... Here, as elsewhere, brave souls committed to battling racial oppression widened the circle of freedoms to which all in America can properly lay claim.<sup>180</sup>



*The white nationalist torchlit march in August 2017 came to a violent end at the Thomas Jefferson statue north of the Rotunda*

***Hiding behind the First Amendment in response to students' deeper demands to reckon with growing hate, intimidation, and racism risks alienating a rising generation of activists, leaders, and scholars from the fundamental tenets of free expression.***

With a contemporary backdrop of charged meanings and national tumult over issues of race and inclusion, administrators face the challenge of ensuring that their calls for free speech are not interpreted as amounting to institutional endorsements of racism, nor interpreted as stemming from any particular partisan ideology. Given that the First Amendment has and continues to be central to the success of civil rights struggles, universities and free speech advocates cannot afford to cede this right to those who use it to fan hate.

The principles of inclusion and free speech are not incompatible. But on today's politicized campuses, leaders must articulate a clear vision of how both are supported. This is particularly important when hateful expression is aired. All universities and colleges should be empowered to denounce speech—even protected speech—whenever it conflicts with the principles of diversity and inclusion. In clear and unequivocal language, leaders must make the case both for why heinous speech should be allowed and for why such speech is inimical to campus values. In a country generally recognized as offering the most protective standard in the world for speech,<sup>161</sup> it is imperative that American institutions of higher learning set an example and staunchly guard the principles of diversity and inclusion in ways that simultaneously reinforce their commitment to supporting free speech for all.





## Section II

# SHUTDOWNS AND SHOUT-DOWNS

In recent years, few topics have generated as many headlines about higher education as the treatment of hotly contested speakers invited to campuses. Objecting to speakers is itself not a new phenomenon, but a handful of recent provocative visitors have stirred particular rancor, some of it turning violent or resulting in events being canceled. Overall, there have been speakers shut down, shouted down, and disinvited from both sides of the political spectrum. In the worst cases, events have prompted protests from fringe groups on campus and in surrounding cities, resulting in damaged property, sky-high security costs, or even injuries. So vexing and frequent were these incidents in 2017 that Kevin Kruger, president of NASPA, called the challenge of balancing free speech and safety the “No. 1 topic of the year.”<sup>182</sup> The high-profile confrontations seen in 2017 lessened in 2018. But efforts to disinvite or disrupt speaking events were still evident on many campuses.

PEN America previously discussed the challenges related to inviting and disinviting speakers in *And Campus for All* and the PEN America Principles on Campus Free Speech. Nonetheless, given persisting attempts at disinvitation, a handful of highly visible incidents in which speakers drew protests, and new challenges in formulating institutional policies, we return to this subject here. As we noted in the past report, although there are some important distinctions based on the way that a speaker is invited to campus—for example, through a student group, for an honorary fellowship, or to address commencement—it is important for administrators to have a high bar for overturning invitations and to apply strict criteria in the very rare case that a disinvitation is appropriate based on genuinely insurmountable security risks.<sup>183</sup> It is likewise necessary for administrators to support counter-speech by protesters, who are themselves exercising their rights to free speech.

### The Shifting Landscape of Speaker Controversies

Numerous speaking invitations are extended, accepted, and seen through on college campuses every day. The vast majority take place without incident. But there has long been a small subset that gain negative attention and become controversial, resulting in efforts to disinvite speakers or protest their presence. Beginning in 2016, new dynamics became more prevalent, with some protests (usually by students on the political left) turning more intense, violent, and

*It is important for administrators to have a high bar for overturning invitations...it is likewise necessary for administrators to support counter-speech by protesters.*

destructive and with some speakers (usually coming from the right) becoming more bent on provoking reactions than on advancing enlightened discourse.

According to data tracked by FIRE in their Disinvitation Database, there have been nearly 380 disinvitation incidents on U.S. campuses since 2000. These include formal disinvitations by hosts, speakers’ own withdrawals (often in the face of disinvitation demands), and “heckler’s vetoes” (when attendees persistently disrupt or prevent a speech).<sup>184</sup> Disinvited or protested speakers from 2016 to 2018 included current and former White House surrogates, academics with contested theories, controversial online personalities, and speech advocates as well as hate group figureheads. FIRE’s database clearly shows that there have been efforts to silence voices from both ends of the political spectrum.

According to FIRE, the number of disinvitations rose to 43 in 2016 and 36 in 2017 but then dropped to 9 in 2018. These findings dovetail with a drop in the number of incidents that gained significant media attention in 2018 compared to the year prior. But even this list—which does not claim to be exhaustive<sup>185</sup>—cannot convey the full range of publicly reported disruptions or cancellations. The postponement and ultimate cancellation of a talk by journalist Lisa Daftari at Rutgers University in October 2018, as a result of an online petition, is but one recent example that is not listed in FIRE’s figures.<sup>186</sup>

### Countering at All Costs

Student protest is a long-standing feature of campus life, and of movements for social change. While the vast majority of campus protests are peaceful, in recent years some students have demonstrated a conviction that ideas they find noxious should be countered at all costs, even with concerted disruption.



*Charles Murray's visit in March 2017 provokes uproar at Middlebury College*

On March 2, 2017, Charles Murray, a conservative political scientist, arrived at Middlebury College to speak. Invited by the school's American Enterprise Institute (AEI) club, the appearance was billed as a talk about Murray's 2012 book, *Coming Apart*, which describes moral and economic divides in the United States. However, the storm surrounding Murray's appearance sprang from his 1994 book, *The Bell Curve*, which made controversial claims about IQ differences between races and was widely regarded as "discredited pseudoscience."<sup>187</sup> Introducing him in the full auditorium, Laurie L. Patton, Middlebury's president, said that she disagreed with his ideas but stood by his right to voice them.<sup>188</sup> As Murray began to speak, his words were drowned out by hundreds of students chanting slogans like "Racist, Sexist, Anti-gay, Charles Murray Go Away!" and "Your Message Is Hatred—We Will Not Tolerate It."<sup>189</sup> Others held signs that read, "No Eugenics Here" and "Fuck Rhetorical Resilience," in reference to a phrase coined by President Patton urging students to use that approach to confront unsavory ideas and arguments.<sup>190</sup>

The talk was being moderated by Allison Stanger, the Russell J. Leng '60 Professor of International Politics and Economics at Middlebury. A tenured 25-year veteran of the Political Science Department, Stanger had agreed to serve as an interlocutor with

Murray in the hope of giving his views a critical airing. In response to the disruption, Stanger and Murray were moved to a separate room, equipped with a video camera to stream the remainder of the event. But students swarmed the hallway, "chanting, banging on windows, and and even pulling fire alarms."<sup>191</sup> After Murray completed his remarks, as he and Stanger were being escorted to a post-lecture dinner, they were accosted by an estimated 20 protesters, many of whom were masked.<sup>192</sup> As the two were being jostled, a hand reached out and grabbed Stanger's hair, twisting her neck. After the group got into a car, she recalled, "protesters climbed on it, hitting the windows and rocking the vehicle whenever we stopped to avoid harming them."<sup>193</sup> The violent encounter resulted in Stanger sustaining a severe concussion and whiplash that required months of recovery. As she said: "I feared for my life."<sup>194</sup>

In another incident, in April 2017, Heather Mac Donald, a self-described "secular conservative," was booked to speak to students at Claremont McKenna College, a private liberal arts school.<sup>195</sup> Mac Donald was scheduled to discuss her new book, *The War on Cops*, which includes significant criticism of the Black Lives Matter movement. On the Facebook page for the event, some accused Mac Donald of "neglecting the state sponsored genocide committed



against black people” and said that she represented “white supremacist and fascist ideologies.”<sup>196</sup> Commenters also indicated their intent to shut down the event, and on the day of, about 170 protesters showed up and formed an insurmountable blockade at the entrance to the building where the talk was scheduled.<sup>197</sup> Seeing the size of the crowd, college leaders instead had Mac Donald deliver her lecture to an empty hall and streamed it. Reflecting on the event, Mac Donald wrote, “American college students are increasingly resorting to brute force, and sometimes criminal violence, to shut down ideas that they don’t like.”<sup>198</sup>

On March 5, 2018, at the invitation of the Federalist Society, Christina Hoff Sommers attempted to deliver remarks at the Lewis & Clark Law School in Portland, Oregon, but was interrupted by over a dozen protesters.<sup>199</sup> A scholar at the American Enterprise Institute (AEI), the author of *Who Stole Feminism?*, and the host of the “Factual Feminist” YouTube series, Sommers was stopped early in her lecture by picketers with messages like “No Platform for Fascists” and “Rape Culture Is Not a Myth.” The protesters chanted and sang about denying Sommers a platform and accused her of delegitimizing the suffering of women.<sup>200</sup> They insisted that she cut her lecture short and respond to questions in the interest of “equal debate.” An exasperated audience member responded, “You’re embarrassing our law school and our student body,” while another explained that it is “fairly common” for a Q&A to follow only after a series of remarks have been given.<sup>201</sup> As Sommers continued attempting to complete her lecture, protesters played music from a speaker to disrupt her further.<sup>202</sup>

Murray, Mac Donald, and Sommers are each controversial for different reasons, but those who have encountered the most vociferous campus protests have tended to be conservative. Reflecting on her own identity and political party, Sommers said of the Lewis & Clark protesters: “My guess is they didn’t know who I was, I mean to call me a fascist. I mean I’m happy to be a registered Democrat and Jewish and there were all these groups aligned against me, I’m just thinking someone misread something.”<sup>203</sup>

Although many right-leaning speakers have visited numerous campuses without significant disruption,<sup>204</sup> a handful of high-profile incidents have garnered the most attention. They have contributed to a narrative that today’s college students are intolerant and out of control, an interpretation promulgated by a wide variety of right-leaning organizations, think tanks,<sup>205</sup> news outlets,<sup>206</sup> and individual scholars and pundits. Writing for *Commentary* magazine, Sommers noted: “To the student activists, thinkers like Heather

**Having shown...that their main goals are to shock, offend, and antagonize, these speakers thwart the ideal of open discourse on campus.**

MacDonald [sic] and Charles Murray are agents of the dominant narrative, and their speech is ‘a form of violence.’ It is hard to know how our institutions of higher learning will find their way back to academic freedom, open inquiry, and mutual understanding.”<sup>207</sup>

### **Protesters’ Motives**

Counter-views of these incidents offer a different focus: on students’ motives. As reported by Conor Friedersdorf in *The Atlantic*, Nana Gyamfi, a Los Angeles civil rights lawyer, explained why students of color at Claremont McKenna felt compelled to shut down Mac Donald’s speech: “The students that engaged in this did so because they have an understanding of something we’re all coming to: that we keep us safe, that we cannot depend even on the institutions we pay, whether the police or our universities, to keep us safe.”<sup>208</sup> For Gyamfi and others, the ideas that Mac Donald was likely to speak about, based on her writings and past speeches, were so fundamentally inimical to the well-being of certain students that preemptively blocking them from being articulated is justifiable. Gyamfi added:

If someone writes books and articles that I feel positions Black Lives Matter protesters as terrorists, and that positions extrajudicial killings of black people as acceptable ... I’m not going to wait until she says kill the n-words or who cares if n-words die, I’m not going to wait for the outrageous thing to come from her mouth when I know where this could possibly go.<sup>209</sup>

Pareena Lawrence, president of Hollins University in Roanoke, Virginia, helps shed light on why such fears have become so intense and why recent conflicts over free speech have been so charged:

This clash is different because it hits a raw nerve—one of identity, particularly those identities that are deeply embedded and not



chosen, such as race, ethnicity, gender, and sexual orientation. If that clash was about any other core values, such as belittling one's chosen position about climate change or economic policy, it wouldn't feel personal. But belittling one's identity? Now exclusion is at the forefront, and it becomes personal.<sup>210</sup>

As discussed in Section I, because such belittling has been deemed particularly heinous, some people have come to believe that campus authorities should intervene to block speakers who might utter them. Amid a rise in hateful speech, escalating hate crimes, and the denigration of certain groups by the president of the United States, there has been a growing impulse to act forcefully against white supremacy and theories that seem to legitimize it. The prospect that speech can be dangerous, which may once have been dismissed as overheated rhetoric motivated by intolerance toward offense, has taken on much more concrete manifestations. This poses a difficult dilemma for free speech advocates, in that while in certain instances hateful speech may make the commission of hate crimes more likely, it is difficult or impossible to determine in advance the circumstances under which that might occur.

Moreover, the boundary between intentionally and inadvertently causing offense is not always clear. In the case of Charles Murray, the protests had little or nothing to do with the anticipated content of his speech and were motivated primarily by ideas that he had espoused in a much earlier work. To understand why the invitation to Murray generated such uproar at Middlebury despite his appearing fairly regularly on other campuses without incident,<sup>211</sup> it helps to recognize that Middlebury is located in the whitest state in the United States and has a student population that is just 4 percent African American.<sup>212</sup> Though their experience is hardly unique and likely resembles that on many predominantly white campuses, black students and faculty at Middlebury have described challenges like “uninvited hypervisibility” and difficulty discussing issues of race on campus.<sup>213</sup> Where students from historically marginalized groups are underrepresented and a campus lacks strong traditions of diversity, feelings of vulnerability in response to potentially offensive messages are likely to be heightened.

Students at Middlebury were hardly all of the same mind about Murray and his talk. But the violent acts that followed Murray's attempt to speak represented a grave infringement on freedom of expression. The obligation to refrain from violence is obvious, a moral baseline for participation in any democratic society. Students and other protesters cannot shirk

this responsibility regardless of the invocation of other societal values, or through a narrative that they must ‘take matters into their own hands’ if they feel the administration has failed to send an appropriate message. Short of a proportionate response in self-defense, violence in the context of protest against speech is never justified.

### Professional Provocation

Part of the challenge of handling these disruptions is that some campus speakers stoke controversy deliberately. Having shown through past speeches that their main goals are to shock, offend, and antagonize, these speakers thwart the ideal of open discourse on campus, giving rise to debates about whether there exists a category of speaker so lacking intellectual or other value that that it legitimizes the denial or withdrawal of the opportunity to speak.

Few individuals exemplify this challenge more than Milo Yiannopoulos. A former editor of the right-wing media site Breitbart, Yiannopoulos gained infamy in 2016 and 2017 as his comments about almost every historically marginalized group were viewed as hateful. He has described himself as “a conservative Lenny Bruce: finding boundaries and raping them in front of you,”<sup>214</sup> and been dubbed a “right-wing professional irritant”<sup>215</sup> and a “professional hate-monger.”<sup>216</sup> He has called rape culture “a fantasy” and transgender people “mentally ill,”<sup>217</sup> and he has derided gays, feminists, Muslims, Black Lives Matter activists, and the leftist cast of college campuses.<sup>218</sup> In July 2016, Twitter permanently banned him for his role in inciting the online harassment of the actress and comedian Leslie Jones.<sup>219</sup>

One of the central ways Yiannopoulos built his brand as a provocateur was through trips to college campuses in 2016—his so-called Dangerous Faggot Tour. Although some of his events were canceled,<sup>220</sup> the tour sparked clashes on campuses across the country that grew increasingly volatile. Some of these included:

- In February 2016, Yiannopoulos spoke at the University of Pittsburgh to a room of 350 students, at the invitation of the school's College Republicans. Some students protested the talk silently by holding up signs, while others briefly interrupted with a chant of “Two, Four, Six, Eight—Stop the Violence, Stop the Rape.” Some reportedly left the room in tears.<sup>221</sup> The Student Government Board, which had allocated funding for the event, held an open meeting the following day to address criticisms. Some students voiced dismay at feeling unsafe on campus, and a discussion ensued about





*Milo Yiannopoulos (seen from a distance) greets supporters on the steps of Sproul Hall for 'Free Speech Week' at UC Berkeley, September 2017*

revisiting the policies for allocating funding to student groups for events.<sup>222</sup>

- In May 2016, Yiannopoulos spoke at DePaul University in Chicago to a room of 550.<sup>223</sup> Invited by the College Republicans, he was interrupted when a group of protesters stormed the stage and stayed there for nearly half an hour, until Yiannopoulos decided to cancel the event. One student screamed directly in his face, and another took the microphone. Security officers were present but did not intervene.<sup>224</sup> After the event, DePaul President Dennis Holtschneider condemned Yiannopoulos's "inflammatory" rhetoric and banned him from appearing on campus again, saying that he had created a "hostile environment."<sup>225</sup> He also criticized the protestors, saying he felt "ashamed" for the university when he saw students rip the microphone from Yiannopoulos.<sup>226</sup>
- In December 2016 at the University of Wisconsin at Milwaukee, Yiannopoulos spoke to a room of over 300.<sup>227</sup> He had been invited by Turning Point USA, a new student group on campus, and his talk was simultaneously streamed live through

Breitbart's website. During the event, Yiannopoulos named and displayed a picture of a transgender former UWM student who had previously protested a new policy at the university stating that students with nonconforming genitalia had to keep them covered at all times in recreational facilities. After the event, university chancellor Mark Mone strongly condemned Yiannopoulos's actions in an email to the university community but referenced the public university's legal obligation to support free speech.<sup>228</sup> The transgender former student reported receiving a flood of hate mail.<sup>229</sup>

- In January 2017, Yiannopoulos was scheduled to speak at the University of Washington on the day of President Trump's inauguration. Protests began peacefully but grew heated, and one protester, Josh Dukes, was shot and wounded.<sup>230</sup> A 29-year-old woman was charged with first-degree assault in the shooting, and her husband was charged with third-degree assault for allegedly using pepper spray on protesters; the couple pled not guilty to the charges.<sup>231</sup> "I did not expect the protests to be that bad," said Karen Huang, president of the College Republicans, who had invited

Yiannopoulos.<sup>232</sup> Despite numerous requests to cancel his appearance, UW President Ana Mari Cauce insisted on letting it go forward, calling it an exercise in free speech. But in an appearance on a local news channel, she also said of Yiannopoulos: “The truth is freedoms can be abused, and he’s someone who’s done that.”<sup>233</sup>

- In February 2017, Yiannopoulos was scheduled to appear at UC Berkeley when over 150 masked, black-clad protesters who reportedly came from off campus gathered on the university’s Sproul Plaza.<sup>234</sup> They threw commercial-grade fireworks and rocks at police, exploded Molotov cocktails, set fires, shattered building windows, and ultimately caused over \$100,000 in damage.<sup>235</sup> During an interview with the media, two students from the College Republicans, who had invited Yiannopoulos, were attacked by protesters who were not affiliated with the school. At least six people were injured during the day’s clashes. In response to the violence, property destruction, and safety concerns, administrators canceled Yiannopoulos’s speech two hours before it was scheduled to take place.<sup>236</sup> Announcing that he had been safely evacuated, Yiannopoulos wrote on Twitter: “One thing we do know for sure: the Left is absolutely terrified of free speech and will do literally anything to shut it down.”<sup>237</sup>
- In September 2017, Yiannopoulos announced plans for a weeklong event at UC Berkeley, dubbed Free Speech Week. He called it the “Coachella of Conservatism,” with a lineup of prominent conservative speakers including Mac Donald, Murray, and former Breitbart executive and former Trump aide Steve Bannon.<sup>238</sup> The event gradually disintegrated as nearly all of the allegedly booked speakers claimed that they had either never been invited or never heard of the event. Reports surfaced that the organizers, a conservative online publication called *The Berkeley Patriot*, had failed to complete the requisite paperwork to book campus spaces.<sup>239</sup> Undiscouraged, Yiannopoulos released a statement saying, “The administration has done everything in its power to crush its own students’ aspirations.” He denounced the school for its “deservedly poor reputation for free speech,” called its leaders “masters of bureaucratic dirty dealing,”<sup>240</sup> and vowed to speak, “with or without student help,” at noon the next day on the campus’s Sproul Plaza. Yiannopoulos’s subsequent brief appearance generated what Dan Mogulof, assistant vice chancellor at Berkeley, called “the most expensive photo op in the university’s history”:

\$800,000 in security for a speech of less than 20 minutes.<sup>241</sup>

Yiannopoulos’s nationwide college tour generated no shortage of commentary. Many questioned why conservative groups across the country were inviting him. Jelani Cobb, director of Columbia’s Ira A. Lipman Center for Journalism and Civil and Human Rights, reflected: “No chemistry department would extend an invitation to an alchemist, no reputable department of psychology would entertain a lecture espousing phrenology.”<sup>242</sup> That conservative students viewed Yiannopoulos’s “toxic brew of bigotries” as worth hearing out, Cobb wrote, was “as big a problem as anything he has said in his talks or in his erstwhile existence as a Twitter troll.”<sup>243</sup>

It is true that Yiannopoulos has been largely uninterested in traditional forms of academic interchange. Key to making sense of his college tour, in fact, is that the backlash he provoked was the goal. Being silenced and censored was Yiannopoulos’s aim, and he used it to ridicule and decry opponents and fan his own notoriety. President Cauce of the University of Washington has diagnosed the phenomenon well, explaining that amid the circuit of campus speakers, there are also individuals

who seek to generate more heat than light, who have no intention of participating in substantive debate. In some cases, they can’t or don’t articulate coherent arguments beyond profanity-laced provocations. Skillful at pushing the limits of free speech right up to the line of incitement, their aim is to attract publicity to their own personas or agendas.<sup>244</sup>

Of Yiannopoulos’s motives, McKay Coppins, a staff writer at *The Atlantic*, explained, “The goal is not to advance conservative arguments in a provocative way; the provocation itself is the point. ‘Liberal tears’ are the coin of the realm, and giving offense is a form of conquest.”<sup>245</sup>

For some conservative students, including several PEN America spoke with at UC Berkeley, the invitation to Yiannopoulos was a rebuke to a climate that is predominantly liberal and where, they believe, the articulation of conservative viewpoints can elicit a powerful backlash. These students described intentional efforts to assert their rights on a campus where support for conservative student organizations from faculty and academic departments can be elusive. Student leaders of color at UC Berkeley who participated in a PEN America symposium in the fall of 2017 acknowledged that conservative groups and viewpoints on their campus can be stigmatized



and ostracized. As we discuss at greater length in Section IV of this report, conservative students at UC Berkeley cited this sense of isolation as part of their motivation to assert themselves and their freedoms of speech and assembly by inviting provocative speakers to campus.

Another prominent campus provocateur who has emerged in recent years is Richard Spencer, leader of the National Policy Institute. The Southern Poverty Law Center has called Spencer “one of the country’s most successful young white nationalist leaders,”<sup>246</sup> recognized for his efforts to “introduce racist ideas to America’s youth.”<sup>247</sup> He gained particular notoriety for a speech he gave soon after the 2016 election that was peppered with Nazi references and ended with Spencer crying out: “Hail Trump! Hail our people! Hail victory!”<sup>248</sup> The latter is the English translation of *Sieg Heil*, and many in the room responded with the Nazi salute.<sup>249</sup> Spencer also spoke at the Unite the Right rally in Charlottesville.

As with Yiannopoulos and others, Spencer’s college visits have been steeped in controversy and resulted in mass protests, like those at Texas A&M in December 2016<sup>250</sup> and the University of Florida in October 2017.<sup>251</sup> By strategically seeking out venues at public universities, which are more constrained in their ability to shut him down, Spencer and his accomplices have deployed the First Amendment to their advantage and repeatedly sued or threatened to sue public universities that deny him a platform. This was the case with Auburn University in April 2017<sup>252</sup> and the University of Michigan in March 2018.<sup>253</sup> Both schools initially blocked Spencer from speaking but were forced by courts to back down.<sup>254</sup> Ohio State successfully barred Spencer by providing the court with “evidence stemming from previous speaking events Spencer has participated in” to prove that his visit could pose a “substantial risk to public safety.”<sup>255</sup> Penn State was also able to deny Spencer a platform, though in this case it was because Spencer’s legal team missed a deadline to provide the court with documents.<sup>256</sup> In April 2018, Spencer voluntarily dropped a lawsuit against the University of Cincinnati. The university had offered him a venue for speaking but required him to pay security and rental fees, which he rejected.<sup>257</sup>

Many college students perceive these provocateurs as jeopardizing their sense of safety on campus by giving voice to, and encouraging, public displays of racism and bigotry. Particularly in the wake of incidents like the torch-lit white supremacist march at UVA that preceded the Unite the Right rally, these concerns are not without grounds. Even conservative groups have criticized certain provocative tactics for distracting from the real problem of “intellectual

***While the university’s role as a venue for open discourse, no matter how contentious, demands that administrators permit lawful speech and defend the speaker’s right to be heard, it does not preclude them from denouncing speech that contradicts the university’s values and speaking out vociferously against hate.***

uniformity.”<sup>258</sup> In June 2018, Frederick M. Hess and Sofia Gallo of AEI published an article made that case, writing that free speech

has also been undermined by conservative groups and campus Republicans themselves who, frustrated by their status as outcasts, have helped make professional provocateurs the face of the campus free speech debates by inviting controversial speakers whose primary function is to rattle progressives and stick a thumb in the eye of campus administrators.... [Conservative students] should seek out speakers and guests who can speak unflinchingly and intellectually to the questions of the hour.<sup>259</sup>

As the provocateurs have become more organized, more nimble at navigating the law, and overall more professional, they have presented new challenges. Administrators should respond by letting these provocateurs have their say, and also take steps to mitigate the harm to the campus community. While the university’s role as a venue for open discourse, no matter how contentious, demands that administrators permit lawful speech and defend the speaker’s right to be heard, it does not preclude them from denouncing speech that contradicts the university’s values and speaking



out vociferously against hate. Student concerns should be recognized, and campus leadership might consider facilitating alternative events that send a message of inclusion and support.

When large protests are expected, the university must ensure that the rights of both the speaker and protesters are robustly protected. Protesters who prevent a speaker from being heard not only curtail the rights of both speaker and audience but also hand the provocateurs exactly what they seek: the controversy and notoriety that come with being censored. Student activists who resort to the heckler's veto—or worse, acts of violence—only further enable speakers trying to demonstrate the supposed intolerance of the left. They contribute to a vicious circle where provocateurs provoke, activists react, and each group confirms the other's worst instincts. This essential fact must be underscored to students across the country: You cannot defeat provocateurs

in the marketplace of ideas through actions that, in and of themselves, allow the provocateurs to claim that you have validated their argument. For universities, the cost of ensuring that both speakers and those who oppose them have their say is likely to be less than the cost of a lawsuit or a return visit.

It is worth noting that these prominent provocateurs' moment in the sun may have come and gone. After a video surfaced in February 2017 showing Yiannopoulos making statements that appeared supportive of pedophilia, even his conservative backers abandoned him,<sup>260</sup> and he is now reported to be millions of dollars in debt.<sup>261</sup> In March 2018, Spencer's lawyer publicly left the alt-right and withdrew from a number of Spencer's lawsuits.<sup>262</sup> Spencer canceled his college speaking tour shortly thereafter, and subsequently appealed to his online supporters to help fund his legal defense in a case related to the Unite the Right rally in which he is a defendant.<sup>263</sup>

## DEBATING THE LIMITS OF COUNTER-SPEECH

At Harvard University's Institute of Politics in September 2017, during a talk by Education Secretary Betsy DeVos, students executed a carefully planned sequence of mostly silent demonstrations. Some students unfurled a series of large banners<sup>264</sup> with messages like "White Supremacist," "Protect Survivors," and "Our Students Are Not 4 Sale," while others raised their fists.<sup>265</sup> Chants from outside the building of "Education Is a Right, Not Just for the Rich and White" filtered into the auditorium during DeVos's remarks,<sup>266</sup> but the protest inside was mostly quiet, allowing students to ask questions.<sup>267</sup> As DeVos exited the room, some in the crowd broke into chants of "This Is What White Supremacy Looks Like."<sup>268</sup>

The five main students behind the protest told *The Harvard Crimson* that their banners strategy was deliberate, what they dubbed a "tiered" approach, aiming to simulate a sustained dialogue between DeVos and the protesters rather than have their counter-speech occur "in one go" and be "over in five minutes."<sup>269</sup> As one of them noted, "There was a rhythm to it."<sup>270</sup>

Frederick M. Hess and Grant Addison wrote for AEI that Harvard had allowed the protesters to

go too far in disrupting DeVos's talk. They called for more decorum and civility on campuses and suggested that the Harvard protesters—whom they dubbed a "mindless mob"—made it impossible for the audience to fully absorb DeVos's remarks.<sup>271</sup> But the students clearly went to thoughtful lengths to creatively structure their counter-speech so that it would deliver a message alongside DeVos's talk without interrupting her. One of the organizers also told the *Crimson* that they wanted to acknowledge the legacy of the JFK Forum, where the talk was held, as a place at Harvard that is "dedicated" to free speech, as well as to applaud DeVos for taking "uncensored," often antagonistic questions from the audience.<sup>272</sup>

To suggest that these students engaged in anything equivalent to a censorious shout-down or shutdown of DeVos's talk would be a mischaracterization of their aims and actions. More importantly, such suggestions threaten to paper over the vital distinction between the "heckler's veto" that actually silences speech and more measured forms of protest, a misleading conflation that will only heighten antagonisms between student protesters and defenders of controversial speakers' right to speak.





## Regulating Speakers

First Amendment jurisprudence recognizes the ability of public universities and colleges to utilize what are known as time, place and manner (TPM) restrictions to regulate speech. These provisions impose reasonable limits on speech for the purpose of protecting the “rights, interests and safety of individuals and the public at large.”<sup>273</sup> TPM policies can be developed to regulate many aspects of speech on campus, such as restricting amplified sound to prevent the disruption of classes, confining public events to daytime hours in the interests of security, or taking measures to limit speech to areas of campus so as not to impair pedestrian or vehicular traffic. Such limits must be content-neutral, meaning they must be consistently implemented across all forms of protest, speech, and expression.<sup>274</sup> They must also be made in the interest of preventing substantial disruption to the educational mission and activities of a university. Finally, they must leave open “ample alternative communication channels” through which the restricted speech could otherwise be expressed.<sup>275</sup>

In the wake of protests around outside speakers and the rise of hate crimes and hateful speech, some campuses have felt compelled to review these policies. At UVA, the aftermath of the Unite the Right rally in August 2017 that brought violence to the campus grounds led to a review of TPM policies. The evening before the main march in downtown Charlottesville, white supremacists attacked a group of 30 counter protesters—many of them students—who stood with their arms linked around a statue of Thomas Jefferson.<sup>276</sup> The small group of students were met by hundreds of torch-wielding far-right protesters, who lunged at them with mace, lighter fluid, torches, and punches, with no campus security or police in sight.

Risa Goluboff, dean of the UVA School of Law, described in a 2018 interview with PEN America how this incident spurred the university to form a special, president-appointed Deans Working Group to assess the response to the horrific episode and ensure that on-campus violence never occurred again. Among the committee’s first changes were an increase in police presence and patrol, strengthened enforcement of open-flame policies, and the creation of explicit protocols authorizing university police to better enforce granted permits. The committee also revisited the university’s TPM policies, and they strenuously debated where the line should be drawn between the rights of university affiliates and non-affiliates to speak on campus. This proved a challenging debate, with some desiring a more stringent policy that could limit the rights of non-affiliates to speak on campus grounds, thereby preventing a revisit from

***In general, administrators are better off accepting the burden of high security costs than shifting it to student groups.***

white supremacist groups. Though Goluboff said the approach would likely “not have been upheld,” she also emphasized that it would have broken from the university’s tradition of remaining open to the city of Charlottesville. Ultimately the university did not break with its historic values, but as Goluboff related, the process brought out many “mixed views” as the group considered “all sorts of little levers one can pull in many directions” in the development of the new policies.<sup>277</sup>

The allowance TPM policies provide can also allow universities to creep too far into the space of restricting speech, for example by carving out unduly tiny physical spaces for speakers to express themselves, such as in a single classroom or a small portion of a campus.<sup>278</sup> FIRE has identified how many institutions’ TPM policies contain these provisions that overly restrict the areas of campus where free speech can happen, known as “free speech zones,” (discussed further in Section V of this report). FIRE also cautions that these policies sometimes require unreasonable advance notice or permits for expressive activity to take place, or require student groups to pay for security for their own campus events.<sup>279</sup>

Events of the past two years have indeed shown that safety should not be taken lightly. Numerous protests of controversial speakers have resulted in arrests, physical damage, and injuries, and some of those protests involved not just students or faculty but also outside groups. A particular challenge for institutions is to develop clear and consistent policies concerning where the burden of hefty security fees should sit when controversial speakers come to campus. Public universities are obligated to refrain from considering listeners’ reactions to speeches when imposing any burdensome requirements on speakers.<sup>280</sup> And while universities have some leeway to impose fees in accordance with time, place, and manner restrictions, it is unconstitutional for public universities to charge security costs that are unreasonable or burdensome. As the Supreme Court has held repeatedly, speech “cannot be financially burdened,

any more than it can be punished or banned, simply because it might offend a hostile mob.”<sup>281</sup>

For the great majority of speakers who visit college campuses, security costs are negligible to nonexistent. But contentious speakers who attract droves of protesters, or aggressive confrontations, are another matter entirely. Protests against Yiannopoulos at the University of Washington in March 2017, for example, reportedly cost \$75,000, including 200 hours of overtime for the university police (\$20,000) and nearly 750 hours (\$55,000) for the Seattle Police.<sup>282</sup>

The result is a conundrum for administrators at public universities: They act unconstitutionally if they block controversial speakers by imposing prohibitive security fees, but they risk a significant financial blow if they allow such events to go forward, requiring a diversion of resources that could otherwise be spent elsewhere. As Erwin Chemerinsky asks, “At what point can a university say that it cannot afford the necessary security precautions and therefore must cancel a speaker because public safety cannot be assured? The law provides no clear answer to this question.... Never should anyone be prevented from speaking because of his or her views, but there must be a point at which a campus can say the financial bill is just too high.”<sup>283</sup>

These financial bills can represent a substantial burden not only for small public colleges but also for large universities struggling with debt. Yet, it is difficult to imagine a legally-sound exception or a special expense-sharing rule for “financial impracticability” that does not raise the potential for abuse by university administrators looking for an easy exit from their First Amendment obligations. Two possible alternatives include limiting the number of invitations to those who may come to campus or limiting the attendance of such events to only members of the campus community.

Further, and perhaps more worryingly, any such exception would logically not be limited to public universities but would become a tool for any government agency to adopt, with possible disastrous effect on Americans’ rights to participate in large protests. This risk was illustrated by a 2018 National Parks Service proposal to charge protest organizers steep fees to use the National Mall and other iconic public spaces in Washington, D.C., giving rising costs as a rationale.<sup>284</sup>

It is not uncommon for universities to make the campus group that invites a speaker pay for security costs, with each group receiving an annual budget. In 2017 at Cornell, a mostly private Ivy League university, conservative campus groups argued that such a practice places a disproportionate burden on them: Because their chosen speakers tend to hold



*A chalking from the Emory University incident, which gave rise to the Chalking*

views considered controversial on campus, they face protests, and security costs, that others do not.<sup>285</sup> Cornell groups trying to host speakers like Senator Rick Santorum have reported having to make tough programming decisions based on fears that security costs could use up their budget.<sup>286</sup> In contrast, *The Cornell Daily Sun* reported, the Cornell Democrats club has not had to pay security fees for the past several years, apparently because their speakers have not incurred costs.<sup>287</sup> Faced with such concerns, in 2017 Cornell began reviewing its policy and in the interim covered the security costs of an upcoming talk from former Speaker of the House Newt Gingrich.<sup>288</sup> A new policy in 2018 stated that speaking costs would be determined by Cornell campus police,<sup>289</sup> but when that approach again led to concerns about bias in these assessments, security fees were suspended for small events. As of February 2019, the university has announced that it is still developing its policy.<sup>290</sup>

In general, administrators are better off accepting the burden of high security costs than shifting it to student groups. Even in cases of extreme expenses, absorbing them will likely be less costly in the long run than barring ideas, which exacts its own price in reputational damage and potential lawsuits, especially for public universities. If a school has reason to believe the costs will be sustained and excessive, it may need to revisit this policy. But the sputtering out of Yiannopoulos’s and Spencer’s campus tours suggests that spurts of speaker-related uproars tend to be finite in duration. While costs may spike, they also seem to settle down relatively quickly, especially if controversial events play out in a way that does not allow a speaker to cry censorship.



## YOUNG AMERICA'S FOUNDATION AND BERKELEY COLLEGE REPUBLICANS V. NAPOLITANO

Tensions around regulating invited speakers came to a head at UC Berkeley in 2017, when the Berkeley College Republicans (BCR), in conjunction with the Young America's Foundation (YAF)—a conservative youth organization that sponsors conservative campus events—filed a lawsuit against several University of California and UC Berkeley administrators. The suit alleged that actions by the university, in conjunction with the groups' efforts to host talks from Yiannopoulos, David Horowitz, and Ann Coulter on campus in 2017, were discriminatory, and violated the plaintiffs' rights to "free speech, equal protection, and due process."<sup>291</sup>

At the heart of the lawsuit was the claim that the administrators at Berkeley discriminated based on the speakers' conservative viewpoints when determining the time, place, and manner of their talks. After the violence surrounding Yiannopoulos's scheduled talk at Berkeley in February 2017, talks by Horowitz and Coulter were ultimately cancelled when the student groups were not given the time and venues for these events that they preferred. Horowitz's talk was canceled by the students;<sup>292</sup> Coulter first said she would still come and speak without a venue, at which point students withdrew their support and then she subsequently cancelled.<sup>293</sup> In both cases, the College Republicans set dates for these talks without first securing venues from the administration. When the requests were evaluated by campus police (UCPD), they recommended the talks occur during daylight hours, so that police could better control expected protests. The plaintiffs claimed the university's policies were unconstitutional, and that administrators used them to "burden or ban speaking engagements involving the expression of conservative viewpoints."<sup>294</sup>

Dan Mogulof, Berkeley spokesperson, stated at the time that this was a false accusation, and has maintained since that the decision to cancel these talks was in neither case taken by the university.<sup>295</sup> In the university's view, UCPD reviewed each of these event proposals according

to "neutral, objective criteria"<sup>296</sup> and their obligation to do so was clearly laid out in existing policies regarding security provisions for campus events.<sup>297</sup> To the student groups though, recent campus events with other high-profile speakers such as the former president of Mexico appeared to receive less scrutiny from the administration, which they claimed evidenced a double standard.

Judge Maxine Chesney originally dismissed the lawsuit in October 2017, but also gave the plaintiffs a month to file a new complaint based on new developments, which included Berkeley's announcement of an interim major events policy in August 2017, and the College Republicans' hosting of Ben Shapiro for a talk that September.<sup>298</sup> A year later, in December 2018, Judge Chesney ruled that Berkeley's major events policy was constitutional, and rejected the plaintiff's claim that the policy allowed the university to discriminate against conservative speakers viewpoints.<sup>299</sup> The student groups and the university agreed to settle the suit, with UC Berkeley paying the student groups' legal fees, totaling \$70,000.<sup>300</sup> As part of the settlement, the university agreed "to consider making a few non-substantive changes" to their major events policy.<sup>301</sup> Nonetheless, YAF celebrated the settlement as a victory, stating, "Transparency and accountability have replaced the notoriously murky process previously enforced by UC Berkeley administrators."<sup>302</sup>

Berkeley claims that its actions and policies have been misrepresented in some public reporting.<sup>303</sup> They say that they have only charged student groups security fees in conjunction with the use of specific venues, and have covered any "extraordinary" security costs related to possible protests or additional security needs.<sup>304</sup> For Ben Shapiro's talk in September 2017, for example, the College Republicans and other sponsoring student groups were charged the cost of basic security, \$15,738,<sup>305</sup> while the university spent in excess of \$600,000 on the "extraordinary" security.<sup>306</sup> University Chancellor Carol Christ

## YOUNG AMERICA'S FOUNDATION AND BERKELEY COLLEGE REPUBLICANS V. NAPOLITANO (con't)

also decided to assume the cost of renting the campus's premiere venue, Zellerbach Hall, on behalf of the students.<sup>307</sup> Writing in March 2019, the university announced that in the past year it had spent more than \$4 million in supporting safe and successful events featuring various conservative speakers, including Charlie Kirk, Rick Santorum, Dennis Prager, Heather Mac Donald, Dave Rubin, and others.<sup>308</sup>

Events of the past two years have presented numerous challenges for UC Berkeley, including how to develop policies that minimize gray areas. In conversations with PEN America in October 2017, community members there spoke of the difficulty of having to “write policies for extremes” while also fulfilling their basic legal obligations and their commitments to the campus's educational

mission and values. Effective policies, they explained, needed to be both flexible enough to support students' ability to organize meaningful, innovative events and comprehensive enough to reduce the risk of violence and unplanned interference from outside groups. Some noted UC Berkeley's obligation, as a public university, to uphold the First Amendment, including the right of all invited speakers to have a platform. But they also described how these events had resulted in numerous classes canceled, and millions of dollars spent to provide campus security to accommodate contentious speakers. Reflecting on this stream of events in 2019, Mogulof told PEN America: “We have become the stage for a national political drama, a battleground for larger forces in society that we at Berkeley have not seen since the Vietnam War.”<sup>309</sup>

### The Imprimatur of the University

As discussed in *And Campus for All*, universities and colleges should set policies that allow the majority of invitations to outside speakers to proceed without problems.<sup>310</sup> At most institutions, numerous bodies have the authority to invite speakers, including academic departments, individual professors, student groups, and the university as a whole. These bodies should have deliberative processes in place to consider different kinds of speakers, and they should be encouraged to be considerate and thorough when making determinations of whom to invite. When a speaker is known for incendiary views and deliberate provocation, campus entities should have searching discussions before issuing an invitation, considering a range of scenarios regarding how such an invitation might unfold and reflecting on their true objectives. Individuals, too, bear a responsibility to publicly register their displeasure before their own group invites an incendiary figure. As Sigal Ben-Porath advises: “Looking to disrupt or enrage can be legitimate goals for an event, but they should be accompanied by content that is worthwhile to think about and consider beyond the spectacle.”<sup>311</sup>

Once a campus body has decided to extend an invitation, though, the choice to withdraw it must meet far more stringent criteria. Otherwise the campus risks surrendering veto power to the loudest constituents—subverting its own decision-making

procedures and limiting the range of ideas allowed on campus. When authority to invite speakers has been delegated to various campus entities, and the invitations proceed through proper channels, the central administration should be wary of infringing upon any of those groups' choices about who they want to hear from. That an event may draw protests should not factor into a decision to withdraw an invitation. Colleges and universities need to have the integrity to stand by the choices of campus bodies that are authorized to issue speaking invitations and to embody the idea that divergent perspectives must be allowed to coexist, even if noisily. Except in the most extreme cases where reasonable remedies are truly out of reach, even concerns over threats or the potential outbreak of violence should not be grounds for canceling an event.

But serving as an open forum for diverse ideas does not require forsaking a clear moral or ethical voice. Universities can signal the value of free expression and their duties under the First Amendment while simultaneously communicating their disapproval of racist or bigoted speakers. While giving a speaker a university-affiliated platform inevitably confers a degree of legitimacy, the right kind of messaging by campus leadership can effectively undermine that legitimacy, making clear that a speaker does not have the full imprimatur of the institution.





For example, during a talk at West Virginia University in December 2016, Yiannopoulos denigrated a professor, Daniel Brewster. In response, students led a campaign to share expressions of support for Brewster on social media with the hashtag #BecauseofBrewster.<sup>312</sup> In a message following Yiannopoulos's appearance, university President E. Gordon Gee stated that he would "always support the decision to bring a speaker to campus and our community—no matter how controversial."<sup>313</sup> He also exercised his own right to "condemn what is presented" and spoke emphatically against Yiannopoulos's attacks on Brewster.<sup>314</sup> Gee participated in the social media campaign, vocally supporting his faculty member and articulating the university's opposition to intolerance.<sup>315</sup> As Gee artfully demonstrated, one of the fundamental concepts of free speech is the understanding that there is a difference between permitting speech and endorsing it. When faced with a provocateur spouting hateful speech, universities have the opportunity to demonstrate that difference to their campus community through their institutional actions.

At the University of Florida in October 2017, President W. Kent Fuchs took a similarly strong stand against Richard Spencer. In the months before Spencer was scheduled to speak at the university, Fuchs and other campus leaders released a series of statements condemning the ideas that he was expected to espouse.<sup>316</sup> In a statement the week prior, he urged students to avoid the event, to deny "Mr. Spencer and his followers the spotlight they are seeking." He also urged them to "not let Mr. Spencer's message of hate and racism go unchallenged." Using the hashtag #TogetherUF, Fuchs touted a separate set of upcoming campus events for the weeks following Spencer's appearance, "promoting education, dialogue, and the embrace of our shared humanity." He closed his note by stressing that as a public research university, "with values that are contrary to all that Mr. Spencer represents, we refuse to be defined by this event. We will overcome this external threat to our university and our values. We will become an even stronger community and an even greater university."<sup>317</sup>

Fuchs's statement was powerful and unequivocal. It clearly conveyed that although Spencer would be speaking in a university facility, the spirit of the institution would not be on his side. He left no question that the university and its administration were against Spencer's message, and he encouraged students not to play into Spencer's provocation game by trying to shut the appearance down and lending him a media spotlight. Violence did break out between a group of men unaffiliated with the university and protesters of Spencer's talk, and a gunshot was fired into the

## **One of the fundamental concepts of free speech is the understanding that there is a difference between permitting speech and endorsing it.**

crowd, leading to three arrests.<sup>318</sup> Nonetheless, the prior actions of Fuchs and the university skillfully undermined whatever legitimacy Spencer's appearance there may have granted him.

In other cases, institutions' failure to draw these lines clearly has contributed to community outrage. When Charles Murray was invited to speak at Middlebury, dozens of faculty signed an open letter to President Patton imploring her not to formally introduce him at the event. The letter characterized Murray as "a discredited ideologue paid ... to promote public policies targeting people of color, women and the poor," who was "not an academic nor a 'critically acclaimed' public scholar, but a well-funded phony" whose "research is an insult to the intellectual integrity of Middlebury College." The letter also noted that "to introduce him—even to critique his arguments—only lends legitimacy to his ideas as worth engaging with."<sup>319</sup>

Nonetheless, some students and faculty strenuously disputed the way Murray was characterized on campus and explained the motive for inviting him. Many told PEN America in a closed door convening in January 2018 that they felt reducing Murray's decades of scholarship to discredited ideas in *The Bell Curve*, a book more than 20 years old, was an injustice both to him and to the students who wished to hear him out. The book Murray was invited to discuss, *Coming Apart*, examines the sources of today's political polarization. Prior to the event, the students who organized it urged the Middlebury community to attend and "argue" and debate with Murray. "We believe that what Dr. Murray has to say on the current divisions in our country is worth hearing and engaging with, regardless of one's political beliefs," read a letter from the school's AEI Club. "We are not operating under the false pretenses that Dr. Murray will radically change anybody's mind.... Without this desire to understand one another, especially people we disagree with, we cannot move forward. Instead, we will only continue

to come apart.<sup>320</sup>

Ultimately, Patton kept to her original plan, introducing Murray as she did most speakers who made the trip to the rural Vermont campus. In her remarks, she noted explicitly that she disagreed with Murray's views, saying, "I would regret it terribly if my presence here today ... is read to be something which it is not: an endorsement of Mr. Murray's research and writings." Patton explained, however, that "the very premise of free speech on this campus is that a speaker has a right to be heard."<sup>321</sup> Despite her disclaimer, some on campus interpreted her introduction as an endorsement not only of his presence on campus but also of his past research. In conversations that PEN America conducted with students, faculty, and staff at Middlebury in January 2018, we learned that many saw Patton's introduction as an undesirable and thoughtless conferring of the institution's credibility on a highly controversial figure. In a piece highlighting more than a dozen Middlebury students' views of the evening and its ensuing protests, Elizabeth Siyuan Lee, a senior at the time of Murray's lecture, told *The New York Times*:

The event was co-sponsored by the political science department and featured opening remarks by the president of the College, elevating the speaker's institutional legitimacy. While students have the right to bring speakers of all kinds to campus, the university itself must be responsible and academically honest when giving such events a show of approval through cosponsorship.<sup>322</sup>

Given the mounting opposition to Murray's planned appearance as it approached, administrators might have considered steps to make more clear that the invitation had been introduced by a student group, rather than the administration itself. Finding a way to avoid the standard introduction by President Patton might have been one such measure. There might also have been opportunities at meetings or in newsletters to make clear that while Murray had been duly invited and would be permitted to speak, the specific views of his that were the basis of the controversy were rejected by the university. Campus leaders could have sought opportunities for engagement and dialogue with those planning the protests, aiming to ensure that their rights were protected and their perspectives heard without impinging upon Murray's ability to speak.

In October 2017, the Hannah Arendt Center for Politics and Humanities at Bard College faced a similar challenge when it hosted Marc Jongen, a prominent "party philosopher"<sup>323</sup> of Germany's far-right

Alternative für Deutschland (AfD) political party, as one of 20 speakers at an annual conference titled "Crises of Democracy: Thinking in Dark Times." A month before, the AfD, a party with an anti-immigration platform<sup>324</sup> and whose leaders have been accused of resurrecting Nazi ideas and language,<sup>325</sup> rose from "near-obscurity" to capture the third-largest number of seats in the German Bundestag.<sup>326</sup> Roger Berkowitz, professor of political studies and human rights at Bard, and the academic director of the Arendt Center, justified Jongen's invitation because he was seen as reflecting a wave of nationalism and authoritarianism sweeping many countries.<sup>327</sup> Jongen spoke in conversation with Ian Buruma, then the editor of *The New York Review of Books*. During the event, the Arendt Center live-tweeted some of Jongen's remarks.<sup>328</sup>

The decision to host Jongen sparked heavy criticism. In the aftermath, *The Chronicle of Higher Education* published a letter signed by over 50 prominent scholars, criticizing Berkowitz and Bard for giving Jongen a platform and failing to publicly rebuke him. They wrote: "We are disappointed that neither the center nor Bard College has issued an unequivocal, principled statement distancing itself from the anti-immigrant, anti-refugee, and Islamophobic agenda of Jongen and the AfD."<sup>329</sup> The letter argued that the AfD politician already had a platform to propagate his ideas and that he had posted the invitation from the center on the AfD Facebook page, depicting it as a victory for his cause. In the scholars' view, the Arendt Center had contributed to the "legitimization and normalization" of the AfD.<sup>330</sup>

In response, both Berkowitz and Bard President Leon Botstein published letters of their own, explaining the rationale for their decision and stating that the invitation should not have been interpreted as an endorsement of Jongen's views. In his letter, Berkowitz argued that in order to have a conference examining the spread and increasing appeal of illiberal democracy, it was necessary to include someone who was representative of that movement, stating: "The effort to resist the rise of illiberal democracy demands that we understand why liberal democracy is failing as well as the attraction of illiberal democracy."<sup>331</sup> Berkowitz went on to note that:

And in fact, while Mr. Jongen had a full opportunity to speak and articulate his argument, he was answered by Mr. Buruma, myself as moderator, and numerous questioners who challenged him directly and forcefully. The event—singly and more importantly within the context of the full two-day conference—was a rare opportunity to argue at length with someone who makes an articulate case for



one version of illiberal democracy. It is essential that we understand and argue against illiberal ideas and not simply condemn them out of hand. I am heartened that the students and participants at our conference rose to the occasion.<sup>332</sup>

In his own letter, Botstein noted that “The issues here are the survival of open debate and of academic censorship. ... Allowing the expression, in a public discussion forum, of views and positions that we find reprehensible is a necessary part of the exercise of freedom in the public realm. This is particularly true in the academy.”<sup>333</sup>

While the Arendt Center might have taken additional steps to frame Jongen’s appearance so that his participation could not be construed as an endorsement of his ideas, an academic conference focused on threats to democracy was the right setting to allow an airing of views that have entered the mainstream in Germany and gained increasing influence worldwide. Having Jongen address an audience of academic specialists in democracy and fascism is very different from inviting him to rile up a roomful of supporters. The Bard conference offered faculty and students the chance to probe and consider Jongen’s theories firsthand. As Francine Prose, Distinguished Writer in Residence at Bard, wrote in *The Guardian*, her students did not see Jongen’s talk as legitimizing his ideas but as a uniquely potent and galvanizing wake-up call about the dangers of rising fascism.<sup>334</sup> Her students, she explained, “were proud to be associated with a school that trusted their ability to weigh unpopular ideas.... They felt that hearing Jongen had been part of their education.”<sup>335</sup>

By carefully handling the messaging, social media, and announcement of the event, the Arendt Center might have been better able to communicate that it had deliberately chosen the setting and structure to avoid advancing Jongen’s ideas or raising his standing. It is also true, though, that universities cannot fully control how a speaker will characterize a campus visit and that the reputations of leading universities may lend a measure of unintended legitimacy. But restricting invitations to speakers deemed deserving of the reputational boost bestowed by association with a top university would dramatically narrow the range of acceptable speakers. When there are important reasons to host speakers on campus—if, for instance, they are likely to contribute influential, even if noxious, perspectives—schools should address concerns over conferring their imprimatur through mitigating steps rather than by avoiding the invitation entirely.

### Disciplinary Decisions

When students disrupt a speech through protest, counter-speech, or civil disobedience, how should universities respond? Some have called for harsh discipline as a deterrent to further disruption, but others have had more sympathy for protesters’ aims and decried punishments that could jeopardize students’ academic careers or chill the climate for counter-speech.

Administering campus discipline is a core responsibility of the university, reflecting the unique and interlocking duties to provide education, guarantee academic freedom, and foster a vibrant community. Reasonable counter-speech should not incur punishment. When institutions punish protesters too harshly, they risk unnecessarily chilling protesters’ free speech, which is protected by the First Amendment. A retributive mindset can lead to harsher punishments than necessary, or to a situation in which discipline is misapplied. At the same time, failure to punish clear disciplinary infractions, impermissible encroachments on speech and particularly acts of violence sends the message that university norms and values won’t be enforced, and can often give rise to impressions that justice is meted out selectively.

Under the First Amendment, individuals do not have the right to impede the speech of others in areas classified as public forums. At the same time, speakers do not have the right to expect a cooperative audience. As constitutional law experts Gillman and Chemerinsky explained in a 2017 op-ed in *The Chronicle of Higher Education*, when speech is exchanged in a truly open, public forum, such as a campus quad, “no one speaker has any more rights to express a point of view than any other.”<sup>336</sup> In reserved spaces that function as “limited public forums,” however, “those who have secured the reservations have recognized claims to that space at those times,”<sup>337</sup> while counter-speakers are “allowed to express their disagreement” only “in ways that nevertheless allow the speakers to have their say.”<sup>338</sup>

Disruptions exist not in a binary between total shutdown and measured tolerance but rather in gradations. Peaceful protesters can make use of silence—for instance, by turning their backs or projecting images onto a speaker—as well as momentary or episodic interruptions that fall far short of complete shutdowns. Counter-speakers can host competing events or circulate pamphlets with counter-messages, and they can express their disapproval as audience members as long as they do not muzzle the speaker. Moreover, protest policies must be made clear to students—and be properly and consistently enforced—so they understand that transgressing clear boundaries carries consequences.

Although it’s not always clear what constitutes

reasonable disruption, administrators must bear in mind that most counter-speech is protected speech and should not incur punishment. College is, after all, a time for young people to test boundaries, explore ideas and ideologies, and develop their civic identities. As long as counter-speech is peaceful and the disruption is momentary or incidental and does not deprive listeners of the opportunity to hear the speaker, leeway for protest should be broad. Campus authorities must make these judgments, as Gillman and Chemerinsky explain, and they may sensibly determine that in some cases limited disruptive actions by students, particularly when they target administrators, are better met with tolerance than discipline. These scholars add, however, that when disruption targets speakers—when it silences their speech—discipline is appropriate, both to serve as a deterrent and to maintain the campus’s role as a promoter of robust debate.<sup>339</sup>

Given the many recent high-profile disruptive protests, many have raised concern that the disciplinary consequences have not been severe enough to act as deterrents. A writer for *National Review* observed that “the default position on many campuses is to cower before the mob.”<sup>340</sup>

Four days after Lewis & Clark Law students effectively shut down the talk by Christina Hoff Sommers, the institution released a statement saying that it was taking “appropriate disciplinary actions in accordance with school policies.”<sup>341</sup> But no further action against the students was ever announced publicly. In the face of an admittedly challenging situation, administrators failed to defend Sommers’s expression. They did not tell protesters to cease and desist or be evicted from the event, and they gave in to demands that Sommers abandon her planned lecture in favor of a Q&A. Beyond conveying to students that their actions were acceptable, this tepid response enabled their ultimately successful silencing campaign and may ultimately encourage similar behavior in the future.

At the CUNY School of Law in April 2018, a group of students heckled professor Josh Blackman as he tried to begin a talk.<sup>342</sup> After a few minutes, university official intervened and told the protesters that according to the university rules they could protest the talk but could not keep Blackman from speaking. Nearly eight minutes later, the protesters disbanded and Blackman’s talk went on. Ultimately, the school decided that the protesters would not be disciplined because their disruption was deemed “limited and reasonable” and not a violation of university policy.<sup>343</sup> Some critics, however, reached the opposite conclusion, pointing out that even though Blackman’s talk went forward, it was disrupted.<sup>344</sup>

At Claremont McKenna, seven of the estimated 170 students involved in the blockade of Heather Mac Donald’s speech were ultimately punished for “blocking free speech.”<sup>345</sup> Five received suspensions of either a semester or a year, and the other two were placed on “conduct probation.” After an investigation, the college determined that the protest, although peaceful, “breached institutional values of freedom of expression and assembly” and “violated policies of both the College and The Claremont Colleges that prohibit material disruption of college programs and created unsafe conditions in disregard of state law.”<sup>346</sup> The college explained that the students’ punishments varied based on “the nature and degree of leadership in the blockade, the acknowledgment and acceptance of responsibility, and other factors.”<sup>347</sup> Many protesters were from other colleges in the Claremont system, and their cases were referred to those institutions.

Nana Gyamfi, a lawyer with Justice Warriors for Black Lives who advised the sanctioned students, described the punishments as “completely outrageous” and intended to “intimidate and to bully.”<sup>348</sup> In an interview with *Inside Higher Ed*, she said: “What free speech rights did the students prevent? Did they jump up in her speech? Did they grab her and pull her aside? She could talk all day long.”<sup>349</sup> It is clear, however, that even if the students didn’t interrupt Mac Donald, they did prevent her event from proceeding— infringing on her right to speak in a specified time and place and on others’ right to hear her.

For her part, Mac Donald told *Inside Higher Ed* that she was grateful that the college had chosen to act in favor of free speech. She called the notion that her criticism of Black Lives Matter could warrant a blockade to prevent her speech “an amazing proposition.”<sup>350</sup>

Administrators in this case might have considered that this incident was peaceful and that the college was able to make arrangements for Mac Donald’s speech to proceed. They also could have discussed whether the students received appropriate warning that suspensions might result from their actions. As a disciplinary measure, suspensions can cause great difficulty for students trying to complete their academic careers and can lead to the loss of scholarships or financial aid. For this reason, campus authorities should resort to them only in response to egregious actions.

The violent protest at Middlebury presents wholly different issues, as it involved ostensibly criminal actions. But despite conducting an independent investigation with the help of an outside law firm, the college was unable to identify all of the 20 estimated protesters engaged in the violence or to determine how many of them were students.<sup>351</sup> Video





*About 200 protesters gathered on October 6, 2016 at the University of Minnesota campus to protest “Build the Wall” panel*

footage was too dark for officials to pinpoint who had physically assaulted Professor Stranger and rocked the SUV in which she and would-be speaker Charles Murray departed.<sup>352</sup> One Middlebury student, Addis Fouche-Channer, was accused of being on the SUV by a public safety officer but was later shown through campus IT records to have been in a different area of campus during the protest.<sup>353</sup> Fouche-Channer later alleged in an interview with PEN America that the same public safety official had “incorrectly profiled three different people, and the college didn’t do anything.”<sup>354</sup>

Ultimately, the school disciplined 67 students for varying degrees of involvement, with punishments ranging from probation to permanent records in their student files.<sup>355</sup> The administration stated that the students’ actions were a clear violation of the college’s policy against disruptive protests, an infraction that can result in suspension. When no participating students were expelled or suspended, many criticized the punishments as too mild.<sup>356</sup> Murray called them a “farce,” predicting that they would not deter future students from shutting down another lecture.<sup>357</sup> Fouche-Channer’s experience, though, shows the difficulty of imposing fair punishment absent sufficient evidence. Although many details of the sanctions were not disclosed publicly due to federal laws related to student privacy, college spokespersons maintained that the most violent acts could not be directly tied to individual students.<sup>358</sup>

The complexities of these cases demonstrate why it is important for schools to have the leeway to set disciplinary policies appropriate for their specific campus context, and to be able to make decisions tailored to the nuanced specifics of each situation that arises. This also highlights the risk of setting down disciplinary guidelines or requirements in legislation, as discussed in Section V of this report. Whatever policies a school adopts, they should be publicly available so that students have a clear understanding of what discipline they may face if they engage in certain forms of counterspeech or protest. Disciplinary processes too should be as transparent as possible, while allowing the opportunity for appeal.

### **Moving Forward**

Some speaker controversies can do lasting damage to a campus, breaking trust and leaving some students questioning their sense of belonging. It is important for university leadership to recognize the impact of these bruising clashes, especially violent ones, and to take steps toward preventing and repairing the fissures and preventing a recurrence. Both Middlebury and UC Berkeley conducted numerous internal and public initiatives to rebuild trust following their widely publicized firestorms. Middlebury launched a Committee on Speech and Inclusion with 12 members, equal parts students, staff, and administrators, to engage in an “intentionally broad” array of issues around “freedom of expression, inclusivity, and the

educational and civic challenges of the 21st century.”<sup>359</sup> The committee reported on ways to encourage vibrant classrooms receptive to a wide range of views as well as ways for both sponsors and audience members to improve their approach to outside speakers, balancing “the ideal of a public sphere with the specific goals of an educational institution.”<sup>360</sup> In the words of the chair of the committee, then-Provost Susan Baldrige:

The group experienced and grappled with the differences in power accorded to faculty, staff, and students on our campus and how those differences in power influence who speaks up and what they are willing to say. They confronted their own and others’ assumptions about what community means and how a fully inclusive intellectual community should function.... The results of their deliberations ... call upon all of us to be responsible—individually and collectively—for creating an inclusive community that not only tolerates disagreement, but engages it confidently, thoughtfully, and with humility.

At UC Berkeley, after the seemingly endless string of costly, incendiary, and disruptive events, Chancellor Carol Christ announced what she promised would be a “free speech year.” The university held daylong conferences with groups like Bridge USA, the Center for New Media, and PEN America to examine issues of free expression. It organized an array of discussions among people with “sharply divergent points of view.”<sup>361</sup> In an all-campus statement released August 2017 and titled “Free Speech Is Who We Are,” Chancellor Christ recalled Berkeley’s lauded history as the home of the 1960s free speech movement while stridently calling on the campus community to meet hateful and hurtful expression with more speech:

You have the right at Berkeley to expect the university to keep you physically safe. But we would be providing students with a less valuable education, preparing them less well for the world after graduation, if we tried to shelter them from ideas that many find wrong, even dangerous. We must show that we can choose what to listen to, that we can cultivate our own arguments and that we can develop inner resilience, which is the surest form of safe space.... Free speech is our legacy, and we have the power once more to shape this narrative.<sup>362</sup>

Soon after, in October 2017, the chancellor

launched a Commission on Free Speech, composed of students, staff, faculty, deans, senior leaders, and public security officials and charged with recommending changes in university policies governing external speakers. The commission was given a great deal of flexibility to “solicit broad community input through hearings, email, and any other avenues it chooses” and was encouraged to focus on changes that would make future speaking events “less disruptive and expensive for the campus.”<sup>363</sup> In April 2018, the committee published its final recommendations, observing that Berkeley had hosted 11,460 non-departmental events in its facilities during the fall of 2017 and that, of these, only two (involving Ben Shapiro and Milo Yiannopoulos) created a “disturbance.” They wrote: “The campus’s co-curricular ecosystem is clearly thriving, on the whole, and the Commission is wary of implementing changes that could impede its good functioning.”<sup>364</sup>

It offered a range of recommendations to help Berkeley defend free speech while also taking “steps to avoid harm to the community” from provocative speakers.<sup>365</sup> The report suggested designating particular campus spaces as free speech zones, making police a “less intimidating presence during potentially disruptive events;” establishing “stronger criteria for ... sponsorship of events that demand extra security, including a requirement that [registered student organizations] submit a public statement explaining how the event comports with the Principles of Community;” and seeking additional support from the state of California “for events likely to disrupt campus and create large, disproportionate financial burdens.”<sup>366</sup> Faculty were encouraged to use the classroom to jointly teach reasons why hateful speech is unrestricted and the effect it can have on listeners. They were also urged to equip students with ways to respectfully debate and disagree as well as “build logic and empirical inquiry skills.”<sup>367</sup>

Picking up the pieces after an incendiary episode is never easy. It requires wading into fraught discussions and emotions, often among numerous campus constituencies, many of whom feel wounded. Administrators often need to contend with a long history of events that predate the controversy yet still shape people’s interpretation of it. PEN America believes that expanding the aperture of community response to consider the conditions that have led to speaker brawls is a worthwhile endeavor and could pay immense dividends toward preventing similar flare-ups in the future. These examples demonstrate that thoughtful, courageous administrators, with engagement and support from students, faculty, and staff, can navigate a productive course forward for the entire campus community.



## Section III

# FACULTY UNDER FIRE

In the past two years, PEN America has documented dozens of incidents in which college faculty or staff have faced harsh rebukes of their academic perspectives or personal opinions. Some professors have experienced public shaming, harassment, official reprisals, or all three. As a result of these incidents, many faculty members report being much more careful with their public speech, going so far, as one told us, as to carefully review any quotations to be used in the media to make sure they are “neutral, anodyne, and vapid”<sup>368</sup>—lest they utter a sensational sound bite that attracts unwanted attention.

An examination of these incidents shows that public attacks on faculty have come from both the political left and the right. Many faculty have been targeted in the wake of comments about the same hot-button issues, such as those related to race, sexual assault, or the Trump presidency. Public outrage has often spread quickly via social media, producing widespread pressure on campus leaders from students, trustees, donors, and outside commentators to respond forcefully to faculty statements that someone deemed offensive.

Universities’ responses have varied. Some have placed tenured professors on temporary research leave or removed them as instructors of mandatory classes so that students who wish to shield themselves from potentially offensive views can do so. Some adjunct and visiting faculty have been fired, or not had their contracts renewed, because of these outrage campaigns, reflecting their more precarious position in the academy.<sup>369</sup> Overall, campus administrators have often demonstrated uncertainty and inconsistency in these incidents, highlighting the need for clear principles and guidance.

Administrators faced with such situations must tread carefully. They should take many factors into account, weighing the context in which statements are made, the range of interpretations in play, the ways that the outrage behind these incidents formed and was fomented, and the implications for the professor, and for the institution, if various disciplinary responses are taken. While public criticism of ideas is fair game, and is itself protected speech, there must be a high threshold for any institutional disciplinary reprisals. When responding to faculty speech that causes justifiable offense but is protected by the First Amendment and/or by university policies that safeguard speech and academic

freedom, administrators should consider several approaches: While affirming free speech principles, they can release statements of values that reject offensive speech and offer support to the parties who have been targeted or have taken offense. They can promote dialogue in the campus community that helps elucidate and contextualize the nature of the offense and lift up alternative perspectives. They can facilitate direct conversation between the faculty member in question and objecting colleagues and students, with the aim of forging greater understanding. Although there are some general principles that PEN America believes should guide administrators in adjudicating their responses, each case has particular characteristics that call for careful review.

The First Amendment was created to constrain government action, not the actions of individuals or private associations. As a result, public universities are legally obliged to uphold the First Amendment, while this same obligation does not extend to private institutions. But all institutions of higher learning have a responsibility to defend academic freedom, which requires ensuring an environment in which faculty are not afraid to speak their minds. In some instances, speech by faculty members evinces levels of actual or perceived gender, racial or ethnic bias that can give rise to genuine questions of whether the professor is capable of upholding a university’s commitment to equal treatment of students. In such cases, the university may have to walk a fine line to uphold its dual obligations to both protect free speech and nurture a discrimination-free learning environment.

### Faculty Under Fire

Campaigns driven by outrage at faculty have varied greatly. A small sample of these cases, from the past two and half years, encompass some of this variation.

- In November 2016, Ted Pawlicki, then the director of the University of Rochester’s computer science program, posted a comment on Facebook that criticized a campus demonstration, billed as Not My America, which was organized to protest the election of Donald Trump.<sup>370</sup> Pawlicki wrote: “A bus ticket from Rochester to Canada is \$16. If this is not your America, then I will pay for your ticket if you promise never to come back.” He faced severe criticism online and deleted the post within hours. Pawlicki subsequently sent an apologetic email to the department’s students and faculty that announced his decision to resign from his position as director but remain on the faculty.<sup>371</sup> Following his apology, the University of Rochester issued a statement acknowledging that his post

was cause for concern but adding that freedom of expression was one of its foundational principles.<sup>372</sup> Pawlicki later told news outlets that his post had been “intended to be humorous. Moving to Canada (in reaction to presidential election outcomes) has been a joke since the Reagan administration. I didn’t intend it to be malicious, certainly. I don’t think there’s anything malicious about it, either.”<sup>373</sup>

- In December 2016, George Ciccariello-Maher, an associate professor at Drexel University, tweeted, “All I want for Christmas is white genocide.”<sup>374</sup> He followed up with another tweet the next day: “To clarify: when whites were massacred during the Haitian Revolution, that was a good thing indeed.”<sup>375</sup> The tweets were quickly picked up by Breitbart and The Daily Caller, which framed the first one especially as a call for violence against white people.<sup>376</sup> Ciccariello-Maher told *The Philadelphia Inquirer* in an email that he then began receiving hate mail and death threats, writing that he believed his words had been misread: “For those who haven’t bothered to do their research, ‘white genocide’ is an idea invented by white supremacists and used to denounce everything from interracial relationships to multicultural policies.... It is a figment of the racist imagination, it should be mocked, and I’m glad to have mocked it.”<sup>377</sup> In March 2017 Ciccariello-Maher again posted to Twitter, this time writing, “Some guy gave up his first class seat for a uniformed soldier. People are thanking him. I’m trying not to vomit or yell about Mosul.”<sup>378</sup> In the midst of another public outcry, Drexel joined in the criticism, saying that it had lost some prospective students and donors because of his tweets.<sup>379</sup> Later the same year, in October, Ciccariello-Maher again came under fire for tweeting, “It’s the white supremacist patriarchy, stupid,” in response to the mass shooting in Las Vegas. In the wake of another round of scrutiny, Drexel placed Ciccariello-Maher on administrative leave, citing safety reasons—a rationale that he accepted skeptically.<sup>380</sup> The university allowed him to finish teaching his courses that semester online but barred him from the campus.<sup>381</sup> In December 2017, Ciccariello-Maher announced that he would be leaving Drexel permanently due to the harassment experienced by him and his family, as part of what he called a “new offensive against academia” driven by “internet mobs.”<sup>382</sup> Facing an indefinite administrative suspension from teaching and the ban on returning to campus, Ciccariello-Maher appears to have felt he had no choice but to resign, despite having tenure.<sup>383</sup>
- In May 2017, Keeanga-Yamahatta Taylor, an assistant professor of African-American studies at Princeton, delivered a commencement address at Hampshire College in which she criticized President Trump’s policies and described him as “a racist, sexist megalomaniac.”<sup>384</sup> The speech drew the attention of *The New Republic*, Glenn Beck’s *The Blaze*, and Fox News, the latter of which described it as an “anti-POTUS tirade.”<sup>385</sup> In the weeks following the negative coverage, Taylor reported receiving hate-filled emails and death threats, eventually causing her to cancel upcoming public lectures at Seattle’s Town Hall and the University of California at San Diego, out of concerns for her and her family’s safety.<sup>386</sup> “I have been threatened with lynching and having the bullet from a .44 Magnum put in my head,” she wrote in a statement. “I am not a newsworthy person. Fox did not run this story because it was ‘news,’ but to incite and unleash the mob-like mentality of its fringe audience, anticipating that they would respond with a deluge of hate-filled emails—or worse.”<sup>387</sup>
- In June 2017 Lisa Durden, an adjunct professor at Essex County College, appeared on Fox News’s *Tucker Carlson Tonight*, defending a Black Lives Matter chapter that had recently sponsored a Memorial Day event that white people were asked not to attend. “Boo-hoo-hoo,” she said. “You white people are angry because you couldn’t use your white privilege card to get invited to the ... all-black memorial celebration.”<sup>388</sup> Two days later, an Essex administrator asked Durden to cancel her class, turn over her grade book, and informed her she was suspended until further notice.<sup>389</sup> Two weeks later, Durden was fired. A recorded announcement on YouTube from Essex President Anthony Munroe claimed that after Durden’s Fox News segment, the college had been “immediately inundated with students, faculty, and prospective students, and their families expressing frustration, concern, and even fear that the views expressed by a College employee (with influence over students) would negatively impact their experience on the campus.”<sup>390</sup> An investigation by FIRE revealed this to be a gross exaggeration, however; in the 13 days following Durden’s appearance, only one person contacted the college to register a complaint.<sup>391</sup> Durden took legal action, alleging that her dismissal was unwarranted because she did not identify her association with the college on TV.<sup>392</sup> Durden told *Diverse Issues in Higher Education*: “Someone has to make very clear, not just to Essex County College but to all colleges: you will not be able to take these unlawful actions





*Conservative commentator and author Ann Coulter speaking at CPAC 2011 in Washington, D.C.*

against academics.”<sup>393</sup>

- In August 2017, Professor Toby Jennings was placed on indefinite administrative leave from Grand Canyon University, a for-profit Christian school in Phoenix, due to controversial comments he had made almost a year earlier about the Black Lives Matter movement. Jennings had stated during a September 2016 seminar discussion that some members of the movement “frankly should be hung” [sic] because their “rhetoric is not helpful to any conversation.”<sup>394</sup> University leaders seem to have learned of Jennings’s remarks only after local chapters of Black Lives Matter and the NAACP brought them to their attention.<sup>395</sup> Jennings had also said that some members of the movement were “very gracious and discerning and conversationally, dynamically dialoguing about the issue,” but he nonetheless apologized to the university community in a written statement: “Particularly, I have inexcusably offended many fellow image bearers of God by my imprudent use of inappropriate, uncharitable, and incendiary language.” He added, “My impassioned choice of words certainly does not reflect the pathos, practice, and vision of Grand Canyon University.”<sup>396</sup> The university placed Jennings on administrative leave for the remainder of the fall semester.<sup>397</sup>
- In April 2018, within hours of the death of former

First Lady Barbara Bush, Randa Jarrar, a tenured professor of English at Fresno State University, tweeted that Bush had been “a generous and smart and amazing racist,” and “I’m happy the witch is dead.”<sup>398</sup> As criticisms mounted, Jarrar responded that she would be shielded from repercussion because she had tenure, then directed her detractors to voice their discontent through a phone number, which, oddly, turned out to reach the crisis hotline at Arizona State University.<sup>399</sup> Within days, Fresno State announced that it was opening an investigation into Jarrar’s tweets, with President Joseph I. Castro stating, “All options are on the table,” and “A professor with tenure does not have blanket protection to say and do what they wish.”<sup>400</sup> After receiving outside pressure, including a letter to Fresno State from FIRE, PEN America, and a coalition of other civil liberties organizations explaining that the First Amendment had no exception for “disrespectful” speech,<sup>401</sup> the school announced that it would not punish Jarrar for her tweets because she had not violated any institutional rules. Castro released a statement criticizing the tweets as “insensitive, inappropriate and an embarrassment to the university,”<sup>402</sup> but in a public forum soon after he was criticized for not firing her.<sup>403</sup> In the ensuing months, Jarrar reported receiving vile hate mail.<sup>404</sup>

- In September 2018, Mitchell Langbert, an associate professor of business at Brooklyn College,

posted an essay on his personal blog about the Senate Judiciary Committee hearing for Supreme Court nominee Brett Kavanaugh, stating, “If someone did not commit sexual assault in high school, then he is not a member of the male sex. The Democrats have discovered that 15-year-olds play spin-the-bottle.”<sup>405</sup> After it was picked up in the school newspaper and some national news outlets,<sup>406</sup> student groups organized a protest calling for Langbert’s dismissal, with the hashtag #FireProfessorLangbert.<sup>407</sup> From October 3 to 4, 767 tweets used this hashtag.<sup>408</sup> In response, Langbert argued that his words were not meant to be taken literally and modified his original post to emphasize its satirical intent.<sup>409</sup> In a series of public statements, college officials acknowledged the sexism in the post and its “repugnance” but cited the First Amendment as reason not to punish or dismiss him.<sup>410</sup>

### Outrage from the Right

While most criticism of faculty—including calls for institutional punishment—is itself protected speech, the outrage storms and cries for official retaliation can jeopardize faculty members’ right to free expression. Such scenarios can lead to self-censorship, preemptively silencing controversial academic ideas rather than exposing them to debate. In a number of cases, unofficial calls for discipline have pressured administrators to act harshly or hastily in response to speech by faculty. Faculty have found themselves in trouble both for their academic writings and for speech outside of their professorial roles, as public citizens.

Conservative news sites in particular have ignited campaigns against professors as part of an effort to raise public scrutiny of a perceived liberal bias in higher education. Media organizations such as Fox News, Breitbart, The Daily Caller, The Blaze, and The Red Elephants have been part of this widespread effort to fan the flames of outrage. A number of conservative nonprofit organizations have also dedicated resources to scaling up these efforts.

One such organization, the Leadership Institute, is a nonprofit group founded in 1979 that trains young conservative activists in campaigns, fundraising, grassroots organizing, youth politics, and media. In 2015 the group started a website called Campus Reform, which reports on supposed liberal bias in higher education, often utilizing student reporters. A blog post by the institute’s founder, Morton C. Blackwell, was titled “The Evil Empire on Campus: Leftist Abuses and Bias” and included sections and bullet points such as “Leftist Control on Campus” and “Leftist Indoctrination on Campus.”<sup>411</sup> As reported in *The Chronicle of Higher Education*, editors of Campus

Reform track instances of professors’ being fired as a result of the website’s reporting, calling them “victories.”<sup>412</sup> As of early 2019, the Leadership Institute reported having a network of more than 1,700 college groups and campus newspapers across the country.<sup>413</sup>

Turning Point USA, with a stated mission of educating students about “true free market values,” is another right-wing group that trains its sights on liberal faculty. Since 2016 it has produced Professor Watchlist, a website “dedicated to documenting and exposing college professors who discriminate against conservative students, promote anti-American values, and advance leftist propaganda in the classroom.”<sup>414</sup> Founded in 2012 by conservative activist Charlie Kirk when he was just 18 years old, the site uses tactics that include the blacklisting of faculty, sometimes based on anonymous tips.<sup>415</sup> One professor reportedly made the list for saying that Ted Cruz’s reference to “New York values” was anti-Semitic.<sup>416</sup> Other professors flagged by the site have argued that it discourages critical engagement and creates a hostile climate for free speech and academic freedom.<sup>417</sup>

In numerous cases, professors targeted by these outlets have had their alleged infractions propelled to a national audience, resulting in public scrutiny, discipline by their institutions, or online harassment. Sarah Bond, a classics professor at the University of Iowa, received online threats of violence after Campus Reform criticized her for an article published in June 2017 on the online arts publication *Hyperallergic*.<sup>418</sup> In the article, Bond explained that the white marble statues of Greek and Roman antiquity were originally painted and colorful, which debunks white supremacist contentions that the statues’ “pristine whiteness” represents the “classical ideal.”<sup>419</sup> In an article in *The Chronicle of Higher Education* headlined “Professors’ Growing Risk: Harassment for Things They Never Really Said,” Bond said that in an effort to drum up outrage against her, Campus Reform had “remixed” her argument to suggest that she’d written that “white statues are racist in themselves.”<sup>420</sup>

Such cases have targeted professors’ academic writing as well as their personal posts on social media. In one instance in 2017, Johnny Eric Williams, a professor at Trinity College in Connecticut, shared an article highlighting how Republican House Majority Whip Steve Scalise had his life saved by a gay black female officer, along with accompanying commentary from the author “Son of Baldwin” entitled “Let Them Fucking Die.”<sup>421</sup> Williams’s sharing of the article, to which he appended an accompanying #LetThemFuckingDie hashtag, indicated—Campus Reform said—that Williams “seemingly endorsed the idea” that black first responders should not help white victims.<sup>422</sup>



Activist groups, *By Any Means Necessary* (BAMN) and *Refuse Fascism*, gather on Sproul Plaza, UC Berkeley on September 24, 2017

Soon the school received bomb threats, Williams took his family into hiding, and Trinity temporarily closed its campus.<sup>423</sup> In the wake of the incident, the school put Williams on paid leave while it investigated his remarks.<sup>424</sup> In another case, after Professor Dana Cloud of Syracuse University tweeted about her desire to “finish ... off” supporters of a group protesting Sharia law,<sup>425</sup> Campus Reform called the tweet a “veiled call for violence.” The university’s chancellor rejected calls to discipline the professor but admitted that the statement was “susceptible to multiple interpretations.”<sup>426</sup>

In the case of Rutgers historian James Livingston, conservative media organizations pressured the university to open an investigation into a post he made on Facebook. In late May 2018 Livingston wrote that white adolescents were ruining his experience of Harlem and should return to the suburbs to be “pampered.”<sup>427</sup> Though he claimed that the post, which includes the lines “I now hate white people ... fuck these people,” was satire, it drew attention online as some viewed it as racist against white people. That interpretation went viral. As described in *Inside Higher Ed*: “His posts quickly bounced around the alt-right corners of the internet, gaining traction on popular sites including *The Daily Caller*, *The Blaze*, *The College Fix* and *Fox News*. The attention also landed him a spot on *Turning Point USA*’s infamous *Professor Watchlist*.”<sup>428</sup> Soon Livingston received nearly 200 hate emails, including death threats.<sup>429</sup> Although there had been no reported complaints at Rutgers

about Livingston or his remarks, the university’s Office of Employment Equity (OEE) started an investigation, deciding in July that he had violated school policy by discriminating against white people.<sup>430</sup> In August, following public pressure, Rutgers President Robert Barchi asked the OEE to review the case, and the decision was reversed in November.<sup>431</sup> With Rutgers out of session during the entire incident, it was clear that most or all of the public outrage came from individuals unaffiliated with the university. There were no reported protests or complaints from the Rutgers campus itself.

### Outrage from the Left

Although there is no set of progressive campus-watchdog organizations that perfectly parallel those on the right, there have been organized efforts to counter speech by faculty deemed conservative or out of step with progressive ideology. Guided by the belief that some ideas are not just bad but morally opprobrious, harmful, and even dangerous, various professors and others have engaged in efforts to silence voices deemed to be transgressing these lines. This outrage from the left has tended to begin in local activism by students and faculty and has sometimes taken the form of open letters and petitions.

For example, Rebecca Tuvel, a professor of philosophy at Rhodes College in Tennessee, attracted considerable scrutiny after publishing a paper in the journal *Hypatia* in March 2017 in which she suggested that, philosophically, transgender identity (what she



***In a number of cases, unofficial calls for discipline have pressured administrators to act harshly or hastily in response to speech by faculty. Faculty have found themselves in trouble both for their academic writings and for speech outside of their professorial roles, as public citizens.***

termed “transgenderism”) that could be applied to a notion of “transracialism”—the idea of transitioning between racial identity categories.<sup>432</sup> The paper went through the regular peer-review process before publication, but a fiery reaction soon circulated online, with an open letter demanding its retraction that drew 800 signatories.<sup>433</sup> Some commentators challenged the accuracy of the open letter, suggesting that its criticisms either were subjective or ignored caveats that Tuel included in her paper.<sup>434</sup> The ordeal resulted in Tuel’s receiving online abuse and hate mail, and although the journal’s editors resisted calls to retract the paper, they did apologize for it online, and they initiated a reevaluation of their editorial processes. Writing for *New York* magazine, Jesse Singal called the incident a “massive internet witch-hunt” and emphasized how alarming it was that so many academics so quickly signed a letter in which “each and every one of the falsifiable points it makes is, based on a plain reading of Tuel’s article, simply false or misleading.”<sup>435</sup>

At Evergreen State College in May 2017, outrage at Bret Weinstein, a professor of biology, erupted in a confrontation with a group of students in a hallway outside his classroom. The students were incensed over recent actions by campus police that they deemed racially biased. But as part of wide-ranging protests that took over the campus for three days, they also called for Weinstein’s dismissal. On multiple occasions during that academic year, Weinstein

had publicly objected to activities and initiatives related to racial justice. He criticized proposals by the college’s Equity Council to require new faculty hires to obtain an “equity justification”<sup>436</sup> and to require all faculty to reflect annually on their individual progress relative to racial diversity, because to him that proposal insinuated that he was racist and had never made any such progress prior.<sup>437</sup> In March 2017, Weinstein also voiced opposition when organizers altered an annual college tradition, the Day of Absence. Since the 1970s, the event had called for students and faculty of color to be absent from the campus for a day, but in 2017 the plan was for white students and faculty to be absent instead.<sup>438</sup> Weinstein wrote an email stating that a group voluntarily absenting themselves from a shared space was different from a group calling for others to stay away. “The first is a forceful call to consciousness which is, of course, crippling to the logic of oppression,” Weinstein wrote. “The second is a show of force, and an act of oppression in and of itself.”<sup>439</sup> Although students did not immediately respond, the remarks became a focus of their anger two months later when, as shown in a video of Weinstein’s altercation with them, they called him “racist,” shouted profanities, and told him to “shut up,” giving him little opportunity to defend himself.<sup>440</sup>

Cases like Tuel’s and Weinstein’s have added to a broad perception among conservatives of the dominance of liberal—and increasingly dogmatic—orthodoxy in the academy. Conservative faculty at numerous institutions have been sharing tales of being isolated, unsupported, even harassed. For the 2016 book *Passing on the Right: Conservative Professors in the Progressive University*, Jon A. Shields and Joshua M. Dunn Sr. conducted 150 interviews with conservative-leaning faculty from 84 campuses, who share stories of how their political views unfairly stigmatize them on campus. A third of those interviewed reported concealing their true political views, biting their tongues to avoid attacks or ridicule, meeting with fellow conservatives at academic conferences in private hotel rooms, and “passing” as liberal at least until they get tenure, if not longer. One interviewee related that “if you are conservative, there [are] such huge no-go zones.”<sup>441</sup> Some explicitly related their own experiences to that of the LGBT experience, saying that they felt pressured to keep secret a politically conservative identity that could upend their careers if it were made public. One described choosing to remain “in the closet” despite tenure, explaining, “If I came out, that would finish me.”<sup>442</sup>

The fear of outrage and reprisal may seem exaggerated, but some incidents make it hard to ignore. In October 2018 at Sarah Lawrence College, Professor





Samuel Abrams had his office door vandalized, seemingly by students, in response to an op-ed that he published in *The New York Times*. Abrams shared research that showed that most “student-facing” college administrators lean left, and he argued that therefore most social and extracurricular programming has a left-leaning political bias.<sup>443</sup> Although he used national data, Abrams began with an anecdote about Sarah Lawrence, leaving some on campus upset at his criticism of their work. Meanwhile, Abrams himself felt attacked for his views and was dismayed when the college president did not immediately take a strong stance defending his academic freedom and right to free expression.<sup>444</sup> The following March, a group of students calling themselves the Diaspora Coalition expressed their continued outrage at Abrams, calling for his tenure to be reviewed, among other wide-ranging demands.<sup>445</sup>

### Exposing Conservative Political Influence

Beyond campus activists, some external organizations and news outlets have supported efforts to expose the influence of conservative donors in higher education. The Charles Koch Foundation is active in the field of higher education, supporting a number of programs aimed at promoting free speech, academic freedom, and tolerance.<sup>446</sup> Critics like UnKoch My Campus, however, argue that the Kochs use their funds to influence decision-making around “hiring, research, and curriculum in higher education.”<sup>447</sup> A nonprofit watchdog group begun in 2013, the goal of UnKoch My Campus is to reveal corporate influence in the academy, particularly funds donated by the Charles Koch Foundation or by funders of Koch-aligned causes and groups. UnKoch aims to “preserve our democracy through protecting higher education from actors whose expressed intent is to place private interests over the common good.”<sup>448</sup> UnKoch has produced reports documenting Koch family influence on higher education and helped organize campaigns against Koch influence at schools like George Mason University, which it describes as “ground zero for Koch influence in higher education.”<sup>449</sup> A suit filed against the university in 2017 by a student group there, Transparent GMU, revealed that gift agreements with the Charles Koch Foundation gave them some say in faculty selection and evaluation, raising concerns over academic freedom.<sup>450</sup> In response to this scrutiny, James Piereson and Naomi Schaefer Riley argued in the *National Review* that this influence “should not have come as a surprise.”<sup>451</sup> Foundations such as Ford, MacArthur, and Rockefeller, they argued, have long awarded significant grants to U.S. universities to support what they describe as left-leaning topics like “social justice,

economic redistribution, bigger government, moral relativism, diversity, feminism, and gender equity.”<sup>452</sup>

At Wellesley College, a program named the Freedom Project came under fire in 2018 after its support from the Kochs was covered in a *Boston Globe* article by Annie Linskey.<sup>453</sup> The article, titled “With Patience, and a Lot of Money, Kochs Sow Conservatism on Campuses,” depicted an annual Koch retreat in which two Freedom Project students spoke before a group of roughly 550 Koch donors about Wellesley’s stifling political climate for conservative voices and free thought.<sup>454</sup> Led by Thomas Cushman, the Duffenbaugh de Hoyos Carlson Professor in the Social Sciences, the Freedom Project brought speakers from across the political spectrum to campus, including conservatives, to promote, in its own words, an “exploration of the idea of freedom in all its manifestations ... tolerance, pluralism, intellectual diversity, and freedom of expression.”<sup>455</sup> (It was a symposium hosted by the Freedom Project at which PEN America was an invited participant that first sparked our organization’s work and interest in the topic of campus free speech.) A few of the Project’s speaking invitations met with controversy. The Freedom Project had been in the news in 2017 for protests against invited speaker Laura Kipnis<sup>456</sup> and again in February 2018 when students demonstrated against historian and bioethicist Alice Dreger for what they alleged were transphobic comments and scholarship.<sup>457</sup>

The *Globe* story also reported that, when asked if he would invite Jane Mayer—a staff writer at *The New Yorker* and critic of Koch philanthropy—to speak at Wellesley as part of the Freedom Project’s program, Cushman replied no.<sup>458</sup> He dismissed Mayer’s award-winning book, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right*, as not “balanced at all.”<sup>459</sup>

In response and citing the article, Mayer tweeted the same day: “Head of Koch-funded ‘free speech’ program at Wellesley says he would bar me from speaking on campus.”<sup>460</sup> In an interview with PEN America, Mayer explained that her tweet was sardonic, poking fun at a program purportedly dedicated to tolerance and free speech that would pointedly decline to invite a critic such as herself to speak.<sup>461</sup> She also related, “The Kochs don’t have a long history of supporting free speech; they have a long history of supporting their point of view.”<sup>462</sup> At the time, Cushman tweeted in response: “I never said I’d bar [Mayer] from Wellesley. How, or why would I ever do that? I said I wouldn’t invite her, and her tendentious and ideologically driven ‘history’ is precisely the reason. She refuses to see complexity in philanthropy.”<sup>463</sup> Cushman cited a list of speakers the Freedom Project had invited to campus including

Cornel West, Steven Pinker, Michael Ignatieff, Nadin Strossen, Mark Lilla, and Laura Kipnis. “[The Globe] article fails to mention that we invited more liberals than those of any other political group,” he wrote. “Jane Mayer [is a] fanatic with [an] agenda who distorts the [Freedom Project].”<sup>464</sup> Following an extended and pitched Twitter exchange, Mayer later addressed Wellesley President Paula Johnson directly: “Only response from Wellesley to me has been more insulting tweets from the head of its ‘free speech’ program . . . How can a great school justify his behavior? Wellesley and Dr. Paula Johnson deserve better.”<sup>465</sup>

About a month after the Twitter exchange and *The Globe*’s story, Wellesley President Paula Johnson and Provost and Dean Andy Shennan addressed the campus via an email message, in which they stated that “For some time, we have been considering how the College might build on [the Freedom Project] to more effectively include – and better engage – all voices across campus.”<sup>466</sup> They noted that Cushman had informed the College that he would be stepping down as director of the Freedom Project and would be spending a year as a visiting scholar “elsewhere.”<sup>467</sup> They also announced that the College would be launching a call for volunteers for a new Task Force on Speech and Inclusion: a “multi-constituency group of faculty, students, and staff to explore the important role of free speech in an inclusive community... [and] move beyond the polarized thinking that affects so much of today’s discourse.”<sup>468</sup> Among the Task Force’s first goals would be to develop a set of recommendations to “create the conditions in which our capacity to talk across difference can thrive.” With Cushman’s departure for the 2018–19 academic year to serve as a visiting senior research fellow at Eudaimonia Institute at Wake Forest University, Kathryn Lynch, a former dean and the Bates/Hart Professor of English, was newly appointed as director of the Freedom Project.<sup>469</sup>

In a 2019 interview with PEN America, Cushman explained that his decision to resign as founding director of the Freedom Project was precipitated by a private meeting with the Provost prior to the College’s official announcement:

Shortly after the appearance of *The Boston Globe* articles by Annie Linskey, both the President and the Provost of Wellesley College had expressed constant support of the Freedom Project. At times, they were not always happy about some of the controversies it created, but this is not unusual among academic administrators these days.

Quite suddenly one day, the Provost called me into his office and told me that in two years one of two things would happen: that the Freedom Project would be shut down or that I would be compelled to resign as Director.<sup>470</sup>

He added:

In my mind, this decision to force my resignation was a direct violation of my academic freedom: I was being punished not only because I had invited controversial speakers, but also because of my constitutionally protected extramural free speech in social media... I decided, based on principle, that I could no longer serve as the Director under conditions of the College’s ultimatum, which I saw as a capitulation to a culture of intolerance at Wellesley College, the undue influence on the administration by some faculty and students, and non-Wellesley outsiders. So I offered the President my resignation.<sup>471</sup>

### Academic Freedom

The frequency and variety of these outrage campaigns, and the pressures on campus leaders to react to them, have led to greater focus on the principle of academic freedom, and its limitations. There is no universally agreed upon definition of academic freedom, and institutions have different policies. Most define it as the protection to pursue knowledge “wherever it leads,”<sup>472</sup> with tenure typically insulating professors from reprisal if it leads someplace dangerous or unpopular. According to the definition developed in 1940 by the American Association of University Professors (AAUP) and the Association of American Colleges and Universities and often used by courts, academic freedom holds that:

teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties.... Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.... College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge



their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.<sup>473</sup>

As for the difference between free speech and academic freedom, most see them as “two related but analytically distinct legal concepts.”<sup>474</sup> While the First Amendment relates to a relationship between a government and its citizens, academic freedom is mostly between an institution and its faculty, beholden not to law but to bedrock traditions of intellectual independence. And while free speech is premised on the right of individuals to speak their minds and express almost any idea, academic freedom is more discriminating. According to Robert Post, the Sterling Professor of Law at Yale Law School, academic freedom springs from the notion of disciplinary or professional competence, meaning the right of professors to exercise judgment in matters of research and teaching based on their training and certification within disciplinary associations.<sup>475</sup> The protections of academic freedom are usually also understood as extending beyond matters of speech to encompass the total array of intellectual activities involved in teaching, such as setting a syllabus, inviting guest speakers, assigning reading lists, designing coursework, and grading students.<sup>476</sup>

### Academic Speech, or Just Speech by an Academic?

A particularly challenging issue raised by these myriad conflicts is whether academic freedom should extend to protect professors’ extramural speech—utterances outside the classroom and in their role as public citizens. The invocation of academic freedom often conjures images of controversial lectures or publications. But today academics also frequently express their views through Facebook, Twitter, blogs, videotaped speeches at demonstrations, media appearances, and petitions. While all such speech is protected by the First Amendment, some have argued that it should be protected by academic freedom as well, and that otherwise professors’ every public statement could be taken as potential grounds for disciplinary action. As Keith E. Whittington, the William Nelson Cromwell Professor of Politics at Princeton, explains: “If faculty members could be dismissed for what they say in public, then the core mission of the university to advance and disseminate knowledge would come under pressure and be subverted.”<sup>477</sup>

This view, consistent with the 1940 statement on

academic freedom, remains the position of the AAUP. Hans-Joerg Tiede, associate secretary of the organization’s Department of Academic Freedom, Tenure, and Governance, explains that professors should “have the freedom to address the larger community with regard to any matter of social, political, economic, or other interest, without institutional discipline or restraint, save in response to fundamental violations of professional ethics or statements that suggest disciplinary incompetence.”<sup>478</sup> Despite some ardent support for this view, numerous recent uproars have challenged it, as institutions have faced overwhelming public demands to discipline outspoken professors rather than protect their speech-related academic rights.

The legal standards for analyzing the scope of constitutional protections remain ill-defined in the context of university and academic speech. Many of the most important Supreme Court holdings on the extent to which the government can regulate the speech of its employees—Constitutional cases such as *Pickering v. Board of Education* (1968), *Connick v. Myers* (1983), and *Garcetti v. Ceballos* (2006)—deal primarily with the utterances of state employees generally, and fail to dig deeply into the implications for academics specifically.

In the seminal 2006 case *Garcetti v. Ceballos*, the U.S. Supreme Court sided heavily with the government’s right to discipline public employees for speech that they engaged in “pursuant to their official duties.” However, the Court explicitly refrained from answering whether the disciplinary rights of government employer actors extended to employers on university campuses who might be regulating speech by academics.<sup>479</sup> The Court noted this tension: “There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”<sup>480</sup> Such an explicit Supreme Court disclaimer demonstrates the unique ways in which academic freedom is sometimes either awkwardly packaged into or simply left unexamined in the larger legal frameworks around employee speech, and raises questions about the long term constitutional protections for scholars’ speech.

In the absence of direct legal precedent to inform this area of law, each new incident where a faculty member’s statements are deemed incendiary or offensive brings uncertainty. For example, when Marc Lamont Hill made a speech about Palestinians

to the United Nations in November 2018, he was criticized for calling for “a free Palestine from the river to the sea,” invoking a phrase long used among more militant factions of the Palestinian cause as a call to arms for genocide against Israel and Jews. In the days following, Hill was fired from his role as a commentator on CNN, and calls spread for him to be dismissed from his endowed chair at Temple University, with many calling his statements anti-Semitic and hateful.<sup>481</sup> Different messages were then communicated by the university about whether he would be disciplined, with the university’s president saying his speech as a public citizen was protected by the Constitution,<sup>482</sup> but with the chairman of the board of trustees stating they were looking into what “remedies” were available to discipline him.<sup>483</sup> The Temple Association of University Professionals then issued a statement that criticized the university’s responses, expressing disappointment that the administration had not publicly invoked academic freedom.<sup>484</sup> In the weeks that followed, debate over whether Hill’s comments should be protected by academic freedom raged on.<sup>485</sup>

Ultimately Temple did not sanction Hill for his remarks. But as with Randa Jarrar at Fresno State and James Livingston at Rutgers, a sense of uncertainty arose, with administrators weighing whether professors’ extramural statements could be grounds for discipline. When Rutgers investigated Livingston for his Facebook comments, he lamented, “Allowing human resource administrators to tell a professor of 30 years what he can and can’t say on Facebook means that the tradition of academic freedom in our public universities is essentially over.”<sup>486</sup> But it is not so clear-cut as to whether social media posts that have little to do with a professor’s research or teaching are—or should be—protected by the principle of academic freedom.

PEN America agrees with those who advocate protecting professors’ extramural speech as necessary to defend their ability to speak freely on matters of public importance. We also believe that while professors wear different hats—as educators, researchers, campus leaders, and private citizens—clearly these personae overlap, and there are frequent instances when the line between official and private blurs. A professor writing an op-ed piece related to her area of academic expertise, for example, is surely writing in her public, professional capacity. If she uses her academic affiliation in the byline or associated bio—even if the topic is unrelated to her research and teaching—the remarks will become linked to her official role. When professors post on social media through accounts that list their professional affiliations or even simply their names, when they have

built a following on these platforms through their professional work, and/or when their posts are publicly accessible, any comments they make may get back to the university community and be viewed as a reflection on them as a teacher and scholar. There are compelling reasons that administrators may have to examine such statements carefully. Posts that imply bias or discriminatory attitudes can raise doubts about whether the faculty member might bring such attitudes to the classroom. But barring evidence that the speech in question has a clear and direct ramification on a professor’s ability to fulfill their professional duties, the principle of academic freedom should be hewed to as a high standard.

### Balancing Academic Freedom and an Equitable Learning Environment

Another challenge regarding academic freedom is universities’ need to balance protections for faculty speech with the duty of care for their students’ well-being and right to equal education. This concern came up in August 2017 when Amy Wax, a law professor at the University of Pennsylvania, drew heavy criticism for an op-ed piece in *The Philadelphia Inquirer* titled “Paying the Price for Breakdown of the Country’s Bourgeois Culture.” In it, she and a coauthor bemoaned the “anti-‘acting white’ rap culture of inner-city blacks” and the “anti-assimilation ideas gaining ground among some Hispanic immigrants,” both of which they deemed ill-suited to the “First World, 21st-century environment.” To counter these societal trends, they advocated “restoring the hegemony of the bourgeois culture.”<sup>487</sup> An open letter signed by 33 Penn Law faculty condemned the op-ed, noting: “Wax’s right to express her opinions does not make her statements right, nor insulate her from criticism.”<sup>488</sup>

In March 2018, Wax came under fire again when members of Penn’s Black Law Student Association found a video interview with her from the previous year in which she stated that she had never “seen a black student graduate in the top quarter of the class, and rarely, rarely in the top half,” calling this a “downside of affirmative action.” Of the black law students attending Penn and other top schools, she said that “some of them shouldn’t” even go to college. She added that the *University of Pennsylvania Law Review* had a racial diversity mandate, the existence of which was a “closely guarded secret.”<sup>489</sup> Responding to these and other controversies surrounding Wax, students organized a petition demanding that she be removed from teaching first-year courses, gathering the signatures of 850 alumni, students, and allies.<sup>490</sup>

In an email statement, law school Dean Ted Ruger





said that Wax spoke both “disparagingly and inaccurately.” Ruger did not provide any specific facts, evidence, or statistics to disprove her claims, explaining that “Penn Law does not permit the public disclosure of grades or class rankings, and we do not collect, sort or publicize grade performance by racial group. The existence of these policies and practices, while constraining this response, is not an invitation to statements made with conscious indifference to their truth content.”<sup>491</sup> Ruger also granted the petitioners’ main demand, relieving Wax of her duty to teach a mandatory first-year course and assigning her to teach only upper-year electives, in which second- and third-year students could voluntarily enroll.<sup>492</sup> Presumably anticipating that the reallocation of her teaching responsibilities might be construed as a disciplinary reprisal in violation of her right to academic freedom as a tenured professor, Ruger’s email was emphatic that her comments were protected by the university’s free expression policies. Nonetheless, he explained:

In light of Professor Wax’s statements, black students assigned to her class in their first week at Penn Law may reasonably wonder whether their professor has already come to a conclusion about their presence, performance, and potential for success in law school and thereafter. They may legitimately question whether the inaccurate and belittling statements she has made may adversely affect their learning environment and career prospects. These students may also reasonably feel an additional and unwarranted burden to perform well, so that their performance not be used or misused by their professor in public discourse about racial inequality in academic success. More broadly, this dynamic may negatively affect the classroom experience for all students regardless of race or background.<sup>493</sup>

Ruger raised valid concerns about whether Wax’s comments could violate the law school’s commitment and legal obligation to ensure equal opportunity in the classroom. Given that her statements so strongly evinced a belief in race-based performance differences, failing to address bias issues could have opened the institution up to criticism and potential lawsuits. Ruger’s compromise—safeguarding students from mandatory exposure to Wax while sustaining her role as a tenured faculty member—struck a reasonable compromise, upholding the principles of both equality of educational opportunity and academic freedom.

Even when professors’ extramural statements

barely relate to their campus roles, they might still be seen as impinging on their ability to fulfill their professional duties. Particularly when professors have dual roles as custodians of the campus environment, as, say, heads of residential colleges or student advisers, it is reasonable for campus leaders to follow a stringent requirement that those who hold such roles show no propensity for bias. This was precisely at issue in the case of June Chu, dean of a residential college at Yale, who was relieved of her position after the head of the college was notified of a series of Yelp reviews in which she made disparaging comments about local restaurants’ customers. Reviewing a Japanese restaurant, she wrote, “If you are white trash, this is the perfect night out for you,” adding that the restaurant was perfect for “those low class folks who believe this is a real night out.”<sup>494</sup> In a review of a movie theater in 2015, she referred to its employees as “barely educated morons trying to manage snack orders for the obese and also try to add \$7 plus \$7.”<sup>495</sup>

Chu had been an advocate for cultural sensitivity and had cultivated that image on campus. Her Yelp posts raised red flags particularly because her responsibilities at Yale included making students from all backgrounds feel welcome. The university responded decisively. It placed Chu on leave, and the head of her college stated that he had lost trust in her ability to execute her duties.<sup>496</sup> She left her position the next month, although the Yale College Dean stated that he had not asked for her resignation.<sup>497</sup> While academic freedom was not an issue, this case demonstrates the challenges that administrators can face when balancing free expression with inclusion.

### Online Harassment and Threats

Recent years have also seen an increase in faculty being harassed and threatened for their views and speech. Though some of this has happened by phone, it is on social media platforms that they have been most prevalent. Anonymous outside actors can ruin professors’ lives and reputations not only by siccing troll armies on them but also by exerting outsize influence on the on-campus discussions of possible punishments for professors’ allegedly controversial speech.

The AAUP reports that, between 2016 and 2018, there have been at least 50 professors subjected to targeted online harassment.<sup>498</sup> Faculty aligned with both the political left and right have reported receiving heinous, racist, and misogynistic messages as well as specific death threats. Some have been so fearful that they became nervous about leaving their houses,<sup>499</sup> took their families into hiding,<sup>500</sup> or withdrew from public view.<sup>501</sup> Abby Ferber, a professor of sociology at the University of Colorado at Colorado



*Screenshot of two Facebook posts from a conservative student group page calling for the University of Mississippi to fire professor James M. Thomas.*

Springs, sees a worrying connection between online harassment and self-censorship, explaining that anti-faculty campaigns “can limit academic freedom through self-censorship, especially for already vulnerable faculty and those who teach subject matter now considered political and ideological.”<sup>502</sup>

Self-censorship became an issue at the University of Mississippi when James M. Thomas, an assistant professor of sociology, experienced online harassment after posting a tweet in October 2018. Soon after the Senate confirmed Brett Kavanaugh’s nomination to the Supreme Court, Thomas tweeted that Republican senators did not deserve to be treated with civility: “Don’t just interrupt a Senator’s meal, y’all,” he wrote. “Put your whole damn fingers in their salads. Take their apps and distribute them to the other diners. Bring boxes and take their food home with you on the way out. They don’t deserve your civility.”<sup>503</sup>

In response to public pressure, Chancellor Jeff Vitter released a statement saying that a recent post by a faculty member “did not reflect the values articulated by the university, such as respect for the dignity of each individual and civility and fairness.”<sup>504</sup> The story was soon picked up by Campus Reform, Fox News, and Breitbart. Thomas’s tweet—like statements

by various other professors—was amplified to an audience primed for outrage, and he was subjected to a campaign of targeted harassment. Thomas estimates that he received 300 emails and 100 voicemails in the next two weeks, many of them blatantly racist and involving specific threats to him and his family.<sup>505</sup>

In the wake of the incident, Thomas stated in a conversation with PEN America that he was asked by campus administrators to keep a low profile, and though he was sympathetic to the university and did not want to create additional headaches for his colleagues, he questioned whether muffling his voice was the best response to harassment.<sup>506</sup> In Thomas’s view, the university was underprepared to deal with the situation, lacking clear guidance on how to defend professors’ academic freedom, or how to support professors once they become targets for such harassment campaigns.

Campus leaders must recognize that slow and timid responses to online harassment can leave faculty feeling unsupported or unsafe. Whatever the facts behind a particular dispute, campus leaders can build good faith by demonstrating clearly and unequivocally that they take online harassment seriously and support faculty and students when they are forced to contend with it. While campus leaders should be encouraged to affirm their institutional values, and should be empowered to point out when statements by faculty break with those values, they should also be ready with an unequivocal defense of academic freedom and free speech.<sup>507</sup>

Facebook posts from October 2018 demonstrate a right-leaning group’s effort to fan outrage and call for the dismissal of Professor Thomas.

### Striking a Fine Balance

In October 2017, Bruce Gilley, an associate professor at Portland State University, published an article in the international studies journal *Third World Quarterly* titled “The Case for Colonialism.” “For the last 100 years, Western colonialism has had a bad name,” the article’s abstract read. “It is high time to question this orthodoxy.”<sup>508</sup> Suggesting that there had been benefits to democracy, public health, and human rights as a result of Western European colonialism, the piece drew major backlash. In protest, nearly half of the journal’s 34-member board resigned, and two online petitions demanded that the journal retract the piece,<sup>509</sup> with one petition gathering 10,000 signatures.<sup>510</sup> After personally receiving death threats online and by phone, Shahid Qadir, the journal’s editor, asked Gilley to withdraw the piece, to which Gilley consented. Some of those who called for the retraction by the journal argued that the article failed to provide reliable findings



*Heather Mac Donald takes part in Center for Political Thought & Leadership panel at Arizona State University in 2015*

and that it had not been reviewed properly.<sup>511</sup> One critic called it “the academic equivalent of a Trump tweet, clickbait with footnotes.”<sup>512</sup> Gilley said that he was not troubled by the voluntary withdrawal, but he maintained that the public response was emblematic of a larger problem, saying, “I think the academy remains highly illiberal and intolerant of my viewpoint.”<sup>513</sup>

Cases like Gilley’s have rightly raised alarms. Academic inquiry rejects the idea that our current understanding of any phenomenon is absolute and final, and asking difficult, even misguided, questions can advance debate and learning. At a moment when defending equality is among many universities’ most pressing missions, statements that appear at odds with this objective have, unsurprisingly, been met with hostility. But while furthering social justice is a worthy endeavor, doing so to the exclusion of contrarian perspectives, disconfirming evidence, or divergent views threatens to poison the pursuit of truth and ultimately weaken the promotion of equality. Engaging with opposing ideas is required in order to challenge them, and students, too, should be equipped to do so through traditional forms of debate rather than by the exercise of threats.

As universities navigate free speech controversies, academic freedom must remain a central, animating principle, including at private institutions, which are not legally obliged to uphold the First Amendment.

Faculty should be cognizant, too, of how controversial work may be received by various quarters on campus and should seek to minimize the chance of misinterpretation and maximize the prospect for genuine dialogue. At the same time, however, they should not have to fear reprisal for following intellectual inquiry wherever it may lead them. University leaders must be prepared to defend their faculty from public uproar and online mobs.

Further, while nothing prohibits campus leadership from condemning an opinion as contrary to its institutional values, official reprisals must be reserved for cases where faculty engage in speech that crosses the line into discrimination, harassment, or calls into question their ability to fulfill their duties. Universities have an obligation to ensure that faculty can discharge their professorial duties in a responsible, impartial way that gives students equal opportunities for success. If faculty speech impairs the sense of belonging or the equal treatment of particular segments of the campus population, it may be appropriate for leaders to distance themselves from—or condemn—this speech and reassert the institution’s values. But even in such circumstances, leaders must strike a fine balance and defend the speaker’s right to express such views, in the hope that doing so might, in the long run, minimize eruptions of extreme outrage and encourage more constructive debate.

## Section IV

# STUDENTS' VIEWS

One of the central threads running through much commentary concerning higher education has been students' attitudes toward free speech and controversial ideas. Some perceive an alarming national crisis, while others have been more conservative in their evaluations. The release of surveys of students' views periodically rekindle this debate, each one proffering one surprising metric or another. Many agree that there is a generational shift underway, even when they disagree on what that shift entails.

Campuses are by and large more heterogeneous than they were a generation ago, as today's student population encompasses more ethnic and racial diversity than at any time in the country's past.<sup>514</sup> This makes generalized statements about students' attitudes difficult to defend, as this diversity can be obscured by descriptions of the "average" or "typical" student. While they are illuminating, these empirical exercises are inherently incomplete, in that they cannot speak to the range of student experiences across institutions. The wording of questions, the methods of recruitment, and other methodological considerations also mean that no survey is a perfect representation of all students' attitudes, much as it might offer insight into trends. In the absence of a perfect picture, PEN America sees great value in looking at the results of major surveys of student attitudes in tandem with other forms of data, and considering the multiple factors at play.

As many campuses promote civil dialogue, we believe that there can be tremendous benefit in encouraging different members of a campus community to speak with one another. Such efforts can be productive for conservative and progressive students alike, as they learn to see each other as people rather than as stereotypes, and reflect on why they all deserve equal opportunities to air their views. Such stories of reasoned, civil engagement do not always make headlines or energize funders. But they will be an essential part of the reconciliation necessary for restoring a shared reality about these incidents and for finding a way through this mire. A recurring lesson from PEN America's campus engagements has been that if we want to properly understand or challenge students' views, we have to begin by talking to students and listen closely to their answers.

### The Big Picture

Have today's students developed the wrong attitudes toward free speech? In recent years a thorough academic debate has been waged around this question.

On one hand, an array of scholars and commentators have advanced the claim that they have, lamenting how U.S. college students have become oversensitive and more likely to call for censorship of ideas and words they find offensive. Lukianoff and Haidt advanced this notion in a 2015 article in *The Atlantic*, then summarized it in their 2018 book, *The Coddling of the American Mind*, explaining that today's students were "coddled" by their parents and are now being overly catered to by university administrators and faculty, as part of what they label the rise of a culture of "safetyism."<sup>515</sup> They write:

What is new today is the premise that students are fragile. Even those who are not fragile themselves often believe that *others* are in danger and therefore need protection. There is no expectation that students will grow stronger from their encounters with speech or texts they label "triggering."<sup>516</sup>

Lukianoff and Haidt draw a direct connection between students' expectations of fragility and rising levels of anxiety and depression, suggesting a kind of self-fulfilling prophecy has been at work. They also describe an increasingly chilled climate on campuses, in which students, faculty, and administrators have been driven to "walk on eggshells" because of an insidious "call-out culture." As they explain: "Anyone can be publicly shamed for saying something well-intentioned that someone else interprets uncharitably."<sup>517</sup> They caution: "Anyone who cares about young people, education, or democracy should be concerned about these trends."<sup>518</sup>

While Lukianoff and Haidt see the incidents of violent student protests at Middlebury, Claremont McKenna, and Evergreen State as illustrative of their narrative that young people and free speech on campus are in jeopardy. Others have begged to differ. Aaron Hanlon counters that these and other incidents are merely "anecdotes" and that the scale of the problem has been "overblown" by "conservative hysteria."<sup>519</sup> Jeffrey Adam Sachs has pointed to various surveys which suggest that young people are more tolerant of free speech than past generations, and that going to college might actually make people *more* tolerant of speech they find offensive.<sup>520</sup>

Others have questioned whether student protests against offensive speech should be viewed as problematic at all. Ulrich Baer, University Professor at NYU, asserted in an April 2017 op-ed piece headlined "What 'Snowflakes' Get Right About Free Speech":

We should recognize that the current





generation of students, roundly ridiculed ... as coddled snowflakes, realized something important about this country before the pundits and professors figured it out. What is under severe attack, in the name of an absolute notion of free speech, are the rights, both legal and cultural, of minorities to participate in public discourse.... They grasped that racial and sexual equality is not so deep in the DNA of the American public that even some of its legal safeguards could not be undone.... We should thank the student protestors, the activists in Black Lives Matter and other “overly sensitive” souls for keeping watch over the soul of our republic.<sup>521</sup>

In Baer’s view, college students have not become overly fragile nor are they the victims of a coddled upbringing. Instead, he describes a generation instead admirably concerned with equality and social justice, and deserving of praise. Although Baer differs with Haidt on many points, the two seem to broadly agree on students’ increasing willingness to call out speech they find harmful. Their disagreement is similar to the chasm over “call out” culture in society more broadly, with many questioning whether it is a means of advancing social justice or of making society more restrictive and censorious.<sup>522</sup>

It is also noteworthy that many of the most incendiary, frequently cited free speech controversies have happened at the most high-profile, exclusive research universities and private colleges.<sup>523</sup> These institutions get the most regular public and media attention in higher education, but they hardly represent the whole story. Just 6 percent of students enrolled in a public four-year college in California attend the highly selective UC Berkeley, and nationally only 2 percent of college students are enrolled in a liberal arts college.<sup>524</sup> Lukianoff and Haidt fully acknowledge that their assessment of “coddled” students has been based on examinations of a fairly privileged segment, and they allow that students from working-class upbringings face a different kind of adversity than their middle- and upper-class peers.<sup>525</sup> A nuanced debate has unfolded around these issues<sup>526</sup>; but such nuance is often lost in public discourse driven by clickbait and a political climate that has increasingly framed college students as in need of intervention.

Additionally, as PEN America CEO Suzanne Nossel has pointed out, many protests in recent years have been led by students of color, who are often “not the helicopter-parented offspring of the upper middle class.”<sup>527</sup> Many of these students’ priorities have centered on “eradicating persistent manifestations of discrimination that have outlasted decades of efforts at integration.”<sup>528</sup> Their views of the values of free

***The dynamics at the country’s most selective research universities are changing as they grow more diverse—recruiting more students of color, more working-class and poor students, more students who are the first in their families to go to college. The presence of these students challenge simplistic narratives of today’s rising generation as collectively coddled.***

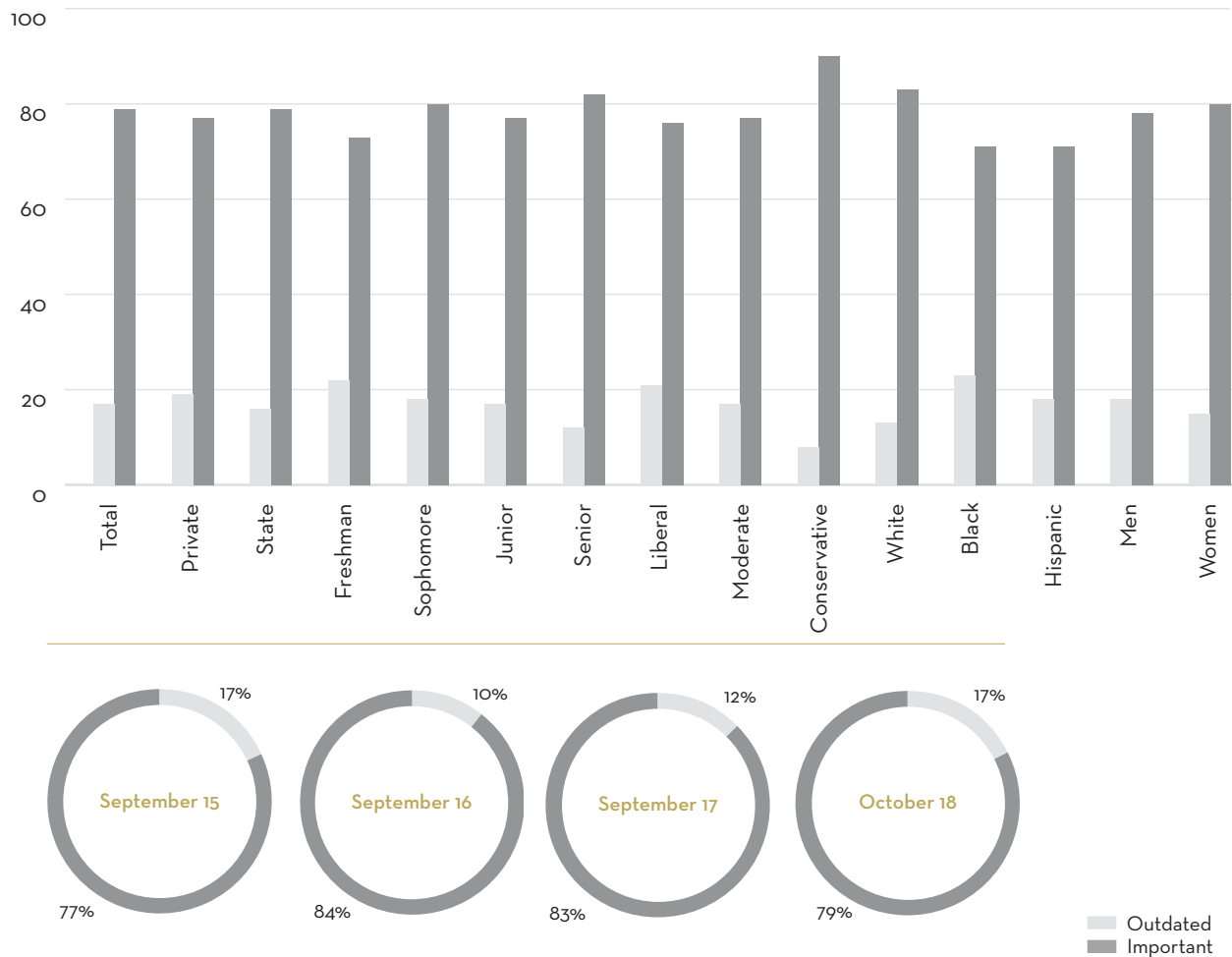
speech, diversity, and inclusion may understandably differ from those held by more privileged students. As we noted in *And Campus for All*, the dynamics at the country’s most selective research universities are changing as they grow more diverse—recruiting more students of color, more working-class and poor students, more students who are the first in their families to go to college. The presence of these students challenge simplistic narratives of today’s rising generation as collectively coddled.<sup>529</sup>

### **Views of Free Speech**

Very few students are willing to come out and say that they are against free speech. In 2017, the Knight Foundation conducted its second nationally representative study of U.S. college students’ support for First Amendment freedoms. Of the 3,014 students surveyed, 89 percent indicated that they value free speech rights. When asked about how important free speech rights are to democracy, more than half selected “extremely important,” and about a third selected “very important.”<sup>530</sup>

A similar line of questioning has been used in recent annual surveys conducted by McLaughlin & Associates for the William F. Buckley, Jr. Program at

FIGURE 1 THE RELEVANCE OF FREE SPEECH FOR COLLEGE STUDENTS



*Undergraduates continue to overwhelmingly believe the First Amendment is an important amendment that still needs to be followed and respected rather than being outdated, 79% to 17%. The question posed was, "Generally speaking, do you think the First Amendment, which deals with freedom of speech, is 'an outdated amendment that can no longer be applied in today's society and should be changed' or '...an important amendment that still needs to be followed and respected in today's society?'"*

Yale. Its 2017 survey asked students: "How important to you personally is the issue of free speech at your college or university?" Of the 800 undergraduate surveyed, 63 percent said "very important," 30 percent said "somewhat important," and only 6 percent said "not that important."<sup>532</sup> The survey also asked students whether they knew which amendment dealt with freedom of speech and whether that amendment was outdated or still relevant. Over 80 percent answered the first question correctly and agreed that the First Amendment "still needs to be followed and respected in today's society."<sup>533</sup> As shown in Figure 1 below, since 2015, student responses to this question have fluctuated somewhat, but they have generally hovered around 80 percent with some consistency.<sup>534</sup>

In 2018, FIRE conducted a survey of 2,225 U.S. college students about a variety of issues relating to freedom of expression and association on campus. When asked which civil right or liberty was the most important to them, the largest proportion of students—30 percent—selected freedom of speech.<sup>535</sup> Indeed, 89 percent of students who participated in this study said that they believed that their college or university should encourage students to have a public voice and share their ideas openly.<sup>536</sup>

These studies suggest that college students strongly support free speech and the First Amendment. Yet when faced with more specific questions about speech, many students' views starts to look different.



FIGURE 2 SMITH STUDENTS VIEWS ON RESTRICTED EXPRESSION

SYMBOLIC SPEECH

	2000 SMITH STUDENTS		2016 SMITH STUDENTS	
	Stay	Remove	Stay	Remove
Defaced American flag	64%	17%	57%	20%
Confederate flag	62%	20%	25%	63%

### Views of Offensive Speech

In the 2017 Knight survey, for example, while many respondents indicated support for free speech, they also expressed support for campus policies that would restrict both hate speech and the wearing of stereotypical costumes that could cause offense. Forty-nine percent of respondents were in favor of “instituting speech codes, or codes of conduct that restrict offensive or biased speech on campus that would be permitted in society more generally.”<sup>538</sup> These findings are troubling, implying either that students do not understand how these responses contradict their own support for free speech or that they do not understand the protections for speech afforded by the First Amendment.

Other surveys have painted the same general picture, with some fluctuation. In FIRE’s 2018 survey, support for speech codes appeared much higher: 57 percent of students thought that colleges and universities should be able to restrict student expression of political views that are hurtful or offensive to certain students.<sup>539</sup> In the 2018 Buckley survey, only 38 percent of undergraduates favored speech codes to regulate the speech of students and faculty.<sup>540</sup>

Of course the definition of hate speech is subjective, and what warrants the label “hateful” on campus seems increasingly elastic, applied to not just to direct slurs but also to jokes with sexual or racial content, art installations that some find discriminatory or disturbing, or academic findings that appear to infringe on the ideals of equality and diversity. The lack of a clear definition has led to a propensity to expand the meaning of hateful speech to encompass a broad range of offenses—making it difficult to know how students interpret survey questions.

At Smith College in 2016, researchers asked 703 undergraduates about the freedom to display flags that some find offensive. The project revisited a survey conducted in 2000 “to test the hypothesis that a predominantly liberal student body would

be especially likely to censor ‘right’ (conservative) viewpoints.”<sup>541</sup> Students in both 2000 and 2016 were asked whether they would require the removal of, first, a defaced American flag, and second, a Confederate flag. While in 2000 the responses were relatively even, in 2016 students by and large favored the removal of the Confederate flag (see Figure 2).<sup>542</sup>

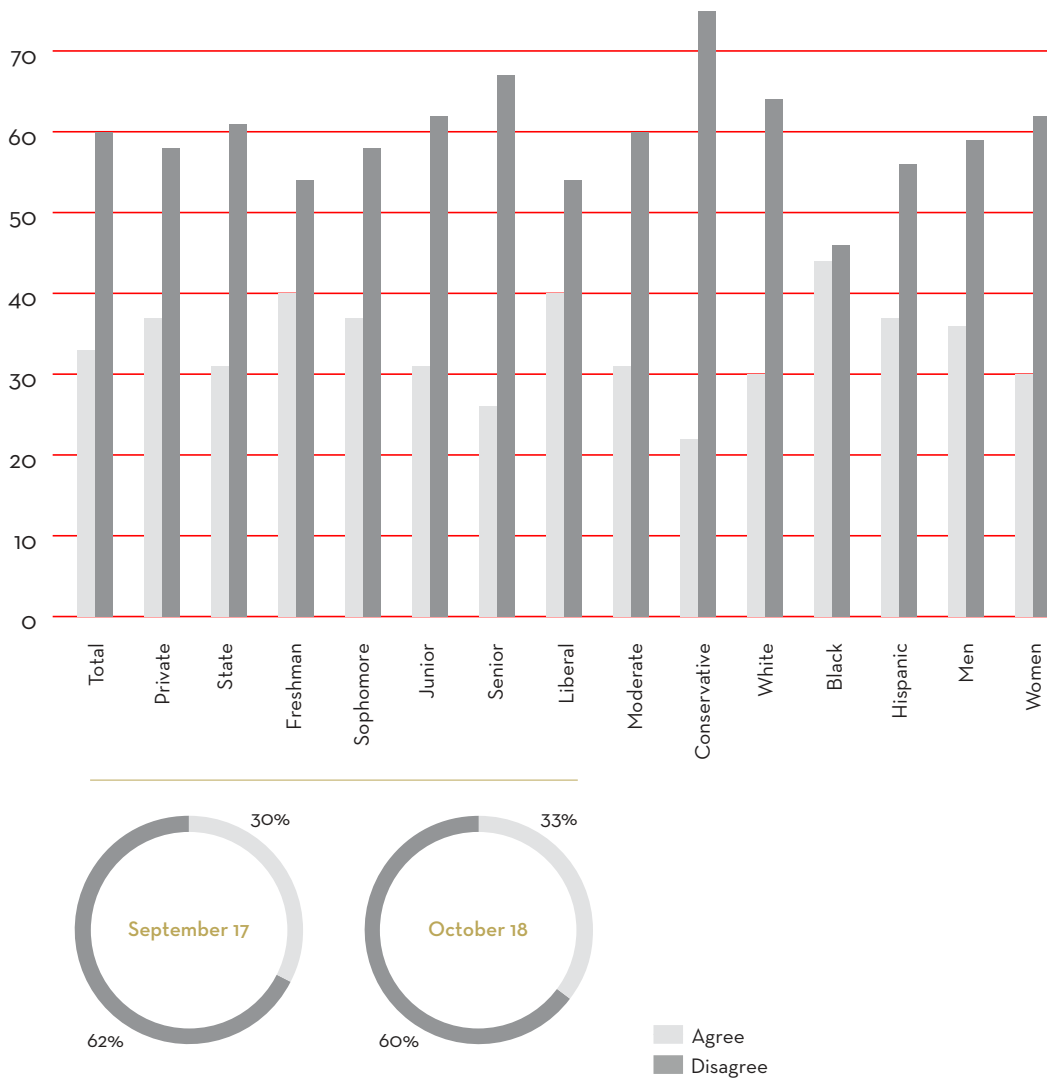
Part of this shift may be attributable to recent high-profile controversies involving Confederate statues and to evolving societal perceptions of the flag’s association with racism.<sup>543</sup> Disapproval of the Confederate flag was particularly strong, for instance, after the murder of nine black congregants by in a church in Charleston, South Carolina, in 2015.<sup>544</sup> On campuses striving for greater inclusion of students of color, it makes sense that students might view it more negatively and expect it to be removed. Still, looking at this data alongside other recent studies, it is interesting that so many students simultaneously advocate censorship and free speech. This dynamic translates into a growing—and troubling—contention among many students that certain forms of legally protected expression should no longer be tolerated.

### Words and Violence

While free speech proponents tend to hold the necessity of protecting even hateful speech as an almost sacred tenet, many students today see hateful expression as not just hurtful but downright dangerous. In the 2017 Buckley Center study, for example, researchers asked about the relationship between words and violence (see Figure 3). Of 800 students surveyed, 81 percent agreed with the statement that “words can be a form of violence”—a number that did not vary significantly by race or political affiliation but did vary somewhat by gender, with more women (86 percent) agreeing than men (74 percent).

A few months earlier, a controversy had erupted around this very comparison, after the *Times* published an op-ed by Lisa Feldman Barrett about

FIGURE 3 SHOULD HATEFUL SPEECH BE MET WITH VIOLENCE?



A third of students, 33%, believe that physical violence can be justified to prevent a person from using hate speech or making racially charged comments. The question posed was, *Do you agree or disagree with the following statement: "If someone is using hate speech or making radically charged comments, physical violence can be justified to prevent this person from espousing their hateful views."*

speech as a form of violence.<sup>546</sup> As discussed in Section I, the piece was widely debated and criticized, with some raising concerns about the ramifications of Barrett's thesis, including that conflating speech and violence could provide a pretext for responding to speech with force.<sup>547</sup> Writing in *New York* magazine, journalist Jesse Singal suggested that telling students that speech on campus could be traumatizing for them could become a self-fulfilling prophecy and indeed cause them harm.<sup>548</sup> A similar caution has been made by Lukianoff and Haidt, as they discuss

how ideas like this can be used to silence any speech found to be objectionable:

In years past, administrators were motivated to create campus speech codes in order to curtail what they deemed to be racist or sexist speech. Increasingly, however, the rationale for speech codes and speaker disinvitations was becoming medicalized: Students claimed that certain kinds of speech—and even the content of some books and courses—interfered with





their *ability to function*. They wanted protection from material that they believed could jeopardize their mental health by “triggering” them, or making them “feel unsafe.”...<sup>549</sup>

Despite these cautions, the 2017 Buckley data strongly suggests that students—regardless of how closely they have followed this particular debate—overwhelmingly align with Barrett rather than her detractors.

Indeed, some surveys have also asked students directly whether physical violence could ever be justified to prevent speakers from voicing hateful or racist speech. As shown in Figure 2, 33 percent of respondents to the 2018 Buckley survey said that they thought it could be.<sup>550</sup> Black respondents were evenly split, with 46 percent saying that such violence could sometimes be justified and 46 percent disagreeing. Women were less likely to share that opinion, 30 percent to 62 percent.<sup>551</sup> It should be noted that Knight researchers got much different results when they asked students a similar question in 2017, with 10 percent responding that violence could sometimes be an acceptable tool to prevent someone from speaking.<sup>552</sup> Whether 33 percent or “only” 10 percent of students share this view, it should be alarming to all concerned with the future of free speech on campus and in broader society that some contingent has repeatedly been found to support violence as a justifiable response to speech.

### Views of Campus Climate

Some surveys reflect students’ uncertainty about how to balance the First Amendment with diversity and inclusion. For example, the majority of student respondents in the 2017 Knight survey believed that both protecting free speech rights (56 percent) and promoting a diverse and inclusive society (52 percent) were “extremely important to democracy.”<sup>553</sup> But when asked to say which was more important, students narrowly favored diversity and inclusion over free speech, 53 percent to 46 percent.<sup>554</sup> Still, it would not be entirely accurate to conclude that students value inclusivity over free speech. When the Knight survey reframed the question to describe different campus cultures, students overwhelmingly favored an “open environment that allowed for offensive speech” over “a positive environment that prohibited certain speech” (see figure 4).

The 2018 FIRE study found similar apparent contradictions: While 75 percent of students agreed that “students should have the right to free speech on campus, even if what is being said offends others,” 60 percent said that “promoting an inclusive environment” should be a higher priority for a rights.<sup>555</sup> college’s administration than “protecting students’ free speech. These surveys reveal important gaps

**FIGURE 4 COLLEGE STUDENTS’ PREFERRED CAMPUS ENVIRONMENT**

	% POSITIVE ENVIRONMENT/ PROHIBIT CERTAIN SPEECH	% OPEN ENVIRONMENT/ ALLOW OFFENSIVE SPEECH
<b>All</b>	<b>29</b>	<b>70</b>
Men	23	75
Women	33	66
Whites	25	74
Blacks	38	62
Democrats	38	61
Independents	26	73
Republicans	12	86
HBCU students	31	69

between students’ support for free speech in the abstract and their support for it in practice. In trying to assess this gap, some of these studies relied on survey questions that force students to choose between free speech and inclusion. Such questions can obscure the fact that many students value both and are still in the process of thinking through how to balance them. Posing free speech and inclusion as competing choices reinforces the idea that they are somehow zero-sum rather than compatible and of equal importance. Rather, students should be encouraged to think of free speech as an important component of a truly inclusive campus, and to think of inclusion as an essential part of equitable speech opportunities for all.

Narratives about today’s college students that focus only on their support of inclusion tend to miss the extent to which they express support for free speech as well. Moreover, discussing this generation through broad generalizations ignores the many differences, subtle and not, within this cohort and among its subgroups. For instance, when it comes to political affiliation, researchers have found both that left-leaning and right-leaning students tend to respond differently from each other and that neither group responds in uniform ways.

## “YOUR FREE SPEECH HIDES BENEATH WHITE SHEETS”

In late September 2017, a month after the Unite the Right rally in Charlottesville, Claire Guthrie Gastañaga, the executive director of ACLU Virginia, was invited to speak at the College of William & Mary. Gastañaga, who had been asked to speak about the First Amendment, was shouted down by students affiliated with Black Lives Matter with chants of “ACLU, You Protect Hitler Too” and “Your Free Speech Hides Beneath White Sheets.”<sup>557</sup> Explaining the rationale for their protest, the students argued that by defending the constitutionality of the Charlottesville rally, the ACLU had “hidden behind the rhetoric of the First Amendment” and ultimately supported white supremacy.<sup>558</sup> “The ACLU and liberals believe that legality determines morality,” one of the students said. “Not too long ago, the Constitution dictated that black people only counted as three-fifths of a person. The Constitution cannot be your moral compass.”<sup>559</sup>

While the ACLU was performing its long-standing role of defending highly unpopular speech, this intense scrutiny and criticism prompted organization-wide soul searching. The fact that the many of the marchers in Charlottesville were armed further complicated the issue, and the murder of counterprotester Heather Heyer demonstrated the all too real genuine dangers that the march posed.

A leaked internal ACLU memo revealed that the organization adopted new guidelines for its national legal department to use in taking on new

cases. The guidelines cautioned against defending speakers seemingly intending to commit violence or carrying weapons, and established that the organization should consider the impact of speech in deciding whether or not to defend it, including the extent to which speech might “may assist in advancing the goals of white supremacists or others whose views are contrary to our values.”<sup>560</sup> Wendy Kaminer, a former ACLU board member, criticized the memo in *The Wall Street Journal*, writing, “The speech-case guidelines reflect a demotion of free speech in the ACLU’s hierarchy of values.”<sup>561</sup> In response, David Cole, the ACLU’s legal director, explained that the guidelines were designed merely to articulate “considerations” concerning new cases, and he rejected the idea that weighing potential harm or other factors might somehow weaken the ACLU’s commitment to defending free speech for all.<sup>562</sup>

These shifts—byproducts of a fraught political moment, evolving mores, and an intensified awareness of the potentially dangerous physical consequences of hateful speech—are striking coming from the ACLU, among the world’s the staunchest and most reliable defenders of free speech, no matter how unsavory the speaker. Even if its policies do not change, it is notable that the ACLU has even begun to reconsider its approach where free speech is concerned. The entire incident reflects some of the challenges that traditional defenses of free expression are encountering on college campuses today.

### Grappling with Liberty, Civility, and Harm

With an issue as complex as the interplay between free speech and hateful speech, surveys can obscure as much as they illuminate, presenting black-and-white choices where there are many shades of gray. Open-ended interviews that give students the opportunity to elaborate on their points can offer a more nuanced sense of their perspectives. For example, following the shutdown of Charles Murray’s lecture at Middlebury, *The New York Times* asked students who had participated in or merely observed the event to contribute short reflections. Sophie Vaughan, a senior, reported that she did not originally

object to Murray speaking but then felt pressure to partake in the protest:

I feared that by not participating in this effort, by not expressing my solidarity with marginalized people, I would become what the Rev. Dr. Martin Luther King Jr. called the “white moderate” in his “Letter From Birmingham Jail”—someone who “is more devoted to ‘order’ than justice.”... But as the protests continued, and Murray stayed silenced, I grew more and more concerned.... If I resist a speaker like Charles Murray, despite the fact his views



have been used in the service of “white nationalism,” am I also resisting intellectually open inquiry? Aren’t we more akin to authoritarian countries if we begin to choose whose speech is acceptable or not? It’s Charles Murray today, but what if it were a communist speaker tomorrow?<sup>563</sup>

Another senior, Alessandria Schumacher, did not agree with Murray but thought it important to engage with him nonetheless:

Murray’s ideas have real, tangible outcomes, which is why those who want to engage with and challenge them must be allowed to do so. Theoretically, it would be nice to discount his ideas and have them go away; pragmatically, they are not going anywhere, and if we want to fight them, at least some of us have to face them. That doesn’t mean that those who feel targeted by his work should have to sit there and listen. Not all of us need to push for progress in the same way.<sup>564</sup>

Interviews with students for a forthcoming book by Amy Binder, professor of sociology at the University of California at San Diego, and Jeffrey Kidder, associate professor of sociology at Northern Illinois University, offer a complementary view, starting from the contention that the portrait of angry and confrontational political dynamics on campus is incomplete.<sup>565</sup> From 2017 to 2018, they spoke to students across the political spectrum at four flagship public universities in different states: the University of Arizona, the University of Colorado, the University of North Carolina, and the University of Virginia. On each campus, they interviewed students involved in a range of campus political organizations, such as the College Democrats, the College Republicans, the Young Democratic Socialists, and libertarian groups. They also interviewed student leaders from various campuses at a national conference sponsored by Bridge USA. Binder and Kidder offered to keep students’ identities confidential in exchange for their participation in the study; we reproduce portions of the interviews here with their permission.

One Asian-American male student expressed sympathy for campus administrators who have to juggle various conflicting responsibilities:

In speaking with the administration on campus, we know that they’re trying, they are trying their hardest to allow the use of free expression of whatever views that people may want to share. But they also have a commitment



*College students in dialogue. PEN America event at NYU in November 2018, co-sponsored with the Penn Project for Civic Engagement and NYU Steinhardt*

to campus security and for the safety of the students, right? First and foremost, that is a priority. So I feel like the campus is definitely trying their very best and doing a good job of trying to accommodate as many people as possible while also making sure the students remain safe.

Like this student, many interviewed by Binder and Kidder evinced some uncertainty on these issues. They were often wrestling with how to balance free speech and inclusion—not unlike faculty and administrators.

When they asked students who self-identify as politically progressive to share their views on whether their university should be allowed to host a controversial speaker on campus and how they might personally react, a white, female student involved in the Democratic club at UVA said that she would not want the university to step in to cancel such a speaker, out of fear that such “administrative oversight” would infringe on speech. On further reflection, she added: “I think protests would definitely result. I guess I probably would be part of them. I honestly am not sure.” Asked to clarify, she said: “I grapple with it because at the same time it’s like those words are offensive to so many people. But we do have free speech laws, regulations, that you do have to allow people to be able to share their viewpoints. But also at what cost? So yeah, I’m not sure.”

Another white, female student, majoring in a STEM field at the University of Arizona, offered a similarly thoughtful response when asked the same question:

I’m not a lawyer, I’m no expert on the First Amendment, but I think they have the right

to be here. That's why we have those crazy preachers on campus saying women deserve rape and stuff. So I think they have a legal right to be here. But I mean, when people feel endangered ... Obviously, yes, I wish we could yes, ban them. But there's free speech and we have to take that into account.

A white, male student at the University of Colorado, who was a member of the College Democrats, differentiated between opposing political views and expressions of racism or sexism:

Republicans, I think they have their right to voice their opinion, and I like that. I like that they have their freedom. I like to hear their ideologies and stuff like that. When the people with the Trump wall were there, I conversed with them because I was interested in how they were actually feeling. I'm not looking at them and saying, "You're a Trump supporter, so that automatically means I don't like you." So that I don't mind. But when someone comes on campus and is saying, "I'm here as a Christian. Now let me say all these horrible things about how every single one of you, even though I don't know you, you're all going to hell. You're all just horrible, horrible people," like calling all these women horrible names. They would even make racial comments and stuff like that. I don't think that should be allowed because that is just plain hate speech on the students of the university in an act to make them mad or get a reaction out of them.

Overall, these interviews illustrate that students often appreciate the complexities of these questions and the tradeoffs involved, even though these understandings may not be fully reflected in their answers to multiple-choice surveys. There are sometimes key gaps in their First Amendment knowledge, making it even more difficult for them to articulate clear and consistent views. Perhaps more than anything, Binder and Kidder's interviews amount to a call to action for free speech advocates: to better articulate a comprehensive understanding of freedom of speech so that students understand that it is not as a cudgel against other societal values but a democratic prerequisite.

### Conservative Student Activism

Conservative students tend to be more wary of speech restrictions than progressives.<sup>566</sup> One driver may be that as the academy has skewed more liberal in recent decades,<sup>567</sup> these students have latched on to free speech as a way to prevent their voices

from being drowned out. Grabbing attention can be a means to this end. In the 2013 book *Becoming Right*, Amy Binder and Kate Wood describe the "provocative style" of some conservative college students, who are "tickled to rile liberals at their universities and are supported in their theatricality by national organizations established to foster such conservative activism on campus."<sup>568</sup> Binder and Wood describe students engaging in "Affirmative Action Bake Sales," where they "sell baked goods at a higher price to white passers-by than they do to, say, African-Americans or Latinos/as."<sup>569</sup> The aim is to highlight, through parody, what they see as the "deleterious effect on all students of Affirmative Action policies."<sup>570</sup> This brand of political theater, they explain, is well recognized as a "national style" of American conservatism,<sup>571</sup> though they add that it not universally adopted by conservative student groups. They recount one conservative student's ire at campus administrators for failing to prevent liberal protesters from blocking a bake sale, which, the student said, amounted to a refusal to "protect the free expression of conservatives."<sup>572</sup>

Progressive students have themselves long engaged in provocative tactics, such as die-ins to bring attention to gun violence. But in Jeffrey Kidder's view, provocation has come to occupy a special place among conservative students, as a "method for establishing a conservative social identity" in the more liberal academy.<sup>573</sup> One result, he explained, is that a subset of conservative students "care less about the content of the speech than the power that it has to provoke anger in others."<sup>574</sup> In correspondence with PEN America on this issue, Binder and Kidder reflected that although they are still fine-tuning the arguments for their new book, their "hunch" is that "liberal students, by and large, do not set out to provoke others in support of their causes as much as conservative students do, because they don't really have to, since they feel quite embedded in the culture of the campus."<sup>575</sup> They noted that liberal students often do "react in confrontational ways in response to conservative actions and events, such as by demanding that controversial speakers be disinvited to campus or by turning their backs on speakers they don't like."<sup>576</sup> But provocation, they contend, has stronger contemporary roots in the national conservative movement.

Similar issues emerged in the closed-door meeting that PEN America held at UC Berkeley in October 2017. In conversation with dozens of students, staff, faculty, and administrators, participants voiced deep frustration at their interactions with those with opposing perspectives. Some explained that they felt anxiety rooted in their specific racial, gender, or political identity, while others conveyed vexation at being





deliberately misunderstood or caricatured, either in the media or by their peers and colleagues.

Conservative students in particular expressed a sense of isolation at Berkeley. They recounted examples of being slighted by their peers and sidelined by campus leaders. Some liberal students and faculty in the room backed up these accounts, agreeing that the administration, faculty, and student body there all lean heavily left. Some conservative students, in turn, acknowledged that they had embraced incendiary speakers precisely to push back against a campus climate that they saw as openly dismissive of their values.

One student recalled that a faculty member had expressed disappointment and an unwillingness to work with him on a project after learning of his role in inviting a controversial speaker to campus. The same student explained that, unlike their liberal counterparts, conservative groups were granted little to no administrative support when navigating campus bureaucracies. Given the frequency with which Berkeley's academic departments host liberal speakers, he argued, liberal student organizations frequently benefit from department help or informal exemptions from institutional policies and that "who you know influences the privileges you receive."<sup>577</sup>

Another conservative student decried the seeming lack of administrative support for problems faced by conservative groups. When posters reading "Behead BCR" (Berkeley College Republicans) appeared on campus, he said, no university administrator released an official statement criticizing them. In contrast, he pointed out that when Trump was elected, the administration released a series of strong statements to support students who felt endangered,<sup>578</sup> which in his view treated his victory "like a natural disaster."<sup>579</sup> The student acknowledged that confrontational pundits like Ann Coulter, Ben Shapiro, and Milo Yiannopoulos were not the best representatives of nuanced and serious conservative discourse. But for him, "the very act of inviting provocative speakers is an act of protest."<sup>580</sup>

UC Berkeley graduate Mike Wright, former president of *The Berkeley Patriot*, was one of the core organizers of Yiannopoulos's Free Speech Week there in September 2017, which was ultimately aborted. In an interview with PEN America, Wright described long-standing tensions between the college's conservative students and administrators and a perception among conservatives of being left out of university decision making and policy considerations.<sup>581</sup> When asked about any missing context that the media had failed to convey when depicting Free Speech Week and Yiannopoulos, Wright said:

The first bit of context was that he was one of the people we'd invited previously: There'd been a whole incident initially in February 2017.<sup>582</sup> That alone, with Horowitz not being able to speak<sup>583</sup> and Coulter not being able to speak,<sup>584</sup> created a sense that conservative speakers who fell outside of the accepted norms for Berkeley were being denied the ability to come to campus. So in that context, it made it more about pushing back on that rather than about any of those particular speakers themselves.... The goal wasn't to invite someone incendiary.<sup>585</sup>

Wright explained that *The Berkeley Patriot* had re-invited Yiannopoulos precisely because he had previously been barred from speaking—not necessarily because of his alignment with the conservative group's values:

Milo didn't represent our beliefs on many issues. I think Milo's style can be a bit crass and not always helpful for a civil debate. But as soon as he wasn't able to speak, that changed the calculus for us and made it about principle... Milo can be difficult at times and his style can exacerbate tensions... the campus consistently played right into that, creating a vicious cycle of escalating rhetoric.

I want to be clear that I'm not saying the university was acting with malicious intent. I really believe they weren't. They were trying to navigate an extremely complicated situation... [But re-inviting Yiannopoulos] was a matter of principle that we couldn't let violent extremists successfully prevent an event from occurring. We saw ourselves as doing something righteous. We were allowing the campus to prove that it could successfully host a controversial speaker like this. And, again, it didn't work out how we'd hoped. The event was a massive failure. But that was our mindset.

Interviews conducted by Binder and Kidder indicate that a similar drama played out at the University of North Carolina in November 2017, when conservative groups invited Sebastian Gorka to speak on the campus. Scholars and national security experts characterize Gorka, who briefly served as a deputy assistant to Trump at the White House and who wrote for Breitbart, as having fringe views on Islam, extremism, and foreign policy.<sup>586</sup> Yet the event garnered wide co-sponsorship from the student groups, including Christians United for Israel, UNC College

Republicans, Turning Point USA, and the *Carolina Review*, a conservative journal.

According to one of the UNC College Republicans who spoke with Binder and Kidder, Gorka was not the group's first choice, or even really on its radar. This white, male student explained that Gorka had been chosen expressly to draw the ire of other groups on campus. "Because he is a controversial speaker," he said, Gorka "appealed to a lot of members of College Republicans." Another white, male College Republican seemed to validate this approach and the outrage it generated. "I enjoyed him speaking here," he said. "That was fun because we had a lot of protesters show up."

### Feelings of Isolation

Assessing whether conservative voices are suppressed on college campuses is not a straightforward task. Though they often fit the demographic mold of the majority, conservative students have reported feeling stigmatized on campus, out of step with the dominant political mood, unable to get the benefit of the doubt from faculty, administrators, and peers, and overall, outnumbered. Beyond these feelings of isolation, there have been reports of harassment of right-leaning students, some of which constitute efforts to chill speech. Recent examples include the repeated vandalization of a pro-life display at Miami University in Ohio<sup>587</sup> and demands for a Christian student senator at UC Berkeley to resign from student government for abstaining from a vote condemning the Trump Administration's proposal to adopt a definition of sex that discounts transgender identities.<sup>588</sup>

But these viral stories can also create a skewed sense of the prevalence of the problem. Take, for example, the University of Nebraska, where in August 2017 a liberal graduate student was summarily removed from her teaching duties after belittling a conservative undergraduate to the point of tears.<sup>589</sup> The case also prompted the university to hire Gallup researchers to measure the political climate on all four of its campuses. What the researchers found, however, did not match the portrait that this one incident had painted. On the contrary, the Gallup report showed that "most people at the universities studied, conservatives included, do not feel intimidated or constrained in what they say on campus."<sup>590</sup>

Nonetheless, because many conservatives report that they feel pressure to keep their views to themselves, truly understanding their experience requires more concerted research. As Jonathan Zimmerman, a professor of the history of education at the University of Pennsylvania, has written, conservative students often fear the social repercussions of making their political beliefs known.<sup>591</sup>

Their fears are not entirely unmerited, Zimmerman argues, citing other cases where conservative students have been "flamed on social media" and that they are "understandably afraid they'll be vilified by their peers."<sup>592</sup>

Like any identifiable group, conservatives show great variations in their attitudes and behaviors. At UC Berkeley, for example, not all agreed with the Berkeley College Republicans' decision to invite Yiannopoulos to speak. In October 2017, a portion of the group splintered to form an independent conservative organization, noting that they wanted to bring "bring back political decency" and that they preferred to invite local legislators and policy experts to campus.<sup>593</sup> Binder and Kidder's interviewees also make clear that there is no monolith of right-wing student thinking. Some conservative students, like their progressive counterparts, were thoughtfully puzzling through their own views on free speech and inclusion. A conservative black female student at UVA said that she would have criticized an invitation to Yiannopoulos had it been made at her university, adding that she would have instead pushed for "someone like Condoleezza Rice." She explained that the group had a right to host Yiannopoulos, and she had just as much right to oppose their decision:

Milo had a right to be there. They had a right to protest. I think what I'm more concerned about in that situation is just the intentionality behind it of what was the goal in choosing Milo. Because for me, I don't necessarily see anything he has to say as productive, and I don't think it makes a more productive view of the conservative movement.

A white, female student and member of the College Republicans at UVA told Binder and Kidder that she could not relate to her conservative peers' desire to deliberately rile up other students, also known as trolling. "We have free speech in order to fight for the good," she said. "People will misuse that." She noted that provocation for its own sake would not help conservatives attract people from the political center, and she felt that it was simply morally wrong. "Why would you use it for things that are hurtful to people?" she said. Why risk confirming the contention that they're "only pro-free speech because they want to say things that no one should say"? She also shared an anecdote about feeling "alienated" from other conservatives for not embracing this provocative attitude:

One group was talking about how on the lawn one day they got a giant ball and they called it



the, like, political correctness ball or something and had people write things that would trigger people on it. I just found it so distasteful. I was like, “That’s not conservative, that’s not me.” But here I am at this conservative club night, and they’re finding joy in triggering people—even though I’m similarly frustrated with this overemphasis on safe space in a university context... I believe in free speech, but I also believe in respect. It’s things like that that make me feel alienated. I’m more frustrated by when I feel alienated within my own tribe than when I already know that I’m a minority opinion.

### Education and Dialogue

While recent snapshots of students’ free speech views are revealing, it is misleading to present them as static. Students are, by definition, learning. Elizabeth Niehaus, professor of education at the University of Nebraska at Lincoln, notes: “The entire purpose of higher education is to help students learn and develop. Students are a work in progress. It is quite likely that, similar to their attitudes and values in many other areas, students’ views on freedom of expression change and become more complex over time.”<sup>594</sup>

Administrators and faculty play a significant role in shaping student views on free speech, inclusion, and their perceptions of whose voices are being protected and valued. It is therefore imperative that they be thoughtful in both their proactive and reactive approaches to free speech issues on campus.

Given that a focus of so much liberal education, and pedagogical strategy in general, is on student interaction, students are poised to improve at dialogue, debate, and counter-speech throughout their collegiate lives. As Niehaus explains, “Engaging in counter-speech requires a fairly high level of cognitive complexity, social perspective-taking ability, and internally defined sense of self.”<sup>595</sup> For students to attain these skills takes time, and it may not be reasonable to expect that all students arriving at college will be able to recognize the value of engaging in productive disagreement, or of deploying provocation judiciously.

Matthew J. Mayhew, the William Ray and Marie Adamson Flesher professor in educational administration at Ohio State University, told Inside Higher Ed that the familiar narrative of “liberal indoctrination” in college is not supported by data. He, Alyssa Rockenbach of North Carolina State University, and two colleagues, surveyed 7,000 students at more than 120 four-year colleges and universities at the start of their freshman and sophomore years. They found that after one year, a plurality of the students viewed both liberals and conservatives more favorably than

***“It is quite likely that, similar to their attitudes and values in many other areas, students’ views on freedom of expression would change and become more complex over time.”***

they had when they first arrived on campus. As Mayhew explained:

Being enrolled at a liberal arts institution or exposed to a liberal education is not about being indoctrinated into a left-leaning political set of philosophies, but about [being] engaged in an educational environment designed to encourage freedom of thought and expression, to equip students with the skills needed to evaluate truth claims and subsequently form thoughtful and responsible opinions, and to grow in appreciation of ideas represented by differing political narratives.<sup>596</sup>

Public narratives of student opinions rarely capture the complex challenges that students grapple with as campus demographics and social mores evolve. Digging a little deeper opens up a more nuanced set of perspectives from students across the political spectrum and illustrates the opportunities that exist both to educate students on First Amendment principles and to address the concerns of students whose sense of marginalization may be pushing them toward the extremes. The narrative that students are “coddled” and “fragile” should not be rejected out of hand, but scholars, commentators, and campus leaders should be cautious about accepting such a generalization.

Analyses that pay short shrift to the nuanced dynamics among students may not only contribute to a weakening of support for free speech but also do a disservice to today’s college students in teaching them to see their own worlds as limited and easily categorizable. With their common educational purpose and sense of community, campuses offer a unique opportunity to promote dialogue across difference, to help students from diverse backgrounds feel welcome and free to speak their minds, to provide space for exploring various political ideologies, and to prepare students to participate fully in civic society.

## Section V

# LEGISLATIVE AND POLITICAL ACTION

Since the publication of *And Campus for All* in 2016, concerns over campus speech have prompted a raft of state and federal legislative proposals. Across the country, state legislatures have introduced new bills that either squarely target or hold significant implications for how colleges and universities police speech, with various implications for free speech zones, external speakers, student protesters, and academic freedom. Often a result of organized campaigns by national groups, these proposals have mostly followed a handful of model bills, adopted fully or partially in different states.

In a fall 2017 white paper titled *Wrong Answer: How Good Faith Attempts to Address Free Speech and Anti-Semitism on Campus Could Backfire*, PEN America offered in-depth analysis of some of these bills, including the Campus Free Speech Act, drafted as model legislation by the Goldwater Institute, a libertarian think tank in Phoenix; and the Anti-Semitism Awareness Act, first introduced and passed by the Senate in 2016, then reintroduced in 2018. While PEN America broadly supports efforts to protect free speech rights, to improve education about the First Amendment, and to lift the voices of the historically marginalized, many state-level bills contain provisions that are antithetical to these goals. Even when legislative initiatives to protect academic freedom and address the silencing of speakers have noble intentions, there is a danger that attempts to protect free speech by expanding government oversight will chill the very rights it aims to secure. Federal and state legislators alike should approach legislative solutions cautiously. Accordingly, it is important to understand the specifics of these new proposals.

Since entering office meanwhile, the Trump Administration has played a key role in this arena. Most notably, the Justice Department under former Attorney General Sessions extended support for plaintiffs in key First Amendment lawsuits against higher-education institutions. Sessions himself emerged as a prominent critic of universities administrations, stating that they are creating “a generation of sanctimonious, sensitive, supercilious snowflakes.”<sup>597</sup> Secretary of Education Betsy DeVos has also spoken out about what she called a “civic sickness” on campuses, which have “abandoned truth.”<sup>598</sup> This rhetoric was turned into action in March 2019 as President Trump signed an Executive Order entitled “Improving Free Inquiry,

Transparency, and Accountability at Colleges and Universities”<sup>599</sup>

In 2018, DeVos announced a slate of proposed changes to the Obama Administration’s guidance concerning Title IX law in higher education, including measures that would narrow the definition of sexual harassment, reduce the jurisdiction of campuses dealing with sexual assault complaints, and alter the standards of evidence necessary for findings of guilt.<sup>600</sup> In part, the new guidelines address problematic aspects of the Obama-era guidance that PEN America and others had previously, in a narrow assessment of the implications for speech, identified as potentially having a chilling effect on speech on campus.

### State-Level Legislation

Recent pronouncements on campus free speech follow a tradition that dates back to a seminal 1974 report by a Yale committee chaired by C. Vann Woodward (“the Woodward report”)<sup>601</sup> and even further back to a 1967 report by the Kalven Committee at the University of Chicago,<sup>602</sup> among others. Today’s legislative proposals have tended to draw on a statement of principles released at the University of Chicago in January 2015 as part of its Report of the Committee on Freedom of Expression.<sup>603</sup> Without offering specific legislative recommendations, the so-called Chicago Principles, or Chicago Statement, pledges a general commitment to freedom of expression on campus and has been promoted by many free speech organizations and some campus leaders. According to FIRE, as of early 2019, the Chicago Principles had been adopted in some form by over 50 American colleges and universities.<sup>604</sup>

State lawmakers, however, have recently proposed legislation that reaches far beyond these principles. One of the model bills that they have drawn on is FIRE’s Campus Free Expression Act (CAFE), which focuses on banning free speech zones on public campuses.<sup>605</sup> Many free speech zones were campuses’ response to protests against United States involvement in the Vietnam War in the 1960s and ’70s.<sup>606</sup> Such zones have often relegated expression and protest to small areas of campus, with some universities imposing even more stringent requirements. At the University of South Dakota, for example, students must reserve the zone at least three days in advance.<sup>607</sup> A fierce debate continues among First Amendment experts regarding the compatibility of free speech zones with the U.S. Constitution, and with a university’s mandate to serve as an open marketplace for the free exchange of ideas. Though proponents believe that these zones provide constitutional and reasonable means for avoiding the disruption of campus functions, detractors have called the registration





and advance-notice requirements unconstitutional.<sup>608</sup> In its “Spotlight on Speech Codes 2019,” FIRE noted that almost 800,000 college students are enrolled at institutions with active free-speech-zone policies, “through which student demonstrations and other expressive activities are quarantined to small or out-of-the-way areas of campus.”<sup>609</sup> Lawsuits that challenge free speech zones have proliferated since the early 2000s. Students attending schools such as New Mexico State, West Virginia University, Texas Tech University Law School, and the University of Cincinnati have sought legal remedies for these restrictive policies.<sup>610</sup>

FIRE’s CAFE Act reflects the view that such zones are unconstitutional, and that all the outdoor areas of campuses that are generally accessible to the public should be treated as “public forums” as defined by the First Amendment. The CAFE Act has inspired other entities to draft their own model bills to limit free speech zones, several of which have gone much further in delineating new requirements for campus speech.

Since 2017 other nonprofit advocacy groups have put forth model legislative proposals that have inspired dozens of state-level bills. The Goldwater Institute’s model Campus Free Speech Act<sup>611</sup> and the American Legislative Exchange Council (ALEC)’s FORUM Act<sup>612</sup> are the two most significant examples. State legislators have drawn from both, as well as from other models, in crafting new laws concerning free speech on public campuses. Of the 37 state legislative proposals from 2017-18 that PEN America has examined, there is some variety in the language and clauses that each of these bills contain.

Based on PEN America’s analysis of bills inspired by either the Goldwater Model Bill or the FORUM Act, each bill has at least several of the following eight elements:

- An official **policy declaration** from the university outlining and endorsing its commitment to free speech and academic freedom
- **Institutional disclosure requirements** mandating that the university disclose its free speech policies to students through guidebooks or informational materials
- **The right to civil action** for anyone whose free speech was infringed upon, or not protected adequately, by the university
- A **prohibition on abridging speech** beyond reasonable time, place, and manner restrictions, whereby the university is not allowed to restrict

the speech of either students or speakers invited to the campus

- The creation of a university oversight body that serves as a **supervisory committee on free speech**
- **Disciplinary sanctions** for anyone who infringes on the free speech of others, most notably through substantially disrupting others’ speech (the so-called heckler’s veto)
- A **mandate of institutional neutrality**, where the university commits to being neutral on contemporary public policy issues
- A **mechanism for institutional accountability**, which usually requires releasing a report on the state of free speech at the university to the public or state government
- As of January 2019, only 11 of these 37 state-level bills have become law, though efforts to pass them have been widespread across the country.

Only 11 of these 37 state-level bills became law in 2017-18, though efforts to pass them were widespread across the country.

### The Goldwater Institute Proposal

In 2017 the Goldwater Institute issued a report titled “Campus Free Speech Act: A Legislative Proposal.”<sup>613</sup> Largely a reaction to high-profile disinvitations of speakers, the report included a draft bill with provisions for public colleges and universities that not only bar the designation of free speech zones but affirm the rights of students and faculty to exercise free speech, to spontaneously gather and protest, and to invite speakers to campus. The model bill also gives students and faculty the right to sue colleges and universities for infringements on their speech rights and requires training and the dissemination of a campus free speech policy in orientation materials. While the model bill is directed at public universities, the Goldwater Institute has indicated that it hopes that “public debates” about the proposal will strengthen freedom of speech at private institutions as well.<sup>614</sup>

As discussed in detail in PEN America’s 2017 white paper *Wrong Answer*, the bill contains many items that we support. These include its primary proposal, which mandates the creation of formal, university-wide policies on free expression that we believe would raise awareness and provide needed clarity. We also favor the bill’s protections of both faculty and students who speak on contemporary controversies, its prohibition against discipline for speech protected by the

First Amendment, its requirement for disseminating and training on campus free speech policies, and its provision for allowing students and staff to sue the school for violating their speech rights. Perhaps most notably, we endorse the Goldwater stipulation that directs universities to declare public areas of campuses traditional public forums, banning delimited free speech zones. Designating specific areas as exclusive zones for student protest and other expressive activity curtails speech. It enables schools to shut down expression that falls outside those zones and, in so doing, may violate the First Amendment. These zones also send the message to students that free speech is something to be corralled and contained, restricted to permitted locations.

But PEN America has significant reservations about other aspects of the model bill, as we have previously articulated. Among these are provisions that require universities to set up Committees on Free Expression to oversee the law and to issue annual reports on the state of free expression on campus. The practice of releasing mandatory annual reports would give the new oversight committees, comprised of members selected by elected officials, considerable power to declare which types of speech are “threatened” on campus, a power that would easily lend itself to politicization. While most committee members would no doubt execute their duties in good faith, the potential for annual reports to be unduly shaped by political or ideological bias is obvious. Moreover, incidents that could be effectively resolved internally might be resurrected as part of the committee’s annual reporting process, becoming fodder for further legislative meddling in the affairs of public colleges and universities.

Another problem is the Goldwater bill’s directive that universities “strive to remain neutral” on public policy issues and that they refrain from taking action on public policy controversies in a way that would require students or faculty to express views on them. While the bill’s authors note that much of this instruction is aspirational,<sup>615</sup> these provisions may in fact prevent campus leaders from acting in accordance with their institutional values and, more importantly, may commit schools to silence on issues that directly concern their community—for example, by blocking schools from commenting on immigration policies that affect their students.

Supporters of campus free speech legislation tend to approve of provisions in the Goldwater proposal that explicitly counter the heckler’s veto by instituting mandatory discipline for students who disrupt speakers.<sup>616</sup> Stanley Kurtz, a senior fellow at the Ethics and Public Policy Center and one of the bill’s co-authors, has stated that requiring harsh

consequences for shout-downs is one of its greatest strengths.<sup>617</sup> Critics have countered that the language of this provision is overbroad and vague and could subject students who engage in peaceful protest to mandatory suspension or expulsion. Sarah Ruger, the director of tolerance and free expression at the libertarian-oriented Charles Koch Institute, has argued that this disciplinary provision “invites abuse,” and that the bill overall may lead to “micromanaging by legislators” and limit university administrators’ autonomy.<sup>618</sup> PEN America has previously expressed its opposition to these provisions, particularly the overly punitive mandatory minimums for any student who has twice been found “infringing the expressive rights of others.”<sup>619</sup> As we stated in *Wrong Answer*: “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.”<sup>620</sup>

The Goldwater draft legislation requires such nuanced analysis in part because it has proved so influential, with state legislatures across the country adopting it as a template. As of January 2019, the Goldwater Institute lists 12 bills either based entirely or partly on their model legislation, of which 5 have passed and become law.<sup>621</sup> While some states have passed laws that closely mirror the model bill, others have deviated significantly from the original proposal.<sup>622</sup>

### The FORUM Act

The Forming Open and Robust University Minds (FORUM) Act is a draft bill released in 2017 by the American Legislative Exchange Council (ALEC), a nonprofit organization of conservative state legislators and private sector representatives.<sup>623</sup> Like the Goldwater proposal, the FORUM Act contains provisions that protect all lawful expression on campus while emphasizing that administrators, campus police, and other actors need to better understand their duty to uphold free expression. The Act also mandates that higher education institutions submit annual reports on the state of free speech on their campus to the state legislature as part of the appropriations process. It differs from Goldwater in that rather than propose committees to oversee compliance, the FORUM Act allows administrators to decide how best to report on free speech issues, maintaining a degree of institutional autonomy.<sup>624</sup>

Shelby Emmett, director of the Center to Protect Free Speech at ALEC, told *The Chronicle of Higher Education* that the main difference is that FORUM is “purely educational,” without the disciplinary measures.<sup>625</sup> Emmett added that FORUM is careful not to impose as much legislative oversight on campus management as the Goldwater proposal,



stressing that it had less of a “top-down approach.”

Critics of the FORUM Act have argued that its attempt to impose reporting requirements on universities is still burdensome and needless. Beth McMurtrie, a senior writer at *The Chronicle of Higher Education*, contends that legislators who champion such proposals may be motivated more by a desire to score points with the Republican base than by a thoughtful engagement with the issues, and she questions whether sponsors and supporters of the FORUM Act are truly interested in protecting student expression across the political spectrum.<sup>626</sup>

PEN America agrees with the spirit of the FORUM Act, with its emphasis on educating students about the First Amendment, and with the effort to maintain university autonomy in reporting. As with the Goldwater proposal, we support the Act’s efforts to do away with free speech zones, to ensure that campus constituents understand the university’s obligations to uphold exercise of free speech, and to provide student organizations with a specific cause of action to protest arbitrary infringement on their free speech rights. We also applaud the FORUM Act’s carefully delineated definition of *campus disruption*, which as drafted provides thoughtful carve-out exceptions for protected activity, including disruptions that are “minor, brief, or fleeting nonviolent events.”

But we also see potential for abuse. The FORUM Act goes further than the Goldwater proposal in its mandate that universities report all incidents of disruption, and all First Amendment lawsuits brought against the university, to both the governor and state legislature. Enforced reporting of all incidents at a university may easily create an atmosphere where even small incidents—that could be effectively mediated by the university—are blown out of proportion. Moreover, tying the annual reporting requirement to the legislative appropriations process inherently politicizes it, setting up the reports to be bargaining chips in budget negotiations.

As with the Goldwater draft, a number of state legislatures have used the FORUM Act as a model. While Virginia, Georgia, and Louisiana successfully enacted versions of the FORUM Act, other states, such as Iowa, Oklahoma, South Carolina, Washington, and West Virginia, have tried but to date failed to do so.<sup>627</sup>

### **The Anti-Semitism Awareness Act**

In 2016, Congress introduced the Anti-Semitism Awareness Act. The Senate passed it by unanimous consent, but the House did not take it up. Since then, the act has been reintroduced more recently as the Anti-Semitism Awareness Act of

2018,<sup>628</sup> and again—days before this report went to press—as the Anti-Semitism Awareness Act of 2019.<sup>629</sup>

The Act’s central provision holds that the Department of Education must take into account a specific definition of anti-Semitism when evaluating whether a particular incident contributes to an atmosphere of harassment that is severe, persistent, or pervasive enough to violate Title VI of the Civil Rights Act. The Act, which applies to public schools and (with some exceptions) to private schools that accept federal funds, delineates a long list of categories of speech that can be taken into account in determining whether anti-Semitic discrimination or harassment has occurred, including speech critical of Israel. This definition is based on a Fact Sheet created by the United States Department of State in 2010, which includes a definition and contemporary examples of Anti-Semitism, as well as a detailed enumeration of what constitutes Anti-Semitism relative to Israel (see box on page 75).<sup>630</sup>

Sponsors of this Act are rightly concerned about an alarming increase in anti-Semitic discrimination and harassment on campuses, as discussed in Section I of this report. But as explained in *Wrong Answer*, the approach taken in the Act is not constructive, and runs the risk of chilling free speech.<sup>631</sup> It is unquestionably true that some anti-Israel speech is anti-Semitic, and equally the case that *not all* anti-Israel speech is tainted by such bias. The Act provisions rightly provide that “criticism of Israel similar to that leveled against any other country cannot be regarded as anti-Semitic.” But by spelling out such a detailed definition of Anti-Semitism there is a risk that campus administrators, faculty and Department of Education officials, will begin to scrutinize all speech in the many designated categories, regardless of whether they bear any trace of anti-Semitic intent or meaning. The determination of whether an incident is anti-Semitic or otherwise discriminatory or harassing is best made by investigating officials, who should be free to take into account detailed definitions as well as the facts and circumstances at hand. Detailed government definitions and examples of various categories of bigotry run the risk of chilling speech by instilling a sense of concern about any sentiment that may draw too close to the line.

University authorities and professors, fearful of a Title VI investigation, might foreseeably respond to the Anti-Semitism Awareness Act by carefully monitoring academic discussions of Israel or its policies out of fear that they might veer into terrain that—under this definition—would include potentially “anti-Semitic” speech from participants in such discussions.

## U.S. STATE DEPARTMENT: DEFINING ANTI-SEMITISM

"Anti-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."

—Working Definition of Anti-Semitism by the European Monitoring Center on Racism and Xenophobia

### Contemporary Examples of Anti-Semitism

- 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.

### What is Anti-Semitism Relative to Israel?

Examples of the ways in which anti-Semitism manifests itself with regard to the state of Israel, taking into account the overall context could include:

#### 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

However, criticism of Israel similar to that leveled against any other country cannot be regarded as anti-Semitic.

*Fact Sheet: Defining Anti-Semitism," Special Envoy to Monitor and Combat Anti-Semitism of the Department of State, June 8, 2010, <https://2009-2017.state.gov/j/drl/rls/fs/2010/122352.htm>*

In May 2018, an amended version of this Act passed in South Carolina, inserted as a rider in the state's 2018-19 budget. Because of this legislative maneuver, it will expire after one year. Critics have argued that the law may significantly hinder legitimate political discussion of Israel in South Carolina's schools and that professors or teachers may self-censor for fear of reprisal.<sup>632</sup>

Others have questioned whether, in targeting speech about Israel, the law can truly help fight anti-Semitism. Kenneth Stern, the executive director of the Justus & Karin Rosenberg Foundation, is the original author of the anti-Semitism definition included

in the act. Stern, who first offered the definition as a way to monitor instances of anti-Semitism in the European Union, has expressed concerns about the law's unintended repercussions in an op-ed piece: "If certain expressions about Israel are officially defined as anti-Semitic," he wrote, "pro-Israel Jewish students will be further marginalized, having gained the reputation for suppressing, rather than answering, speech they don't like."<sup>633</sup>

Those who make further attempts to pass this legislation at the state or federal level should carefully consider these criticisms, for as it stands the bill seems likely to deter speech. In testimony before





*Thomas Jefferson's Rotunda at the University of Virginia on February 3, 2009*

the House Judiciary Committee in November 2017, PEN America CEO Suzanne Nossel pointed out that adopting such a detailed definition of anti-Semitism may open a door that can't be closed, encouraging other ethnic or religious groups to seek their own legislated definitions of offensive speech—including definitions that might encompass contested issues of history, identity, and nationhood—as grounds for findings of discrimination.<sup>634</sup> While none of these factors is, or should be, excluded from determinations of bias, to legislatively delineate them as potential triggers for government action would risk constricting the space for freedom of speech on campus. On the whole PEN America cautions against legislating any inventory of types of speech that could be construed as discriminatory because of the likelihood of unintended consequences.

Since 2015, a number of states have also introduced legislation to outlaw awarding state contracts to companies or individuals who participate in the Boycott, Divestment and Sanctions (BDS) campaign against Israel.<sup>635</sup> These bills vary but have commonly prohibited all state institutions and agencies, including public universities and colleges, from contracting with private citizens or organizations unless they sign riders to contracts pledging not to boycott Israel.<sup>636</sup> PEN America opposes any legislation that require contractors to make such pledges, which

would violate individual civil liberties to participate in political boycotts, and which have been protected in First Amendment jurisprudence. Because this legislation affects all state institutions and agencies rather than specifically targeting the educational arena it is not addressed in-depth in this report.

### **Ideologically Driven Involvement by the Justice Department**

In the past two years, the federal government has become more vocal and aggressive in responding to free speech controversies on campus. As laid out below, the Department of Justice has intervened in several campus speech cases, helping to vindicate the rights of speakers against overly intrusive administrative policies. In several instances, the department's interventions helped prompt policy reforms that widen the space for free speech on campus. While the department's engagement in support of speech rights is commendable, its contributions are undercut by the one-sided nature of recent rhetoric by leadership and by the apparent failure of the Trump Administration to give commensurate attention to high-profile violations of the speech rights of left-leaning students and faculty.

The Department of Justice under Sessions intervened in several lawsuits on the side of plaintiffs who alleged that their speech had been abridged by

higher education institutions. These cases include:

- *Uzuegbunam v. Preczewski*: Blocked from handing out Christian flyers and evangelizing other students in public areas of Georgia Gwinnett College, students Chike Uzuegbunam and Joseph Bradford challenged the school's free-speech-zone policy as well as its rule mandating prior authorization to use a designated space to speak. In its statement of interest, the Justice Department sided with the students, arguing that "the college's speech policies were not content-neutral, established an impermissible heckler's veto, and were not narrowly tailored to achieve a compelling government interest."<sup>637</sup> Ultimately, the college amended its policy before the case was heard, making it easier for students, guest speakers, and organizations to speak on campus. In addition, since one of the plaintiffs had by then graduated, the judge in the case decided that the First Amendment claims were moot.<sup>638</sup>
- *Shaw v. Burke*: Kevin Shaw, a student at Los Angeles Pierce College, a public college within the L.A. Community College District (LACCD), challenged the constitutionality of banning all free expression on campus outside a 600-square-foot free speech zone. Shaw argued that he should have the right to distribute Spanish-language copies of the U.S. Constitution beyond that zone. In its statement of interest, the Department of Justice sided with the student, arguing that "the college's speech policies amounted to an unconstitutional prior restraint that chilled free expression, and that they did not constitute valid time, place, and manner restrictions."<sup>639</sup> The case was settled in December 2018, with LACCD agreeing to enlarge the free speech zone at Pierce and to make sure that all of its nine colleges have policies that allow free speech by students.<sup>640</sup>
- *Young America's Foundation and Berkeley College Republicans v. Napolitano*: As discussed in Section II, two conservative student groups alleged that UC Berkeley had discriminated against them in their efforts to bring conservative speakers to campus, evaluating their guests as "high profile" speakers, constraining the time and place when they could speak, and increasing the cost of security. In its statement of interest the Justice Department sided with these groups, arguing that the existing policies gave administrators "unfettered discretion to decide which speakers are subject to arduous curfews, prohibitive security costs, or undesirable venues."<sup>641</sup> The suit was settled in December 2018, with UC

Berkeley agreeing to pay \$70,000 in legal fees for the plaintiffs, and to consider some non-substantive changes to its policies.<sup>642</sup>

- *Speech First, Inc., v. Schlissel*: Advocacy group Speech First alleged that in adopting policies that banned "bullying" and "harassing," the University of Michigan had used overbroad language and prohibited and punished constitutionally protected speech. In its statement of interest, the Justice Department sided with Speech First, arguing that such vague definitions would likely lead the school's Bias Response Team to curtail protected speech.<sup>643</sup> In response to the lawsuit, prior to court hearings the university modified its definitions of *bullying* and *harassment* to better protect freedom of expression.<sup>644</sup> Though the case remains open, the judge has made comments suggesting that she doesn't believe that the university's policies violate the First Amendment.<sup>645</sup>

While some members of the Trump administration have emphasized the importance of nonpartisan applications of the First Amendment,<sup>646</sup> their rhetoric has sometimes undermined that emphasis.<sup>647</sup> As PEN America CEO Suzanne Nossel detailed in an op-ed in August 2018, at the center of the above conflicts have been statements and deeds by former Attorney General Sessions, who left Trump's Justice Department in November 2018.<sup>648</sup> Sessions adopted a mocking and derisive tone in describing student protesters and university administrators. For example, at Georgetown University Law Center on September 27, 2017, Sessions described campuses as "transforming into an echo chamber of political correctness and homogenous thought, a shelter for fragile egos."<sup>649</sup> Referring to an event at UC Berkeley with former Breitbart News editor Ben Shapiro, he mocked administrators' decision to offer counseling to students, saying: "To my knowledge, no one fainted, no one was unsafe. No one needed counseling."<sup>650</sup> Public reporting indicated that organizers of the Georgetown event "excluded some students and law professors, while taking only friendly questions from the audience," calling into question Sessions's credibility as a critic of "echo chambers."<sup>651</sup>

In July 2018, at a summit organized by Turning Point USA, Sessions told conservative high school students that the main problem on college campuses was the "hard left." He said that there are "elements in our society today who want to stop you and silence you.... They want you to feel outnumbered ... to get discouraged ... to quit." He made no mention of the Professor Watchlist that Turning Point USA is known for: a directory purporting to "expose" college professors





President Donald J. Trump is introduced on stage at the Conservative Political Action Conference (CPAC), March 2, 2019, at the Gaylord National Resort and Convention Center in Oxon Hill, Md

who “advance leftist propaganda in the classroom.”<sup>652</sup> And rather than emphasize rights to free speech for all, or touch on the ways that some conservative media outlets have worked to intimidate left-leaning faculty, Sessions struck a highly partisan tone, suggesting that controversies on campus had targeted, and silenced, only conservative voices.<sup>653</sup>

Notably absent during Sessions’s tenure was any statement supporting or defending the rights of black students who faced retaliation for kneeling during the national anthem during campus athletic competitions.<sup>654</sup> Nor did his Justice Department appear to take up the cases of any of the myriad left-leaning faculty members who endured online threats that made them fear for their lives or chilled their speech and research.<sup>655</sup>

### Changes to Title IX Guidance

PEN America’s *And Campus for All* included an extensive discussion of university investigations of sex discrimination, harassment, and assault, as part of the enforcement of Title IX, a law that prohibits federal funding for schools that discriminate on the basis of sex. While the harassment provisions of Title IX are wide-ranging, we again confine our evaluation to instances that involve free speech.

In *And Campus for All*, we described the changes that resulted from the 2011 “Dear Colleague” letter issued by the Department of Education’s Office for

Civil Rights (OCR). As part of changes made to address the concerning data regarding the prevalence of sexual assault on campus, the letter altered the definition of sexual harassment, including to incorporate “offensive speech ‘of a sexual nature’ that creates a ‘hostile environment’ for education.”<sup>656</sup> *And Campus for All* concluded that “the current implementation of Title IX’s interpretation of the relationship between speech and harassment presents direct and worrying instances of encroachment on free expression rights as well as a far broader but no less damaging chilling effect that is suppressing legitimate speech on campuses.”<sup>657</sup> The report went on to say: “There is no contradiction between advocating for more stringent measures to address sexual harassment and assault on campus, on the one hand, and on the other, insisting on measures to restore proper protections for free speech,” and, among other points, called on OCR to reaffirm its 2001 guidance, which would set a higher bar for what constitutes a Title IX violation, although universities could still of course take other steps to address speech that did not rise to that level.<sup>658</sup>

In September 2017, Secretary of Education Betsy DeVos announced that her department was rescinding the Title IX guidance from 2011 and 2014, and issued interim guidelines while seeking a more permanent solution.<sup>659</sup> These moves were largely viewed as a rebuke

to the Obama-era OCR regulations and hinted of a return to the previous definition of sexual harassment. In November 2018, DeVos announced proposed new guidelines, giving stakeholders and the public a 60-day comment period.<sup>660</sup> Currently, the Education Department is in the process of reviewing these comments, and it is not yet clear what the final regulations will look like or when they may be implemented.<sup>661</sup>

The proposed new guidelines, if adopted, would narrow the definition of sexual harassment, shifting from “unwelcome conduct of a sexual nature” to “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”<sup>662</sup> The proposed rules would also reduce schools’ responsibility to investigate complaints that have occurred off-campus or outside their educational programs or activities. In addition, the Education Department moved to expand due process protections for those accused of sexual harassment or assault—providing measures to ensure that hearings are conducted by a neutral decision maker and under a presumption of innocence, the opportunity for parties to review all evidence, the right of the accused to cross-examine parties and witnesses, and the ability to apply a stricter, “clear and convincing” evidentiary standard rather than a lower, “preponderance of evidence” standard.

While the interim guidelines introduced in 2017 still apply, the Department’s proposed new regulations have significant implications for how all public and private educational institutions that receive federal funds comply with Title IX. Advocates for sexual assault survivors have been highly critical of them,<sup>663</sup> and the ACLU has argued that they would “undermine” Title IX by “substantially reducing” schools’ obligations to respond to sexual harassment and assault claims.<sup>664</sup>

The proposed changes have been cautiously welcomed, however, by those who argued that the Obama-era language was insufficiently concerned with providing due process to the accused and that it chilled the speech of faculty members who taught subject matter with sexual content. Samantha Harris, the vice president for procedural advocacy at FIRE, called the proposed revisions a “marked improvement,” emphasizing that the definition of sexual harassment is “in accordance with established Supreme Court precedent, eliminating the confusion that has led institutions nationwide to adopt overly broad definitions of sexual harassment that threaten student and faculty speech.”<sup>665</sup>

In the same way that PEN America has recognized that an unequal learning environment can hinder the willingness of students of color to speak up in the classroom or on campus, we believe that an overly

permissive atmosphere for sexual harassment and assault can silence students, particularly women. To the extent that, as critics maintain, the new regulations could insufficiently police harassment and assault and impair equal access to education, they could raise new free expression concerns, and we caution against possible overcorrection.

As of this writing, the new guidelines have yet to be adopted, and subsequent changes may alter our assessments. Given this ambiguity, and given the rules’ broad implications, PEN America refrains from passing judgment on the regulations as a whole. That said, the revisions do effectively address the concerns that PEN America has raised in the past. Most notably, we support the efforts to clarify the definition of “sexual harassment” and “hostile environment;” to better distinguish between speech and conduct; and to ensure that the Department of Education’s interpretation of Title IX embodies an appreciation of academic freedom and free speech.

### **Trump’s Executive Order on “Free Inquiry”**

On March 21, 2019, just weeks before the release of this report, President Trump signed Executive Order 13864, titled “Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities.”<sup>666</sup> Surrounded by conservative students and members of conservative organizations, he stated that the directive would send a message to those trying to prevent Americans “from challenging rigid, far-left ideologies.”<sup>667</sup> The order charges 12 federal grant-making agencies with the responsibility to “take appropriate steps . . . to ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable Federal laws, regulations, and policies.”<sup>668</sup> The order does not specify what this entails, leaving it up to the federal agencies to determine how they will ensure that free inquiry is promoted on campuses.<sup>669</sup>

Numerous higher education organizations responded with similar critical statements. Julie Schmid, executive director of the AAUP, called the order is “a solution in search of a problem.”<sup>670</sup> Peter McPherson, president of the Association of Public and Land-grant Universities (APLU), called it “plainly unnecessary,” insisting that “[p]ublic universities are already bound by the First Amendment and work each day to defend and honor it.”<sup>671</sup> Ted Mitchell, president of the American Council on Education (ACE), added that it was not only “unwelcome,” but that it was not clear “what happens next.”<sup>672</sup> He added, “Executive Orders are not self-implementing. What remains to be seen is the process the administration develops to flesh out these requirements and the extent to which it is willing to consult with the communities most





affected—especially research universities.”<sup>673</sup> FIRE meanwhile responded by stating that it would monitor to see if this Order helped address its concerns with censorship on college campuses, or would result in any “unintended consequences.”<sup>674</sup>

In response to the Order, PEN America released the following statement:

“PEN America has extensively documented and spoken out regarding our concerns about threats to free speech on campus, most recently this week in anticipation of this Executive Order being signed. In analyzing President Trump’s Executive Order, we look not just at the formulation on the page, but at intent, context and potential effects. There is nothing wrong with the White House seeking to promote open debate on campus, or stressing that institutions that receive federal research funds comply with the law and promote freedom of thought. There are concrete steps the federal government could take, such as making funds available for campus education on the First Amendment, to advance these goals.

We have several serious concerns with the Order. The directive that federal agency heads, in coordination with the federal Office of Management and Budget, take “appropriate steps” to ensure that institutions receiving such funds “promote free inquiry” and comply with federal law and policy is vague and overbroad. Neither “appropriate steps” nor “free inquiry” are defined, opening the door to interpretations that could impinge upon academic freedom or insert the government into decisions that are properly made by faculty and university leadership. “Free inquiry” must not mean that discredited theories or pseudoscience need to be given a forum on campus.

All U.S. academic institutions are required to uphold the law, and oversight and enforcement mechanisms already exist to ensure such compliance. It is not clear that any additional steps would be appropriate for the federal government to guarantee that an individual university promote the White House’s concept of “free inquiry.” The idea that scientific research or educational grants could be tied to prevailing political winds is anathema to the academic enterprise.

We are concerned that this Order is intended as a shot across the bow, putting researchers,

faculty, and university administrators on notice that speech will now be monitored by the federal government, and that research dollars could be in jeopardy. By making the linkage to research funds, the Order runs the risk of chilling more speech than it protects. Administrators and faculty members may feel the prying eyes of federal officials looking over their shoulders, such that every decision must be reexamined through the lens of whether it would pass muster with a White House that holds university research funds on the line.

We are also cognizant of the larger context in which this Order has been issued. The First Amendment protects all speech regardless of political party or ideological leanings. Yet this Administration has a pronounced pattern of using its muscle to protect certain viewpoints, while either encouraging or even exacting reprisals against speech it finds objectionable or critical. Whether it is in response to protesters at a campaign rally, NFL or college football players taking a knee on the field, or journalists asking tough questions, the Administration has resorted to taunts and intimidation in order to suppress the speech of those with whom it disagrees. The President has even crossed the line into threats and acts of retaliation against journalists whose news coverage he disapproves of, violating the First Amendment (see [PEN America v Trump](#)). The President’s decision to announce this Executive Order at a meeting of the Conservative Political Action Committee underscores the concern that it represents an effort to put an ideological thumb on the scale of federal free speech protections.

If this Executive Order is used to enlist federal agencies in the quest to suppress speech with which the Administration disagrees, federal agency heads and college administrators must mightily resist, including by going to court if necessary. They should vigilantly guard against censorship, self-censorship or other decision-making that aims to appease a White House trying to drive an ideological agenda on university campuses. The President’s invocation of the First Amendment in this Order must not obscure what may turn out to be an effort to flout it.”

PEN America will monitor the implementation of the Executive Order by agencies and universities to determine whether the concerns raised by us and others are borne out.

## STATE-LEVEL CAMPUS SPEECH LEGISLATION 2017-18

STATE AND BILL	FOCUS OF BILL	OUTCOME (AS OF DECEMBER 31, 2018)
Arizona HB 2563*	Requires reporting on censorship, consequences for those who infringe on speech, and forming 15-member university committee to submit an annual report that, among other things, outlines “the barriers to or disruptions of free expression within the universities” and “the barriers to or descriptions of the administrative handling and discipline relating to barriers to or disruptions of free expression within the universities in the state.” <sup>675</sup>	HB 2563 passed and signed into law in 2018. <sup>676</sup>
Alabama HB 94	Prohibits any effort by an individual to prevent others from making public speeches, on public property because of content of speech. <sup>677</sup>	HB 94 introduced in 2018. <sup>678</sup>
California AB 2374* SB 1381	Also known as Free Speech on Campus Act of 2018, AB 2374 requires public colleges and universities to create and disseminate statements that affirm importance of free expression and to provide opportunities to teach history and value of First Amendment. <sup>679</sup> SB 1381 designates publicly accessible outdoor areas on public college and university campuses as forums for free expression.	AB 2374 introduced in April 2018 but did not pass. <sup>680</sup> SB 1371 cleared Senate Judiciary and Senate Education committee but still in process. <sup>681</sup>
Colorado SB62	Mainly designed to prohibit public institutions of higher education from creating free speech zones or policies that otherwise restrict expressive activities to a particular area of campus.	SB 62 passed in April 2017. <sup>682</sup>
Florida SB 4	Also known as Florida Excellence in Higher Education Act of 2018, it prohibits public colleges and universities from establishing “free speech zones.” It also creates right to sue if free speech on campus is interfered with in a way that is “materially and substantially disruptive.”	SB 4 passed in 2018. <sup>683</sup>
Georgia SB 339**	Discourages speaker disinvitations, sets up annual, independent oversight system under control of the Board of Regents, and mandates disciplinary sanctions for those found to have interfered with policies relevant to free speech.	SB 339 passed in 2018. <sup>684</sup>
Idaho HB 622	HB 622 reaffirms need for public colleges and universities to respect free speech rights of students, faculty employees, and invited guests.	HB 622 <sup>685</sup> introduced in 2018 but did not pass.
Illinois HB 2939*	Also known as “Campus Free Speech Act,” it requires the governing board of each public university and community college to develop and adopt policy on free expression and requires campuses to discipline students who disrupt speakers.	HB 2939 introduced in 2017 but did not pass. <sup>686</sup>
Iowa SB 3120**	Requires state Board of Regents and board of directors of each state college to adopt policy that supports First Amendment rights on campus and to release report of any barriers to or incidents of disruption of free expression on campus.	SSB 3120 passed Senate in 2018 but died in House. <sup>687</sup>
Kansas SB 340	Also known as “Campus Free Speech Protection Act,” the bill requires public institutions in higher education to reaffirm their commitment to free speech by sanctioning free speech zones and overboard campus speech codes, as well as prohibiting the disinvitations of speakers.	SB 340 was introduced in 2018 but did not pass. <sup>688</sup>



## STATE-LEVEL CAMPUS SPEECH LEGISLATION 2017-18 (CON'T)

STATE AND BILL	FOCUS OF BILL	OUTCOME (AS OF DECEMBER 31, 2018)
Kentucky SB 17	Has many aspects related to religious expression but also enacts a statutory ban on public campuses' ability to designate free speech zones. <sup>689</sup>	SB 17 passed in 2017. <sup>690</sup>
Louisiana HB 269 SB 3 64	HB 269 requires public colleges to develop free speech policy, create annual reports on state of free expression, and establish sanctions for students who interfere with free expression. SB 364 eliminates free speech zones, designates Louisiana public postsecondary institutions as traditional public forums, and implements measures to hold institutions accountable for protecting free speech.	HB 269 passed in House and Senate <sup>691</sup> but vetoed by governor June 2017. <sup>692</sup> SB 364 <sup>693</sup> went into effect June 2018. <sup>694</sup>
Michigan SB 0349 SB 0350*	SB 0349 limits public colleges ability to restrict expressive conduct in the public areas of its campuses and empowers individuals whose free speech rights have been violated to bring legal action. <sup>695</sup> SB 0350 requires state universities and community colleges to implement free speech policies, including adopting policies that set forth different disciplinary measures for students found to be interfering with the free expression of others. <sup>696</sup>	SB 0349 introduced in 2017 but did not pass. <sup>697</sup> SB 0350 introduced in 2017 but did not pass. <sup>698</sup>
Minnesota SF 2451* HF 3394	Also known as Campus Free Expression Act, SF 2451 requires state colleges and universities to adopt free expression policy. HF 3394 functions similarly but adds requirement that public higher education institutions publish report on free expression on their campuses.	SF 2451 <sup>699</sup> and HF 3394 <sup>700</sup> introduced in 2018.
Nebraska LB 718*	Also known as Higher Education Free Speech Accountability Act it requires public colleges and universities to set free speech policies and present annual reports to legislature.	LB 718 introduced in January 2018. <sup>701</sup>
New York A4066	Designates outdoor areas of college campuses as public forums as defined by the First Amendment.	A4066 introduced in 2018. <sup>702</sup>
North Dakota HB 1329	Requires state colleges to adopt a free speech policy that, among other things, reaffirms content-neutral speech regulation, discourages speaker shut downs, and/or disinvitations.	HB 1239 passed in House but killed in Senate in 2017. <sup>703</sup>
North Carolina SL 2017-196* (aka HB 527)	Also known as North Carolina Restore Campus Free Speech Act it requires state universities to produce annual reports on campus free speech, bans free speech zones, and prohibits expression that "substantially interferes with the protected free speech rights of others." <sup>704</sup>	SL 2017-196 approved by Assembly and became law (without governor's signature) in December 2017. <sup>705</sup>
Ohio HB 363	Also known as Campus Free Speech Act, it requires public universities to produce report on campus free speech within 180 days after passing bill and to notify government within 30 days when action is brought against state institution of higher education for alleged violation of expression rights. <sup>706</sup>	HB 363 introduced in 2017. <sup>707</sup>
Oklahoma SB 1202**	Requires the Oklahoma State Regents for Higher Education to adopt policy on free expression that includes disciplinary procedures for students in public colleges and universities who "infringe upon the rights of others to engage in or listen to expressive activity."	SB 1202 introduced in February 2018. <sup>708</sup> Did not pass.

## STATE-LEVEL CAMPUS SPEECH LEGISLATION 2017-18 (con't)

STATE AND BILL	FOCUS OF BILL	OUTCOME (AS OF DECEMBER 31, 2018)
South Carolina H 4440**	Requires public universities and community colleges to adopt policies that include issuing a digital report, on state of free speech on their campuses. <sup>709</sup>	H 4440 introduced in 2018. <sup>710</sup>
South Dakota HB 1073 SB 198	Both deem any outdoor areas on state campuses as public forums as well as create a process for students to sue public universities if barred from protesting on campus.	HB 1073 <sup>711</sup> and SB 198 <sup>712</sup> introduced in 2018 but did not pass.
Tennessee SB0723*	Requires that public universities and colleges eliminate free speech zones and create policies in line with the University of Chicago's statement on free expression. The legislation additionally prohibits speaker disinvitations, protects faculty from being punished for classroom speech, and protects student groups from losing funding due to viewpoint discrimination.	SB0723 introduced in 2017 and passed. <sup>713</sup>
Texas SB 1151 HB 2527	SB 1151 requires state universities to ensure students' rights to partake in free expression activities, prohibits free speech zones. HB 2527 provides recourse for students who believe their free-speech rights have been violated.	SB 1151 introduced in 2017 but died in House. <sup>714</sup> HB 2527 introduced in House but died in committee. <sup>715</sup>
Virginia VA HB 344**	Requires each public institution of higher education to educate students on First Amendment and develop digital and publicly accessible annual report on institutions' compliance relating to free speech on campus. <sup>716</sup>	HB 344 passed in 2018. <sup>717</sup>
West Virginia HB 4203**	It requires universities and colleges to adopt policy on free expression and to produce annual report on state of free expression. It mandates "a range of disciplinary sanctions for anyone under the jurisdiction of a state institution of higher learning who interferes with the free expression of others."	HB 4203 introduced in January 2018. <sup>718</sup>
Wisconsin AB 299 SB 250* AB 440 SB 351	AB 299 and SB 250 require University of Wisconsin Board of Regents to adopt policy on free expression and to craft report on free expression issues. Bills mandate discipline for any student who "interferes with the free expression of others." AB 440 and SB 351 prohibit protests that infringe on rights of others to engage in or listen to expressive activity.	AB 299 introduced in June 2017 and approved but failed to pass in Senate. <sup>719</sup> University of Wisconsin nonetheless implemented policy. SB 250 introduced in 2018 but did not pass. <sup>720</sup> AB 440 <sup>721</sup> introduced in 2017 but failed to pass. SB 351 <sup>722</sup> introduced in 2018 but failed to pass.
Wyoming HB 137*	Also known Wyoming Higher Education Free Speech Protection Act, it prevents students from interfering with free speech events and sets up disciplinary measures for those who do. It also requires faculty members to be "cautious in expressing personal views in the classroom and not to introduce controversial matters bearing no relationship to the subject taught."	HB 137 introduced in February 2018 but defeated without vote. <sup>723</sup>

\*based in whole or in part on Goldwater proposal

\*\*based in whole or in part on FORUM Act





## Special Section

# ECHOES ABROAD

The United States is not the only country where campus speech controversies have proliferated in recent years. Similar debates surrounding speakers, protests, professors, and the regulation of speech have arisen abroad as well, particularly in other Anglophone countries. As the concepts of trigger warnings and safe spaces, and pressures to increase diversity and inclusion, have spread internationally, a similar wave of resistance has spread as well, producing nearly identical debates. And as U.S. campuses have experienced a surge in hateful speech and a rise in demands to reckon with the legacies of slavery and racism, these developments, too, have seen global counterparts.

These trends have presented challenges to university leaders and governments worldwide to protect free speech and academic freedom while simultaneously supporting diversity and inclusion. At the same time, in numerous countries the repression of scholars has become extreme, with professors violently attacked or jailed<sup>724</sup>—galvanizing greater international action in an increasingly globalized academy.

### Trends in Anglophone Countries

The question of whether or not there is a campus free speech crisis is being actively debated in Canada,<sup>725</sup> the United Kingdom,<sup>726</sup> Australia,<sup>727</sup> and New Zealand<sup>728</sup> in ways that sound remarkably familiar to American ears. The legal context for regulating speech differs in each country, but in the wake of efforts to cancel speeches at universities, there has been vocal support for the notion that universities should facilitate broad inquiry and provide platforms for all ideas, even offensive ones. This principle has been widely echoed by faculty, university leaders, and politicians alike. Nonetheless, as in the United States, some worry that student protesters' counter-speech has gone too far and that a climate of oversensitivity is shrinking the bounds of academic discourse, in both research and teaching. National governments, sometimes reacting to these views, have turned to legislative solutions, in some cases appearing to borrow tactics and policies from one another.

As in the United States, a number of other Anglophone countries have experienced a rise in hateful acts and speech on campus. In Canada, far-right slogans and flyers have been posted at numerous universities.<sup>729</sup> In the United Kingdom, nativist and nationalist incidents on campus have risen by 60 percent in the past two years, and students of color

*It is difficult to distinguish a recent dispute in Sydney from one in Manchester from one in Toronto. The issues, tactics, and sensationalism seem to cross oceans as if they are jumping puddles.*

have reported hearing racist chants in residential halls and suffering physical violence. Anti-Semitism and Islamophobia have reportedly been increasing, with students found responsible for these acts facing consequences ranging from writing an essay of reflection to expulsion.<sup>730</sup> In Australia, international students, particularly from China, have been targets of racist and xenophobic attacks. In 2017 at universities in Melbourne, racist flyers directed at Chinese students were posted around campus, and at the University of Sydney “Kill Chinese” was written above a swastika.<sup>731</sup>

In Australia, several attempts by protestors to shut down controversial speakers have played out similarly to events in the U.S. One such incident occurred in August 2018 at the University of Western Australia, where an American pediatrician known as a “transgender skeptic” was scheduled to give a lecture.<sup>732</sup> Students took to social media to protest the appearance and circulated a petition calling for its cancellation that garnered more than 5,000 signatures. The event was ultimately canceled, not because of the speaker’s reputation but because the organizers “were unable to provide the requested information to meet the venue hire conditions.”<sup>733</sup>

In the next month, students at Sydney University attempted to shut down a talk by Bettina Arndt, a sex therapist and critic of the #MeToo movement. Despite vociferous objections from the student body, the university allowed the event to proceed. But when Arndt’s talk was supposed to take place, nearly 40 students blocked access to it and allegedly “pushed and shoved” those who had come to attend.<sup>734</sup>

In 2017, Melbourne’s Monash University adopted a policy requiring professors to warn students of potentially distressing or triggering material before distributing it to the class.<sup>735</sup> In an interview with ABC

News, Chris Berg, a fellow at the Institute of Public Affairs, a conservative, Melbourne-based think tank, pointed to the United States as a cautionary example: “We’ve seen how this has played out in the U.S.,” he said, “and it can turn into a censorious, highly politically correct [culture] and highly harmful to the mission of education that universities exist for.”<sup>736</sup>

In 2018, these developments led Dan Tehan, Australia’s education minister, to consider government action. According to *The Sydney Morning Herald*, one of his proposals was to make students protesters pay for their own security<sup>737</sup>:

We want to make sure that there are procedures and structures in place that mean events can occur ... and not be put in jeopardy because of increased security costs. It might well be those people who seek to disrupt [who] might have to end up bearing some of the responsibility of the financial cost. It should not be based solely on those who want to run events [having to pay].<sup>738</sup>

While Tehan’s plan to charge protestors has not been enacted, he has maintained that he intends to address the issue and has hired a former High Court chief justice, Robert French, to lead an inquiry into free speech on university campuses.<sup>739</sup>

Glyn Davis, a political science professor at Australian National University, has admonished Tehan and others for basing their cries of crisis on little more than “a small number of anecdotes repeatedly told.”<sup>740</sup> At a conference on academic freedom, he observed that “the dependence on U.S. material is striking.”<sup>741</sup> He noted that a conservative think tank’s report on campus free speech in Australia<sup>742</sup> “opens its discussion of ‘substantial hostility to free speech’ not with Australian content but with American cases—Middlebury College, Evergreen State College, and widely reported clashes at the University of California Berkeley over an appearance by ‘conservative provocateur’ Milo Yiannopoulos.”<sup>743</sup>

In Canada, perhaps no figure has been more divisive than Jordan Peterson, a professor of psychology at the University of Toronto who gained attention for his opposition to legislation that added gender identity as a prohibited form of discrimination under the country’s Human Rights Act.<sup>744</sup> Peterson’s outspoken comments on gender and women’s issues, and his invocation of the right to freely express his provocative ideas, have led some to see him as a crusader for free speech, like some conservative speakers on U.S. campuses. Others have denounced Peterson’s views as hate speech, and he has been disinvited from some speaking engagements.<sup>745</sup>

When hundreds protested during his appearance at Queen’s University, he paused mid-speech to decry his detractors’ close-mindedness.<sup>746</sup> In a related incident, Lindsay Shepherd, a teaching assistant at Wilfrid Laurier University, encountered backlash for showing a video of Peterson discussing his views of gender-neutral pronouns in her communications class and was reprimanded by two faculty members and the head of the school’s diversity and equity office.<sup>747</sup> Shepherd surreptitiously recorded the disciplinary meeting, and the recording sparked public anger.<sup>748</sup> Shepherd sued the university, arguing that it did not protect her right to free speech and hindered her future job prospects.<sup>749</sup> Peterson, too, sued Wilfrid Laurier, claiming that during the supposedly private disciplinary meeting, it defamed his character with its harsh criticism.<sup>750</sup>

In Ontario in August 2018, the newly elected Progressive Conservative provincial government under Premier Doug Ford instituted a requirement that by January 2019, all publicly assisted colleges and universities had to develop and enact an explicit free speech policy that met a set of minimum standards.<sup>751</sup> These standards include:

- A definition of freedom of speech
- Principles based on the University of Chicago Statement on Principles of Free Expression:
  - Universities and colleges should be places for open discussion and free inquiry
  - They should not attempt to shield students from ideas or opinions that they disagree with or find offensive.
  - While members of the academic community are free to criticize and contest views expressed on campus, they may not obstruct the freedom of others to express their views
  - Speech that violates the law is not allowed

Disciplinary measures for students who violate the policy (e.g., through ongoing disruptive protest that significantly interferes with the ability of an event to proceed)

- Compliance with the policy as a condition for student groups’ financial support and recognition
- Use of existing mechanisms at the college or university to handle complaints and ensure compliance. Complaints against an institution



that remain unresolved may be referred to the Ontario ombudsman<sup>752</sup>

The rules also require colleges and universities, starting in September 2019, to submit an annual report on their compliance to the Higher Education Quality Council of Ontario.<sup>753</sup>

This slate of mandates bears obvious resemblance to legislative efforts in the United States. Even though many higher-education institutions already had free expression policies and dispute resolution mechanisms in place, Ontario's provincial government seemed intent on imposing further regulation. David Robinson, the executive director of the Canadian Association of University teachers, called the new policy a "solution in search of a problem."<sup>754</sup> Creso Sá, director of the Centre for the Study of Canadian and International Higher Education at the University of Toronto, described it as part of the Premier Ford's political theatrics, explaining: "If the free speech policy were anything but a show, we would expect to see a modicum of thought given to what the government expects colleges and universities to do that is different from what they have been doing, and adds to what is already determined by the law."<sup>755</sup> Although few have objected to the provisions in the Chicago Principles, some have found it peculiar that, given Canada's different legal framework for free speech, Ontario promoted an American framework over a domestic one, such as the University of Toronto's 1992 Statement on Freedom of Speech.<sup>756</sup> As in Australia, this situation reflects U.S. influence, and various professors have similarly chafed at this dominance, resisting the new requirements as well as the very idea that Canadian colleges and universities are experiencing a full-blown free-speech crisis.<sup>757</sup>

In December 2018, colleges in Ontario rushed to adopt a shared free speech policy, and many universities pushed new policies through their decision-making bodies, despite some cries from faculty and others that the process had not allowed sufficient time for their input.<sup>758</sup> Mirroring disputes in the United States and Australia, some felt strongly that the requirements overall were directed more at restraining protesters' than protecting their freedom of speech. On this issue, RM Kennedy, the college faculty executive chair of the Ontario Public Service Employee Union, stated:

This fundamentally undemocratic policy was drafted by the employer to the government's exact specifications. It's not a free-speech directive; it's an anti-protest edict that will have a chilling effect on the entire college system

and beyond.... The policy allows college administrators to designate where and when students and faculty and others may protest on campus. This is a wakeup call for anyone who cares about democracy.<sup>759</sup>

In the United Kingdom, a similar national debate has unfolded. The notion of "no-platforming," for example, in which controversial speakers are denied a platform to speak, has its origins in a policy first developed by the National Union of Students (NUS) in the 1970s<sup>760</sup> as a way to bar "self-proclaimed fascists and Holocaust-deniers." Some argue that, as the practice has evolved to target a wider range of speakers, it has transformed into a form of academic censorship.<sup>761</sup> But university students in the U.K. largely support it. A 2016 survey found that 63 percent were in favor of the NUS having a no-platforming policy, and 54 percent believed that it should enforce the policy "against individuals they believe threaten a safe space."<sup>762</sup>

The speakers themselves have also sparked protest on U.K. campuses, particularly around gender issues. In October 2015, the University of Manchester Students' Union denied a platform to Julie Bindel, a feminist scholar,<sup>763</sup> who in an article from 2004, argued against the right of trans women to use female bathrooms and against sex change more generally.<sup>764</sup> A co-founder of the group Justice for Women, Bindel was rejected because the Students' Union believed that her speech could "incite hatred towards and exclusion of trans students."<sup>765</sup> In a subsequent article for *The Guardian*, Bindel criticized "the campus craze of banning outspoken women" and wrote, "The current climate in universities of creating 'safe spaces' in which no evil must enter is pathetic."<sup>766</sup> In that same month, under similar circumstances, students at Cardiff University protested the invitation of writer Germaine Greer to campus. An online petition urging the university to cancel Greer's lecture collected more than 3,000 signatures. Like Bindel, Greer was targeted for her controversial statements regarding transgender women, including suggesting they are under a "delusion."<sup>767</sup> Ultimately, however, the campaign to disinvite her failed.<sup>768</sup>

A number of other public figures have been no-platformed in the U.K. In 2016, Fran Cowling, the NUS's LGBTQ representative, refused to share a stage with Peter Tatchell, a prominent gay rights campaigner, because Cowling believed him to be racist and transphobic.<sup>769</sup> Though in the end Tatchell was allowed to speak, Cowling's accusations of bigotry spurred weeks of online debate on the political divisions within the LGBTQ movement and the status of free speech at the university.<sup>770</sup>

That same year, London Mayor Boris Johnson received a letter from King's Think Tank, a student policy group at King's College London, informing him that he was banned from their speaking events because of his remarks about Barack Obama's Kenyan heritage and supposed "ancestral dislike of the British Empire."<sup>771</sup> Major news outlets, including *The Telegraph*, *The Independent*, and *HuffPost*, reported that the politician had been no-platformed.<sup>772</sup> As the story gained traction on social media, representatives of the King's Think Tank released an official statement on Twitter that apologized and revealed that the no-platforming letter was sent by neither a student at the college nor a member of King's Think Tank but was made to appear official.<sup>773</sup>

While wide support for censoring speakers should raise red flags, a number of articles have suggested that despite the outrage that it stirs, the policy is rarely applied. The BBC reported that in recent years only a small number of speakers' events have been canceled or shut down because of student protests.<sup>774</sup> "Universities host hundreds, if not thousands, of events each year, among a student population of over 2 million," said Alistair Jarvis, head of Universities UK. "The vast majority of these events pass without incident."<sup>775</sup> William Davies, a sociologist and political economist at Goldsmiths, University of London, agreed that the muzzling is overhyped. As an example, he noted that *Spiked*, an online current affairs magazine that compiles instances of censorship, uses an exceptionally liberal definition, often treating "any written code of conduct (such as HR policy on the use of abusive language) as a form of censorship."<sup>776</sup>

As part of this debate, in March 2018, a Joint Committee on Human Rights, convened by the British Parliament, published a report titled "Freedom of Speech in Universities," with recommendations for improving the atmosphere for free speech on university campuses.<sup>777</sup> Sam Gyimah, the higher-education minister, held a summit in May 2018 to raise awareness of these issues and called on universities to work with the government to develop new guidelines to clarify "the rules for both students and universities" in protecting free speech on campuses.<sup>778</sup> The new guidelines, released in February 2019 by the Equality and Human Rights Commission, were crafted in collaboration with numerous organizations from across the U.K. higher-education sector.<sup>779</sup> As David Isaac, chair of the commission, explained, "Our guidance makes clear that freedom of speech in higher education should be upheld at every opportunity and should only be limited where there are genuine safety concerns or it constitutes unlawful behaviour."<sup>780</sup> Under the guidelines, bans of certain organizations and individuals by student unions may

***Would-be government regulators, especially at the highest levels, should be thoughtful in ensuring that proposed legislative solutions to the campus speech "crisis" do not spawn copycat laws countries where the potential for abuse is much greater.***

be deemed unlawful.<sup>781</sup> At the same time, however, the rules specify that universities have a "duty of care" to protect students, that they may cancel an event when public safety is at stake, and that student unions must consider the potential harm that a speaker could inflict on some students when considering an invitation.<sup>782</sup> The new guidelines reflect a similar set of concerns for protecting campus free speech that have evolved in tandem in the United States, Australia, and Canada.

Although governments can play constructive roles in protecting campus free speech—bringing attention to important issues, clarifying the line between universities' duty of care and their obligation to defend free expression—we advise caution and a light touch. The U.K.'s collaborative approach is better than the more common tendency of governments to impose top-down policies, but because speech policies are so susceptible to political manipulation, politicians should be extra vigilant about ensuring that their rules do not infringe on the autonomy of scholars and of the academy generally.

While most of the above speaker battles have been homegrown, the parallels among them are striking, and many have fanned international outrage. Peterson has found a significant following outside Canada, and one of his most contentious interviews was on the United Kingdom's Channel 4 with Cathy Newman.<sup>783</sup> Yiannopoulos, who gained notoriety in the United States, created a stir at the University of Glasgow when its student union voted to ban him from a Livestreamed Q&A because of his "deplorable" opinions.<sup>784</sup> *Red Pill*, a documentary about the





U.S. men's rights movement, caused a ruckus when Sydney University's student union pulled funding for its screening.<sup>785</sup> The screening went forward a month later, and minor clashes between supporters and detractors had to be broken up by police.<sup>786</sup>

Much like the global student upheavals of 1968, it is difficult to distinguish a recent dispute in Sydney from one in Manchester from one in Toronto. The issues, tactics, and sensationalism seem to cross oceans as if they are jumping puddles.

### RECKONING WITH HISTORY: #RHODESMUSTFALL

Much as some U.S. universities have had to reckon with historical ties to slavery and the Confederacy, so too have schools in the U.K. and South Africa wrestled with the legacy of colonialism, and in particular the figure of British colonialist Cecil Rhodes. In South Africa, the #RhodesMustFall movement, which started in 2015 at the University of Cape Town (UCT),<sup>787</sup> saw students pushing for the removal of a statue of Rhodes from the campus. A former prime minister of the Cape Colony in what is now South Africa, Rhodes was the father of British colonialism in the region and instituted policies that many see as having laid the groundwork for apartheid.<sup>788</sup> The protests began when one student defaced the statue with excrement, and in the following weeks students "occupied part of an administration building and wrapped the statue in black plastic."<sup>789</sup> Kgotsi Chikane, a leader of the movement, told NPR: "If we can see that the statue is a problem, we can start looking more deeply at the norms and values of institutionalized racism that don't physically manifest themselves, that are harder to see."<sup>790</sup> In April 2015, following a month of fervent protests, the university removed the Rhodes statue to cheering crowds.<sup>791</sup>

#RhodesMustFall soon spread to the United Kingdom, where in 2016 students at the University of Oxford lobbied to have their own statue of Cecil Rhodes removed.<sup>792</sup> The organizers at Oxford were directly inspired by the efforts of student protesters in South Africa, with one student telling *The Guardian*: "Cecil Rhodes is the Hitler of southern Africa.... The fact that Rhodes is still memorialised with statues, plaques and buildings demonstrates the size and strength of Britain's imperial blind spot."<sup>793</sup> As in South

Africa, students saw the campaign as being about more than just Rhodes. Student Daisy Chanley told *The Guardian*: "This isn't just a campaign against Cecil Rhodes - it's a campaign against racism at Oxford, of which the Rhodes statue is a small but symbolic part."<sup>794</sup> The Oxford campaign's outcome, however, did not mirror South Africa's; the college ultimately decided to keep the statue, agreeing instead to provide "clear historical context to explain why [the statue] is there."<sup>795</sup> The school stated that it had received more than 500 submissions on the topic and that the "overwhelming message we have received has been in support of the statue remaining in place."<sup>796</sup> However a leaked report also revealed that college leaders had feared a promised 100 million pound gift would be retracted.<sup>797</sup>

The different outcomes can likely be traced to differing power structures and constituencies in South Africa versus the U.K., however in the U.S. too we have seen that different schools determine different paths for how to contend with difficult histories and the legacies of institutional racism. The campaign that began in South Africa had echoes in the U.S. as well. At Harvard in late 2015 a group of law students organized around a "Royall Must Fall" campaign to have the crest of the Law School retired because it included the symbol of a former slaveholding family.<sup>798</sup> The dean appointed a committee made up of faculty, students, alumni, and staff to examine the issue and in 2016 they recommended removal of the crest, which followed shortly thereafter. The recurrence of similar campaigns for reckoning with the lingering symbols of the past has been an international phenomenon and sparked no shortage of debate, regardless of the continents on which these movements occur.

## Global Academic Freedom

While free speech debates rage in some countries, academics, students, and the principle of academic freedom face far graver threats in many others. According to Scholars at Risk, an international network that protects academic freedom, over the course of the period from September 2017 to August 2018 there were "294 reported attacks on higher-education communities in 47 countries."<sup>799</sup> Of these attacks, 79 involved "killings, violence, or disappearance," and 88 led to imprisonments. In all, at least 875 students were killed, arrested, or subjected to other coercive forces.<sup>800</sup> The breadth and frequency of these acts raise alarms for the traditions of academic freedom, which should be upheld as a global principle.

Governments that have been especially aggressive toward scholars include Turkey, China, Iran, and Saudi Arabia. In Turkey, for example, as part of a crackdown on freedoms of all kinds that was sparked by a coup attempt in July 2016, numerous academics have been prosecuted under criminal law, and by the end of 2017, 5,822 of them had been dismissed from universities throughout the country.<sup>801</sup> Human Rights Watch examined many of the professors' dismissals and found insufficient or no evidence to warrant the mass firings.<sup>802</sup>

In China, Uyghur academics have been targeted as part of a wave of horrific repression against this ethnic and religious minority in which as many as a million people are believed to be held in "re-education camps."<sup>803</sup> In December 2018, Uyghur professor Rahile Dawut vanished, and her family and close friends are convinced that her disappearance is part of the government's anti-Uyghur campaign.<sup>804</sup> In late 2018 it was revealed that several Uyghur scholars had been sentenced to death or life imprisonment for the charge of "separatism."<sup>805</sup>

In December 2017 in Iran, students from the University of Tehran were detained for their involvement in anti-government demonstrations protesting economic stagnation and lack of opportunity. By January, reformist lawmaker Mahmood Sadeqi estimated, 58 students, many of them not involved in the protests, had been held in custody,<sup>806</sup> part of a larger movement across Iran that resulted in the arrest of some 150 students. Scholars elsewhere have been detained for their activism, in countries like Ethiopia, India, and Bangladesh.<sup>807</sup> (More incidents of global academic repression are documented in the table-of-incidents section of the 2018 Scholars at Risk Academic Freedom Monitoring Project.<sup>808</sup>)

Some governments have targeted single universities, or fields of study. Under Prime Minister Viktor

Orbán, the Hungarian government has banned gender studies programs, attempted to seize control of scientific research funding, and passed legislation that threatened the survival of Central European University (CEU).<sup>809</sup> In 2017, in a move widely perceived as a direct attack on CEU, the government passed a law that made it illegal for a university to be registered in a country where it does not have a campus. As CEU has dual accreditation in Hungary and the United States but its only campus is in Budapest, the move left the university, in the words of its president, in "a state of legal limbo."<sup>810</sup> Orbán has targeted CEU because it was founded by the Hungarian-born American philanthropist George Soros and stands for values like pluralism and liberal democracy—values that Orbán has attacked as he has transformed his country into what he calls an "illiberal democracy,"<sup>811</sup> modeled on nations like Turkey and Russia. In December 2018, CEU announced it was leaving Hungary because of these pressures.<sup>812</sup> Similar dynamics have also riled some institutions in Russia in the past two years, where two Western-oriented universities, the European University and the Moscow School of Social and Economic Sciences, had their teaching licenses revoked.<sup>813</sup>

In October 2018 in Brazil, just before far-right candidate and Trump ally Jair Bolsonaro was elected president, police raided universities across the country, often without warrants, to question professors and confiscate materials that called Bolsonaro fascist—deemed "illegal advertising" for Bolsonaro's center-left opponent.<sup>814</sup> A bill first introduced in 2018 and recently re-introduced in Brazil's Congress would ban the use of the terms "gender" and "sexual orientation" in university classrooms and prohibit professors from expressing any political views in their teaching.<sup>815</sup>

An international view of academic freedom brings sobering perspective to our own homegrown debates. Despite the uncanny parallels around free speech controversies, it is the differences that can be most illuminating. Across the world, academic freedom is deeply endangered, not by crusading students but by repressive governments and powerful interests that are hostile to scholarly inquiry.<sup>816</sup> Portraying students as dangerous ideologues risks seeding the rhetorical ground for autocrats who see universities and scholars as the enemy. Would-be government regulators, especially at the highest levels, should be thoughtful in ensuring that proposed legislative solutions to the campus speech "crisis" do not spawn copycat laws countries where the potential for abuse is much greater.



PEN America

# PRINCIPLES ON CAMPUS FREE SPEECH

PEN America’s Principles on Campus Free Speech were originally developed as part of our landmark 2016 report, *And Campus for All*. We add to these principles here to reflect changing dynamics and new challenges on U.S. campuses.

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## OVERVIEW

- While free speech is alive and well on campus, it is not free from threats, and must be vigilantly guarded if its continued strength is to be assured.
- Current campus controversies merit attention and there have been a significant number of troubling instances of speech curtailed amid what seems to be an increasingly tense campus environment. But these controversies in many cases represent campus communities sorting out differences in values, however heatedly. They represent an area of serious concern but not a wholesale “crisis” for free speech on campus.
- At times, protests and forms of expression are treated as if they are incursions on free speech when in fact they are manifestations of free speech.
- Many of today’s campus controversies that implicate free speech and the First Amendment are fueled by legitimate concerns about racism, discrimination, inclusion, and inequality. The failure at times to recognize these factors may impair efforts to defuse conflict and safeguard free speech.
- Free expression should be recognized as a principle that will overwhelmingly serve not to exclude or marginalize minority voices, but rather to amplify them. Free

speech protections have been essential to the movements to counter racism, redress inequalities and advance social justices.

- By acknowledging and addressing legitimate concerns regarding racism and bigotry in the context of free speech debates, universities can help ensure that the defense of freedom of expression is not misconstrued as a cause that is at odds with movements for social justice.

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## THE CAMPUS CLIMATE

- Administrators must look hard at how physical barriers, historical traditions, inequalities, prejudices, and power dynamics can weigh against openness, and take concrete steps to alleviate those burdens.
- Campus discourse should be predicated on the presumption of respect for differences, including differences of view that cause disagreement.
- Respect entails an obligation to listen to understand what words may cause offense to others and why, and to conscientiously consider avoiding such words when no offense is intended.
- The duty of care involved in understanding different perspectives and learning to anticipate where offense might be caused is heightened for administrators and faculty when they are

carrying out institutional duties.

- Violence, threats, and harassment are never appropriate. However, vociferous, adamant, and even contentious argument and protest have their place.
- College should be acknowledged as a time for students to engage with new ideas and participate in robust debates, which can involve testing boundaries and experimenting with forms of speech and activism. As such, consequences for errors of judgment should be commensurate, and geared toward the possibility of learning and future improvement.
- An environment where too many offenses are considered impermissible or even punishable becomes sterile, constraining, and inimical to creativity.
- So-called “free speech zones,” wherein schools limit activities such as pamphleteering or spontaneous demonstrations to contained areas on campus, may violate the First Amendment and contravene principles of free speech.
- Schools should refrain from establishing policies or imposing facially neutral rules that either intend or have the effect of discriminating against speakers based upon the content of their speech.
- Administrators should ensure equitable space and opportunities

for diverse political perspectives and thought.

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## HATEFUL SPEECH

- Hateful speech that is intended to menace, intimidate or discriminate against an individual based upon a personal characteristic or membership in a group can impair equal access to the full benefits of a college education and the ability of all students to participate in campus discourse.
- In an environment of rising incidences of hateful speech and hate crimes nationally, the potency of individual instances of hateful speech on campus can be heightened, increasing the psychological harm that such speech can cause and underscoring the importance of effective institutional responses.
- That some individuals may experience offense or insult or negative feelings such as anger, resentment, frustration, or discouragement in response to others' speech is not sufficient grounds to limit that speech, because by its nature speech frequently does give rise to such feelings.
- Conflating the expression of controversial or even offensive viewpoints with hateful speech can result in the suppression of open discourse and trigger a backlash from groups whose expression is deterred or punished despite not being intentionally hateful.
- Administrators have an imperative to be responsive to threats, hateful intimidation, and students' encounters with overt racism and other forms of discrimination. This responsiveness is imperative to nurturing an environment where

all feel empowered to participate in the free exchange of ideas and opinions.

- Effective responses to hateful speech include counter-messaging, condemnations, direct support to targeted individuals and groups, dialogue, and education. In the case of hate crimes, harassment and any other conduct that violates the law, aggressive disciplinary response is warranted.

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## CAMPUS SPEAKERS

- Campuses, both public and private, should keep their platforms accessible to a wide variety of academic and popular opinions, while fostering a culture where speech and reasoned debate are seen as the best tools for confronting mistaken, wrongheaded or hateful ideas.
- A decentralized approach to campus speakers, where student groups, academic departments, classroom teachers and others are free to invite whom they wish to campus without having to receive prior administrative approval can help foster exposure to the widest breadth of ideas, although student groups will usually benefit from consultation with a faculty adviser.
- When an invited speaker is likely to be controversial, those issuing the invitation should consider whether outreach to other stakeholders, facilitating counter-speech or other measures are appropriate to ensure that the speech is aired without negative repercussions.
- Once a body has decided to extend an invitation to a campus speaker, the decision by

administrators' to override that choice and rescind the invitation should be made only in the rarest of circumstances.

- Except in the most extreme cases, concerns over threats of violence or the potential outbreak of violence should not be grounds for withdrawing an invitation or canceling a controversial speech or event.
- That a campus event may meet with protests should not be considered a reason to suspend it.
- Wherever possible, campuses should not allow security costs to be grounds for withdrawing a speaking invitation, recognizing that such costs are unavoidably linked to the anticipated reaction to the content of speech and are thus viewpoint specific.
- If security costs for campus events are born by inviting organizations or speakers themselves, they must be apportioned based on content and viewpoint neutral policies.
- When a speaking invitation sparks protests, those who object and wish to protest should have an opportunity to make themselves heard.
- Protesters should not be permitted to shutdown, shout-down or obstruct speech, preventing others from hearing the speaker.
- Some speakers invited to campus fall into the category of professional provocateurs, whose primary aim is to shock, offend, and build their own notoriety when they are silenced or censored. While there is no obligation to invite such speakers, when invitations are made through proper, authorized





campus channels such speakers should be permitted to speak.

- When a university provides a platform to a figure who contradicts its values, leaders should strenuously and unequivocally affirm their values, explaining their position in considerable detail, while still permitting the speaker to speak.

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### **CALLS TO PUNISH SPEECH**

- Institutions should be careful to avoid any form of discipline or punishment solely for legally protected speech.
- While demands for punishment themselves constitute protected speech, calls to punish speakers for their speech have a chilling effect and are usually inimical to an open environment for ideas.
- As forums and guardians of open debate, campuses must resist pressure from external actors and campus constituencies to curtail and punish speech. Campus leaders should engage legitimate complaints through dialogue, counter-speech and support while defending the rights of speakers to voice their opinions without fear of official reprimand or discipline.
- Administrators and campus leaders must be consistent in coming to prompt, full-throated defense of a faculty member's right to exercise academic freedom without fear of dismissal, retaliation, or loss of position even when the speech in question is controversial.
- When campus constituents are targeted by doxxing, online harassment or other unofficial reprisals for speech, they should enjoy the support of campus

administrators in safeguarding themselves from such reprisals, including through the pursuit of disciplinary action against those responsible.

- Universities should not shy away from commenting on or denouncing the content of a faculty member's speech when it contravenes a university's stated values. It does not constitute retaliation or chilling for a university president or leader merely to criticize, without seeking punishment, the content of a faculty member's speech in such cases. Such counter-speech can be an effective reassurance to various university constituencies when hateful speech arises from faculty. Doing so, however, should never preclude the campus from doing everything in its power to shield faculty from threats to their safety or position as a result of such speech.

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### **FACULTY SPEECH AND EXPRESSION**

- With the rise of social media and new methods of recording and distributing information, faculty members should not expect privacy when it comes to their public online speech and expression and should recognize that anything they say may be construed to reflect upon their ability to carry out their institutional responsibilities.
- When considering a response to faculty speech, universities should take into account whether a faculty member had a reasonable expectation of privacy in expressing his or her views.
- Academic freedom is a core tenet of the academy and faculty should be encouraged to push the bounds of knowledge without fear of retaliation for

exploring ideas that might offend.

- Extramural speech by faculty members is considered protected by most definitions of academic freedom. Administrators should resist pressures to engage in disciplinary actions in response to such speech except in instances where the content of the speech calls into question whether a faculty member can adequately execute their duties.
- Where faculty members serve in an institutional capacity that may be negatively affected by the content of speech that raises questions about their ability to fulfill duties fairly and with equal respect for all students, universities should strive to ensure that any reallocation of duties is not punitive do not spill over to impair the faculty member's academic career.

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### **MICROAGGRESSIONS AND THE LANGUAGE OF HARM**

- The increasing diversity of college populations requires a wider conscientiousness of how words are understood by different groups of listeners.
- The task of fostering a more inclusive environment—and calling out language that undercuts it—cannot be left only, or even primarily, to students who are members of marginalized groups.
- University administrators should encourage all students to be sensitive to the ways that their words can unintentionally hurt others and should show sensitivity in their own communications.
- The onus to consider the impact of words, images and messages on diverse groups of students is heightened for administrators

and faculty in that their professional duties encompass the creation and maintenance of an open and equal learning environment.

- University policies regulating everyday speech or attempting to define insults for the entire community are intrusive and risk prohibiting or even simply disfavoring permissible speech.

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### TRIGGER WARNINGS

- If professors wish to offer students a preview of troubling content to come in a syllabus, the university should not prevent them from doing so.
- Universities cannot and should not position themselves institutionally to ensure that every possibly upsetting encounter with course material is averted.
- Universities should therefore leave the question of trigger warnings or any other sort of alerts about course material up to individual faculty members.

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### SAFE SPACES

- It is the obligation of the university to foster an environment in which violent, harassing, and reckless conduct does not occur and respect is encouraged.
- It is neither possible nor desirable for the campus to offer protection from all ideas and speech that may cause a measure of damage.
- Campuses should acknowledge and respond to the impact of hateful speech and hate crimes in terms of creating an environment of safety and belonging on campus, taking affirmative steps

to make sure that affected students are supported and that the campus culture fosters mutual respect for individual differences.

- It is reasonable to designate some spaces “safe” for particular groups on a campus but these must always be entered into voluntarily by those wishing to associate with the group. It is unreasonable to impose such constraints on public or communal areas of a campus as a way to exclude certain words or ideas.
- Campuses should enable and even support the creation and protection of spaces established by students—such as clubs, organizations, or even small gathering areas based on common themes and lifestyles.
- The campus as a whole and segments thereof that are intended for all—such as dorms, residential colleges, classrooms, and cafeterias—must be kept physically safe but intellectually and ideologically open.

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### SPEECH AND SEXUAL HARASSMENT

- There is no contradiction between advocating for more stringent measures to address sexual harassment and assault on campus and insisting on measures to protect free speech and academic freedom.
- Universities should reiterate the centrality of academic freedom when they address issues of harassment.

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### EDUCATION AND DIALOGUE

- There is both a need and an opportunity for expanded

education and mobilization on issues of free speech on campus.

- All groups supportive of free speech should redouble their efforts to ensure that campus free speech is a cause that engages students from across the political spectrum.
- Institutions and funders with an interest in supporting free speech should invest in the next generation by underwriting grants for work to build awareness and appreciation for free speech on campus.
- Whether it is on racial, gender, ethnic or ideological grounds, those who may feel marginalized in campus discourse should be supported by the universities in finding avenues for full participation in campus life.
- Campuses should take full advantage of the diversity of their student bodies to ensure opportunities for dialogue are maintained for students who have different views from one another. Principles of free speech should be adhered to as central to such endeavors.

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### CAMPUS SPEECH LEGISLATION

- State and federal bodies invested in defending speech on campus should take care to avoid overreach, especially in the form of guiding campuses’ responses to various free speech incidents. This includes ensuring campuses are free to affirm and articulate the values of open discourse, academic freedom, diversity and inclusion, and other principles integral to the institutional role of the university in society.
- Legislation seeking to address



College students in dialogue. PEN America event at NYU in November 2018, co-sponsored with the Penn Project for Civic Engagement and NYU Steinhardt

free speech on campus should avoid the use of overbroad and vague definitions that have the potential curtail free speech or otherwise render legitimate topics of academic deliberation effectively off-limits.

- Legislation should not dictate disciplinary requirements or penalties, and should leave decisions

about discipline to the discretion of school administrators who have a full understanding of the context in which events have occurred.

- Legislation should preserve the ability of public colleges to prevent discrimination based on race, ethnicity, religion, or other protected class by publicly

funded student organizations.

- Legislative efforts to address campus free speech should include or be accompanied by the appropriation of funds for orientation and ongoing education on the importance of free expression.

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