



April 28, 2020

**Submission by the Foundation for Individual Rights in Education
to the Special Rapporteur on the Promotion and Protection
of the Right to Freedom of Opinion and Expression
Regarding Academic Freedom on College Campuses**

The Foundation for Individual Rights in Education (FIRE) is pleased to offer this submission to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

FIRE is a nonpartisan, nonprofit organization founded in 1999. FIRE's mission is to defend and sustain the individual rights, including freedom of expression and academic freedom, of students and faculty members at America's colleges and universities. FIRE educates students, faculty, alumni, trustees, and the public about the threats to these rights on our campuses, and provides the means to preserve them.

FIRE presents this comment to provide a fuller picture of the state of academic freedom on American college campuses. The discussion below does not address all of the numerous, multifaceted threats posed to the rights of students and faculty, but identifies two pernicious threats FIRE has combatted in recent years.

I. The rights of academic freedom and freedom of expression on American college campuses

The First Amendment to the United States Constitution is binding on public universities, offering broad protections for student and faculty speech and limiting how universities can regulate the speech of campus community members. In *Healy v. James*, the Supreme Court of the United States wrote: “[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”¹

¹ *Healy v. James*, 408 U.S. 169, 180 (1972).

In addition to the freedom of speech, the Supreme Court has also found academic freedom is protected by the First Amendment. In *Keyishian v. Board of Regents*, the Court wrote: “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”²

Likewise, in *Sweezy v. New Hampshire*, the Court observed:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.³

While the First Amendment applies only to the actions of public universities, the vast majority of private universities surveyed annually by FIRE make commitments to freedom of expression in their written policies, mission statements, and student and faculty handbooks. Of the 105 private universities FIRE surveyed last year, all but six made some type of commitment prioritizing expressive freedoms on campus.⁴ The language private universities use in their commitments to freedom of expression often gives students a reasonable expectation that they will have free speech rights commensurate with their peers at public institutions.

However, despite public universities’ clear First Amendment obligations and private universities’ declared commitments, threats to these freedoms persist.

II. The threat of public pressure to fire outspoken faculty members

While many important relationships within the university community are employment relationships—including those with tenured, tenure-track, and adjunct faculty—the First Amendment limits when a government employer may discipline an employee for expression. When faculty members speak as employees, such as through their classroom teaching or their research, the First Amendment’s protection of academic freedom may prevent their public university employer from disciplining them for sharing controversial views or materials.⁵

² *Keyishian v. Bd. of Regents*, 385 U. S. 589, 603 (1967).

³ *Sweezy v. New Hampshire*, 354 U. S. 234, 250 (1957).

⁴ *Spotlight on Speech Codes 2020*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2020>.

⁵ Although the First Amendment may not protect government employees such as state university professors from discipline based on speech made pursuant to their job duties, there are “additional constitutional interests” at stake in the academic context “involving speech related to scholarship or teaching.” *Garcetti v. Ceballos*, 547

When they speak as private citizens on matters of public concern, such as through social media or public commentary, the First Amendment may prevent a public university employer from punishing controversial statements. “Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees’ speech.”⁶

Academic freedom allows for, and even requires, faculty to be insulated from the halls of legislatures and pressure to conform with public opinion.⁷ The interests of different political and social spheres are not always in alignment with the research, theories, and analysis of academics. If the academic’s ability to speak or research is subject to the popular approval of politicians and the masses, only popular or previously approved views will be advanced.

However, the First Amendment and principles of free inquiry are too often disregarded when universities, which may be sensitive to public opinion, face pressure to fire or punish faculty members who have engaged in controversial speech. FIRE has defended and advocated on behalf of many professors who have faced repercussions for their words or social media posts. Below is a collection of some of these cases to provide a more comprehensive look at public pressure and universities’ failure to respond appropriately to it.

- **University of Kansas (KU), 2013:** After a shooting at the Washington Navy Yard, KU Professor David Guth tweeted critically of the National Rifle Association: “#NavyYardShooting The blood is on the hands of the #NRA. Next time, let it be YOUR sons and daughters. Shame on you. May God damn you.” Guth was placed on paid leave by KU’s administration, but this response was insufficient for multiple state legislators, who demanded Guth’s firing. State Senator Greg Smith announced that he would not “support any budget proposals or recommendations” for KU until Guth was

U.S. 410, 425 (2006); *Connick v. Myers*, 461 U.S. 138, 140 (1983) (employees of government institutions do not “relinquish First Amendment rights to comment on matters of public interest by virtue of government employment”); *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014) (holding that state university professors retain First Amendment protection for their “teaching and academic writing” because such activities “are at the core of the official duties of teachers and professors”); *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975) (“The desire to maintain a sedate academic environment, to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint, is not an interest sufficiently compelling, however, to justify limitations on a teacher’s freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms.”) (internal quotations omitted).

⁶ *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

⁷ The American Association of University Professors’ 1940 *Statement of Principles on Academic Freedom and Tenure* explains, regarding academic freedom and professors’ right to speak: “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.” AM. ASS’N OF UNIV. PROFESSORS, STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940), available at <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>.

fired.⁸ Months later, despite faculty protest, KU’s Board of Regents adopted a policy giving the university power to discipline faculty and staff for social media use, including posts deemed “contrary to the best interests of the employer.”⁹

- **University of Illinois at Urbana-Champaign (UIUC), 2014:** Professor Steven Salaita posted a series of critical tweets about Israel in July 2014, responding to the conflict in Gaza. He wrote, among other comments: “At this point, if Netanyahu appeared on TV with a necklace made from the teeth of Palestinian children, would anybody be surprised? #Gaza.”¹⁰ After Salaita’s posts gained widespread attention, UIUC rescinded its offer for a tenured faculty position, which he had been set to start in the fall semester, and the Board of Trustees of the University of Illinois system subsequently voted against giving him the position.¹¹ The revocation of Salaita’s position proved expensive for the university, costing over \$2 million in legal fees and a settlement with Salaita.¹²
- **Drexel University, 2016:** On Christmas Eve, Associate Professor George Ciccariello-Maher tweeted: “All I Want for Christmas is White Genocide,” a mockery of white nationalists’ belief that miscegenation will result in the end of the white race. The tweet was met with widespread outrage on social media. Months later, Ciccariello-Maher again spurred controversy by tweeting that he was “trying not to vomit” after seeing a passenger give up his first-class seat to an American soldier. Drexel’s provost, Brian Blake, wrote publicly in April 2017 that Ciccariello-Maher’s “behavior has left [Blake] with no choice but to ensure that an appropriate review is conducted in order to deal with this serious distraction to the important academic mission of the university.”¹³ In October of that year, Drexel barred Ciccariello-Maher from teaching on campus, alleging safety concerns.¹⁴ By December, he resigned, writing: “We are all a single outrage campaign away from having no rights at all, as my case and many others

⁸ John Celock, *David Guth, Kansas Professor, On Leave After Controversial Tweet — But GOP Lawmakers Want Him Fired*, HUFFINGTON POST (Sept. 20, 2013), https://www.huffpost.com/entry/david-guth-kansas-fired_n_3963351.

⁹ Scott Rothschild, *Regents approve social media policy; faculty, staff attend meeting to urge rejection*, LAWRENCE J.-WORLD (May 14, 2014), <https://www2.ljworld.com/news/2014/may/14/regents-approve-social-media-policy-faculty-staff>.

¹⁰ Sarah Kaplan, *University of Illinois censured after professor loses job over tweets critical of Israel*, WASH. POST (June 15, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/06/15/university-of-illinois-censured-after-professor-loses-job-over-tweets-critical-of-israel>.

¹¹ Colleen Flaherty, *Officially Out of a Job*, INSIDE HIGHER ED (Sept. 12, 2014), <https://www.insidehighered.com/news/2014/09/12/u-illinois-board-votes-no-salaita-appointment>.

¹² Jodi Cohen, *University of Illinois OKs \$875,000 settlement to end Steven Salaita dispute*, CHICAGO TRIBUNE (Nov. 12, 2015), <https://www.chicagotribune.com/news/breaking/ct-steven-salaita-settlement-met-20151112-story.html>.

¹³ Colleen Flaherty, *Looking Into Tweets*, INSIDE HIGHER ED (Apr. 18, 2017), <https://www.insidehighered.com/news/2017/04/18/documents-show-drexel-investigating-professors-tweets-its-unclear-whether-faculty>.

¹⁴ Walker Alexander and Gina Vitale, *Students walk out of class to protest prof’s removal*, TRIANGLE (Nov. 17, 2017), <https://www.thetriangle.org/news/students-walk-out-of-class-to-protest-profs-removal>.

make clear.”¹⁵

- **Trinity College, 2017:** In June 2017, Professor Johnny Eric Williams shared on Facebook an anonymous author’s essay suggesting oppressed minorities should “do nothing” to help people “who practice bigotry.” Discussing the shooting of U.S. Rep. Steve Scalise, the essay suggested that, in the case of bigots, we should “let them fucking die.”¹⁶ Two days later, in response to news that police in Seattle had shot and killed a black mother armed with a knife, Williams posted on Facebook again, restating the “let them fucking die” refrain from the essay to encourage readers to “confront” white people who engage in violence against “oppressed people,” and “put an end to . . . their white supremacy system.” Trinity President Joanne Berger-Sweeney temporarily closed the campus after receiving threats related to Williams’ posts, announced an investigation into whether Williams violated Trinity’s policies, and placed him on leave.¹⁷ Weeks later, Berger-Sweeney wrote that “Williams’s actions and words were protected by academic freedom and did not violate Trinity College policies,” but that Williams would stay on leave for the following semester “by mutual agreement.”¹⁸
- **Essex County College (ECC), 2017:** On June 6, 2017, ECC Professor Lisa Durden appeared as a guest, in her personal capacity, on a segment of Fox News’ “Tucker Carlson Tonight.” During that segment, Durden argued with Carlson and defended a Black Lives Matter event that white individuals were asked not to attend. Two days later, ECC administrators informed Durden she was suspended, falsely claiming she had referenced the college on her television appearance.¹⁹ ECC’s president then issued a statement claiming the college had been “immediately inundated with feedback from students, faculty and prospective students and their families expressing frustration, concern and even fear” over Durden’s views.²⁰ Durden was soon fired.²¹ FIRE submitted a public records request asking ECC to provide copies of the “feedback” it claimed to have been “inundated with,” allegedly necessitating Durden’s firing. ECC stonewalled for months, leading FIRE to file a lawsuit for the records, which were

¹⁵ George Ciccariello-Maher, FACEBOOK (Dec. 28, 2017),

<https://www.facebook.com/george.ciccariellomaher/posts/10155729883545325>.

¹⁶ Son of Baldwin, *Let Them Fucking Die*, MEDIUM (Jun. 16, 2017), <https://medium.com/@SonofBaldwin/let-them-fucking-die-c316eee34212>.

¹⁷ Kathleen Megan, *Trinity Professor Flees Campus After Threats Over Facebook Comments, Issues Public Apology*, HARTFORD COURANT (Jun. 22, 2017), <https://www.courant.com/education/hc-trinity-williams-facebook-furor-20170622-story.html>.

¹⁸ *President Joanne Berger-Sweeney’s Statements Concerning Professor Johnny Williams*, TRINITY COLL. (Jul. 14, 2017), <https://www.trincoll.edu/NewsEvents/NewsArticles/pages/WilliamsUpdatesSummer2017.aspx>.

¹⁹ Barry Carter, *Going on Fox News cost me my job, professor claims*, NJ.COM (Jun. 20, 2017), https://www.nj.com/essex/2017/06/essex_county_college_professor_suspended_after_fox.html.

²⁰ STATEMENT FROM ESSEX COUNTY COLLEGE PRESIDENT ANTHONY E. MUNROE, ESSEX CTY. COLL., *archived at* <http://web.archive.org/web/20170630084921/https://www.essex.edu/pr/2017/06/23/statement-from-essex-county-college-president-anthony-e-munroe-3>.

²¹ Hannan Adely, *Professor who was fired after defending Black Lives Matter on Fox News sues NJ college*, NORTHJERSEY.COM (Apr. 16, 2018), <https://www.northjersey.com/story/news/2018/04/16/fired-professor-sues-college-claiming-her-free-speech-violationshttps-presto-gannettdigital/521563002>.

finally obtained in January 2018. The records showed ECC greatly exaggerated its claims about negative feedback as a shield to fire an outspoken professor—for the first 13 days after Durden’s appearance, only one person contacted the college to complain.²²

- **California State University, Fresno (Fresno State), 2018:** After the death of former first lady Barbara Bush, Fresno State Professor Randa Jarrar tweeted: “Barbara Bush was a generous and smart and amazing racist who, along with her husband, raised a war criminal. Fuck outta here with your nice words.” Jarrar had already been on leave during that semester.²³ Fresno State President Joseph Castro responded to the outrage spurred by Jarrar’s comments and announced that the university was looking into the issue and that disciplinary action was on the table.²⁴ Fresno State revoked the threat of investigation after a coalition of civil liberties organizations, including FIRE and the ACLU of Northern California, warned the university against violating the First Amendment.²⁵
- **Temple University, 2018:** On November 28, Temple Professor Marc Lamont Hill spoke before the United Nations in recognition of “International Day of Solidarity with the Palestinian People.” Hill discussed boycotts of Israel and said that “what justice requires . . . is a free Palestine from the river to the sea.”²⁶ Social media users and pro-Israel advocacy groups called for his firing from both Temple and CNN, the latter of which acquiesced and removed Hill as a contributor.²⁷ Patrick O’Connor, the Chairman of the Board of Trustees of Temple University, suggested that both the board and the university administration were unhappy with Hill and were looking into “remedies,” citing Hill’s “hate speech.”²⁸ Despite O’Connor’s pressure to punish Hill,

²² Adam Steinbaugh, *After FIRE lawsuit, Essex County College finally turns over documents about firing of Black Lives Matter advocate*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Jan. 23, 2018), <https://www.thefire.org/after-fire-lawsuit-essex-county-college-finally-turns-over-documents-about-firing-of-black-lives-matter-advocate>.

²³ Bryant-Jon Anteola, *Fresno State professor stirs outrage, calls Barbara Bush an ‘amazing racist,’* FRESNO BEE (Apr. 17, 2018), <https://www.fresnobee.com/news/local/article209197719.html>.

²⁴ Vanessa Vasconcelos, *‘I was shocked and horrified by them,’ President Castro responds to Fresno State professor’s tweets*, ABC30 (Apr. 19, 2018), <https://abc30.com/politics/i-was-shocked-and-horrified-by-them-president-castro-responds-to-fresno-state-professors-tweets-/3362996>.

²⁵ Press Release, Found. for Individual Rights in Educ., VICTORY: Fresno State drops investigation into professor’s fiery tweets about former First Lady Barbara Bush (Apr. 25, 2018), *available at* <https://www.thefire.org/victory-fresno-state-drops-investigation-into-professors-fiery-tweets-about-former-first-lady-barbara-bush>.

²⁶ Oona Goodin-Smith, *CNN drops Temple professor Marc Lamont Hill after comments on Israel*, PHILADELPHIA INQUIRER (Nov. 29, 2018), <https://www.inquirer.com/philly/news/marc-lamont-hill-cnn-israel-speech-temple-20181129.html>.

²⁷ *Id.*

²⁸ Craig R. McCoy, *U.N. speech by Temple prof draws fire from university’s board chair*, PHILADELPHIA INQUIRER (Nov. 30, 2018), <https://www.inquirer.com/philly/news/breaking/marc-lamont-hill-temple-israel-anti-semitic-20181130.html>.

Temple announced the following month that Hill would not face punishment for his comments.²⁹

- **Harvard University, 2019:** In May 2019, Dean of the College Rakesh Khurana declared that Ronald S. Sullivan, Jr. and his wife Stephanie Robinson’s positions as Faculty Deans at Winthrop House, a residential house at Harvard, would not be renewed.³⁰ Khurana’s announcement came after Harvard had experienced months of protests over Sullivan’s decision to join the defense team of Hollywood producer Harvey Weinstein. Sullivan and Robinson were “surprised and dismayed” by the decision, writing: “We believed the discussions we were having with high-level university representatives were progressing in a positive manner, but Harvard unilaterally ended those talks.”³¹ The nonrenewal of their Winthrop Faculty Dean positions raised questions about whether Harvard succumbed to protests over Sullivan’s legal practice.
- **University of California, Davis (UC Davis), 2019:** After Professor Joshua Clover’s years-old negative tweets about law enforcement resurfaced, critics quickly demanded his firing. Local news initially reported that UC Davis’ legal team was investigating Clover,³² but the university confirmed it would not investigate him in line with its First Amendment obligation.³³ Clover’s tweets drew the attention of a local official, California Assemblyman James Gallagher, who demanded the firing of Clover in a petition³⁴ and op-ed,³⁵ and introduced a House Resolution calling on UC Davis to terminate Clover.³⁶
- **Kirkwood Community College, 2019:** In an “Iowa Antifa” Facebook group, Professor Jeff Klinzman commented on a screenshot of a tweet from President Trump about members of Antifa going “around hitting (only non-fighters) people over the heads with baseball bats.” Klinzman added, “Yeah, I know who I’d clock with a bat.” A local reporter saw the post, and found a 2012 post in which Klinzman wrote that he had “a

²⁹ Sarah McLaughlin, *Temple will not punish Marc Lamont Hill, issues condemnation*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Dec. 11, 2018), <https://www.thefire.org/breaking-temple-will-not-punish-marc-lamont-hill-issues-condemnation>.

³⁰ Kate Taylor, *Harvard’s First Black Faculty Deans Let Go Amid Uproar Over Harvey Weinstein Defense*, N.Y. TIMES (May 11, 2019), <https://www.nytimes.com/2019/05/11/us/ronald-sullivan-harvard.html>.

³¹ *Id.*

³² Chelsea Shannon, *Why UC Davis hasn’t fired English professor over tweets that cops should be killed*, ABC10 (Mar. 4, 2019), <https://www.abc10.com/article/news/local/davis/why-uc-davis-hasnt-fired-english-professor-over-tweets-that-cops-should-be-killed/103-639b5517-38ec-48d4-8221-22d8032b80f0>.

³³ Sarah McLaughlin, *UC Davis confirms professor will not be investigated for years-old tweets amid legislative pressure*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Mar. 18, 2019), <https://www.thefire.org/uc-davis-confirms-professor-will-not-be-investigated-for-years-old-tweets-amid-legislative-pressure>.

³⁴ Assemblyman James Gallagher, FACEBOOK (Mar. 7, 2019), <https://www.facebook.com/AssemblymanJamesGallagher/posts/1984826885145525>.

³⁵ James Gallagher, *Opinion, Guest: The downturn of our civic dialogue*, CALIFORNIA AGGIE (Mar. 7, 2019), <https://theaggie.org/2019/03/07/guest-the-downturn-of-our-civic-dialogue>.

³⁶ A.R. 22, Assemb., 2019-2020 Reg. Sess. (Cal. 2019), *available at* <https://legiscan.com/CA/text/AR22/2019>.

desire to exact revenge” upon Evangelical Christians accused of homophobic actions. Speaking with the reporter, Klinzman confirmed that he considered himself a member of Antifa.³⁷ After the local reporter ran a story on Klinzman’s posts, it was picked up by conservative national media outlets and stirred public outrage. In response, Kirkwood’s administration asked Klinzman to resign or be removed from the classroom by the school, opening up the college to liability for violating the First Amendment and resulting in Klinzman’s resignation.³⁸ Represented by FIRE attorneys, Klinzman reached a settlement with the college in 2020.³⁹

- **Babson College, 2020:** After President Trump tweeted a threat to target 52 Iranian sites, including cultural sites, Babson adjunct professor and staff member Asheen Phansey made a sardonic Facebook post suggesting that Iran create a list of American cultural heritage sites to bomb, including the Mall of America and the Kardashians’ home. The post was quickly picked up and generated considerable outrage, much of it failing to acknowledge Phansey’s satirical intent.⁴⁰ In response, Babson announced the completion of a “prompt and thorough investigation”—which only took one day—into Phansey, resulting in his firing.⁴¹ Babson falsely implied that local and state police were investigating Phansey’s speech, claiming the college was “cooperating” with local and state law enforcement, an allegation unsupported by records provided by both the local police department and the Massachusetts state police.⁴²

By caving to censors, universities signal that the rights of faculty are subordinate to the demands of the loudest critics. As more universities cave to outrage, more campaigns demanding faculty firings will arise, along with harassment and threats. After all, their methods will have proven effective. This is a trend identified by the American Association of University Professors as well. In a 2017 statement, the AAUP urged “administrations, governing boards, and faculties, individually and collectively, to speak out clearly and

³⁷ Josh Scheinblum, *Kirkwood professor: ‘I affirm that I am antifa,’* KCRG (Aug. 22, 2019), <https://www.kcrg.com/content/news/Kirkwood-professor-I-affirm-that-I-am-antifa-557897151.html>.

³⁸ Vanessa Miller, *Linked in TV report to ‘antifa,’ ousted professor says Kirkwood violated his rights,* GAZETTE (Aug. 27, 2019),

<https://www.thegazette.com/subject/news/education/kirkwood-professor-antifa-jeff-klinzman-free-speech-removal-reports-kcrg-fox-news-community-college-20190827>.

³⁹ Press Release, Found. for Individual Rights in Educ., VICTORY: College settles with ‘antifa’ professor fired for criticizing President Trump on Facebook, avoids First Amendment lawsuit from FIRE (Apr. 27, 2020), *available at* <https://www.thefire.org/victory-college-settles-with-antifa-professor-fired-for-criticizing-president-trump-on-facebook-avoids-first-amendment-lawsuit-from-fire>.

⁴⁰ Uncle Turtleboy, *Babson Professor Urges Iran To Bomb 52 American Cultural Sites To Own The Trumpsters,* TB DAILY NEWS (Jan. 7, 2020), <https://tbdailynews.com/babson-professor-urges-iran-to-bomb-52-american-cultural-sites-to-own-the-trumpsters>.

⁴¹ *Statement from Babson College,* BABSON COLL. (Jan. 9, 2020), <https://www.babson.edu/statement>.

⁴² Adam Steinbaugh, *Babson falsely claimed it was ‘cooperating’ with Massachusetts State Police over professor’s ‘threatening’ Facebook post,* FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Feb. 17, 2020), <https://www.thefire.org/babson-falsely-claimed-it-was-cooperating-with-massachusetts-state-police-over-professors-threatening-facebook-post>.

forcefully to defend academic freedom and to condemn targeted harassment and intimidation of faculty members.”⁴³

The rights of faculty should not depend on the whims of social media critics or state legislators. There are concrete steps universities should be encouraged to take now to safeguard against threats to expressive rights in the future, including:

- Drafting strong policies stating that speech plainly protected by the First Amendment will not be subject to investigation or punishment;
- Publicizing those commitments, along with a clear statement that they will not be abridged in the face of demands for censorship of protected speech;
- Enacting protocols to guide institutional responses in the event that a faculty member’s speech is met with threats to members of the campus, including temporary security measures that address the need for safety without threatening expressive rights; and
- Recognizing that administrations have the power to respond to offensive speech with more speech, and that universities can make strong statements against bigotry and controversial viewpoints without undermining the rights of community members.

The University of Tennessee College of Law (UT Law) offers an example of how an institution can fix its errors when responding to controversial faculty speech. In 2016, law professor and blogger Glenn Reynolds tweeted “Run them down” in reference to protesters blocking traffic in Charlotte, North Carolina after a fatal police shooting.⁴⁴ Though UT Law initially stumbled in announcing an investigation into Reynolds, Dean Melanie Wilson posted a statement days later announcing that “no disciplinary action will be taken against Professor Reynolds” because his “tweet was an exercise of his First Amendment rights.”⁴⁵ Her statement acknowledged that some community members were offended but did not suggest that offense could outweigh the college’s First Amendment obligations. That is the right result universities should seek to achieve: acknowledging and protecting the rights of faculty, as well as the rights of those who wish to disagree with them.

III. The First Amendment and efforts to combat campus anti-Semitism

Recent governmental efforts to combat anti-Semitism on campuses, however well-intentioned they may be, have proven to be an additional threat to academic freedom and free expression on college campuses.

⁴³ AM. ASS’N OF UNIV. PROFESSORS, TARGETED ONLINE HARASSMENT OF FACULTY (Jan. 31, 2017), <https://www.aaup.org/news/targeted-online-harassment-faculty>.

⁴⁴ Colleen Flaherty, *Run Them Down*, INSIDE HIGHER ED (Sept. 23, 2016), <https://www.insidehighered.com/news/2016/09/23/u-tennessee-investigating-professor-and-popular-conservative-blogger-tweeting>.

⁴⁵ *Statement from Dean Melanie Wilson about Professor’s Tweet*, UNIV. OF TENN. COLL. OF LAW (Sept. 27, 2016), <https://law.utk.edu/2016/09/27/dean-statement>.

While FIRE takes no position on the Israeli-Palestinian conflict, and agrees that institutions of higher education must take action to protect students from anti-Semitism and other forms of discriminatory harassment, those goals must be accomplished within a framework that protects academic freedom and free expression. Too often, as the examples of Professor Salaita and Lamont Hill demonstrate, those freedoms were not upheld.

Unfortunately, governmental attempts to address anti-Semitism on college campuses have been particularly dismissive of academic freedom and free expression.

For example, since 2016, members of Congress from both sides of the aisle have sought to secure the passage of the Anti-Semitism Awareness Act, legislation that would require the Department of Education to “take into consideration” the International Holocaust Remembrance Alliance (IHRA) definition of anti-Semitism when assessing institutional responses to alleged violations of Title VI of the Civil Rights Act.⁴⁶

The IHRA definition provides, in part: “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.” This language is overbroad and inherently vague, as consensus on what it means in practical terms would be impossible to achieve.

The legislation went even further by incorporating examples of anti-Semitism, which were initially included in the State Department’s explanation regarding its adoption of the IHRA definition for the purposes of collecting statistics on anti-Semitism.⁴⁷ Those examples declare that both Holocaust denial and “[d]rawing comparisons of contemporary Israeli policy to that of the Nazis” constitute anti-Semitism. Whether such speech is anti-Semitic or not is beside the point, as both types of expression are clearly protected by the First Amendment, and neither can be punished by a government agency, including a public university. Similar legislation was enacted in Florida in 2019.⁴⁸

In December 2019, with the Anti-Semitism Awareness Act stalled in Congress, President Trump signed an Executive Order on Combating Anti-Semitism, directing federal agencies to “consider” the IHRA definition of anti-Semitism when assessing institutional responses to alleged violations of Title VI of the Civil Rights Act.⁴⁹ FIRE warned at the time of its signing that the order represented a threat to the First Amendment:

⁴⁶ Joseph Cohn, *Problematic Campus Anti-Semitism Bill Clears Senate*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Dec. 2, 2016), <https://www.thefire.org/problematic-campus-anti-semitism-bill-clears-senate>.

⁴⁷ U.S. Dep’t of State, *Contemporary Examples of Anti-Semitism*, (June 8, 2010), available at <https://2009-2017.state.gov/documents/organization/156684.pdf>.

⁴⁸ H.B. 741, 121st Reg. Sess. (Fl. 2019).

⁴⁹ Exec. Order No. 13,899, 84 FR 68779 (Dec. 11, 2019), available at <https://www.whitehouse.gov/presidential-actions/executive-order-combating-anti-semitism>.

Adopted by the U.S. Department of State and later in expanded form by the International Holocaust Remembrance Alliance, the definition and examples reach core political speech protected by the First Amendment. Directing federal agencies to rely on this framework in enforcing Title VI would effectively order nearly every campus in the country to censor its students and faculty on the basis of viewpoint—in this case, constitutionally protected speech that is critical of Israel. (The vast majority of American campuses, public and private, receive federal funding and would be subject to the order.) This result would be sharply at odds with our national commitment to freedom of speech and academic freedom, decades of First Amendment precedent, and the President’s stated concern for protecting free speech on campus.⁵⁰

In recent years, FIRE has joined other civil liberties groups⁵¹ and the lead author of the IHRA definition⁵² in expressing concerns about the threats posed by legislative bodies’ efforts to enforce the IHRA definition.

Unfortunately, concerns about the threat posed to the First Amendment by the Executive Order have already been borne out. Shortly after the launch of the Executive Order, the Department of Education’s Office for Civil Rights initiated two investigations into complaints filed against the University of California, Los Angeles. One of the investigations relates to the UCLA Students for Justice in Palestine chapter’s hosting of the 2018 National Students for Justice in Palestine Conference, which had faced demands for cancellation.⁵³ This investigation has again raised concerns that the federal government’s efforts to combat anti-Semitism will involve investigations and punishment of protected speech.

In February 2020, Rep. Paul Gosar of Arizona wrote to Secretary of Education Betsy DeVos requesting investigations into faculty members at the University of Arizona, citing the Executive Order. Of the two investigations Gosar sought, one centered on the views and expression of faculty at the university, citing faculty members who “openly support” the Boycott, Divestment, and Sanctions movement, which Gosar called a “hate group.”⁵⁴ Even if no punishment is ultimately enacted, any investigation into expression that is known to be protected may still violate the First Amendment and chill the speech of students and faculty.

⁵⁰ *UPDATED: FIRE statement regarding executive order on campus anti-Semitism*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Dec. 10, 2019), <https://www.thefire.org/fire-statement-regarding-executive-order-on-campus-anti-semitism/>.

⁵¹ Press Release, American Civil Liberties Union, *ACLU STATEMENT ON SENATE INTRODUCTION OF ‘ANTI-SEMITISM AWARENESS ACT’* (May 23, 2018), <https://www.aclu.org/press-releases/aclu-statement-senate-introduction-anti-semitism-awareness-act>.

⁵² Kenneth S. Stern, Opinion, *Will Campus Criticism of Israel Violate Federal Law?*, N.Y. TIMES, Dec. 12, 2016, <https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html>.

⁵³ Letter from Hussam Ayloush, Executive Director, Council on American-Islamic Relations, California, *et al.*, to Gene Block, Chancellor, Univ. of Cal., Los Angeles (March 19, 2020), *available at* <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/5e74fd90498fc92a2c3a29a9/1584725395521/Letter+to+Chancellor+re+DOE+Investigation.pdf>.

⁵⁴ Letter from Rep. Paul Gosar to Betsy DeVos, Secretary of Education, U.S. Dep’t of Educ. (Feb. 24, 2020), *available at* <https://www.thefire.org/representative-paul-gosar-letter-to-betsy-devos-february-24-2020>.

These threats are not limited to the United States. In January, the United Kingdom’s Secretary of State for Housing, Communities and Local Government, Robert Jenrick, announced that universities that failed to adopt the IHRA definition of anti-Semitism would not be eligible to receive federal funding.⁵⁵

Both the United States and the United Kingdom deserve credit for working to combat bigotry on campus. But any governmental effort to address anti-Semitism must be implemented in a manner that does not infringe upon core political speech. Rather than try to define anti-Semitism, governments should instead ensure that students are free from all religiously motivated harassment. To ensure that this approach protects academic freedom and free speech, standards for when conduct is actionable harassment should be carefully crafted.⁵⁶

IV. Protecting academic freedom and free expression on campuses

Threats to academic freedom and freedom of expression are not a new development, whether in the United States or the rest of the world. But as technology, political movements, and campuses evolve, the ways these threats present themselves change, too. For this reason, it is vital for academic institutions to author, maintain, and publicize viewpoint-neutral policies protecting expression, and for advocacy and watchdog groups to monitor both how institutions threaten faculty rights and how institutions themselves can be threatened. Challenges to the academy are closely linked to challenges to the rights of civil society more broadly. Civil society cannot be protected unless its academic institutions are protected, too.

FIRE would like to thank the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression for considering this report. We hope this account is useful, and we would be pleased to offer further commentary or support as needed.

⁵⁵ Francis Elliott, *Universities face cuts if they reject antisemitism definition*, THE TIMES, Jan. 27, 2020, <https://www.thetimes.co.uk/article/universities-face-cuts-if-they-reject-antisemitism-definition-95zfbtp7c>.

⁵⁶ In the United States, most anti-Semitic expression, like most expressions of hatred for other people and groups, is, standing alone, protected by the First Amendment to the U.S. Constitution. Hateful speech loses First Amendment protection when it falls under one of several limited and precisely defined exceptions, including incitement, true threats, intimidation, or actionable discriminatory harassment. In the educational context, discriminatory harassment is best defined by the standard set forth by the Supreme Court of the United States in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999), requiring conduct to be “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” For a fuller analysis of the *Davis* standard, see Foundation for Individual Rights in Education, Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Financial Assistance (Jan. 30, 2019), at 6-11, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-18168>.