CAMPUS FREE SPEECH: A LEGISLATIVE PROPOSAL

BY STANLEY KURTZ, JAMES MANLEY, AND JONATHAN BUTCHER



EXECUTIVE SUMMARY

In her 2016 convocation speech, Brown University President Christina Paxson explained that a reporter had recently asked school officials if Brown had established any "safe spaces" on campus. "What on earth are they referring to?" Paxson said. "Idea-free zones staffed by thought police, where disagreement is prohibited?"[1]

Yes, precisely such spaces. Sadly, this kind of challenge to campus free speech is now widespread. Surveys show that student support for restrictive speech codes and speaker bans is at historic heights. As both a deeply held commitment and a living tradition, freedom of speech is dying on our college campuses, and is increasingly imperiled in society at large.

Nowhere is the need for open debate more important than on America's college campuses. Students maturing from teenagers into adults must be confronted with new ideas, especially ideas with which they disagree, if they are to become informed and responsible members of a free society.

In order to protect the increasingly imperiled principle and practice of campus free speech, this brief offers model legislation designed to ensure free expression at America's public university systems. It is hoped that public debate over these legislative proposals will strengthen freedom of speech at private colleges and universities as well. The key provisions in this model legislation are inspired by three classic defenses of campus free speech: Yale's 1974 Woodward Report, The University of Chicago's 1967 Kalven Report, and the University of Chicago's 2015 Stone Report.[2]

The model legislation presented and explained in this brief does several things:

- It creates an official university policy that strongly affirms the importance of free expression, nullifying any existing restrictive speech codes in the process.
- It prevents administrators from disinviting speakers, no matter how controversial, whom members of the campus community wish to hear from.
- It establishes a system of disciplinary sanctions for students and anyone else who interferes with the free-speech rights of others.
- It allows persons whose free-speech rights have been improperly infringed by the university to recover court costs and attorney's fees.
- It reaffirms the principle that universities, at the official institutional level, ought to remain neutral on issues of public controversy to encourage the widest possible range of opinion and dialogue within the university itself.
- It ensures that students will be informed of the official policy on free expression.
- It authorizes a special subcommittee of the university board of trustees to issue a yearly report to the public, the trustees, the governor, and the legislature on the administrative handling of free-speech issues.

Taken together, these provisions create a system of interlocking incentives designed to encourage students and administrators to respect and protect the free expression of others.



INTRODUCTION

Freedom of speech, that cornerstone of our liberty and most fundamental constitutional right, is under siege on America's college campuses. Speakers who challenge campus orthodoxies are rarely sought out, are disinvited when called, and are shouted down or otherwise disrupted while on campus. Speech codes that substantially limit First Amendment rights are widespread. New devices like "trigger warnings" and "safe spaces" shelter students from the give-and-take of discussion and debate. When protestors disrupt visiting speakers, or break in on meetings to take them over and list demands, administrators look the other way. Students have come to take it for granted they will face no discipline for such disruptions. Administrators themselves often disinvite controversial speakers and limit the exercise of liberty to narrow "free speech zones." Administrators also focus enforcement on silencing "offensive" speech and give short shrift to due process protections for students accused of saying the wrong thing to the wrong group. University governing boards (boards of trustees) rarely act to curb these administrative abuses. Substantial sections of the faculty have abandoned the defense of free speech. The classic advocates of liberty of thought and discussion are rarely taught. Surveys show that student support for restrictive speech codes and speaker bans is at historic heights.

In short, as both a deeply held commitment and a living tradition, freedom of speech is dying on our college campuses, and is increasingly imperiled in society at large.

The Goldwater Institute has partnered with Stanley Kurtz of the Ethics and Public Policy Center to craft a model bill that will allow state legislatures to restore freedom of speech to our public university systems. As legislators introduce this bill across the country, a national debate on preserving campus free speech should influence both private colleges and the broader culture.

In 2016, the Goldwater Institute helped design a policy protecting free speech on Arizona campuses.[3] Under HB 2615, community colleges and universities cannot create "free speech zones" that relegate free expression to narrow areas of campus. Rather, there is a presumption in favor of free speech and tailored restrictions to address legitimate time, place, and manner concerns are the exception.

The bill also "removes permissive language" in existing Arizona law that allows a "university or community college to restrict a student's speech in a public forum."[4]

The model legislation presented in this white paper is patterned on recommendations contained in three reports widely regarded as classic statements on campus free expression: Yale's Woodward Report of 1974, the University of Chicago's Kalven Report of 1967, and the University of Chicago's Stone Report of 2015.[5]

The model bill offered herein is designed to change the balance of forces contributing to the current baleful national climate for campus free speech. Administrators generally feel pressured to placate demonstrators who interfere with the free expression of others, so as to move campus controversies as



quickly as possible out of the public eye. Students who know they have little to fear in return for shouting down visiting speakers or interfering with public meetings feel free to protest in highly disruptive ways. In this atmosphere, students or faculty who disagree with current campus orthodoxies are left intimidated and uncertain of administrative support for their rights. Meanwhile, all students suffer for want of opportunities to hear the very best arguments on opposing sides of public questions.

The model legislation offered here challenges this balance of forces in several ways. First, it creates an official university policy that strongly affirms the importance of free expression, while formally nullifying any existing restrictive speech codes. Second, it establishes a system of disciplinary sanctions for students and others who interfere with the free-speech rights of others, while strongly protecting the due-process rights of those accused of such disruption. Third, it empowers persons whose free-speech rights have been infringed to seek legal recourse and recover court costs and attorney's fees. Fourth, it ensures that students will be informed of their university's commitment to free expression, and of the penalties for the violation of others' free-speech rights, during a special section of freshman orientation. Fifth, it authorizes a special subcommittee of the university governing board to issue a yearly report to the board itself, the public, the governor, and the legislature on the administrative handling of free-speech issues, including the application of disciplinary sanctions.

In sum, the model bill is designed to encourage public and institutional oversight of administrators' handling of free-speech issues, thus counterbalancing pressures on administrators to overlook interference with the free-speech rights of others. Students will know from the moment they enter the university that they must respect the free expression of others, and will face significant consequences if they do not. An annual report on the administrative handling of these issues will either hold university presidents accountable, or be subject to public criticism for failing to do so. The overall effect will be to break the vicious cycle that has placed campus free speech in increasing peril.

In addition to these provisions, the model bill affirms the principle of institutional neutrality on issues of public controversy. As articulated by the University of Chicago's Kalven Report of 1967, the institutional neutrality of universities on controversial public issues is the surest guarantee of intellectual freedom for individuals within the university community. When a university, as an institution, takes a strong stand on a major public debate, this inherently pressures faculty and students to toe the official university line, thereby inhibiting their freedom to speak and decide for themselves.

We see this issue at work today in the campaigns to press universities to divest their endowments of holdings in oil companies or companies based in the state of Israel. At any university, such divestment would tend to inhibit intellectual freedom. This is particularly true for state universities, which should reflect the diverse views of the entire population of the state that provides the university funding.

It's important to note, however, that the model bill's provision bearing on institutional neutrality is aspirational in character. Rather than undertaking the difficult task of identifying a clear boundary in law between issues on which there is social consensus and issues of public controversy, the bill simply affirms the basic principle of institutional neutrality and leaves its application in the hands of the university governing board.

Considered as a whole, the model bill presented in this report constitutes the most comprehensive legislative proposal ever offered to restore and protect campus free speech.

THE BILL'S PROVISIONS EXPLAINED

THE TEXT OF THE BILL CAN BE FOUND ON PAGE 19.

Having described the bill as a whole, this section will explain the rationale for its individual provisions in greater detail:

SECTIONS 1.1 AND 1.3

These sections instruct the state university system's governing board to develop an official policy statement that both ensures the fullest degree of intellectual freedom and explains its intellectual rationale. Core elements of such a statement are included in several other provisions of Section 1 as well. This part of the bill is broadly inspired by Yale's Woodward Report and the University of Chicago's Stone Report.[6] While the model bill leaves the development of a full statement text to university governing boards, a full model statement on free expression is included at the end of this report.

SECTIONS 1.2, 1.4–1.6

These sections allow university officials to establish reasonable restrictions on the time, place, and manner of student expression, while also preventing the abuse of such power. The university must be permitted to protect its institutional functions from unreasonable disruption. At the same time, the power to regulate expression must not become a backdoor way of stifling legitimate speech.

Section 1.4 establishes the right to protest or demonstrate on campus, while also making it clear that infringement of the expressive rights of others is prohibited and subject to sanction. This section also affirms that the right of free expression does not prohibit professors or other instructors from maintaining order in the classroom.

Section 1.5 establishes the right of students, student groups, or members of the faculty to invite outside speakers of their choice to the campus. In doing so, it prevents administrators from disinviting speakers, no matter how controversial, whom members of the campus community wish to hear from (subject to the allowances for legitimate administrative regulation in Section 1.2).

Section 1.6 establishes the public areas of campuses as public forums, open to any speaker on the same terms. This counteracts restrictive speech codes that attempt to cabin the exercise of free speech to certain narrow and approved "zones" of the campus.

As the U.S. Supreme Court has noted, "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"[7] The precedents of the Supreme 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."[8]

The sections of the bill limiting a university's authority to restrict speech reflect the legislature's duty to enforce the protections of the state and U.S. constitutions. The time, place, and manner of regulations allowed under these sections focus on the when, where, and how of campus speech—but quite deliberately prohibit any consideration of the "who" and "what." These regulations must be (1) rea-

sonable; (2) viewpoint- and content-neutral; (3) necessary to achieve a significant institutional interest; (4) clear, published, and provide ample alternative means of expression; and (5) recognize the public areas of campuses of the institution as public forums, open on the same terms to any speaker. This clarifies the standard courts will apply to university speech codes by ensuring that regulations are actually necessary to prevent disruption of the university [9] and by ensuring all publicly accessible areas of campus are open to all speakers on the same terms.[10]



In some respects, these limits go beyond what courts have held are the bare minimum requirements of the U.S. Constitution, and state constitutions will often require universities to provide more robust free-speech protection, even in the absence of the model bill.[11] For example, courts have upheld a university policy that allowed only certain candidates for student government, and no other students, to solicit door-to-door in student dorms, because the uneven ban furthered "responsible and effective participation in student government political activity." But the Supreme Court has recently made clear that the lodestar of First Amendment protections is content neutrality—regulation of speech must be evenhanded, regardless of the message. These regulations embrace this more protective content-neutral view of free speech rights. Thus, to take the dorm solicitation example, the university still has the authority under this bill to ban dorm room solicitation if it were demonstrated to be disruptive, or limit solicitation to certain times or dates, but all speakers must be subject to the same limits, regardless of their message.

SECTIONS 1.7–1.9

These three sections set the parameters within which state university systems will construct disciplinary sanctions for those who interfere with the free expression of others.

Yale's Woodward Report guided these sections because it was a direct response to a decade in which Yale had seen controversial speakers disinvited by administrators, or shouted down by students. That report was developed by a Committee on Free Expression, charged with reaffirming Yale's commitment to the intertwined issues of student discipline and free speech. So the Woodward Report not only eloquently upheld the centrality of free expression to the university's mission, it also laid out a code of conduct and a strategy for fairly but firmly punishing those who forcibly silenced the speech of others. That discipline policy remains in Yale's regulations to this day. According to those regulations, "temporary or permanent separation from the University" is the ultimate penalty for infringing on the rights of others "to listen to a speech or lecture."

In constructing a discipline policy for the present, the authors of the model bill have been mindful of abuses of the due-process rights of students brought before campus disciplinary hearings in recent years. The lack of due-process protections in these hearings not only harms the students accused, it hampers the search for truth that due process facilitates. Students confronting witnesses against them and calling witnesses in their defense—with the aid of counsel—are much more likely to reveal the truth than a one-sided prosecution. In consideration of that, the model bill provides robust due-process protections for campus disciplinary hearings.

At the same time, mindful of the need for both administrative flexibility and for avoiding potentially expensive and burdensome procedures in less serious cases, the model bill constructs a multitier system of sanctions that distinguish between greater and lesser offenses, and between first-time and repeat offenders.

Section 1.7 charges the state university system's directors with developing a range of disciplinary sanctions for anyone under the jurisdiction of the institution who interferes with the free expression of others.

Section 1.8 gives any student subject to a disciplinary hearing, at minimum, (1) the right to receive advanced written notice of the charges, (2) the right to review the evidence in support of the charges, (3) the right to confront witnesses against them, (4) the right to present a defense, (5) the right to call witnesses, (6) a decision by an impartial arbiter or panel, and (7) the right of appeal. Items 1, 2, and 4 represent the absolute bare minimum, but additional process is due in cases involving fundamental First Amendment freedoms, so the protections included in the bill are very strong.

Section 1.8 also includes the right to assistance of counsel when suspension for longer than 30 days, or expulsion, are potential penalties. This ensures robust due-process protections for the most serious cases, while also allowing more flexible procedures in less serious cases.

Section 1.9 provides that any student who has twice been found guilty of infringing the expressive rights of others will be suspended for a minimum of one year, or expelled.

The overall effect of this system of sanctions is to allow for lesser penalties and less burdensome procedures in less serious cases, while also making it clear to students that even a single offense could lead to major consequences in the future. Recall that the university governing board is charged with developing a broad range of disciplinary sanctions. This means that some offenses might provoke a simple probationary warning, with no suspension at all. At the same time, the student in question would know that a second offense would bring the potential of a very significant penalty.

These due-process protections are not just good policy; they are mandated by the state and U.S. constitutions. The Fourteenth Amendment guarantees due process of law and requires procedural protections commensurate with the significance of the rights at stake and the potential consequences.[12] Those protections must be tailored to reduce the likelihood of errors in the enforcement process, but need not be unnecessarily costly and time consuming.[13] Essentially, the Constitution requires a balance between protection of the accused and efficient administration of justice.

This balance must be especially protective when significant rights are at stake, which will almost always be the case in discipline arising under the model bill. The provisions of the bill relate to funda-

mental First Amendment rights, and discipline for exercising those rights must be subject to the most stringent due-process protections to sufficiently safeguard freedom of speech.

The Supreme Court has established minimum standards for high school students in campus disciplinary cases; but this floor is insufficient for college students who, as adults, are entitled to greater due-process protections. The bare minimum standards identified by the Supreme Court are (1) notice of the charges, (2) an explanation of the evidence, and (3) an opportunity to present a defense.[14] Exactly what due-process protections the Fourteenth Amendment requires in campus free-speech cases is unsettled. That is why the model bill takes a broadly protective approach to due process, while also maintaining administrative flexibility in cases involving less severe punishment.[15]

Some of the model bill's protections are already required by state laws. For example, students in Texas have the right to be present throughout a formal disciplinary hearing.[16] At least 13 states protect the right to hire counsel in state administrative proceedings: Alaska, Arizona, Arkansas, California, Hawaii, Kansas, Maryland, Montana, New Hampshire, New Mexico, Oregon, Washington, and Tennessee .[17] Three of those states have applied that right to hire counsel to public college disciplinary hearings (Washington, Tennessee, and Oregon) .[18] The model bill protects the right to counsel in the most serious disciplinary cases.

The entire disciplinary system will be explained to students during a special section of freshman orientation. Also yearly public reports, required by section 2 of the model bill, will examine the administrative handling of the system. This should encourage both students and administrators to seriously regard the prospect of discipline for infringing the expressive rights of others.

SECTION 1.10

This section affirms the principle that the university, as an institution, ought to maintain a position of neutrality on the "public policy controversies of the day." As noted in the introductory section, the language here is aspirational. The university system is instructed to "strive" to remain neutral, as an institution, on the public policy controversies of the day, while the determination of what constitutes neutrality is left to the discretion of the university governing board. The annual report required by section 2 of the model bill will help provide oversight to facilitate neutrality and address administrative practices that disregard or breach institutional neutrality.

Despite the aspirational language, divestment of university holdings on political grounds would be a fairly straightforward violation of the principle of institutional neutrality. So, too, would inappropriate political pressures on students from official university offices (for example, an office of sustainability) be potentially subject to intervention by the university governing board in defense of the principle of institutional neutrality.

In addition to the basic affirmation of the principle of institutional neutrality, Section 1.10 also directly prohibits the university from requiring students or faculty to publicly express a given view of social policy.

This section takes into account that when the university speaks, it does so with funds that have likely not been given to it for that purpose. This raises the risk that students and faculty could be compelled to fund or be associated with speech they disagree with and that puts the university in the position of

making content-based decisions about what speech to fund.[19] Compelling members of the university community to support speech burdens their First Amendment rights, since the right to free speech includes the right not to speak.[20] The bedrock principle of the model bill is that members of the university community should not be required to surrender their First Amendment rights in order to participate in the life of the university; protectecting the right not to speak is equally important to preserve First Amendment freedoms.

SECTION 1.11

This section ensures that any existing university speech codes inconsistent with the above provisions will be superseded and nullified by passage of the bill.

SECTION 2

This section establishes a Committee on Free Expression within the university's governing board and instructs it to issue an annual report on the campus's state of free expression to the public, the governor, and the legislature. The report must include a description of barriers to free expression, a description of administrative handling of discipline relating to these issues, a description of controversies, difficulties, or successes in maintaining a posture of institutional neutrality, and any assessments, criticisms, commendations, or recommendations the committee sees fit to include.

It is important to emphasize that the only power inherent in this report is the power of sunlight. The report itself simply describes the state of free expression on campus, and offers criticisms, commendations, or recommendations. Legislatures hold the power of the purse, and the university governing board (board of trustees) has the power to replace the leading administrator of the university system. Yet the model bill neither adds to nor detracts from these powers.

Nonetheless, exposure of problems with the administrative handling of free-speech issues can galvanize the public, the university governing board, and the legislature to ensure the flourishing of liberty on campus. And should problems with campus free expression be ignored or whitewashed by the annual report, the committee that produced it will be subject to public criticism. Ultimately, therefore, the purpose of the annual report is to encourage greater involvement by the public, the university governing board, and the legislature in the protection of campus free speech.

Once the public and their representatives are alert and involved on these issues, administrators will be compelled to take note. Instead of blithely overlooking assaults on free expression in hopes of keeping controversy off the front pages, administrators will need to consider how their actions will be judged in the next annual public report. Given the powers already inherent in the university governing board and the legislature, additional sunlight and more energetic public involvement with issues of campus free speech can be very powerful.

SECTION 3

This section requires freshman orientation programs to describe the policies and regulations regarding free expression contained in the model bill. This means that students will read the extended

statement on freedom of speech and its place in the university, and will be apprised in detail of the discipline policy as well. This is important, because students need to understand the potential consequences of infringing the expressive rights of others if the system of discipline is to prevent such abuses before they occur.

Above all, students must be educated in the meaning and importance of freedom of speech. The most important thing the university can do in defense of freedom of speech is to teach its students the history, value, and significance of this fundamental liberty. Explaining the university's statement on the meaning of free expression begins to do this, but it is only a first step.

The university governing board and administrators may wish to encourage even more attention to issues of free expression, both during freshman orientation and in university life more generally. For example, they might recommend the adoption of classic defenses of free speech, like John Stuart Mill's *On Liberty*, as "common readings" to be assigned to entering students in the summer before freshman year and discussed in lectures and special events for first year students. A series of invited lectures, conferences, or debates on freedom of speech directed to the entire university might also be arranged. A university might also wish to establish a "Center for the Study and Practice of Free Speech." Such centers could be charged with fostering an understanding of free speech and its indissoluble connection with liberal education.

SECTION 4

This section authorizes the university governing board and administrators to adopt any regulations necessary to further the purposes of the various policies included in the model bill.

This section also makes it clear that nothing in the model bill prevents universities from regulating student speech or activity that is prohibited by law. So, for example, campus speakers would not be permitted to arrange for recruits to join ISIS or al-Qaeda, since it is illegal under 18 U.S.C. § 2339A to provide material support for terrorists. Nor would a school be prohibited from policing "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[21]

SECTION 5

This section empowers individuals to enforce the model bill's protections for free speech. Individuals who are prevented from speaking on campus, relegated to unreasonable "free speech zones," or discriminated against based on the content of their speech will have recourse to the courts to enforce the protections of the model bill. By allowing plaintiffs to recover attorney fees, the model bill makes it practical for plaintiffs to bring cases where significant nonmonetary values are at stake. The fee provisions also serve as a reminder to administrators that they must take free-speech rights seriously or face real consequences; it will be better for everyone if administrators have an incentive to be protective of free speech, protecting the First Amendment rights of speakers and university budgets at the same time.

MODEL POLICY STATEMENT ON FREE EXPRESSION

The following text, largely drawing on language from Yale's Woodward Report and the University of Chicago's Stone Report and Kalven Report, represents a model policy statement that could be adopted by the university governing board in fulfillment of Sections 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.10, and 1.11 of the model bill. The provisions in Sections 1.7, 1.8, and 1.9 should result in the crafting of a separate discipline policy by the university governing board (board of trustees). Both the general statement and the discipline policy must be presented and explained to students during a special section of freshman orientation.

The primary function of a university is the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate. To fulfill this function a free interchange of ideas is necessary not only within its walls but with the world beyond. It follows that the university must strive to ensure the fullest degree of intellectual freedom. Although the need for intellectual freedom cannot by itself fully resolve the question of what to teach or how to structure the curriculum, free expression is a central value and priority of university life.

Because the university is committed to free and open inquiry in all matters, it guarantees all members of the university community the broadest possible latitude to speak, write, listen, challenge, and learn. Except insofar as limitations on that freedom are necessary to the functioning of the university, the university fully respects and supports the freedom of all members of the university community to discuss any problem that presents itself.

Of course, the ideas of different members of the university community will often and quite naturally conflict. But it is not the proper role of the university to attempt to shield individuals from speech protected by the First Amendment, including, without limitation, ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Without sacrificing its central purpose, the university cannot make its primary and dominant value the fostering of friendship, solidarity, harmony, civility, or mutual respect. Although the university greatly values civility, and although all members of the university community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

The freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, wherever they wish. The university may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the university. In addition, the university may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the university. Professors or other instructors may, for example, maintain order in the classroom. But these are narrow exceptions to the general principle of freedom of expression, and it is vitally important that these exceptions never be used in a manner that is inconsistent with the university's commitment to a completely free and open discussion of ideas.

In sum, the university's fundamental commitment is to the principal that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the university community to be offensive, unwise, immoral, or wrongheaded. It is for the individual members of the university community, not for the university as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech but by openly and vigorously contesting the ideas that they oppose. Indeed, fostering the ability of members of the university community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the university's educational mission, as is the need to foster awareness and understanding of the principle of freedom of speech itself.

As a corollary to the university's commitment to protect and promote free expression, members of the university community must also act in conformity with the principle of free expression. By voluntarily participating in the life of the university and thereby asserting a claim to its rights and privileges, members also acknowledge the existence of certain obligations upon themselves and their fellows. Although members of the university community are free to criticize and contest the views expressed on campus, and to criticize and contest speakers who are invited to express their views on campus, they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe. In light of this, protests and demonstrations that infringe upon the rights of others to engage in or listen to expressive activity shall not be permitted at the university and shall be subject to sanction.

Every official of the university, moreover, has a special obligation to foster the free interchange of ideas and to ensure that is not obstructed. This obligation can and should be enforced by appropriate formal sanctions. If the university's overriding commitment to free expression is to be sustained, secondary social and ethical responsibilities must be left to the informal processes of suasion, example, and argument.

In light of the university's commitment to free expression, the public areas of the university's campuses are public forums, open on the same terms to any speaker. Any person lawfully present on campus may protest, demonstrate, assemble, or engage in spontaneous expressive activity, so long as they adhere to university regulations of the time, place, and manner of expression and do not infringe upon the rights of others to engage in or listen to expressive activity. Students, student groups, or members of the faculty are free to invite any speaker they wish, without any university interference based on viewpoint or content.

As noted, students and faculty have the freedom to discuss any problem that presents itself, as the First Amendment permits and within the limits of reasonable viewpoint- and content-neutral restrictions on time, place, and manner of expression. Those restrictions must be necessary to achieve a significant institutional interest, and must also be clear, published, and provide ample alternative means of expression.

In addition to the above considerations, institutional neutrality plays a critical role in ensuring the fullest possible freedom of expression to the university community. To perform its mission in society, the university must sustain an extraordinary environment of freedom of inquiry and maintain an independence from political fashions, passions, and pressures. The university, if it is to be true to its faith in intellectual inquiry, must embrace, be hospitable to, and encourage the widest diversity of views within



its own community. It is a community but only for the limited, albeit great, purposes of research, teaching, discussion, and debate. It is not a club, it is not a trade association, it is not a lobby.

The neutrality of the university as an institution arises, then, not from a lack of courage, nor out of indifference and insensitivity. It arises out of respect for free inquiry and the obligation to cherish a diversity of viewpoints, an obligation that applies with particular force to a public university. And this neutrality as an institution on the public policy controversies of the day has its complement in the fullest freedom for its faculty and students as individuals to participate in political action and social protest. It finds its complement, too, in the obligation of the university to provide a forum for the most searching and candid discussion of public issues.

There exists, therefore, a heavy presumption against the university taking collective action or expressing collective opinions on the public policy controversies of the day, or modifying its corporate activities to foster social or political values, however compelling and appealing they may be.

These are matters of large principle, and the application of principle to an individual case will not be easy. It must always be appropriate, therefore, for faculty or students or administration to question, through existing channels, whether in light of these principles the university in particular circumstances is playing its proper role. Insofar as possible however, and particularly in light of its responsibility to the people of this state who fund the university (with all of their own diverse views on social and political controversies) it is of fundamental importance that the university strive to remain neutral, as an institu-

tion, on the public policy controversies of the day and may not take action, as an institution, on those issues in such a way as to require students or faculty to publicly express a given view of social policy.

This statement of policy supersedes and nullifies any prior provisions in the policies and regulations of the university and its constituent institutions that restrict speech on campus and are, therefore, inconsistent with this statement on free expression. Each constituent of the university will take steps to remove or revise any such provisions in its policies and regulations to ensure compatibility with the above statement on free expression.

CONCLUSION

While many campuses have failed to safeguard free expression, others have taken more positive steps. In November 2016, campus police at Grand Valley State University in Michigan threatened to arrest students for handing out copies of the U.S. Constitution.[22] Yet just days earlier, George Mason University's vice president for University Life reaffirmed the school's commitment to free speech by condemning student intimidation of those they disagree with.[23]

"You can choose to engage with those who have opposing viewpoints or you can walk away," this official said.

Lawmakers and university leaders cannot walk away from the responsibility to protect free expression on campus, or anywhere in society. This brief and its accompanying model legislation provide a new tool for policymakers working to protect the right of free expression on the campuses of their public university systems.

The model legislation contained herein draws on policy statements first issued by Yale University and the University of Chicago, statements now widely regarded as authoritative articulations of the nature and importance of campus free expression. Inspired by these predecessors, the model legislation offered in this brief requires university leaders to develop a policy statement that protects, explains, and defends free expression on campus. University leaders are also called upon to disseminate that policy statement to the campus community, and to issue regular public reports on the state of free speech on campus. The model bill also requires trustees and administrators to devise and impose consequences for those who interfere with the expressive rights of others, while protecting the rights of the accused.

This brief, with the model legislation it contains and explains, is a resource policymakers should use to protect the primacy of ideas and discourse at our public universities and the ideal of liberty for all.

APPENDIX A: YALE'S WOODWARD REPORT

Two days before Christmas, 1974, the Yale Committee on Freedom of Expression released its final report. The Yale faculty had earlier called on President Kingman Brewster Jr. to create a commission to examine "the conditions of free expression, peaceful dissent, mutual respect and tolerance" at the school.[24] The commission was formed after conflicts sparked by invitations to controversial speakers

had played out over the turbulent decade of the 1960s and beyond ("The University's commitment to the principle of freedom of expression was put to severe tests during the years of campus upheaval," the commission wrote).

No test was more controversial than the 1963 invitation issued by a campus political club to Alabama Gov. George C. Wallace. Given his opposition to racial integration, Wallace was, "the very symbol of reactionary intransigence." At the urging of then-Provost Brewster, the college's Political Union rescinded the invitation.

The student newspaper, college faculty, and even the *Boston Herald* opposed the decision to cancel the speech and cited the school's responsibility to "maintain the principles of free discussion." As a result, a group of law students issued Wallace a second invitation, which he declined.

Yale's commission cited this example as a case in which the school had tried but failed to defend free speech. The commission's report lists other examples, including campus protests of the U.S. invasion of Cambodia and several invitations from student groups to U.S. political and military leaders that led to disruptive demonstrations and canceled lectures.

Tasked with assessing and improving the college's responses to these events, the commission called on members of the college community to "revitalize our principles."The Woodward Commission issued three broad directives designed to restore freedom of expression to its rightful place at the center of Yale's institutional mission.

These recommendations are also embodied in the model legislation presented in this brief. Today what is known as the "Woodward Report" stands as an example of how university community can properly address threats to free speech on campus.

In its first recommendation, the Woodward Report called on Yale to recommit itself to educating members of the community in the value of freedom of thought and expression. "Education in the value of free expression at Yale is the business of all sectors of the University," the commission wrote. The doctrine of protecting and allowing for this freedom should be written down and made available for all to read. "[The] attention of students should be directed to these statements each year at registration." The model legislation offered here contains just such a provision.



Next the commission established boundaries for those who wished to protest visiting campus lecturers. The commission encouraged debate and opposition but explained that such activities must remain peaceful. Protesters should not disrupt events in such a way as to block the free expression of either the speaker or the audience.

Otherwise, said the Woodward Report, students should be subject to discipline. The model legislation offered here contains disciplinary sanctions of this nature.

Finally, the commission identified techniques by which Yale's administrators could protect free expression from disruptive actions. Many of the techniques listed by the commission are administrative rules (asking for student I.D. cards at events and providing ample space, for example). In general this final directive explains that Yale officials must be proactive about making sure that visiting lecturers in particular are protected. The potential for actions that might shut down a visiting lecturer must be diffused ahead of time, for example by explaining the disciplinary consequences of disruption to students. Again, the model legislation offered here contains just such proposals.

The Woodward Report takes its name from its chairman, Yale historian C. Vann Woodward. Officially, however, the report was issued by "The Committee on Free Expression" at Yale. The model legislation offered in this brief would establish a similar Committee on Free Expression within a given state's public university system, and would authorize that committee to issue annual public reports on the administrative handling of campus free speech issues. In effect, then, the model legislation offered here would institutionalize the process of a formal public report that so famously helped to restore free speech to Yale in the 1970s.

So in a number of ways, from its strong affirmation of the principles of free speech, to its disciplinary provisions, to its proactive attempts to alert students to the importance of free expression, to the institutionalization of university committees on free expression, the model legislation presented and explained in this brief draws on the lessons of Yale's widely respected Woodward Report.

APPENDIX B: THE UNIVERSITY OF CHICAGO AND THE KALVEN AND STONE REPORTS

Earlier this year, University of Chicago Dean of Students John Ellison welcomed the class of 2020 with a letter reiterating the school's commitment to free expression:

> Our commitment to academic freedom means that we do not support so-called 'trigger warnings,' we do not cancel invited speakers because their topics might prove controversial, and we do not condone the creation of intellectual 'safe spaces' where individuals can retreat from ideas and perspectives at odds with their own.[25]

Some, like Wesleyan University President Michael S. Roth, dismissed the letter as a "publicity stunt," but the dean's message was consistent with the university's long-standing position protecting free speech on campus.[26]

For more than a century, the University of Chicago has maintained a commitment to free expression on campus, as demonstrated by semiregular commissions and reports on the issue. In 1902, then-University President William Rainey Harper marked the school's position on free expression in his address on the university's decennial anniversary, saying, "The principle of complete freedom of speech on all

subjects has from the beginning been regarded as fundamental in the University of Chicago . . . This principle can neither now nor at any future time be called into question."[27]

As explained in the University of Chicago's widely hailed 2015 Stone Report, even when students invited a known communist to speak on campus in 1932, then-University President Robert M. Hutchins defended students' right to listen to opinions with which they disagree. "Our students . . . should have freedom to discuss any problem that presents itself."[28]

In 1967, what became known as the "Kalven Committee" at the University of Chicago released a statement articulating the principle of institutional neutrality on political controversies as a central pillar of campus free expression.[29] This report is notable not just for its statement of principles but also because the committee issued the paper during the turbulent 1960s—the same period during which Yale and other colleges were struggling to protect free speech (the committee and its findings are named for Harry Kalven, who served at this time as the university's Harry A. Bigelow Professor of Law.).

The Kalven report is not as long or prescriptive as Yale's Woodward report, but it does affirm the critical principle of institutional neutrality, while explaining its essential role in protecting campus free expression.

The Kalven Report affirms that a "university faithful to its mission will provide enduring challenges to social values, policies, and institutions." Yet it also notes that the instrument of such dissent and criticism is the individual faculty member and the individual student. The university, as an institution, has an obligation to remain officially neutral on major political controversies, so as not to place undue pressure on individual faculty or students to take one side of a debate. Thus does the Kalven Report conclude:

> The neutrality of the university as an institution . . . arises out of respect for free inquiry and the obligation to cherish a diversity of viewpoints. And this neutrality as an institution has its complement in the fullest freedom for its faculty and students as individuals to participate in political action and social protest.

The principle of institutional neutrality as classically articulated and affirmed by the Kalven Report is likewise affirmed in the model legislation offered in this brief.

Shortly after the Yale episode of inviting and then disinviting then-Alabama Gov. George Wallace, another University of Chicago president committed the school to protecting ideas.[30] Edward H. Levi called "freedom of inquiry" our "inheritance" in his 1968 inaugural address.

Thus, Dean Ellison's letter to freshman is only the most recent declaration in a long line of such affirmations by University of Chicago leaders who have held fast to the principle of free speech. As with the Woodward report, the model legislation offered in this brief draws inspiration from the University of Chicago's long history of publicly defending the primacy of free expression on campus.

CAMPUS FREE SPEECH ACT

WHEREAS, [free speech provision of state constitution] recognizes that "[quote]"; and

WHEREAS, the state institutions of higher education have historically embraced a commitment to freedom of expression in policy; and

WHEREAS, in recent years, state institutions of higher education have abdicated their responsibility to uphold free-speech principles, and these failures make it appropriate for all state institutions of higher education to restate and confirm their commitment in this regard; and

WHEREAS, in 1974, the Committee on Free Expression at Yale issued a statement known as the Woodward Report that stands as a classic defense of free expression on campuses; in 2015, the Committee on Freedom of Expression at the University of Chicago issued a similar and widely respected report; and in 1967, the Kalven Committee Report of the University of Chicago articulated the principle of institutional neutrality regarding political and social issues and the essential role of such neutrality in protecting freedom of thought and expression at universities. The principles affirmed by these three highly regarded reports are inspiring articulations of the critical importance of free expression in higher education; and

WHEREAS, this legislature views freedom of expression as being of critical importance and requires that each state institution of higher education ensure free, robust, and uninhibited debate and deliberation by students of state institutions whether on or off campus; and

WHEREAS, this legislature has determined that it is a matter of statewide concern that all state institutions of higher education officially recognize freedom of speech as a fundamental right; now, therefore,

BE IT ENACTED:

Section 1.

The governing bodies of all state institutions of higher education shall develop and adopt a policy on free expression that contains, at least, the following:

1. A statement that the primary function of an institution of higher education is the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate. This statement shall provide that, to fulfill this function, the institution must strive to ensure the fullest degree of intellectual freedom and free expression.

2. A statement that it is not the proper role of the institution to shield individuals from speech protected by the First Amendment, including, without limitation, ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.

3. That students and faculty have the freedom to discuss any problem that presents itself, as the First Amendment permits and

CAMPUS FREE SPEECH ACT

within the limits of reasonable viewpoint — and content-neutral restrictions on time, place, and manner of expression that are consistent with this act and that are necessary to achieve a significant institutional interest; provided that these restrictions are clear, published, and provide ample alternative means of expression. Students and faculty shall be permitted to assemble and engage in spontaneous expressive activity as long as such activity is not unlawful and does not materially and substantially disrupt the functioning of the institution, subject to the requirements of this subsection.

4. Any person lawfully present on campus may protest or demonstrate there. Such statement shall make clear that protests and demonstrations that infringe upon the rights of others to engage in or listen to expressive activity shall not be permitted and shall be subject to sanction. This does not prohibit professors or other instructors from maintaining order in the classroom.

5. That the campuses of the institution are open to any speaker whom students, student groups, or members of the faculty have invited.

6. That the public areas of campuses of the institution are traditional public forums, open on the same terms to any speaker.

7. The policy shall include a range of disciplinary sanctions for anyone under the jurisdiction of the institution who interferes with the free expression of others.

8. In all disciplinary cases involving expressive conduct, students are entitled to a disciplinary hearing under published procedures, including, at minimum (1) the right to receive advanced written notice of the charges, (2) the right to review the evidence in support of the charges, (3) the right to confront witnesses against them, (4) the right to present a defense, (5) the right to call witnesses, (6) a decision by an impartial arbiter or panel, and (7) the right of appeal.

When suspension for longer than 30 days or expulsion are potential penalties, students are entitled to a disciplinary hearing under published procedures, including, at minimum, all of the above procedures, plus the right to active assistance of counsel.

9. Any student who has twice been found responsible for infringing the expressive rights of others will be suspended for a minimum of one year, or expelled.

10. That the institution (1) shall strive to remain neutral, as an institution, on the public policy controversies of the day, and (2) may not take action, as an institution, on the public policy controversies of the day in such a way as to require students or faculty to publicly express a given view of social policy.

11. That this statement supersedes and nullifies any prior provisions in the policies and regulations of the institution that restrict speech on campus and are, therefore, inconsistent with this statement on free expression. The institution will remove or

CAMPUS FREE SPEECH ACT

revise any such provisions in its policies and regulations to ensure compatibility with the above statement on free expression.

Section 2

The governing bodies of state institutions of higher education shall create a single Joint Committee on Free Expression consisting of no less than 15 members. The Committee on Free Expression shall report to the public, governing bodies of state institutions of higher education, the governor, and the state legislature on September 1 of every year. The report shall include:

1. A description of any barriers to or disruptions of free expression within state institutions of higher education.

2. A description of the administrative handling and discipline relating to these disruptions or barriers.

3. A description of substantial difficulties, controversies, or successes in maintaining a posture of administrative and institutional neutrality with regard to political or social issues.

4. Any assessments, criticisms, commendations, or recommendations the committee sees fit to include.

Section 3

State institutions of higher education shall include in freshman orientation programs a section describing to all students the policies and regulations regarding free expression consistent with this act.

Section 4

State institutions of higher education are authorized to adopt regulations to further the purposes of the policies adopted pursuant to this Act. Nothing in this Act shall be construed to prevent institutions from regulating student speech or activity that is prohibited by law. Except as further limited by this Act, institutions shall be allowed to restrict student expression only for expressive activity not protected by the First Amendment, including:

(A) Violations of state or federal law.

(B) Expression that a court has deemed unprotected defamation.

(C) Harassment.

(1) "Peer-on-peer harassment," which is defined as conduct directed by a student towards another individual student, on the basis of that student's membership or perceived membership in a protected class, that is so severe, pervasive, and objectively offensive that it effectively deprives the victim of access to the educational opportunities or benefits provided by the university.

(2) "Quid pro quo sexual harassment,"which is defined as explicitly or implicitly conditioning a student's participation in an education program or activity or basing an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors,

CAMPUS FREE SPEECH ACT

or other verbal, nonverbal, or physical conduct of a sexual nature.

(D) True threats, which are defined as statements meant by the speaker to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.

(E) An unjustifiable invasion of privacy or confidentiality not involving a matter of public concern.

(F) An action that unlawfully disrupts the function of the university.

(G) Reasonable time, place, and manner restrictions on expressive activities consistent with Section 1.2 herein.

Section 5

A. A state institution of higher education may restrict expressive conduct in the public areas of campus only if it demonstrates that the restriction is:

1. Necessary to achieve a compelling governmental interest;
2. The least restrictive means of furthering that compelling governmental interest;
3. Leave open ample other opportunities to engage in the expressive conduct; and
4. Provide for spontaneous assembly and distribution of literature.

B. The following persons may bring an action in a court of competent jurisdiction to enjoin any violation of this section or to recover reasonable court costs and reasonable attorney fees:

1. The attorney general.
2. A person whose expressive rights are violated by a violation of this section.

C. In an action brought under subsection B of this section, if the court finds that a violation of this section occurred, the court shall award the aggrieved person injunctive relief for the violation and shall award reasonable court costs and reasonable attorney fees. The court shall also award damages of $1,000 or actual damages, whichever is higher.

D. A person shall bring an action for a violation of this section within one year after the date the cause of action accrues. For the purpose of calculating the one-year limitation period, each day that the violation persists or each day that a policy in violation of this section remains in effect constitutes a new violation of this section and shall be considered a day that the cause of action has accrued.



ENDNOTES

[1] Stephen Beale, "Brown Confronts 'Safe Space' Criticisms, Schedules Free Speech Forum," New Boston Post, September 12, 2016, http://newbostonpost.com/2016/09/12/brown-confronts-safe-space-criticisms-schedules-free-speech-forum/.

[2] See Appendix B and University of Chicago, "Kalven Committee: Report on the University's Role in Political and Social Action," November 11, 1967, https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt.pdf.

[3] Fifty-second Arizona Legislature, Second Regular Session, HB 2615, https://apps.azleg.gov/BillStatus/BillOverview/68236 .

[4] Fifty-second Arizona Legislature, Second Regular Session, HB 2615, House Summary as transmitted to the governor, http://www.azleg.gov/legtext/52leg/2r/summary/H.HB2615_04-21-16_ASTRANSMITTEDTOGO VERNOR.DOC.html.

[5] For a history of these documents, see Appendices A and B.

[6] For summaries of how Yale and the University of Chicago have dealt with free expression on campus, see Appendices A and B at the end of this report.

[7] *Healy v. James*, 408 U.S. 169, 180 (1972) (quotations omitted).

[8] *Healy*, 408 U.S. at 180 (quotations omitted).

[9] See *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969).

[10] See *Roberts v. Haragan*, 346 F. Supp. 2d 853, 861–62 (N.D. Tex. 2004) ("to the extent the campus has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University's students . . . [T]he University, by express designation, may open up more of the residual campus as public forums for its students, but it can not designate less.")

[11] See Robert F. Utter, The Right To Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment, 8 U. PUGET SOUND L. REV. 157 (1985) ("The limited pro- tection provided to freedom of expression in the federal Constitution has so overshadowed the corresponding and often stronger state constitutional guarantees that freedom of expression is almost universally referred to as a 'first amendment' right.")

[12] *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

[13] *Id.*

[14] *Goss v. Lopez*, 419 U.S. 565, 581 (1975)

[15] *Id.* at 584 ("Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.")

[16] *Univ. of Texas Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 931 (Tex. 1995).

[17] ALASKA STAT. § 44.62.420(b); ARIZ. REV. STAT. § 41-1062(A)(1); ARK. CODE § 25-15-213(1); CAL. GOV'T CODE § 11509; HAW. REV. STAT. § 91-9(b)(5); KAN. STAT. § 77-515(b); MD. CODE,

ENDNOTES

STATE GOV'T § 10-206.1(a)(3); MONT. CODE § 2-4-105; N.H. REV. STAT. § 541-A:31(III)(e); N.M STAT. § 12-8-11(F); OR. REV. STAT. § 183.417(1); WASH. REV. CODE § 34.05.428(1); TENN. CODE § 4-5-30(b).

[18] See, e.g., WASH. ADMIN. CODE 516-28-035; TENN. COMP. R. & REGS. 1720-01-05-.01(2)(a); OR. ADMIN. R. 579-040-0015(4)(f).

[19] *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 229–30 (2000) ("The viewpoint neutrality requirement of the University program is in general sufficient to protect the rights of the objecting students.")

[20] *Knox v. Service Employees Intern. Union*, 132 S. Ct. 2277, 2288–89 (2012), see also *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 712–13 (7th Cir. 2010).

[21] *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

[22] Tyler Arnold, "Students Threatened with Arrest for Handing out Constitutions," Campus Reform, November 3, 2016, https://www.campusreform.org/?ID=8343. A video of the altercation is available on YouTube at https://www.youtube.com/watch?v=EWRTt8PwNxE (accessed November 9, 2016).

[23] Jenna Lifhits, "George Mason U. Reaffirms Committement to Free Speech in All-Student Email," Weekly Standard, October 28, 2016, http://www.weeklystandard.com/george-mason-u.-reaffirms-commitment-to-free-speech-in-all-student-email/article/2005136 .

[24] Yale College Dean's Office, "Report of the Committee on Freedom of Expression at Yale," December 23, 1974, available at http://yalecollege.yale.edu/deans-office/policies-reports/report-committee-freedom-expression-yale.

[25] Scott Jaschik, "U Chicago to Freshmen: Don't Expect Safe Spaces," InsideHigherEd, August 25, 2016, https://www.insidehighered.com/news/2016/08/25/u-chicago-warns-incoming-students-not-e xpect-safe-spaces-or-trigger-warnings.

[26] Richard Pérez-Peña, Mitch Smith, and Stephanie Saul, "University of Chicago Strikes Back Against Campus Political Correctness," *New York Times*, August 26, 2016, http://www.nytimes.com/2016/08/27/us/university-of-chicago-strikes-back-against-campus-political-correctness.html.

[27] University of Chicago, Report of the Committee on Freedom of Expression, January 2015, https://freeexpression.uchicago.edu/sites/freeexpression.uchicago.edu/files/FOECommitteeRe port.pdf .

[28] University of Chicago, Report of the Committee on Freedom of Expression.

[29] University of Chicago, "Kalven Committee: Report on the University's Role in Political and Social Action."

[30] University of Chicago, Report of the Committee on Freedom of Expression.



500 East Coronado Road | Phoenix, Arizona 85004
Office (602) 462-5000 | Fax (602) 256-7045
www.GoldwaterInstitute.org