



October 26, 2017

The Honorable Lamar Alexander
Chair
Senate Health, Education, Labor
and Pensions Committee
Washington, D.C. 20510

The Honorable Patty Murray
Ranking Member
Senate Health, Education, Labor
and Pensions Committee
Washington, D.C. 20510

Dear Chairman Alexander and Ranking Member Murray:

We write to provide the views of the Anti-Defamation League (ADL) for today's Senate HELP Committee hearings on "Exploring Free Speech on College Campuses" and ask that this statement be included as part of the official hearings record.

The Anti-Defamation League

Since 1913, the mission of ADL has been to "stop the defamation of the Jewish people and to secure justice and fair treatment for all." Dedicated to combating anti-Semitism, prejudice, and bigotry of all kinds, as well as defending democratic ideals and promoting civil rights, ADL is proud of its leadership role in developing innovative materials, programs, and services that build bridges of communication, understanding, and respect among diverse racial, religious, and ethnic groups.

We work with colleges and universities across the country, on both proactive education about hate, bigotry and bias, and in response to specific hate incidents on campus when they occur. ADL's expertise in combatting hate, building inclusive communities, and safeguarding civil rights, perfectly positions our organization to weigh in on this critical issue for institutions of higher education.

Free Speech and the Marketplace of Ideas

In our work around the country, we regularly encounter virulent hate speech. Even the most heinous speech is largely protected by our federal and state constitutions – and ADL staunchly and consistently supports this bedrock principle of American democracy. The ability to express controversial and even offensive ideas is a cornerstone of our nation's democratic ideals – one of the principal ways our nation is exceptional and distinguished from the vast majority of countries around the globe where unpopular viewpoints can be – and are – punished.

While odious hurtful, hate speech may be permissible, it is not harmless, and must not go unanswered. As early as the 1600's, John Milton introduced the concept of American society as a "marketplace of ideas." He posited that truth will emerge from the competition of ideas in free, transparent public discourse. Yet this marketplace is not self-executing. Rather, it depends on people's willingness to respond to words which are intended to demean, humiliate, and deride. Malicious speech, including hate speech, must be responded to with better speech. This commitment to counter hateful speech is particularly critical at our university and college campuses as they are our best laboratories for nurturing ideas, innovation, and debate.

The Integral Role Universities Play When Responding to Hate Speech

In the past year, ADL has not only seen a spike in anti-Semitic/hateful incidents on campus, but we have documented a changing nature of incidents, and an increased impact on communities that coincides with a polarized climate.¹

A recent survey commissioned by UCLA's Higher Education Research Institute, "*The American Freshman: National Forms Fall 2016*," highlights three trends about the incoming class of 2016 that explain the current climate on college campuses.² First, entering first-year college students are the most politically polarized cohort of in the 51-year history of the survey. Fewer students than ever before (42.3%) categorize their political views as "middle of the road." Second, a larger proportion of students placed a greater importance on life goals of influencing the political structure and social values. Third, students' pluralistic orientation skills and dispositions appropriate for living and working with diverse minded others—have remained steady.

Together, these trends help explain the current campus climate, including the contentiousness of debate and discourse on campus. The political and ideological divide between students is widening and their willingness and ability to engage in civil discourse is weakening. While students may be more willing to engage civically and attempt to effectuate change, their ability to understand another's point of view and communicate respectfully has not grown. This has contributed to an increased number of First Amendment violations on campus—like shout downs and violent protests.

These developments highlight the key role that college and university leaders must play when responding to these types of situations: they must ensure that no one is punished for their protected speech just because it discomfits some and, simultaneously, use their bully pulpit to counter hateful speech with timely, specific, and direct responses. We have seen this technique successfully utilized across the country.

¹ The danger posed by hate group efforts to organize on campus is perhaps best exemplified by a large white supremacist event dubbed "Unite the Right" which occurred in Charlottesville, Virginia, on August 11 and 12, ostensibly to protest the removal of a statue of Robert E. Lee in a local park. A torchlit parade on and around the University of Virginia campus the first evening of the event became violent, with clashes between white supremacists and counter-protesters. The violence continued and increased the next day. The worst example of such violence occurred when a Unite the Right attendee from Ohio allegedly drove his car into a crowd of protesters, killing one woman and injuring many more. Two other lives were tragically lost when a Virginia State Police helicopter on its way to monitor the event crashed, killing the two state troopers on board.

As one powerful, united response, Congress approved S.J. Res 49, which, among other things, condemned the "racist violence and terrorist attack" and put the Congress on record in rejecting "White nationalism, White supremacy, and neo-Nazism as hateful expressions of intolerance that are contradictory to the values that define the people of the United States." The Resolution urged

- (A) the President and his administration to--
 - (i) speak out against hate groups that espouse racism, extremism, xenophobia, anti-Semitism, and White supremacy; and
 - (ii) use all resources available to the President and the President's Cabinet to address the growing relevance of those hate groups in the United States; and
- B) the Attorney General to work with--
 - (i) the Secretary of Homeland Security to investigate thoroughly all acts of violence, intimidation, and domestic terrorism by White supremacists, White nationalists, neo-Nazis, the Ku Klux Klan, and associated groups in order to determine if any criminal laws have been violated and to prevent those groups from fomenting and facilitating additional violence; and
 - (ii) the heads of other Federal agencies to improve the reporting of hate crimes and to emphasize the importance of the collection, and the reporting to the Federal Bureau of Investigation, of hate crime data by State and local agencies.

Public Law 115-58 <https://www.congress.gov/115/plaws/publ58/PLAW-115publ58.pdf> (9/14/2017)

² Eagan, M. K., Stolzenberg, E. B., Zimmerman, H. B., Aragon, M. C., Whang Sayson, H., & Rios-Aguilar, C. (2017). *The American Freshman: National Norms Fall 2016*. Los Angeles: Higher Education Research Institute, UCLA <https://www.heri.ucla.edu/monographs/TheAmericanFreshman2016.pdf>

For instance, on Valentine's Day, a Central Michigan University (CMU) Republican student group distributed gift bags to students including a card that read, "my love 4 u burns like 6,000 jews." The card included a photo of Adolf Hitler. In response to this incident, CMU President George Ross issued a forceful statement that the card's language, "while protected by the First Amendment, is unacceptable and is not consistent with our values and standards." He continued by calling upon "each of our students, faculty and staff to be beacons of peace, respect, inclusivity and civility — to be role models of integrity, dignity and leadership."³

More than 100 faculty members heeded this call when they wrote an Open Letter to the university community. It stated,

"First and foremost, we stand in unflinching solidarity with Jewish communities on our campus and beyond. We uphold you now and always. We will do everything in our power to protect you, to listen to and hear your truths, to affirm and teach your histories and current-day experiences, and to celebrate your people.

Further, we reject acts of hate against any group of fellow humans on our campus and in our communities at home and abroad. Here, too, we vow to uphold the values of a diverse society that treasures the multiplicity of voices, experiences, and identities.

We condemn any rhetoric or any group that provides fertile ground for hate speech. We will not hesitate to name things for what they are. Speaking out against hate and intolerance isn't a partisan act; it is a moral imperative rooted in the fight for justice, dignity, and human rights.

We won't make peace with hate on our campus or anywhere else."⁴

Even though the creator of the valentine turned out not to be a student, the initial impact of the incident was deeply painful to the campus community. When messages appear on campus that are demeaning to a group of people or demonstrate actions that are contradictory to the values of diversity, equity, and inclusion, trust is eroded and communities need to heal. Make no mistake: hate speech on campus, though it may be protected by the First Amendment, has a significant harm and impact. It distracts from the learning community institutions strive to create, and it increases the perception of division in an already deeply-polarized political climate.

This issue of hate speech creating a distraction from learning is important. When a person's sense of value and belonging in a place they call home is challenged, it interferes with a student's ability to learn inside the classroom and out, and it impacts the success of staff and faculty who are also affected.

While civility and discourse are critical, educational institutions also must take into account the fact that historically-marginalized and other minoritized groups bear a greater burden when speech targets their personal identities and sense of self. Gaps in success rates for students of color are well documented. There are several compounding factors at work for many of these students, including that they are already vulnerable to bias, stereotypes, threats and, in some cases, financial concerns, and pressures from being the first in their family to attend college.

We note this to say that, while the ideal of open expression appears to be equal, inequities in impact certainly exist. For this reason, it is critical that administrators, staff, faculty, students,

³ <https://www.cmich.edu/news/article/Pages/card-statement.aspx>

⁴ <https://docs.google.com/document/d/1j2k-LRpoTknuCdL9Gsoc2eMhI-1TLmaj-nGsb2qhQY/pub>

and all community members speak and act, both against hate, and in support of a civil environment that accounts for the complexities of a diverse community. Colleges and universities must build an institution for learning that works toward inclusion and equity while also ensuring open expression and a marketplace for ideas. This requires flexibility and the ability for campus leadership to shift policies and practices for the needs of their community.

The Cost of Protecting Speech

Protecting free speech on campus in today's climate has put tremendous fiscal pressure on universities. For example, in a typical year, University of California (UC), Berkeley, allocates around \$200,000 to pay for security at campus protests.⁵ The university spent triple that amount -- \$600,000 -- in one night when conservative speaker Ben Shapiro recently spoke on campus.⁶ Security measures included calling in reinforcements from all 10 UC campuses and from law enforcement agencies around the San Francisco Bay Area, erecting concrete barriers, establishing a police perimeter, shutting down nearby buildings and roads, and redirecting traffic.⁷ Similarly, Milo Yiannopoulos' 15 minutes at UC Berkeley's campus cost the university \$800,000; university officials called it the "the most expensive photo-op in the university's history."⁸ Last week, white supremacist Richard Spencer spoke at the University of Florida. Officials estimated that the institution spent at least half a million dollars on security.⁹ While UC Berkeley and University of Florida are large institutions that perhaps can withstand these expenses temporarily, smaller colleges may not have the reserves to provide for adequate security. This places universities in the untenable position of choosing between violating the First Amendment by shutting down the speaker or risking serious harm to property or life.

Free speech is constitutionally protected and existing law establishes that a university cannot assess security costs based upon the content of a speaker's message or the likely response of counter protestors.¹⁰ However, the current law is unclear about how much a university must be willing to spend in order to protect that right. Universities seek a long-term strategy for paying for security. Federal funding specifically for increased costs associated with controversial speakers and rallies could ameliorate the crushing burden on universities.

Heckler's Veto

Our free speech rights may be the world's broadest, but they are not unlimited. Speech that intentionally intimidates, threatens, or otherwise interferes with the legal rights of others is not protected. While protest, for instance, is a time-honored manifestation of our free speech rights, there are limits to this expressive activity too. No outside person has a right to be invited to speak on campus, but when they are invited in an authorized manner by a university department, faculty, or an authorized student group, First Amendment free speech rights attach. Preventing authorized speakers from talking is not protected by the First Amendment. Regrettably, we are seeing protestors employ this tactic – sometimes referred to as a "heckler's veto" – increasingly on campuses. When campus authorities or police allow dissenters to drown out someone's speech or prevent someone from speaking, they are allowing protestors to silence that speaker, and fail to protect the constitutional rights of both the speaker and the audience.

⁵ https://www.nytimes.com/2017/09/24/opinion/milo-yiannopoulos-free-speech-week-berkeley.html?_r=0

⁶ <https://www.usnews.com/news/politics/articles/2017-09-14/uc-berkeley-under-tight-security-for-conservative-speaker>

⁷ Id.

⁸ <http://www.mercurynews.com/2017/09/24/update-barricades-ring-sproul-plaza-as-berkeley-braces-for-milo-yiannopoulos/>

⁹ <http://www.npr.org/sections/thetwo-way/2017/10/17/558294630/floridas-governor-declares-state-of-emergency-ahead-of-richard-spencer-speech>

¹⁰ *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992)

Sadly, this sequence has become all too familiar. Just this year, we have watched it play out at institutions including Middlebury College, University of California at Berkeley, Claremont McKenna College, New York University, Columbia, University of Buffalo, University of California at Irvine and Northwestern University.¹¹ These intentional interruptions – done under the guise of free expression -- contravene the First Amendment and undermine academic freedom and the open exchange of ideas. Presenters and protestors can both be heard without one infringing upon the rights of the other. Campus policies should reflect this, and administrators must act to prevent speakers from being deprived of their constitutional rights. In academia, not all ideas must be legitimized, but when presented, they should be given the opportunity to be heard. Open expression and academic freedom are guiding principles toward honest inquiry and the shaping of a society where current unpopular ideas have a path to becoming future truths.

For example, last April, at San Francisco State University, protestors equipped with sound amplifiers effectively shut down a scheduled presentation by Jerusalem Mayor Nir Barkat. Despite the presence of a university administrator and campus police at the event, Mayor Barkat was forced to retreat with a smaller group while protesters continued using amplified sound in an effort to prevent him and the audience from exercising their First Amendment rights – therefore inhibiting any chance for dialogue on the issues. We have seen similar conduct directed at pro-Israel speakers at other universities including the University of California at Davis, the University of California at Irvine, the University of Minnesota, and the University of Chicago. These disruptions are part of a troubling campaign designed to preclude pro-Israel speakers from being heard on campus.

Legislation Pertaining to Free Speech on Campus

In an attempt to respond to this ill-conceived, deeply offensive ‘shout-down’ strategy,” legislators in at least 17 states have introduced legislation purported to protect free speech on campus. These bills are largely based on a model written by the Goldwater Institute¹² and contain troubling provisions that would shift discretion on how to handle these incidences from the university to the statehouse. Some proposed legislation mandates suspension and/or expulsion as a result of infringing the expressive rights of others, and other proposals allow for similar exclusionary discipline. ADL has broad concerns about these legislative proposals and strongly believes that decisions about discipline must be left to the judgment of individual university leaders. Additionally, we have concerns that fear of such harsh discipline and consequences will have a chilling effect on student and faculty speech.

The Institute’s Model also places an emphasis on the need for individuals to be permitted to spontaneously assemble and distribute literature. The model, however, does not contain a definition of spontaneous. This ambiguousness could lead to unintended consequences such as attempts to circumvent the permit process¹³ or other ways in which colleges and universities authorize speakers for campus events in a constitutional manner, designed to ensure both freedom of speech and safety and order on campus.

Perhaps most troubling, one-third of these bills include a condition that universities “(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

¹¹ <http://www.nationalreview.com/corner/448132/year-shout-down-worse-you-think-campus-free-speech>

¹² <http://goldwaterinstitute.org/en/work/topics/constitutional-rights/free-speech/campus-free-speech-a-legislative-proposal/>

¹³ For instance, a bill currently in the Texas Assembly requires that members of the university’s community be allowed “to spontaneously and contemporaneously assemble or distribute written materials without a permit or other permission from the institution.”

ftp://ftp.legis.state.tx.us/bills/85R/billtext/html/house_bills/HB02500_HB02599/HB025271.htm

as to require students or faculty to publicly express a given view of social policy.”¹⁴ Precluding universities from advocating on behalf of issues that reflect their institutional values violates fundamental academic norms and inhibits their ability to maintain a safe and inclusive campus climate.

For instance, after President Trump issued his Executive Orders signaling a crackdown on illegal immigration, many students around the country felt deep-seated fear and uncertainty. In order to assuage students’ anxiety, 28 universities vowed to offer sanctuary to their undocumented students¹⁵. For example, University of Pennsylvania President Amy Gutmann announced that, “The University of Pennsylvania will not allow Immigration and Customs Enforcement (ICE) / Customs and Border Protection (CBP) / U.S. Citizenship and Immigration Services (USCIS) on our campus unless required by warrant...Further, the university will not share any information about any undocumented student with these agencies unless presented with valid legal process.”¹⁶ University leaders must not be stripped of their policy making discretion and other tools to create a campus where all community members feel welcome.

When the state of Indiana was grappling with whether to pass an amendment banning same-sex marriage statewide, the University of Indiana was the state’s first college or university to join Freedom Indiana – a bipartisan coalition of organizations and businesses dedicated to thwarting the ban. The university’s capacity to speak out in no way undermined the ability of individual students, faculty, or administrators to articulate a contradictory opinion.

In 2005, Lawrence Summers, then president of Harvard University, made public remarks to the conference of the National Bureau of Economic Research expressing skepticism of discrimination as a factor in gender gaps facing women in science fields. While controversial, it was important that Summers have the ability to speak freely, and that dissenters to his speech also be allowed to express other views.

A Collective Response: UC Final Report on the Principles Against Intolerance

In 2016, the University of California Regents took an important step forward in outlining university rights and responsibilities on campus when it unanimously passed its *Final Report of the Regents Working Group on Principles Against Intolerance*.¹⁷ This pioneering approach not only recognized that First Amendment and academic freedom principles must remain paramount, but also established an aspirational tone that reflects an understanding of the many real challenges presented when a college atmosphere becomes the target of anti-Semitic behavior, racism, or discrimination of any kind. Most critically, the report highlighted the vital role of university leadership in addressing tolerance. ADL supported the adoption of the Report and has urged the California State University system to adopt similar principles.¹⁸

Colleges and universities must have the ability to pivot as the needs of the community and the context of American society shift. This past year, issues related to extremism have affected campuses in a disturbing, new way.

The Wrong Response: University of Wisconsin’s Board of Regents Recently-Adopted Policy Will Stifle Speech

Earlier this month, the Board of Regents of University of Wisconsin adopted a deeply-troubling policy that creates mandatory penalties for students who repeatedly disrupt on-campus

¹⁴ Goldwater Institute model

¹⁵ <http://remezcla.com/lists/culture/sanctuary-campus-daca/>

¹⁶ <https://news.upenn.edu/message-penn-community-concerning-our-daca-and-undocumented-community-members>

¹⁷ <http://regents.universityofcalifornia.edu/aar/mare.pdf>

¹⁸ <http://la.adl.org/news/joint-statement-in-support-of-uc-regents-policy-against-intolerance/>

speakers.¹⁹ The policy mirrors legislation that has passed the Wisconsin Assembly and is currently under consideration by the state Senate.²⁰ The Board's policy is emblematic of the potential problems that arise when a blanket free speech rule is promulgated, rather than a tailored response to specific facts.

The policy compels suspension for students found twice responsible for violating the free speech rights of others and mandates expulsion for a third violation. However, the bill does not contain definitions of "disruption" or "interference with free speech." These vague terms increase the likelihood of misuse of the policy and selective enforcement by those who wish to silence certain perspectives or curb discussion of controversial topics. Because they are coupled with harsh punishments—suspension and expulsion—these ambiguities will discourage students from engaging in debate and voicing their opinion. The punishments are mandatory and, therefore, strip university officials of their ability to respond proportionately and appropriate to specific circumstances. Taken together these factors will ultimately chill speech.

The Board's policy also contains a neutrality provision, stating that "[e]ach UW institution shall not take action, as an institution, in such a way as to require students or employees to express a particular view on a public policy issue." At best, this provision is unnecessary because a university's stance on an issue does not compel a campus stakeholder to personally adopt the same position (or any position at all). At worst, the neutrality provision infringes on the university's First Amendment rights and inhibits a university's ability to speak out against hate and, therefore, maintain a safe and inclusive environment for its students and faculty.

White Supremacists on Campus: Unprecedented Recruitment Efforts Underway

ADL has documented that white supremacists are engaged in unprecedented outreach efforts on American college campuses – another sign that these hate groups feel emboldened by the current political climate.²¹ ADL's Center on Extremism has counted 79 incidents of racist fliers, banners, or stickers being posted on college campuses since Sept. 1. This compares to only nine incidents in September and October of 2016. A total of 260 incidents have been recorded on 173 campuses in 40 states since September 2016.

White supremacists are mobilizing in hopes of translating their online activism to "real world" action, and campuses – and young people – are prime targets, in part because they are still figuring out who they are, and what they believe. Extremists also undoubtedly see value in recruiting a new generation that can carry the movement for years to come.

Longtime white supremacist Jared Taylor recently wrote on his website, American Renaissance, that colleges are of special interest "because they are bastions of anti-white propaganda." Before he imploded publicly in February, Islamophobic and misogynist gadfly Milo Yiannopoulos told CNN, "I am speaking on college campuses because education ... is really what matters. It's a crucible where these bad ideas are formed. Bad ideas like ... progressive social justice, feminists, Black Lives Matter..."²²

Yiannopoulos' appearances (some of which were cancelled) seem to have had an energizing impact on other racists. Nathan Damigo, founder of the white supremacist group Identity Evropa, has called Yiannopoulos "an inspiration," and showed up at the (ultimately cancelled)

¹⁹ https://www.wisconsin.edu/regents/download/meeting_materials/2017/october/Board-of-Regents-Friday-Agenda-and-Materials--October-2017.pdf

²⁰ <https://docs.legis.wisconsin.gov/2017/proposals/ab299>

²¹ <https://www.adl.org/blog/white-supremacists-on-campus-unprecedented-recruitment-efforts-underway>

²² <http://www.cnn.com/2017/02/02/us/milo-yiannopoulos-ivory-tower/index.html>

Yiannopoulos speech at UC Davis, hoping to poach a few fans for his own cause, which he outlined in a Tweet: “We will not rest until Alt-Right ideas are represented on campuses nationwide.”

While the vast majority of white supremacist campus actions involve hateful fliers (“Imagine a Muslim-Free America,”) and stickers (“Make America White Again”), white supremacists have also sent anti-Semitic faxes and, in the case of white supremacist Richard Spencer, delivered speeches on campus. Many of these incidents are linked to larger coordinated promotional efforts by white supremacist groups, like Identity Evropa’s “Project Siege,” which includes actual campus recruitment visits, and American Vanguard’s “Northern Propaganda Campaign.” Not coincidentally, these two groups are responsible for the majority of the white supremacist fliers and events tracked over the last several months.

In January, American Renaissance launched a hate-filled campus campaign, which for now seems to be limited to hanging “pro-white” propaganda posters. “Racial activists,” Jared Taylor wrote on the American Renaissance website, should place the “attractive posters” in “high-traffic areas” around campus. Racist fliers and posters have adorned parking garages, street signs, billboards, utility poles, and along corridors.

Andrew Auernheimer, a white supremacist hacker known as “Weev,” took targeting to the next technological level when he sent out anti-Semitic and racist fliers via many thousands of campus printers across the country. One flier, which was adorned with swastikas, read in part: “I unequivocally support the killing of children. I believe that our enemies need such a level of atrocity inflicted upon them...So the hordes of our enemies from the blacks to the Jews to the federal agents are deserving of fates of violence so extreme that there is no limit to the acts by which can be done upon them in defense of the white race.” The fliers referenced The Daily Stormer, Andrew Anglin’s neo-Nazi website.

Until recently, on-the-ground white supremacist actions have been relatively infrequent on college campuses – but there have been notable exceptions. In 2013, Matthew Heimbach attempted to start a White Student Union at Towson University in Maryland to “represent the unique cultural heritage, folk customs, and strong Christian traditions that define white civilization.” Later that same year, Patrick Sharp established a similar group at Georgia State University.

In 2015, two white supremacist groups, the now-defunct National Youth Front (NYF) and Traditionalist Youth Network (TYN), launched a campaign against two intellectuals whose work focuses on race-related issues. The targets of their online and on-campus protests were Lee Bebout, an associate professor of English at Arizona State University who was teaching a course called “U.S. Race Theory and the Problem of Whiteness,” and Tim Wise, an independent scholar who delivers lectures on racism on campuses across the country.

These days, white supremacists are taking more forceful steps to establish a physical presence on campus. Identity Evropa (founded by Nathan Damigo) was clear in its goals – and used fittingly “academic” language – when describing “Project Siege” plans for the 2016-17 school year: Go talk to actual students. “Project Siege is the beginning of a long-term cultural war of attrition against the academia’s cultural Marxist narrative that is maintained and propagated into society through the indoctrination of the future managerial class. If we are to be successful in combating the current paradigm,” the online message read, “it is imperative that we create space for our ideas at universities across the country. Speaking with students and helping them unpack some of their assumptions while gaining name recognition for our organizations are the ways in which we will create the foundation for that space.”

Sometimes, students take things into their own hands. (Damigo, for example, is a student at California State University at Stanislaus.) At the University of Wisconsin, Daniel Dropik, a 33-year-old student-employee who was convicted in 2006 of setting fire to two black churches, attempted to form the Madison branch of the American Freedom Party, which urges students to “fight anti-white racism.” The American Freedom Party is a white supremacist group founded by William Johnson, and was heavily involved in the 2016 presidential campaign, calling voters nationwide urging them to vote for Trump.

White supremacist events on campus face particular scrutiny and, in some cases, speakers are able to circumvent the school altogether, avoiding heated debates over free speech rights. In December, when Richard Spencer spoke on the Texas A&M campus, he wasn’t there as a guest of the University. Instead, he spoke to supporters and onlookers in a room rented for the occasion by local neo-Nazi Preston Wiginton.

Why now?

White supremacists, emboldened by the rhetoric of the 2016 presidential campaign, are stepping out of the shadows and into the mainstream. In January, Jared Taylor wrote, “It is widely understood that the election of Donald Trump is a sign of rising white consciousness...Now is the time to press our advantage in every way possible.” Richard Spencer has stated that now is the time to “professionalize” white supremacist beliefs, and is currently fundraising to take his message to campuses across the country. “These types of events are tremendous opportunities for us to communicate our message,” he told supporters in December. “They are ways for us to reach millions of people who would otherwise never have heard our ideas.”

Campus responses

Fear and anger are the most common reactions to white supremacist fliers and events, usually followed by a powerful response from students and others who are appalled by the display of hate and divisiveness. Rallies and other gatherings are common. At Purdue, a group of students replaced American Vanguard’s “pro-white” posters with their own inclusive messages, and loud protests met Richard Spencer when he arrived to speak at Texas A&M, and, more recently, at the University of Florida.

College administrators are responding more quickly and forcefully to campus hate speech; the president of the University of Texas at Austin immediately called for a town hall meeting after anti-Muslim and anti-immigrant fliers (courtesy of American Vanguard) were found all over the campus. While this town hall did not alone heal tensions, they and many schools are launching new Diversity, Equity, and Inclusion initiatives, with which the schools intend to make all campus populations feel safer and more empowered.

It is crucial for universities to have free speech policies in place before a controversial speaker or large protest is expected on campus. These policies should specify the time, place, and manner of permissible speech and explain the permitting process requirements. This will allow campus security to address and limit violent protests before significant harm to persons or property results.²³

The importance of such policies is highlighted by the August 11 “Unite the Right” rally at the University of Virginia- Charlottesville and the subsequent deaths of Heather Heyes and two police officers. Many criticized the university for failing to respond to the situation earlier and more aggressively. The university commissioned a Deans Working Group to suggest specific

²³ The League has created a short FAQ on the most important free speech on campus issues, available here: <https://www.adl.org/education/resources/tools-and-strategies/free-speech-qa-faq-about-free-speech-on-campus>

improvements to the university's policies. The university has "neither a formal permitting process nor time, place, and manner policies for use of common spaces on [university] grounds" and thus the university was vulnerable to an unannounced march of white supremacists. The "Unite the Right" group arrived without warning or a permit. If a permit had been required, University officials and campus law enforcement would have known about the protest in advance and could have taken steps to decrease the impact on the campus community. Constitutionally-allowable time, place, and manner restrictions would have provided campus police a better chance to maintain order and security while protecting the First Amendment. Ultimately, the Working Group concluded that the university has insufficient policies to govern protests.²⁴

Addressing Anti-Semitism on Campus: The Anti-Semitism Awareness Act (ASAA)

ADL has documented the fact that anti-Semitism is disturbingly pervasive and moving into the mainstream. In recent years, the issue of hostility towards Jewish students and Israel and anti-Semitic incidents on college campuses have attracted considerable national attention. The League has been doing an annual *Audit of Anti-Semitic Incidents* since 1979. According to recent *Audits*, anti-Semitic incidents at colleges and universities nearly doubled from 2014 to 2015, with this significantly heightened activity increasing further in 2016.

Most incidents of anti-Semitism on campus are entirely unrelated to anti-Israel activity. But some are. We are concerned about organized anti-Israel activity on college campuses which can create an atmosphere in which Jewish students feel intimidated and under siege. And sometimes anti-Israel activism on campus crosses the line into anti-Semitism.

Title VI of the Civil Rights Act of 1964 is one of the most important federal education anti-discrimination statutes. But it only prohibits discrimination on the basis of race, color, or national origin. In March 2010 a broad coalition of Jewish community organizations wrote²⁵ to urge the Department of Education to interpret Title VI to protect Jewish students from anti-Semitic harassment, intimidation and discrimination – and they did. In fact, both the Department of Justice²⁶ and the Department of Education²⁷ have properly concluded that Title VI prohibits discrimination against Jews, Muslims, Sikhs, and members of other religious groups when the discrimination is based on the group's actual or perceived shared ancestry or ethnic characteristics.

What the legislation would do

Since 2010, the Department of Education has used its inclusive interpretation of Title VI authority in a number of religious discrimination cases.²⁸ The ASAA²⁹ would codify the Department's authority to investigate and remedy instances of harassment and intimidation against Jewish students and others targeted because of their actual or perceived shared ancestry or ethnic characteristics.

Understanding the nature and magnitude of a problem is essential to address it. Anti-Semitism is a multifaceted form of prejudice which can be, and is, manifested in many different ways. The State Department has developed a definition of anti-Semitism and accompanying

²⁴ <http://response.virginia.edu/system/files/public/observations-improvements-uva-response.pdf>

²⁵ <https://www.adl.org/news/press-releases/adl-urges-education-secretary-to-protect-jewish-students-on-campus-from>

²⁶ https://www.justice.gov/sites/default/files/crt/legacy/2011/05/04/090810_AAG_Perez_Letter_to_Ed_OCR_Title%20VI_and_Religiously_Identifiable_Groups.pdf

²⁷ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>

²⁸ <https://www2.ed.gov/about/offices/list/ocr/religion.html>

²⁹ This legislation has not been introduced in the 115th Congress, but was approved by the Senate in December 2016. <https://www.congress.gov/114/bills/s10/BILLS-114s10rfh.pdf>

examples to serve as a guidepost for America's diplomats abroad who report on incidents and trends around the world.³⁰

The ASAA references the State Department definition, but does not use it to automatically trigger federal education anti-discrimination investigations or enforcement actions – because much of what is covered by the definition and accompanying examples is First Amendment-protected speech. It is essential to accurately distinguish First Amendment-protected speech – including disagreement and even harsh criticism of the government of Israel – from intentional, targeted conduct that unlawfully threatens, harasses, or intimidates particular Jewish students and jeopardizes their equal educational opportunities. That conduct is not protected by the First Amendment – and it should not be deemed inactionable simply because that conduct is couched as “anti-Israel” or “anti-Zionist.”

Following an alleged violation of federal education anti-discrimination laws, the plain language of the ASAA simply requires the Department of Education to “take into consideration” the State Department definition of anti-Semitism “as part of the Department’s assessment” of whether an investigation of that allegation is warranted.

Finally, it’s not easy to make out a federal anti-discrimination case – and it shouldn’t be. There’s no need to make a *federal case* out of things that can and should be resolved in school or on campus. This legislation will not affect the current coverage of other religious groups under Title VI – and it will not change the substantive rights, obligations, or standards of review under Title VI. But enactment of the ASAA is a step in the right direction to help ensure that Jewish students remain safe on campus while at the same time protecting the free speech rights of all students.

Policy Recommendations

1) Reject legislative attempts to strip university leaders of their discretion and link federal funding to speech.

In addition to state efforts to shift decision-making regarding academic freedom and free expression from university halls to state houses, there is also a movement advocating tying eligibility for tax-exempt status or federal student aid under the Higher Education Act to how universities respond in the face of free speech challenges. The prospect of creating a free speech ‘test’ which a college or university must ‘pass’ in order to receive federal financial assistance is disquieting and wrong. The business of safeguarding our educational institutions’ free speech is a non-partisan one, and should not be legislated by Congress. Rather, it should be left in the hands of the academy. We urge Congress to reject attempts at linking federal funds to a unilateral vision of what speech on campus should look like.

2) Educate faculty and students on the parameters of their First Amendment free speech rights.

Based on our decades-long work on campuses, we believe that the best means of helping people understand and exercise their First Amendment rights is to educate them. ADL has shared its program – “Identity, Inclusiveness, and Free Speech on Campus” which helps administrators, faculty, students, and campus security officials balance the complex interplay of free expression, bias, and offers insights on how best to create an inclusive campus

³⁰ <https://www.state.gov/s/rga/resources/267538.htm>

environment. We have had the privilege of working with a number of California, Illinois, Texas, Massachusetts, New York, and Washington, D.C. campuses on this issue.

Another of our programs, “Words to Action,”³¹ helps students learn how to respond constructively when dialogue becomes heated or even aggressive. ‘Words to Action’ has served over 2500 students in the past year. Additionally, for over 15 years, ADL has been sharing with college administrators our resource guide “Responding to Bigotry and Intergroup Strife on Campus: A Guide for College and University Presidents and Senior Administrators.”³² This manual provides guidance and techniques to use in response to severe conflicts on campus.

3) Improve training for campus officials and police on responding to bias incidents and hate crime.

Every year, thousands of students are the victims of bias-motivated slurs, vandalism, threats, and physical assaults on college campuses. In 1998, to increase awareness of hate violence on college campuses, Congress enacted an amendment to the Higher Education Act (HEA) requiring all colleges and universities to collect and report hate crime statistics to the Office of Postsecondary Education (OPE) of the Department of Education. Unfortunately, the Department of Education’s current hate crime statistics³³ reflect very substantial underreporting. Even worse, the limited available data is frequently inconsistent with campus hate crime information collected by the Federal Bureau of Investigation under the 1990 Hate Crime Statistics Act (HCSA)- though, theoretically, they are reporting hate crimes under the same criteria.³⁴

The Violence Against Women Reauthorization Act of 2013³⁵ amended the Clery Act³⁶ to require campus security and local law enforcement to identify, record, and effectively respond to incidents motivated by gender identity bias and national origin bias – in addition to the longstanding requirements to report hate crime incidents based on race, gender, religion, disability, sexual orientation, or ethnicity bias.

The Department of Education and the Department of Justice should work with law enforcement organizations (including campus police) and civil rights and religious groups with interest and expertise in combating hate violence to do outreach and education – highlighting the recently-added issues of gender-identity and national origin based hate violence, using the updated Clery Handbook.³⁷ Coordination with relevant college and university offices in these efforts is essential.

4) Dedicate resources to determining the most effective means of capturing and responding to bias incidents.

ADL has tracked a significant increase in hate incidents at colleges and universities across the country over the past eight months. The fact that many of these incidents fall within the protection of the First Amendment does not lessen their painful and far-reaching impact and harm. Academic institutions have created various ways to both capture the frequency of such incidents (e.g. on-line reporting forms) and respond to them meaningfully and effectively (e.g. campus climate response teams). However, this data is being captured in a

³¹ <https://www.adl.org/words-to-action>

³² <https://www.adl.org/sites/default/files/documents/assets/pdf/education-outreach/Responding-to-Bigotry-and-Intergroup-Strife-on-Campus.pdf>

³³ <https://ope.ed.gov/campusafety/#/>

³⁴ <https://ucr.fbi.gov/hate-crime/2015>

³⁵ Public Law 113-4 (2013) <https://www.congress.gov/113/plaws/publ4/PLAW-113publ4.pdf>

³⁶ Public Law 101-542 (1990) <https://www.gpo.gov/fdsys/pkg/STATUTE-104/pdf/STATUTE-104-Pg2381.pdf>

³⁷ <https://www2.ed.gov/admins/lead/safety/handbook.pdf>

piecemeal way. Studying bias incidents and campus climate from a national perspective would be exceptionally valuable. What works? What doesn't? Who reports? Who doesn't? How do we assess effectiveness? We urge Congress to approve funding to study these questions. Investing in finding answers will have tremendous bearing on how best to protect free speech while ensuring a safe and inclusive campus.

5) Create and Convene a National Task Force on Inclusive Excellence.³⁸

Colleges and universities operate under the premise that equity, inclusion, and belonging are key factors of a successful learning environment. Without inclusion at every level, excellence is not achieved. Creating a more diverse community brings benefits of varied viewpoints for creative problem solving, and it also creates the need for a wide lens with which to view the needs of all members of a diverse community. In a society that faces challenges of inequity, colleges and universities face this as well. There is a growing awareness of unconscious bias, achievement gaps, and overt hate speech. This is the first step toward inclusion, but a national task force is needed to ensure that solving these problems is considered critical to success of higher education institutions and the experience of all students, staff, faculty administrators, and visitors. Systems must be created that consider the ways in which all members experience the environment, curriculum, student services, tenure and promotion procedure, leadership opportunities, and day-to-day living and learning. A task force specific to equity and inclusion elevates the message that all people must know that their success is valuable. Working toward inclusion is working toward every member of our campuses and our society reaching their full potential without some people feeling the additional burdens of stereotypes, biases, and systems that were not designed to include them.

6) Provide funding to universities specifically earmarked for protecting free speech.

Each time a controversial speaker comes to campus, a university can easily spend hundreds of thousands of dollars on security costs. Existing law establishes that a university cannot assess a speaker's security costs on the content of the speaker's message or the likely reaction of counterprotesters.³⁹ However, the current law is unclear about how much a university must spend in order to protect that right. Universities shoulder a huge fiscal burden in order to protect free speech on campus. Federal funding specifically for increased costs associated with controversial speakers and rallies would ameliorate the crushing burden upon universities while protecting First Amendment rights.

Ultimately, improving campus climate – both for those speaking and for those listening – can only result from a steadfast commitment to civility, dialogue, and education. ADL appreciates this Committee's willingness to highlight this important issue. We look forward to further discussion and progress on fulfilling the promise of creating educational institutions that both safeguard free expression from all perspectives *and* ensure that all members of the community feel safe and welcome.

Sincerely,

Elissa Buxbaum
Director
Campus Affairs

Michelle Deutchman
Western States and National Campus
Counsel

Oren Segal
Director
Center on Extremism

³⁸ <https://www.aacu.org/making-excellence-inclusive>

³⁹ *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992)