

IN THE SUPREME COURT OF ALABAMA

YOUNG AMERICANS FOR)
LIBERTY UNIVERSITY)
OF AL HSV,)
GREER JOSHUA)
Appellant,)
)
v.)
)
BROCK MIKE,)
BROOKS KAREN,)
DOWSON DARREN,)
ENGLAND HJOHN JR., ET AL.)
Appellee.)

Case No. 1210309

BRIEF OF AMICUS CURIAE
EAGLE FORUM OF ALABAMA
IN SUPPORT OF APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Amicus Curiae defers to Appellant's judgment as to whether oral argument is necessary in this case. Amicus Curiae believes that it has sufficiently presented its case through its brief and therefore will not file the unusual motion for an amicus curia to participate in oral argument.

See Rule 29(f), Ala. R. App. P.

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IDENTITY AND INTEREST OF AMICUS CURIAE¹

Eagle Forum of Alabama (“EFA”) is a private nonprofit organization based in Birmingham, Alabama, dedicated to the support of strong families, constitutional liberty, personal responsibility, the sanctity of life, and principles of free government through civic education, public policy initiatives and legislative reform efforts.² EFA has been serving the citizens of the State of Alabama for over forty-five years.

EFA was closely involved in drafting the Alabama Campus Free Speech Act (ACFSA), now codified as *ALA. CODE §§ 16-68-1, et. seq.* The Sponsor of ACFSA in the House was then-Representative Matt Fridy (R-73), now the Honorable Matt Fridy of the Alabama Court of Civil Appeals. EFA was involved in then-ongoing discussions about ACFSA amendments with the sponsor, private legal and advocacy groups, local and national organizations, and with the legal departments and other

¹ Appellant has consented to the filing of this brief; Amicus Curiae did not ask for consent from Appellee because the typical amicus practice in Alabama is to file a motion instead of asking for consent. *See Ala. R. App. P. 29* and comments. Counsel for a party did not author this brief in whole or in part, and no such counsel or party made any monetary contribution to fund the preparation or submission of this brief. No person or entity other than Amicus Curiae and its counsel made a monetary contribution to fund the preparation or submission of this brief.

² <https://alabamaeagle.org/about/>

representatives from Alabama public institutions of higher education and the Alabama Department of Education. EFA testified at both the House and Senate Education Committee hearings,³ and supported a witness who co-authored a model bill and was familiar with the escalating violations of free-expression across the nation.⁴ EFA's contributions during the legislative process resulted in amendments to the ACFSA draft bill while maintaining the intent and purposes of the Alabama Legislature.

Therefore, EFA submits this *amicus* brief to examine the ACFSA legislative history and to highlight the discordance between the original legislative purposes and interpretation of the mandates in the Act and the public university policy in question.

³ See, Exhibit 1: Testimony before Alabama House and Senate Education Committee, Becky Gerritson, Executive Director, Eagle Forum of Alabama, May 8, 2019, and May 28, 2019 Montgomery, AL.

⁴ See, Exhibit 2: Testimony before Alabama House Education Committee, Stanley Kurtz, Senior Fellow at the Ethics and Public Policy Center in Washington DC, May 8, 2019, Montgomery, AL; Exhibit 3: Testimony before Alabama Senate Education Committee, Stanley Kurtz, Senior Fellow at the Ethics and Public Policy Center in Washington DC, May 28, 2019, Montgomery, AL.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Under a growing threat of constitutional violations,⁵ the Alabama Legislature enacted the Alabama Campus Free Speech Act (ACFSA). *ALA. CODE §§ 16-68-1, et. seq*, requiring that, “[o]n or before January 1, 2021, the board of trustees of each public institution of higher education⁶ shall adopt a policy on free expression that is consistent with this chapter...” *ALA. CODE § 16-68-3(a)*. The principles that the ACFSA sought to enshrine include, for example, that “all public institutions of higher education provide adequate safeguards for the First Amendment rights of students, and promote, protect, and uphold these important constitutional freedoms through the *re-examination, clarification, and re-publication* of their policies to *ensure*⁷ -- to guarantee-- to the fullest

⁵ *See, infra*, pgs. 7-12.

⁶ (1) PUBLIC INSTITUTIONS OF HIGHER EDUCATION. Those public educational institutions in Alabama which have been authorized by the Legislature or by the constitution to provide formal education, including vocational, technical, collegiate, professional or any other form of education, above the secondary school level. *ALA. CODE §16-5-1(1)*. This definition is used in ACFSA. *ALA. CODE § 16-68-2(8)*.

⁷ ENSURE, and its derivatives. [See *Insure*.] American Dictionary of the English Language; An Introductory Dissertation on the Origin, History and Connection of the Languages of Western Asia and of Europe, Vol. 1., Noah Webster, New York, S. Converse Publishing (1828). *INSURE, v.t.*

degree possible, intellectual and academic freedom and free expression (emphasis added).” See, e.g., *ALA. CODE § 16-68-1(8)*.

In response to the enactment of the ACFSA, the University of Alabama Board of Trustees (“Appellees”) adopted a campus speech policy, but failed to adhere to the minimum provisions envisioned by the ACFSA.⁸ *ALA. CODE § 16-68-3(a)*. Furthermore, the Appellees promulgated a campus speech policy that fails on almost every level to comply with the spirit, purpose, and requirements of the ACFSA.⁹ *ALA. CODE § 16-68-1, et. seq.*

The policy in question is essentially fourteen pages of enigmatic small-print contractual terms that must be read, understood, and followed before a student or faculty member may engage in spontaneous free-expression on campus.¹⁰ This policy violates the ACFSA’s mandate

inshu’re. [in and sure. The French use *assure*; we use indifferently *assure* or *insure*.] To make sure or secure; to contract or covenant for a consideration to secure a person against loss; or to engage to indemnify another for the loss of any specified property, at a certain stipulated rate per cent., called a premium. *The property usually insured is such as is exposed to extraordinary hazard* (emphasis added). *Id.*

⁸ C39.

⁹ C40, 81-95, *discussed, infra*, pgs. 22-30.

¹⁰ C40, 81-95.

that campus free speech policies be “clear,” and further violates the ACFSA requirement to provide robust protections for spontaneous speech and assembly. *See ALA. CODE §§ 16-68-3(a)(3), (a)(7)*. Moreover, the Appellees’ policy contains a prior-restraint registration requirement¹¹ and limits spontaneous speech topics to “current events” that have occurred within the last few days.¹² Such provisions violate the content-neutral and viewpoint-neutral policies envisioned by the ACFSA and further create confusion. *ALA. CODE § 16-68-3(a)(7)*. Indeed, how is a topic deemed to be sufficiently related to a “current event” before one is permitted to engage in spontaneous speech about it? Such vague restrictions on speech are illegal under the ACFSA.

Furthermore, the Appellees’ policy designates twenty (20) obscure “free-speech-limiting zones”¹³ where “spontaneous speech” may occur.¹⁴

¹¹ C40-42, 83-84.

¹² C42-42, 86-89.

¹³ C45, 87-88, 101. We are using the term “free-speech-limiting zones” rather than “free-speech zones.” “Free-speech zones” is a misnomer because it suggests that a College is providing space. In reality the college is limiting free-speech to a localized, and sometimes obscure and small area. However, under a forum analysis, most spaces inside and out on public College campuses should be available to the public. Therefore, “free-speech zones” is very misleading.

¹⁴ *Id.*

The zones are so obscure that they necessitate a separate cartography instrument.¹⁵ However, free-speech-limiting zones of any kind are specifically prohibited by ACFSA. *ALA. CODE § 16-68-3(a)(4)*. Moreover, the policy in question appears to twist the definition of “ample alternatives” to suggest that its provision of many tiny *illegal* free-speech-limiting zones somehow mitigates the policy’s clear violation of the ACFSA.¹⁶ This misuse of terms is indicative of either a complete misunderstanding of the ACFSA, or else an intentional refusal to follow the ACFSA. Finally, the Appellees’ policy includes sanctions for those who exercise their free-expression rights¹⁷ yet fails to include sanctions for those who violate another’s constitutional freedoms to speak and to listen as required by the ACFSA. At best, these numerous violations completely undermine the ACFSA. At worst, a policy that runs so far afoul of the ACFSA renders a mockery of the Alabama State Legislature. Regardless, even if the Appellees’ policy is well-intended, it nonetheless runs counter to the Alabama Legislature’s goal of protecting Alabama

¹⁵ C101.

¹⁶ C87. Policy states, “...A multitude of venues and forum across campus are available for free expression.” Then it lists the free-speech-limiting zones, and then refers reader to the map. *See*, C101.

¹⁷ C45, 90-91.

citizens' otherwise deteriorating Constitutional freedoms on public college and university campuses and invites further abuses of such freedoms.¹⁸

Accordingly, this Honorable Court should reverse the decision below and provide clarifying instructions on “re-examination, clarification and re-publication” of the Appellees’ policy such that it conforms to the ACFSA.

ARGUMENT

I. There is a growing threat to constitutionally protected speech on college campuses around the nation, including to those in Alabama.

In the fall of 2018, First Amendment free-expression violations were becoming more violent and escalating on college campuses around the United States.¹⁹ By the time the Alabama Legislature considered

¹⁸ Alabama citizens highly value education and are faithful supporters of our public colleges and universities. A substantial percentage of almost 300,000 Alabama college students attend public colleges and universities. The issues before the court are groundbreaking and will impact free-expression rights of tens of thousands of Alabama students on our public college and universities.

¹⁹ See, e.g., Peter Berkowitz, *How Lawmakers can Restore Freedom on Campus*, Wall Street Journal, Jan. 30, 2017; Stanley Kurtz, *The Campus Free-Speech Crises Deepens*, National Review, Sept. 27, 2017. Found at <https://www.nationalreview.com/corner/campus-free-speech-crisis->

violations in Alabama, many states had already adopted, or were in the process of drafting, constitutional protections of their own.²⁰ The Alabama Congress recognized that the good-will and sincere intentions of Alabama public college and university administrators and boards would be essential to *ensure*²¹ the adoption of robust polices protecting free-expression in conformity with the ACFSA. At the hearings, Alabama colleges and universities revealed they were reluctant to adopt or enforce free-expression mandates. Addressing the issue, Stanley Kurtz, Senior Fellow at the Ethic and Public Policy Center in Washington, D.C., stated, “[t]his means that the most important provisions of [ACFSA] may actually be the system that directs the [board of trustees] to actively oversee the administrative handling of free speech. After all, [magistrates] are already obligated to enforce the First Amendment, and yet they often undercut it.”²² Kurtz is an educational writer for National Review and has closely covered the alarming

[deepens/](#) (last opened March 29, 2022); Kurtz, *The Campus Intellectual Diversity Act: A Proposal*, National Review, February 12, 2019.

²⁰ Exhibit 4, SUMMARY OF STATES, CAMPUS FREE SPEECH BILL, April 2019.

²¹ See fn 55.

²² Ex 3, at 2.

proliferation of free-speech violations on college campuses over the last 19 years.²³

During both the House and Senate committee hearings, Kurtz emphasized the role of university magistrates in the preservation of free-expression: “[t]he First Amendment does not enforce itself...It is the job of public university administrators and the trustees, or the board of regents who oversee them.”²⁴ Kurtz further observed that, “...not only do administrators sometimes fail to uphold free-speech, too often they actively undermine it by promulgating unconstitutional speech codes and so-called free-speech zones...”²⁵ Furthermore, he stated that “[t]he most fundamental American Liberty - free-speech - is now critically endangered on America’s college campuses.”²⁶ Kurtz rebuffed the assumption that these violations “... are largely confined to colleges and universities in coastal states like California and New York.”²⁷ After highlighting violations in North Carolina, Georgia, and Texas, he urged the Alabama Legislature to take note of the then-recent heckling occurring on

²³ Ex 2, at 1.

²⁴ Ex 3 at 1.

²⁵ *Id.* Also see, fn. 73.

²⁶ Ex 2 at 1.

²⁷ *Id.*

Auburn’s campus as a warning, and then went on to enumerate violations in Alabama.²⁸

Kurtz noted that Alabama public colleges were no strangers free-speech-limiting zones.²⁹ For example, he stated that the magistrates from “...the University of South Alabama forced Students for Life to confine their demonstration to a tiny so-called free-speech-[limiting] zone, even though other student organizations had been permitted to demonstrate outside the area before them.”³⁰

At the Senate hearing on May 28th, 2019, Kurtz described Alabama’s current situation well. He remarked that “[t]he problem we face as a country is that university administrators too often fail in their responsibility to uphold freedom of speech. Sadly, not only do administrators sometimes fail to uphold free speech, too often they actively undermine it by promulgating unconstitutional speech codes and

²⁸ *Id.* at 2. *See also*, Ex 3.

²⁹ *For example*, Luke Connell, *Campus Areas Set Aside for Free Speech*, Timesdaily.com, Monday, May 5, 2003. University of Alabama and Auburn have free-speech-limiting zones.

³⁰ Ex 2 at 2.

so-called free-speech zones ...When that is not being properly done by officials on the scene, it is time for the legislature to act.”³¹

Indeed, this Honorable Court must consider vague, restrictive speech codes that have plagued Alabama campuses for decades.³² These codes have a chilling effect on student expression and contain prior restraints like the appellee’s policy in question.³³ Foundation for Individual rights in Education (FIRE) has been tracking and rating speech codes that violate student and faculty First Amendment rights for over twenty years.³⁴ Alabama has repeatedly received red-lights ratings

³¹ Ex 3 at 1.

³² *University of Alabama’s Faculty Senate Seeks to Revoke the First Amendment; Rights of Free Speech and Petition Are Under Siege*, April 4, 2002. Found For Individual Rights in Education (March 29, 2022).

³³ See, e.g., *Newsdesk, Blog: FIRE’s Open Letter to the University of Alabama Community*, Foundation for Individual Right’s in Education (FIRE). (Nov. 11, 2004), <https://www.thefire.org/fires-open-letter-to-the-university-of-alabama-community/> (faculty passed a resolution seeking to eliminate “offensive” speech)(last visited March 28, 2022); *Cases; Free Speech: University of Alabama: Attempt to Limit Freedom of Speech and Right to Petition*, Foundation for Individual Right’s in Education (FIRE). (April 4, 2002) <https://www.thefire.org/cases/university-of-alabama-attempt-to-limit-freedom-of-speech-and-right-to-petition/> (faculty imposed mandatory diversity training)(last visited March 28, 2022).

³⁴ *Spotlight on Speech Codes 2022*. Found, for Individual Rights in Education (Found March 29, 2022). A Red-light ratings is the worst and indicates that the policy in question clearly and substantially restricts freedom of speech.

from this organization. For example, Kurtz noted that“...four of Troy University’s speech policies have received a red-light rating from FIRE.... FIRE also gives a red-light rating to five speech policies at Alabama A&M, which earned FIRE’s speech code of the month award this past April for having some of the worst speech policies in the country.”³⁵ Such violations are ongoing,³⁶ and the Appellees’ policy is yet another example. Such policies must be discouraged or else the protections in the ACFSA will be denied to others as well.³⁷

II. ACFSA was enacted to provide clear guidance for boards of trustees and universities to enact policies that “ensure” robust constitutional protections.

A. Legislative Purposes

The Alabama Legislature established Alabama’s three primary legislative goals for ACFSA:

(1) To reassert the primacy and full force of First Amendment freedoms under the United States Constitution and the Alabama

³⁵ Ex 2 at 3; Ex 3 at 2. *See*, Spotlight.

³⁶ Noah Moore, Contributor, *Code Red: University of West a free speech zone restricts speech on campus*, Washington Examiner, July 11, 2018, Found at <https://www.washingtonexaminer.com/red-alert-politics/code-red-university-of-west-alabamas-free-speech-zone-restricts-speech-on-campus> (found March 29, 2022)

³⁷ See fn. 18.

Constitution provisions of Free Speech and Assembly for all individuals on Alabama public institutions of higher education campuses, *ALA. CODE § 16-68-1, et seq.*³⁸

(2) To require by January 1, 2021, all Board of Trustees to adopt, and for Alabama public institutions of higher education to formally re-examine, clarify, and re-publish robust policies to “*ensure*” the protection of free-expression to the broadest extent possible, *ALA. CODE §§ 16-68-1(8), 16-68-3(a).*

(3) To make board of trustees and universities accountable and to ensure compliance by publishing policies and annual reporting of violations to the public, Governor and the Legislature. *ALA. CODE §§ 16-68-3(c), 16-68-4, and 16-68-5.*³⁹

B. Importance of Constitutional Liberties

The Alabama Legislature provides copious information and guidelines in the ACFSA and drafted comprehensive and robust policies

³⁸ Legislative discussions included the significant decline in the Alabama populace’s understanding of founding documents, and particularly the lack of appreciation for First Amendment rights. *See also herein, Argument, Section I, pages 9 - 11.*

³⁹ *See herein, pgs. 29-30.*

to protect free expression. The ACFSA begins by highlighting the most relevant Alabama Constitution provision:

“Article I, Section 4 of the Constitution of Alabama of 1901, recognizes that *all persons* (emphasis added) may speak, write, and publish their sentiments on all subjects, and that ‘*no law* shall ever be passed to curtail or restrain the liberty of speech....”⁴⁰ *ALA. CODE § 16-68-1(1)* (emphasis added).

State free-expression protections can be broader than the United States Constitution First Amendment, but not less.

The ACFSA recognizes the broad application of First Amendment rights to college campus policies in two seminal United States Supreme Court cases. These two cases articulate important concepts that are distinctive to college campuses and reinforce the importance of ACFSA mandates for Alabama. The ACFSA states:

“The United States Supreme Court has called public universities “peculiarly the marketplace of ideas,” *Healy v. James*, 408 U.S. 169, 180 (1972), where young adults learn to exercise those constitutional rights necessary to participate in our system of government and to tolerate the exercise of those rights by others, and there is “no room for the view that First Amendment protections should apply with less force on college campuses than in the community at large.” *Healy*, 408 U.S. at 180.” *ALA. CODE § 16-68-1(3)*.

⁴⁰ “**SECTION 4, Freedom of speech and press.** That no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty.” *ALA. CONST. art. I, § 4*.

Using another United States Supreme Court case to emphasize these ideals, the ACFSA recognized the dire consequences of failing to provide free speech protections on college campuses. The Legislature reasoned:

“The United States Supreme Court has warned that if state-supported institutions of higher education stifle student speech and prevent the open exchange of ideas on campus, "our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).” *ALA. CODE §16-68-1(4)*.

The Alabama Legislature reminded Alabama public college and university magistrates that they exercise their authority *in trust* for the people of Alabama. Indeed, the ACFSA states that:

“A significant amount of taxpayer dollars is appropriated to public institutions of higher education each year, and all public institutions of higher education should strive to ensure the fullest degree of intellectual and academic freedom and free expression” *ALA. CODE §16-68-1(5)*.

These ACFSA legislative findings leave no doubt that the Alabama Legislature desires to preserve First Amendment protections and *ensure* free-expression and academic intellectual freedom to the fullest degree possible on the campuses of Alabama public institutions of higher education.

C. Historical Tools for Current Robust Policies

“...the Paramount obligation of the university that is to protect their right to free-expression.” – 1967 Woodward Report

ALA. CODE § 16-68-1(7) identifies three classic reports on free expression and institutional neutrality by other higher learning institutions. These include the 1974 Woodward Report of the Committee of Freedom of Expression at Yale (“Woodward Report”),⁴¹ the 2015 Report of The Committee on Freedom of Expression, at the University of Chicago, (“Chicago Report”)⁴² and the 1967 Kalven Committee, Report on the University’s Role in Political and Social Action, (“Kalven Report”).⁴³ The Alabama Legislature referenced these reports as tools to assist

⁴¹ Exhibit 5. 1974 Woodward Report of the Committee of Freedom of Expression at Yale, Yale University, Newhaven, CT. Found at [https://yalecollege.yale.edu/get-know-yale-college/office-dean/reports/report-committee-freedom-expression-yale#Report of the Committee](https://yalecollege.yale.edu/get-know-yale-college/office-dean/reports/report-committee-freedom-expression-yale#Report%20of%20the%20Committee)

⁴² Exhibit 6. Kalven Report of the Committee on Freedom of Expression, University of Chicago (2015), Found at [https://provost.uchicago.edu/sites/default/files/documents/reports/FOEC ommitteeReport.pdf](https://provost.uchicago.edu/sites/default/files/documents/reports/FOEC%20CommitteeReport.pdf) (last visited March 28, 2022).

⁴³ Exhibit 7. Kalven Committee; Report on the University’s Role in Political and Social Action, (1967). Found at: <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2020/07/20104433/KalvenReport.pdf> (Last visited March 28, 2022).

public universities with drafting their campus speech policies. *See, ALA. CODE §§ 16-68-1(7)*.

The Alabama Legislature noted that these publications articulate “...the essential role of free expression and the importance of neutrality at public institutions of higher education to preserve freedom of thought, speech, and expression on campus.” *Id.* On the historical connection between freedom of thought on college campuses and potential double violations to both speaker and listener, the Woodward Report states,

“ [t]he history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views.”⁴⁴

Speaking to the purpose of university education, the Kalven Report holds that, “[t]he mission of the university is the discovery, improvement and dissemination of knowledge ... A 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.”⁴⁵

⁴⁴ Ex 5 at 5.

⁴⁵ Ex 6 at 1.

Referring to the historical support for free-expression at the University of Chicago, a previous university president was quoted in the report as saying “free inquiry is indispensable to the good life, that universities exist for the sake of such inquiry, [and] without it they cease to be universities.”⁴⁶ Indeed, another university president stated, “education should not be intended to make people comfortable, it is meant to make them think.”⁴⁷

These reports established universally recognized defenses of free expression on college campuses. The language of these reports is used throughout the ACFSA. The intent of the Alabama Legislature was to provide Alabama magistrates examples of strong and robust intellectual freedom policies. There are few, if any, references to either the ACFSA or language from these reports in the Appellees’ policy.

D. Sanctions

The Woodward Report recommended formal sanctions for the protection of free-expression when necessary. It called for punishment of violations of free-speech via formal sanctions because obstruction of free

⁴⁶ Ex 7 at 1.

⁴⁷ *Id.*

expression threatens the central function of public higher education.⁴⁸ The Alabama Legislature ascribed to the board of trustees the authority to determine consequences for violations of campus free speech.⁴⁹ However, rather than promulgating any sanctions upon those who would infringe upon campus free speech, the Appellees' policy seeks to sanction those who exercise their rights to campus free speech.⁵⁰ Indeed, the Appellees' policy completely undermines the ACFSA.

E. Accountability Requirements

The ACFSA contains detailed accountability mandates that must be included in campus speech policies to ensure fullest degree of protection for free expression. While the accountability provisions of the Appellees' policy are not specifically addressed, such provisions should be reviewed by this Honorable Court in order to facilitate Appellees' future compliance with the ACFSA. *ALA. CODE §§ 16-68-3(c), 16-68-4 & 16-68-5.*⁵¹

III. ACFSA requires boards of trustees and universities, as public servants of Alabama, to “ensure” robust constitutional protections by re-examination, clarification

⁴⁸ Ex 5 at 34-35.

⁴⁹ *ALA. CODE § 16-68-3(a)(6)*.

⁵⁰ C45, 90-91.

⁵¹ *See infra*, pg. 13.

and re-publication of free expression policies in conformity with the ACFSA.

“Freedom of speech is a principal pillar of a free government: When this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins. Republics and limited monarchies derive their strength and vigor from a popular *examination into the action of the magistrates.*”⁵²

— Benjamin Franklin, U.S. Founding Father

A. Public Magistrates; Legislative Intervention

Alabama public institutions of higher education (“colleges” or “universities”) are state government entities funded by and belong to the citizens of Alabama. *ALA. CODE § 16-68-2(8)*. Public colleges and universities are held in trust for the people by the Alabama government and its agents, often by a board of trustees and administrators (collectively referred to as “Magistrates”). Alabama public colleges and

⁵² MAGISTRATE, n. {L. *magistratus*, from *magister*, master; *magis*, *major*, and *ster*, Teutonic *steora*, a director; *steoran*, to steer; the principle director.] A public officer, invested with the executive government or some branch of it. In this sense, a king is the highest or first magistrate, as is the President of the United States. But the word is more particularly applied to subordinate officers, as governors, intendants, prefects, mayors, justices of the peace, and the like. *The magistrate must have the reverence; the laws their authority* (emphasis added). American Dictionary of the English Language; An Introductory Dissertation on the Origin, History and Connection of the Languages of Western Asia and of Europe, Vol. 1., Noah Webster, New York, S. Converse Publishing (1828).

universities also take federal money and are subject to the liberties and limitations of the United States Constitution. When Alabama government institutions like public colleges and universities repeatedly fail to protect individual liberties and violate either the United States Constitution and/or the Alabama Constitution and state laws, it is the responsibility of the Alabama Legislature to perform “*examination into the action of the magistrates*.”⁵³ When such government institutions are found wanting, it is the duty of the Alabama Legislature to intervene on behalf of the people of Alabama. The ACFSA is the product of Alabama Legislative intervention into the malfeasance of college and university magistrates in the realm of campus speech.

B. Responsibilities of Board of Trustees

Well-intentioned boards of trustees are key to robust free-expression policies in Alabama. The ACFSA commands boards of trustees to adopt such policies in a timely manner:

“On or before January 1, 2021, the board of trustees of each public institution of higher education shall adopt a policy on free expression that is consistent with this chapter.” *ALA. CODE § 16-68-3(a)*.

⁵³ See quote at fn. 34.

Boards are responsible for ensuring that all public Alabama colleges and universities re-evaluate and re-publish their free-expression policies in accordance with the ACFSA. “[It] is a matter of statewide concern that all public institutions of higher education provide adequate safeguards ... through the re-examination, clarification, and re-publication of their policies to “*ensure*” the fullest degree possible of intellectual and academic freedom and free expression.” *ALA. CODE §§ 16-68-1(8)*. “Ensure” means to guarantee.⁵⁴ The ACFSA clearly and repeatedly mandates that Alabama public institutions of higher education provide adequate safeguards to *ensure* that campus free speech protections are guaranteed in re-published policies.⁵⁵

⁵⁴ ENSURE, and its derivatives. [See *Insure*.] American Dictionary of the English Language; An Introductory Dissertation on the Origin, History and Connection of the Languages of Western Asia and of Europe, Vol. 1., Noah Webster, New York, S. Converse Publishing (1828). INSURE, *v.t. inshu're*. [in and sure. The French use *assure*; we use indifferently *assure* or *insure*.] To make sure or secure; to contract or covenant for a consideration to secure a person against loss; or to engage to indemnify another for the loss of any specified property, at a certain stipulated rate per cent., called a premium. *The property usually insured is such as is exposed to extraordinary hazard* (emphasis added). *Id.*

⁵⁵ “...[A]ll public institutions of higher education should strive to ensure the fullest degree of intellectual and academic freedom and free expression (emphasis added) ...” *ALA. CODE § 16-68-1(5)*. “Freedom of expression is critically important during the education experience of students, and each public institution of higher education should ensure

IV. Appellees’ policy does not incorporate the minimum provisions for, and constitutional protections of, campus speech required by ACFSA. This Honorable Court should enjoin any further enforcement of Appellees’ policy until it is sufficiently “re-examined, clarified and re-published” in conformity with ACFSA

After a painstaking review of seminal free-expression statements adopted by other universities⁵⁶ and several pieces of model legislation,⁵⁷ in addition to evaluating campus speech statutes from around the

free, robust, and uninhibited debate and deliberation by students.” (emphasis added). *ALA. CODE § 16-68-1(6)*; “It is a matter of statewide concern that all public institutions of higher education provide adequate safeguards for the First Amendment rights of students, and ... to ensure the fullest degree possible of intellectual and academic freedom and free expression (emphasis added).” *ALA. CODE § 16-68-1(8)*; “That ... the institution will strive to ensure the fullest degree possible of intellectual freedom and free expression (emphasis added). *ALA. CODE § 16-68-3(a)*.

⁵⁶ ACFSA refers to three classic university statements on Free-Expression and Campus Neutrality. *See*, *ALA. CODE 1975 §16-68-1(7)*. These statements provided wise and experienced guidelines, examples and perspectives on the importance and the method of protecting free-expression in colleges. *See supra*, pgs. 14-16.

⁵⁷ ACFSA first draft was patterned after the example provided by the Goldwater model found in the “Campus Free Speech: A Legislative Proposal”, Goldwater Institute, Phoenix, AR (2017) https://goldwaterinstitute.org/wp-content/uploads/2019/03/Campus-Free-Speech-A-Legislative-Proposal_Web.pdf.)Last visited March 28, 2022). This proposal included comprehensive research that was used to determine the best wording for Alabama’s Act. Another resource that was used was “Forum: A Legislative Model,” Alliance Defending Freedom. <https://alec.org/model-policy/forming-open-and-robust-university-minds-forum-act/> (Last visited March 24, 2022); ALEC and Liberty First Also had models or offered input that was considered.

country,⁵⁸ and after consulting with advocacy groups and representatives from public colleges and universities and the Alabama Department of Education, The Alabama Legislature enumerated precise guidelines and baseline provisions that must be included in the campus speech policies of all Alabama public institutions of higher learning. *ALA. CODE §§ 16-68-1, et seq.*⁵⁹ ACFSA states in pertinent parts:

“...The policy, at a *minimum*⁶⁰ shall adhere to all of the following provisions:

(1) That the primary function of the public institution of higher education is the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate, and that, to fulfill that function, the institution will strive to ensure the fullest degree possible of intellectual freedom and free expression.” *ALA. CODE § 16-68-3(a)(1) (emphasis added).*

This provision incorporates language and principles from the Woodward, Kalven, and Chicago reports.⁶¹

⁵⁸ Exhibit 8: SUMMARY OF STATES, CAMPUS FREE SPEECH BILL, April 2019.

⁵⁹ *See herein*, pgs. 11-18.

⁶⁰ ACFSA clarifies the minimum, not the limit of Constitutional protections. It was never intended to, nor had the power, to limit additional constitutional protections, but rather to re-state, in order to highlight and prevent, the most egregious Constitutional violations from the current decade.

⁶¹ *See discussion, supra*, pgs. 14-18.

“(2) That it is not the proper role of the institution to shield individuals from speech protected by the First Amendment to the United States Constitution and Article I, Section 4 of the Constitution of Alabama of 1901, including without limitation, ideas and opinions they find unwelcome, disagreeable, or offensive.” *Id.* at (a)(2).

The provision above also includes language from the classic reports and adopts all available First Amendment protections.⁶²

“(3) That students, administrators, faculty, and staff are free to take positions on public controversies and to engage in protected expressive activity in outdoor areas of the campus, and to spontaneously and contemporaneously *assemble*, (emphasis added) speak, and distribute literature. *Id.* at (a)(3)”

Under the provision above, universities are required to provide robust protections to spontaneous speech and assembly. This provision ensures that the entire campus community⁶³ may use outdoor areas to engage in all types of protected speech *without prior restraint*, including but not limited to constitutionally protected spontaneous assembly.⁶⁴ Freedom of assembly or association is intricately intertwined with freedom of expression. An audience is necessary to communicate an idea to others.

⁶² *Id.*

⁶³ ALA. CODE § 16-68-2(2).

⁶⁴ ALA. CONST. art. I, § 25.

The policy in question violates this requirement with the prior restraint registration requirement.⁶⁵

“(4) That the outdoor areas of a campus of a public institution of higher education shall be deemed to be a *forum* for members of the campus community, and the institution *shall not create free speech zones*⁶⁶ or other designated outdoor areas of the campus in order to limit or prohibit protected expressive activities.⁶⁷” *ALA. CODE § 16-68-3(a) (emphasis added)*.

The above provision addresses two important policy requirements: First, it declares that a college campus is a public forum. Second, it completely eliminates free-speech-limiting zones. Under this provision all such zones are prohibited, including the list of free speech zones promulgated in the Appellees’ campus speech policy.⁶⁸

“(6) That the public institution of higher education shall not permit members of the campus community to engage in conduct that materially and substantially disrupts another person's protected expressive activity or infringes on the rights of others to engage in or listen to a protected expressive activity that is occurring in a location that has been reserved for that protected expressive activity and *shall adopt a range of disciplinary sanctions for anyone under the jurisdiction of the institution who materially and substantially disrupts the free expression of others.*” *Id.* at (a)(6) (emphasis added).

⁶⁵ C40-42, 83-84.

⁶⁶ C45,87-88, 101.

⁶⁷ “Protected expressive activity” is broadly defined in ALA. CODE 1975 §16-68-2(7).

⁶⁸ C45,87-88, 101.

The provision above accomplishes two things: First, it prevents members of the campus community from violating other members' Constitutional freedoms to speak and listen. Second, it requires boards of trustees to create a range of sanctions for such violations. Contrary to the ACFSA guidelines, the Appellees' campus speech policy enacts sanctions upon individuals who exercise their First Amendment rights rather than upon those who violate others' first Amendment rights to listen and speak.⁶⁹

(7) That the public institution of higher education may maintain and enforce constitutional time, place, and manner restrictions for outdoor areas of campus only when they are *narrowly tailored to serve a significant institutional interest* (emphasis added) and when the restrictions employ *clear, published, content-neutral, and viewpoint-neutral criteria*, and provide for *ample alternative means of expression*. All restrictions shall allow for members of the university community to spontaneously and contemporaneously assemble and distribute literature. *Id.* at (a)(7) (emphasis added).

The purpose of the provision above is to provide universities clear guidelines for drafting time, place and manner restrictions. While this language has constitutional foundations, the plain meaning of the provision provides universities with transparent and sufficiently clear guidelines for drafting policies that ensure robust protection of

⁶⁹ C45,90-91.

constitutional rights. This provision requires that time, place and manner restrictions must:

1. be narrowly tailored;
2. serve a significant institutional interest;
3. be content neutral;
4. be view-point neutral;
5. provide ample alternative means of expression; and,
6. allow spontaneously and contemporaneously assemble and distribution of literature.

The Appellees' campus speech policy violates a number of the protections ensured by *ALA. CODE §16-68-3(7)*. The Appellees' policy contains fourteen pages of small-print terms to which compliance is required before a student or faculty member can engage in "spontaneous" free-expression on campus.⁷⁰ Such provisions violate the ACFSA's mandate that time, place and manner restrictions be "clear" and sufficiently allow for spontaneous expression. *Id.* Next, the Appellees' policy limits spontaneous speech topics to current events.⁷¹ This violates

⁷⁰ C81-95.

⁷¹ C42-43, 86-89.

the content-neutral and viewpoint-neutral requirement of this provision, and further creates confusion.

Even more troubling is the fact that the Appellees' policy clearly fails to appreciate the meaning of "ample alternatives." Indeed, the Appellees' campus speech policy constrains spontaneous speech⁷² to twenty (20) comparatively small and/or obscure "free-speech-limiting zones"⁷³ that require a separate map to identify.⁷⁴ Apparently the Appellees assume that designating numerous and obscure free-speech-limiting zones will satisfy the ACFSA's definition of "ample alternatives." *Id.* However, because free-speech-limiting zones of any kind are explicitly prohibited by *ALA. CODE § 16-68-3(4)*, Appellees' policy falls far short of the ACFSA's campus speech protections. Prohibited free-speech-limiting zones include any type of "*...designated outdoor areas of the campus in order to limit or prohibit protected expressive activities. Id.* (emphasis added).

⁷² C45, 87-88.

⁷³ We are using the term "free-speech-limiting zones" rather than "free-speech zones."

⁷⁴ C101 *See* fn. 13.

Ultimately, Appellees' campus speech policy completely undermines the Alabama Legislature's desire and intent – as unequivocally promulgated in the ACFSA -- to protect Alabama citizens' deteriorating Constitutional freedoms on public college and university campuses.

CONCLUSION

For these reasons set forth and stated above, notably that:

1. the Alabama Legislature has clearly promulgated guidelines for re-examining, clarifying, adopting, re-publishing and enforcing campus speech policies necessary to protect Constitutional free-expression on the campuses of public institutions of higher education in the ACFSA, and;

2. the baseline protections of the ACFSA have been completely disregarded by Appellees' campus speech policy;

EFA respectfully requests that this Honorable Court enjoin the enforcement of Appellees' campus speech policy as violative of the baseline provisions of the Alabama Campus Free Speech Act until such time that Appellees' policy is properly re-published in accordance the Act.

Respectfully submitted this 29 day of March, 2022,

/s/ Margaret S. Clarke

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 28(a)(12) and 29(c), Ala. R. App. P., I hereby certify that this brief complies with the font and word limits as required by Rule 32(d), Ala. R. App. P. This brief was written in 14-point Century Schoolbook font, and the text is fully justified. Not counting the portions exempted by Rules 28(j)(1) and Rule 29(c), this brief contains 7,528 words.

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CERTIFICATE OF SERVICE

I hereby certify that on March 29th, 2022, I filed the foregoing with the Clerk of Court using the Alabama Judicial System electronic filing system, which will send notification of such filing to the following parties of record who are registered for electronic filing:

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I also certify that I will, upon leave of Court to file this amicus brief, mail two hard copies of the foregoing, one to counsel for each party, first-class mail within 24 hours of e-filing.

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- Exhibit 4:** SUMMARY OF STATES, CAMPUS FREE SPEECH BILL, April 2019.
- Exhibit 5:** 1974 Woodward Report of the Committee of Freedom of Expression at Yale, Yale University, Newhaven, CT. Found at https://yalecollege.yale.edu/get-know-yale-college/office-dean/reports/report-committee-freedom-expression-yale#Report_of_the_Committee (last access March 29, 2022).
- Exhibit 6:** Kalven Report of the Committee on Freedom of Expression, University of Chicago (2015), Found at <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf> (last accessed March 28, 2022).
- Exhibit 7:** Kalven Committee; Report on the University's Role in Political and Social Action, (1967). Found at: <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2020/07/20104433/KalvenReport.pdf> (Last accessed March 28, 2022).

EXHIBIT 1

Testimony Free Speech Bill HB498

5.8.19(House-Ed Policy) -- 5.28.19 (Senate Ed Policy)

Becky Gerritson-Executive Director -Eagle Forum

An Interesting phenomenon has taken place in this county.

Generally speaking, those born before 1980 were not as closely supervised as they are now. Neighborhoods were safer.

Kids played outside all day and they knew to come home when the street lights came on.

When kids had disagreements with each other they learned to work it out.

But during the 80's we saw a shift in the way American parents raised their kids. Kids were under constant supervision.

When a child's feelings were hurt, they would run to the adult who would comfort and protect them. This form of conflict resolution has followed the kids into their college experiences and beyond.

Many, when confronted with ideas they don't like or that may be foreign to them are quick to run the adult or rather a bureaucracy or an agency to protect their feelings and punish the offender.

This is evidenced by the rise in shout-downs, trigger warnings, bias response teams, free speech zones, safe spaces, class invasions and meeting disruptions on college campuses nation-wide.

This is a disturbing trend. Unfortunately, university policies are somewhat responsible.

Through their overbroad speech policies, students are learning to obey the doctrine of political correctness rather than striving to search for truth even if it's uncomfortable.

It is a matter of statewide concern that all public institutions of higher education provide adequate safeguards for the First Amendment rights of students.

HB 498 is a common sense bill that will empower Alabama public university administrators to ensure that their campuses promote free, robust, and uninhibited debate and deliberation by students and faculty across the state of Alabama.

The bill will accomplish this in three ways.

First, it will eliminate overbroad and ambiguous speech policies that infringe on expression protected by the US and Alabama constitutions.

Second, it will eliminate Free-Speech-Zones.

And third, it will EMPOWER the universities to protect free expression by members of the campus community from unlawful violations by other members of the campus community.

Protecting freedom of speech at Alabama's public colleges and universities is a first step in the direction of a much-needed revival of American education. This bill will lead the way.

I ask for a favorable report.

EXHIBIT 2

Testimony by Stanley Kurtz

Senior Fellow, Ethics and Public Policy Center, Washington DC

Before the Alabama State House Education Policy Committee

Regarding

HB 498, the Campus Free Speech Act

Wednesday, May 8, 2019

Thank you Madame Chair. I am a senior fellow at the Ethics and Public Policy Center in Washington, DC, and I have written on higher education issues for National Review Online for the past 19 years. I am also a co-author of model campus free speech legislation published by Arizona's Goldwater Institute. I have testified on campus free speech legislation before several state legislatures and I'm honored to be here before you in Alabama today. I'm here to discuss the campus free speech crisis nationally, and Alabama's place within that big picture.

That most fundamental American liberty—free speech—is now critically endangered on America's college campuses. Students are subject to unconstitutional speech codes and so-called free-speech zones, while speakers whom students or faculty wish to hear from are disinvited by timid administrators because some individuals on campus object to their ideas. Most seriously, visiting speakers are subject to intentional disruptions. These shout-downs, which violate the rights not only of speakers but of those who wish to hear them, are at the core of today's campus free-speech crisis.

Some are under the mistaken impression that these problems are largely confined to colleges and universities in coastal states like California and New York. It's true that the campus free-speech crisis disproportionately affected the East and West coasts, especially at the start. But in the last few years, we've seen these problems start to spread to every section of the country.

In response, states across the country have begun to adopt legislation designed to safeguard freedom of speech on public university campuses. For example, in 2017 North Carolina became one of the first states to adopt comprehensive campus free-speech legislation, much like Alabama's HB 498, the bill before you today. In the following year, 2018, Alabama's neighbor Georgia adopted a very similar bill. Campus free speech legislation has now become law in about 15 states and the total continues to grow. Just last week, the Texas State House passed a campus free speech bill quite similar to HB 498. On the day that bill was debated in the House, a smoke bomb was set off at a pro-life talk at the University of Texas at Austin. The smoke bomb set off a fire alarm and caused the entire building to be evacuated. We've seen periodic trouble with campus free speech in Texas, but the rate of incidents appears to have increased of late. And by the way, the sponsor of the Texas bill, State Representative Briscoe Cain, was himself the victim of a shout-down at Texas Southern University in 2017. So, even state legislators aren't immune from campus shout-downs.

Last year I testified on campus free speech legislation in Georgia, first before the Georgia State Senate and later before the Georgia State House. During the Senate hearing, the legislators were told about two occasions on which Students for Justice in Palestine had disrupted talks by pro-Israel speakers that had been organized by a coalition of Jewish and Christian groups. Not only were the disrupting students not disciplined, the administration hadn't even condemned the disruption. The administrators were dismissive about the whole issue at the Senate hearing. By the time I testified before the Georgia State House a month later, yet another pro-Israel event had been disrupted. So in real time, the legislature had a chance to see how the problem of speaker disruptions was proliferating because it wasn't being properly addressed.

Only three weeks ago, CIA Director Gina Haspel was heckled at Auburn University. Although this was not a major disruption as these incidents go, and although the heckler was promptly removed, the incident was a clear indication of what can happen as the shout-down culture spreads across the country.

Alabama has also had its own share of problems with speech codes, speech zones, and related issues. In 2014, for example, a pro-life display by Bama Students for Life was removed by a University of Alabama official simply because someone complained that it offended them. In 2013 and again in 2014 Alabama the University of South Alabama forced Students for Life to confine their demonstration to a tiny so-called free speech zone, even though other student organizations had been permitted to demonstrate outside that area before them. Two years later, in 2016, the university agreed to expand its free speech zone in response to a lawsuit filed on behalf of Students for life. Four of Troy University's speech policies have received a red light rating from FIRE, the Foundation for Individual Rights in Education. Red light ratings indicate that the policies in question clearly and substantially restrict freedom of speech. FIRE also gives a red-light rating to five speech policies at Alabama A&M, which earned FIRE's speech code of the month award this April for having some of the worst speech policies in the country.

Over and above these problematic actions and policies, all of which would be addressed and remedied by HB498, it is only prudent to take the Haspel heckling incident as a warning and address it with the same kind of legislation other states are adopting in order to prevent further proliferation and escalation of these problems. Thank you.

EXHIBIT 3

Testimony before the Alabama State Senate

Committee on Education Policy

On HB 498

The Alabama Campus Free Speech Act

By

Stanley Kurtz

Senior Fellow, Ethics and Public Policy Center

May 28, 2019

Thank you, Mr. Chairman. My name is Stanley Kurtz and I'm a senior fellow at the Ethics and Public Policy Center in Washington DC. I'm also a co-author of the model campus free speech bill that helped inspire HB 498.

Mr. Chairman, the first duty of a legislature is to safeguard the fundamental liberties of our citizens. That is why over the past few years, more than 25 states have passed legislation to secure and protect the freedom to speak on public university campuses. The First Amendment does not enforce itself. In the first instance, that is the job of public university administrators and the trustees, or regents, who oversee them. The problem we face as a country is that university administrators too often fail in their responsibility to uphold freedom of speech.

Sadly, not only do administrators sometimes fail to uphold free speech, too often they actively undermine it by promulgating unconstitutional speech codes and so-called free speech zones, for example. That is why it has become necessary for legislatures to step in. It is the government's responsibility to secure and protect our fundamental liberties. When that is not being properly done by officials on the scene, it is time for the legislature to act.

Like every other state, Alabama has had its own share of problems with speech codes, speech zones, and related issues. In 2014, for example, a pro-life display by Bama Students for Life was removed by a University of Alabama administrator simply because someone complained that it offended them. In 2013 and again in 2014 the University of South Alabama forced Students for Life to confine their demonstration to a tiny so-called free speech zone, even though other student organizations had been permitted to demonstrate outside that area before them. Four of Troy University's speech policies have received a red light rating from FIRE, the Foundation for Individual Rights in Education. Red light ratings indicate that the policies in question clearly and substantially restrict freedom of speech. FIRE also gives a red-light rating to five speech policies at Alabama A&M, which earned FIRE's speech code of the month award this past April for having some of the worst speech policies in the country.

Instances like this illustrate the point that, instead of carrying out their legal obligation to protect freedom of speech, campus administrators too often directly undermine it. This means that the most important provision of HB 498 may actually be the system that directs the regents to actively oversee the administrative handling of free speech. After all, administrators are already obligated to enforce the First Amendment, and yet they often undercut it.

So simply passing another law affirming these responsibilities will not, by itself, suffice to solve the problem. Instead, the law needs to have some teeth in the form of an oversight system. With the passage of HB 498, administrators will know that their bosses, the regents, are obligated to actively oversee the administrative handling of campus free speech, and to report their findings to the public as well. This will have a powerful effect.

One of the reasons we as a nation are facing a crisis of campus free speech is that administrators currently have every motive to sweep problems and controversies under the rug. Too often, administrators capitulate to the loudest voices, many of which oppose and even stifle free speech. Usually, administrators give in, just to get controversies off the front page. Now, however, before giving

in to demands for the suppression of speech, administrators will have to consider what the regents will say in their annual oversight report. And that will tend to strengthen their resolve to protect and defend freedom of thought and expression on campus.

So passage of HB 498 will secure freedom of speech on the campuses of Alabama's public universities, not only because its core provisions will ban restrictive speech codes, so-called free speech zones, and shout-downs of visiting speakers, but because its oversight system will give everyone involved, from students, to administrators, to regents, good reasons to uphold this most fundamental liberty. Thank you.

EXHIBIT 4

SUMMARY OF STATES
 CAMPUS FREE SPEECH BILL
 April 2019

Radified	Date	State	Type of Bill	Senate	House	Special Notes
	2017	North Carolina	Goldwater - Ok			Due process in separate bill
	*2017	Arizona	Goldwater – Excellent, but 2 nd offense susp. is advisory.			2019 – adds court costs and attorney fees
		Georgia	Goldwater – watered down			
		Wisconsin	Goldwater - Strongest			Board of regents. Toughest discipline provisions.
	2017	Tennessee	Extensive provisions - weaker			No discipline or oversight
	2017	Louisiana	Extensive provisions - weaker			No discipline or oversight
	2019	South Dakota	Extensive provisions - weaker			No discipline or oversight
	2019	Iowa	Extensive provisions - weaker			No discipline or oversight
		Kentucky	?			
	2017	California				
	*2017?	Missouri	Limited – No FS Zones. Possible open forum language			GW bill introduced 2019
	*2017?	Colorado	Limited – No FS Zones. Possible open forum language			No FS Zones
	2017	Illinois				Expel students
	2017	Michigan				
	2017	Utah				
	2017	Virginia				
	2019	Texas	Goldwater		Passed extensive bill	No oversight
		Alabama	Goldwater - Strongest			
		Arkansas				
		South Carolina				

EXHIBIT 5

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**Chairman's Letter
to the Fellows
of the Yale Corporation**

December 23, 1974

To the Fellows
of the Yale Corporation:

The following report is the result of the findings and deliberations of a committee appointed last September by President Kingman Brewster, Jr. The President was responding in part to a resolution adopted by the Yale College Faculty on May 2, 1974, requesting him "to appoint a faculty commission to examine the condition of free expression, peaceful dissent, mutual respect and tolerance at Yale, to draft recommendations for any measures it may deem necessary for the maintenance of those principles, and to report to the faculties of the University early next term." Guided by the Rules of Governance adopted in 1970, the President appointed a committee of thirteen consisting of five faculty members, two members of the administration, three graduate students, two undergraduates, and one member of the Yale alumni. Their names, with one exception, will be found at the end of the report.

In efforts to fulfill its assignment the committee not only reviewed the record of the past decade but also sought to inform itself about attitudes and opinions of all members of the University community who wished to make their views known. Repeated invitations in the press brought in numerous written statements, many of them

thoughtful and informative. The committee also held advertised public as well as private hearings and recorded hours of testimony and advice.

It is gratifying to report that the committee found strong support for the maintenance and defense of freedom of expression among those whose views were received. A smaller number held reservations of various kinds about how much freedom should be tolerated. Some felt that freedom of speech was too dangerous, or that enjoyment of free speech should await the establishment of equality or the liberation of the oppressed. Only one appeared willing to advocate censorship and suppression of unpopular speakers.

How well the views last mentioned are represented in the dissenting statement of one member of the committee it is impossible to say. At least it serves as some indication of the difficulties the University might face in implementing the principles supported by the committee. Printed exactly as delivered, the dissenting member's statement was only received after the committee had finished its deliberations, completed the writing of its report, and disbanded for the holidays. The committee was therefore unable to comment on the faithfulness with which its views are represented, the scrupulousness with which its words are quoted, or the accuracy of factual allegations.

From the beginning of its investigations the committee has been aware that Yale's problems are shared by sister institutions at home and abroad. Correspondence with some of them has reinforced the impression that a movement which in its inception in California a decade ago proudly invoked the name of Free Speech has in latter days showed signs of repudiating its original commitment. While this investigation is confined to the experience at

Yale, it has been the hope of the committee that its statement might inspire in other universities a rededication to the principles asserted in this report.

The Secretary of the University has kindly agreed to make available to those requesting them the full texts of the President's baccalaureate address of May 19, 1974 and the public statements of the Yale Corporation that have been quoted in this report.

C. Vann Woodward
Chairman

The Report of the Committee

I

Of Values and Priorities

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter.

John Milton, *Areopagitica*, 1644

If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate.

Oliver Wendell Holmes, Jr.,
U.S. v. Schwimmer, 1928

The primary function of a university is to discover and disseminate knowledge by means of research and teaching. To fulfill this function a free interchange of ideas is necessary not only within its walls but with the world beyond as well. It follows that the university must do everything possible to ensure within it the fullest degree of intellectual freedom. The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpop-

ular views necessarily also deprives others of the right to listen to those views.

We take a chance, as the First Amendment takes a chance, when we commit ourselves to the idea that the results of free expression are to the general benefit in the long run, however unpleasant they may appear at the time. The validity of such a belief cannot be demonstrated conclusively. It is a belief of recent historical development, even within universities, one embodied in American constitutional doctrine but not widely shared outside the academic world, and denied in theory and in practice by much of the world most of the time.

Because few other institutions in our society have the same central function, few assign such high priority to freedom of expression. Few are expected to. Because no other kind of institution combines the discovery and dissemination of basic knowledge with teaching, none confronts quite the same problems as a university.

For if a university is a place for knowledge, it is also a special kind of small society. Yet it is not primarily a fellowship, a club, a circle of friends, a replica of the civil society outside it. Without sacrificing its central purpose, it cannot make its primary and dominant value the fostering of friendship, solidarity, harmony, civility, or mutual respect. To be sure, these are important values; other institutions may properly assign them the highest, and not merely a subordinate priority; and a good university will seek and may in some significant measure attain these ends. But it will never let these values, important as they are, override its central purpose. We value freedom of expression precisely because it provides a forum for the new, the provocative, the disturbing, and the unorthodox. Free speech is a barrier to the tyranny of authoritarian or

even majority opinion as to the rightness or wrongness of particular doctrines or thoughts.

If the priority assigned to free expression by the nature of a university is to be maintained in practice, clearly the responsibility for maintaining that priority rests with its members. By voluntarily taking up membership in a university and thereby asserting a claim to its rights and privileges, members also acknowledge the existence of certain obligations upon themselves and their fellows. Above all, every member of the university has an obligation to permit free expression in the university. No member has a right to prevent such expression. Every official of the university, moreover, has a special obligation to foster free expression and to ensure that it is not obstructed.

The strength of these obligations, and the willingness to respect and comply with them, probably depend less on the expectation of punishment for violation than they do on the presence of a widely shared belief in the primacy of free expression. Nonetheless, we believe that the positive obligation to protect and respect free expression shared by all members of the university should be enforced by appropriate formal sanctions, because obstruction of such expression threatens the central function of the university. We further believe that such sanctions should be made explicit, so that potential violators will be aware of the consequences of their intended acts.

In addition to the university's primary obligation to protect free expression there are also ethical responsibilities assumed by each member of the university community, along with the right to enjoy free expression. Though these are much more difficult to state clearly, they are of great importance. If freedom of expression is to serve its purpose, and thus the purpose of the university,

it should seek to enhance understanding. Shock, hurt, and anger are not consequences to be weighed lightly. No member of the community with a decent respect for others should use, or encourage others to use, slurs and epithets intended to discredit another's race, ethnic group, religion, or sex. It may sometimes be necessary in a university for civility and mutual respect to be superseded by the need to guarantee free expression. The values superseded are nevertheless important, and every member of the university community should consider them in exercising the fundamental right to free expression.

We have considered the opposing argument that behavior which violates these social and ethical considerations should be made subject to formal sanctions, and the argument that such behavior entitles others to prevent speech they might regard as offensive. Our conviction that the central purpose of the university is to foster the free access of knowledge compels us to reject both of these arguments. They assert a right to prevent free expression. They rest upon the assumption that speech can be suppressed by anyone who deems it false or offensive. They deny what Justice Holmes termed "freedom for the thought that we hate." They make the majority, or any willful minority, the arbiters of truth for all. If expression may be prevented, censored or punished, because of its content or because of the motives attributed to those who promote it, then it is no longer free. It will be subordinated to other values that we believe to be of lower priority in a university.

The conclusions we draw, then, are these: even when some members of the university community fail to meet their social and ethical responsibilities, the paramount obligation of the university is to protect their right

to free expression. 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.

II

Of Trials and Errors

Part of the Committee's charge was to assess the condition of freedom of expression at Yale. This requires some search of the University's record, good, bad, and indifferent, in defending its principles. The full history is too long and complicated to unfold here, but there are more reasons for concentrating on the recent past than lack of space and time. It is not clear, for one thing, how early in its history Yale's commitment to these principles became firm. Nor is it clear how much is to be gained by comparing in this respect the old Yale with the new Yale of recent years.

While the old Yale laid valid claim to being a national institution with representatives in its student body and faculty from all parts of the country and many parts of the world, in significant ways it was more homogeneous than the new Yale. One consequence of that homogeneity was the absence of some divisions that would plague the future. Changes in policies of recruitment, admission, and grants of assistance replaced the relative homogeneity of old Yale with the heterogeneity of new Yale. The decade of the sixties brought larger delegations of classes, races, and ethnic groups that had been underrepresented before

or not present at all. The new groups were more self-conscious as minorities and others were more conscious of them. Reactions ranged from insensitivity for minority points of view to paternalistic solicitude for minority welfare and feelings. And sometimes insensitivity and solicitude commingled.

The new heterogeneity did not prevent the forging of a strongly held consensus on certain issues. One of them was civil rights, and especially the rights of black people. Another was opposition to the Vietnam War and a multitude of policies associated with it. Yale shared in full the spirit of political activism and radical protest that swept the major campuses in the sixties. Storms of controversy and crises of confrontation broke over the campus with a force comparable to that which crippled some of the country's strongest universities. Yale was generally regarded as exceptionally fortunate in its ability to weather the years of crisis. Some thought the University led a charmed life, and while President Brewster had numerous critics, others attributed Yale's comparative stability to the quality of leadership provided by his administration. A complete account of those years, even a full study of free speech during the sixties would contain much in which Yale could take pride. Placed in the context of failures elsewhere, the failures at home — and they are serious enough to cause concern — would loom less large.

The University's commitment to the principle of freedom of expression was put to severe tests during the years of campus upheaval. It should be noted, however, that the main incidents of equivocation and failure with which this report is concerned did not coincide with the years of storm and stress. The first incident, that of the invitation to Governor George C. Wallace, occurred in 1963,

before the full onset of the critical period. The others came in 1972, after the tumult had subsided, and in 1974, a year of relative tranquillity. The latter incidents are those involving General William Westmoreland, Secretary of State William Rogers, and Professor William Shockley. Only the last of them culminated in actions that physically prevented a speaker from being heard when he appeared before an audience. The other scheduled speakers did not actually appear before an audience for various reasons, including the withdrawal of an invitation, decisions by invitees not to appear, and threats of disruption and possible violence. But failure or equivocation in defense of free speech was fairly attributable to the University community in some degree in at least three and possibly all four incidents.

It should be recalled that the record of the University includes successes as well as failures, and that the successes in defense of principle were not all on the side of speakers who supported the University consensus on the war and racial issues. In spite of prevailing hostility to their views on the part of a large campus majority, General Curtis LeMay, Governor Ronald Reagan, Senator Barry Goldwater, and Professor Richard Herrnstein were invited, received, and heard during these years.

The first of the failures came in the fall of 1963 when the Political Union invited Governor George C. Wallace of Alabama to speak at Yale. He was only one of several political figures, including Senator George McGovern and Representative Robert A. Taft, Jr., who were scheduled for appearances in the fall term, but Wallace stood out as the most controversial. He accepted the invitation. At the height of the civil rights crusade, the Governor was regarded as the very symbol of reactionary

intransigence, the national champion of segregation. In the previous spring he was the central figure in a series of bloody racial confrontations in his state. Then on September 15, shortly after the Political Union invitation, four black children were killed and some twenty others were injured in the bombing of a church in Birmingham. The Governor did not condemn the bombing as forthrightly as many thought he should. In these circumstances Mr. Brewster, then Provost of the University, asked the officers of the Political Union to consider withdrawing their invitation. When the Union complied, he justified his request in view of "the damage which Governor Wallace's appearance would do to the confidence of the New Haven community in Yale and the feelings of the New Haven Negro population." He expressed gratitude for a decision "in the interest of law and order as well as town-gown relations."*

Reactions to the decision contrast strikingly with the responses to comparable incidents during the next decade. "We are shocked by the Provost's statement," declared an editorial in the *Yale Daily News* in the issue quoting it. "The more we consider Yale's treatment of the invitation to Governor Wallace, the more painful it all becomes," said an editorial three days later, adding that "This kind of action simply does not belong in this great academic community. The pressures of time must not dull our allegiance to such a basic duty of a free University." One inference drawn by the *News* from the Provost's pronouncements on the Wallace incident was that in the administration's view, "the threat of disorder and poor taste" was on the whole "more important than any issue of free

**Yale Daily News*, September 20, 1963. Subsequent quotations, unless otherwise noted, are from the *News*.

speech involved." It quoted the opinion of Zachariah Chafee, Jr., an eminent constitutional scholar, that "We are more especially called upon to maintain the principles of free discussion in case of unpopular sentiments or persons, as in no other case will any effort to maintain them be needed."

The *News* reported that "feeling among faculty members and students" with regard to the withdrawal of the invitation "appears almost overwhelmingly negative." In addition to the criticisms by faculty members and administrative officers, the *News* quoted an editorial of the *New York Herald-Tribune* calling it "highly unfortunate that the threat of disorder should cast a shadow on the tradition of free speech at Yale" which "deserves a stronger defense from all concerned." The *Boston Herald*, according to the *News*, called the University action "a disservice to the cause of civil rights and liberties."

A sequel to the episode was a second invitation to Wallace by Law School groups. Commenting on this action, Provost Brewster said, "Yale will not stand in the way of an appearance by Governor Wallace even though the administration has told the sponsors that it is both offensive and unwise at this time." He left "the ultimate responsibility to the students," and added that "While we regret that decision of the law students, we will do our best to help them conduct an orderly and dignified meeting and will expect this same spirit in the Yale community." This expectation was never put to the test, however, since Wallace did not accept the new invitation.

In the ensuing years of political activism, radical protest, violent dissent, and confrontation, Mr. Brewster, now President, gave repeated public assurances of the University's commitment to "the risk of real freedom," which

"has been vindicated at Yale for 264 years." One of the risks was irresponsibility, but "the capacity for responsibility which emerges from exposure to irresponsibility is far stronger, far tougher, far more impressive than the kind of responsibility which is either coerced by restraint or moulded by paternalism." He drew the line against "compromise on the basic proposition that forcible coercion and violent intimidation are unacceptable means of persuasion . . . as long as channels of communication and the chance of reasoned argument are available."

In the worst of the crises in the activist years, that centering on May Day, 1970, freedom of speech never had freer rein. It will be recalled that May Day, 1970, came the day after President Nixon announced the invasion of Cambodia. Even before the invasion, waves of protest were already sweeping over the nation's universities. Sit-ins, classroom disruptions and violence were the domestic disorder of the day. In New Haven, resentment was also fueled by the Black Panther trial that drew nationwide attention.

May Day became a symbolic day of protest, and New Haven became a symbolic focus for the protesters. Thousands of militant demonstrators were heading for New Haven and the University to join many local sympathizers. Together with local and national authorities, the Yale administration made plans to meet the crisis. President Brewster urged that all protest be peaceful, and that disruptive acts be avoided. The University gates were thrown open to outside demonstrators and many were provided with food and lodging. Revolutionary Black Panthers and their supporters spoke freely to huge crowds at Woolsey Hall, Battell Chapel, Ingalls Rink, and Dwight Hall, as well as on the New Haven Green. It was reported that Jerry Rubin urged at Woolsey Hall that "Yale University be

closed down forever" and preached "a permanent revolution." Panthers declared they intended to "turn Yale into a police state," and "create peace by destroying the people who don't want peace." They urged students to "pick up your guns" and "to kill pigs." Orators hurled revolutionary threats, insults, and obscenities at the faculty, the administration, the Corporation, and the University and all they stood for and vowed they would "burn it all down."

In the May Day crisis there was, of course, no feasible way of "withdrawing" invitations to fifteen or twenty thousands of uninvited guests and scores of willing speakers. Nor did speakers and demonstrators of local origin stand on ceremony or await invitations. They spoke — often, without inhibition, and with free use of University facilities. Gratification over this triumph of uninhibited free speech, however, was dimmed for those who recalled that the Wallace speech had been discouraged "in the interest of law and order as well as town-gown relations." Yet while the Black Panther demonstrations and speeches could hardly have been prevented in any event, they were perceived as being, and might well have been, more of a threat to law and order and town-gown relations than the appearance of George Wallace would have been in 1963. These disparities led some to conclude that this particular defense of free speech was less a triumph of principle than of pragmatic considerations. In all fairness, however, the perspective of time lends credence to the contemporaneous impression that in the extremely difficult circumstances of May Day the administration had maneuvered skillfully in its efforts to maintain peace without sacrifice of principle. Under conditions graver than those in which other universities had foundered or were simultaneously foundering, the strategy of tolerance and restraint succeeded.

Two years later, April 4, 1972, General William Westmoreland, Chief of Staff of the United States Army, was scheduled to speak at the invitation of the Yale Political Union to an audience limited to its members. Because of the large crowd anticipated, the Law School auditorium was selected. Before General Westmoreland's appearance the *Yale Daily News* carried a story about plans of anti-Vietnam War off-campus organizations to disrupt or prevent his speech. General Westmoreland arrived and was dining with his hosts when he was informed that hundreds of people, some students, but mainly Vietnam veterans from outside the city had packed the halls outside the Law School auditorium and were trying to force their way in past a barrier manned by the campus police. The campus police said they could not assure the general that the crowd could be restrained, and even if it were restrained, that he would not be subject to disruption and abusive language. So informed, he accepted the advice of his security aide to cancel the speech. Campus police then removed their barrier and those outside pushed into the auditorium and occupied its stage. The only students on the stage in a picture taken at that time were officers of the Political Union — the rest were outsiders. The announcement of the general's decision by the President of the Union was drowned out by shouted obscenities. Police discovered fresh paint spilled on the floor after the meeting ended.

Reactions to this gross violation of established principle differed markedly from campus responses to the milder discouragements of free speech in the Wallace affair. Faculty criticism was not nearly so vocal this time. Instead of shock and indignation, such as the *Yale Daily News* had expressed over the withdrawal of the Wallace invitation, the *News* editorial of April 6 laconically said, "We hope

General Westmoreland enjoyed his dinner at Mory's last night . . ." It was obvious, declared the editor, that "the demonstrators did not stop the general" because "he made no attempt to speak." He added that he could not condone the crowd's violence. In a public statement President Brewster laid the blame upon General Westmoreland as well as on the demonstrators. While declaring that he was "disappointed" that the anti-war sentiment of demonstrators "overcame their concern for freedom of speech," the President was "doubly disappointed by General Westmoreland's decision to cancel his appearance" in view of administrative assurances "that he would be adequately protected in his right to be heard."

The President's statement was followed shortly by one from the Yale Corporation. While not repeating the assignment of blame to General Westmoreland, the Corporation extenuated the failure to protect freedom of speech in part on the grounds that "the location of the building made it impossible to deal adequately" with the disruptors, and that "the most threatening behavior was by people who had no Yale connection." They nevertheless affirmed that "the University must vindicate its commitment to freedom of speech, whether the threat comes from insiders or from outsiders" and that they were "determined to assure that any authorized meeting, performance, or speech scheduled at Yale shall be allowed to proceed without disruption." The campus police had been unable to identify any student offenders and no disciplinary action was taken. They did identify some non-students, but since no acts of violence had occurred and the only ground for legal proceedings against them was trespassing, no charges were filed. The chief of the campus police said that "an unsuitable auditorium and an insufficient number of policemen" were "the

major factors contributing to the refusal of General William Westmoreland to speak."

Secretary of State William Rogers had also agreed to appear before the Yale Political Union on April 23 to accept the A. Whitney Griswold Award for international statesmanship. At the auditorium seized by the Westmoreland disruptors, reference to the Secretary's visit had been greeted according to the News by the threat, "He'll get chased away, too." A spokesman of one of the groups that organized the demonstration against the general was quoted as announcing more than a week before the Secretary of State was to appear that plans were laid for "the most severe possible action" against Rogers. The Secretary of State postponed his visit until May 15.

On May 12, the day after some student violence protesting Marine recruiters on campus, in which several students were arrested, President Brewster issued a statement saying that "in the aftermath of General Westmoreland's decision not to attempt to speak in the face of threatened disruption, it is absolutely essential for Yale to vindicate its commitment to freedom of speech." While he said that he "would expect and even understand peaceful demonstration and picketing" against Rogers, any member of the University "who engages in violent or coercive action which interferes with the rights of others, including Secretary Rogers . . . will be subject to severe discipline." He specified suspension and expulsion. Unlawful conduct of non-members of the University would be prosecuted. One spokesman for the planned disruption was quoted in the News as professing to be wholly undeterred by this announcement. But the hope of the administration to vindicate the University's commitment of free speech was dis-

appointed when Secretary Rogers cancelled his appointment because of "pressing engagements."

In the meantime the administration was informed shortly before the event that the student branch of Lux et Veritas, an alumni organization, had invited Professor Richard Herrnstein of Harvard to speak at Yale on May 1. For some time Herrnstein had been subject to severe harrassment on the Harvard Yard because of his views on the genetic transmission of human intelligence. Under threat of violence, his scheduled appearances at two other universities had been cancelled. Pointing out that May 1 was a provocative date, an administrative spokesman asked the inviters to select another. They refused, and declared the date to be a pure coincidence. Officers of their parent organization offered to call off the speech if requested, but no such request was made. Anticipating trouble at Yale, an officer of the administration assigned Sprague Hall, believed to be the most secure against disruption, for the speech. He also met with representatives of minority groups most concerned, told them the University was obliged to protect free speech, and gained their pledge of cooperation. The speech was delivered as scheduled without interference of any kind. In this instance the administration policies proclaimed before Secretary Rogers' planned visit were put to the test, and the principle of free discussion was observed and upheld by the entire University community.

Two years later, however, in the affair of Professor William Shockley, the Stanford University physicist, the University community failed to live up to the principle. For the first time in memory a speaker tried to speak at a scheduled appearance at Yale and was prevented from doing so by organized disruption. This time the opposition to

the invitation and the determination to disrupt the speech came largely from within the University and was open, determined, and menacing from the start. It was also clear from the start that the opposition focused on Shockley, regardless of whom he debated, on his views of genetic inferiority and his proposal of voluntary sterilization as a solution.

The suggestion for the debate originally had come from Roy Innis, the black chairman of the Congress of Racial Equality, who proposed that he face Shockley before the Yale Political Union on national television after the fashion of the preceding Buckley-Weicker debate. In deciding whether to issue the invitation, the Union had before it the failure of Harvard (and other places) and the success of Princeton in resisting the prevention of a Shockley appearance. Well before the decision for the debate was reached, threats to prevent it were announced. Pronouncing the basic issue one of "free speech and unimpeded academic freedom," the Executive Board of the Union, after prolonged debate, decided on January 21, 1974, by a vote of 6 to 3 to invite Shockley and Innis and also voted against televising the debate. A *News* editorial seconded the invitation as "reaffirming the individual's right of public speech."

Shortly after the decision, officers of the Black Law Students and the Black Students Alliance at Yale joined with a graduate student and a medical student in a statement carried in the *News* of January 28: "We hereby serve notice that we vehemently oppose the Shockley-Innis debate and will exert all necessary efforts to prevent its occurrence." They urged members of the Political Union to override their Board's decision and withdraw the invitation.

The University administration received delegations of objecting students and conferred with officials of the Union, but at this stage adopted a hands-off policy. Several student organizations however, did bring pressure on the Union. The Chairman of the Progressive Labor Party, according to the *News*, dismissed freedom of speech as "a nice abstract idea to enable people like Shockley to spread racism." An open letter from an organization of Puerto Rican students to the Union called the debate "an insult to the Third World Community." Other *News* stories reported that concerned members of the Asian American Student Association declared that it "must not be tolerated," and a spokesman of the Chicano students did not think Shockley would "be given the opportunity to speak." Catholic, Protestant, and Jewish Chaplains of the Yale Religious Ministry urged cancellation. Voices were also raised in support of the invitation. Some contended that opposition to the invitation was not the same as opposition to the principle of free speech. The Political Union held a referendum of its whole membership, and by a vote of 200 to 190 on February 17 recommended that the Board rescind its invitation, which it did.

Immediately after this action the student branch of *Lux et Veritas*, which had invited Herrnstein two years before, announced its intention to invite Shockley and another speaker to Yale. The administration thereupon abandoned its hands-off policy and intervened with two unprecedented statements published on February 18, one by the Yale Corporation and another by President Brewster, both calling in question the motives of the *Lux et Veritas* inviters and the views of the proposed speaker. In words which regrettably failed to give proper emphasis to the primacy of free expression, the Corporation statement de-

clared that "This is apparently done in order to test whether Yale's belief in free speech can stand up against such provocation. The entire community is being used. The sponsors have tried this sort of thing before and the Yale community did not rise to the bait." The unspecified reference to "this sort of thing" was to the Herrnstein speech of May 1, 1972.

The President added a personal statement that "the use of free speech as a game, the lack of sensitivity to others, the lack of consideration for the community, and the lack of responsible concern for the University as an institution seem to me reprehensible." Both statements asserted continued support of the principles of free speech, but both expressed reservations about the Shockley invitation if, as the President put it, "provocation rather than understanding is accepted as the basis for inviting speakers to a campus." He recommended a boycott of the event as "the best way to show one's scorn and distaste." Complaining that "intimidation by the Yale Corporation and President Brewster hampers free and open discussion at Yale," Lux et Veritas decided not to invite the speakers.

In spite of these official discouragements, a third student organization, the Calliopean Society, renewed the invitations to Shockley and Innis. It soon gave up, according to the News, because of "insufficient funds" and "threats emanating from members of the Yale community" that were described as "more than rhetorical." In March another invitation was extended to Shockley by the newly reconstituted Yale chapter of Young Americans for Freedom (YAF), who also invited William Rusher, publisher of the *National Review*, to debate him. The subject of the debate later accepted by YAF, and one cause of offense to others, was, "Resolved: That society has a moral obligation to diagnose and treat tragic racial IQ inferiority." A politically conser-

vative group, YAF stated that it regarded Shockley as a liberal and said its members sought refutation of his doctrines of state genetic control through Rusher's arguments.

For the debate, which was to take place on April 15, the administration assigned room 114 in Strathcona Hall. On April 12 the *Yale Daily News* ran a front page story telling in detail how "student protest now threatens to disrupt the event itself." Several protest organizations, not all of them endorsing disruptive tactics, were cited and quoted. The tactic that later proved to be the most effectively used to disrupt the debate was that attributed to the Ad Hoc Committee to Stop Shockley, namely to drown out all speakers with noise. Other groups planned to picket the debate outside the hall. The administration took some steps to discourage disruption. On the evening of April 13, at a meeting called by students and attended by about 100 people invited from the sponsoring and objecting groups, University Secretary Henry Chauncey, Jr., repeated the warning President Brewster had spelled out in the face of threatened disruption of a speech by Secretary of State Rogers in May 1972. On the day of the debate the News repeated these warnings of "severe discipline" against students using "violent or coercive action."

At the hour appointed, the speakers and their hosts arrived at 114 Strathcona Hall to debate. When YAF officers could not make themselves heard, Secretary Chauncey took the platform to repeat his warning and was shouted down. The speakers were not permitted to say an audible word. They were drowned out by derisive applause, insults chanted at Shockley, and shouted obscenities. No more than a third of the audience seemed to participate in the disruption. Chauncey sought to quiet the disrupters and warn them of disciplinary penalties, but

without effect. "Racist Chauncey, go home!" became part of the chanting. After an hour and fifteen minutes Chauncey closed the meeting. The disruption of the speakers had been a complete success and the University's defense of principle had ended in total failure.

Response to this worst of the failures indicated further deterioration in the commitment to freedom of speech and the understanding of its importance in some quarters. Few faculty members spoke out. Far from echoing the old indignation called forth by the Wallace episode of 1963, the editorial voice of the college paper divided the blame, according the disrupters only a small share, citing repression elsewhere as justification for disrupting a speaker at Yale, stressing the unacceptability of the views of one of the debaters, deploring the invitations, and paraphrasing the statement of the Yale Corporation against the Lux et Veritas proposed invitation to shift the blame for the whole affair to the administration. Referring to the Corporation statement that "The entire community is being used," the editorial declared that "By sanctioning this particular debate, the University administration, and in particular Secretary Henry Chauncey, Jr., have allowed the community to be used in a way much more foul." President Brewster reminded the University that disrupters "were warned about the disciplinary consequences of their persistence in preventing others from listening to Mr. Shockley." He added that "it makes me sick that even a small minority of Yale students would choose storm trooper tactics in preference to freedom of speech." The President was to elaborate his reactions in a baccalaureate address discussed below.

Information on the disruption and those who participated was collected by Dean Horace Taft and laid

before the Yale College Executive Committee,* which had responsibility for administering discipline to offenders against college rules. This committee heard charges against the alleged disrupters. Its deliberations took more than fifty hours, and its findings were awaited with interest. Judging from its statement released on May 10, the committee shared the ambivalence expressed by the News editorial and the President's address of the week following. The statement declared that "the circumstances of this particular disruption" justified leniency to the offenders. Among these circumstances were "lack of adequate planning" in arrangements for the debate, the fact that "only a small fraction" of the disrupters were identified, that the subject of the debate, was perceived by some as "both insulting and provocative," and that "frustration" was felt by those "who had worked several months" to prevent the invitation to Shockley. In view of the above considerations, while twelve students were found guilty and suspended for the following fall term, the Executive Committee ruled that they would be considered for readmission in the fall if they would express "willingness to abide by the conditions of General Conduct" in the Undergraduate Regulations. Eleven did so apply and were readmitted in the fall under no penalty save disciplinary probation for one semester. The twelfth student did not apply for readmission. A medical student was also identified as an offender. He appeared before an ad hoc disciplinary board convened by the Dean of Students of the Medical School, which suspended him and then in the same action reinstated him for the summer term.

*For its composition, jurisdiction, and procedures, see "Report on the Executive Committee of Yale College." by a committee chaired by A. Dwight Culler, September, 1970.

Members of some of the twelve faculties of the University and a number of students expressed dismay and concern over the disruption of the Shockley-Rusher debate in public letters and speeches. At a meeting of one of the faculties, that of Yale College on May 2, 1974, a resolution was passed to "reaffirm its adherence to the principles set forth in the Undergraduate Regulations" and to ask the President to appoint a committee to examine the condition of those principles and recommend measures deemed necessary to maintain them. It was partly in response to this resolution that the President eventually appointed the committee that submits this report.

In his baccalaureate address on May 19 the President did not assert the primacy of free expression over competing values. Instead he included "the invitation as well as the disruption" in his disapproval. He suggested that the disease that afflicts us is "a combination of arrogant insensitivity, and paranoid intolerance," with gradations in both categories. He saw some of the first affliction "in the invitation which finally brought Shockley to Yale," and declared that in its extreme form insensitivity could become "the true fanaticism of a Lenin or a Hitler." He said that signs of both insensitivity and "paranoid intolerance" were evident among the disrupters.

* * *

This committee's account has revealed instances of faltering, uncertainty, and failure in the defense of principle on the part of various elements in the University community. Within the community has appeared from time to time a willingness to compromise standards, to give priority to peace and order and amicable relations over the principle of free speech when it threatens these other values. Elements within the University community have

shown since the time of the Wallace incident signs of declining commitment to the defense of freedom of expression in the University.

A significant number of students and some faculty members appear to believe that when speakers are offensive to majority opinion, especially on such issues as war and race, it is permissible and even desirable to disrupt them; that there is small chance of being caught, particularly among a mass of offenders; that if caught there is a relatively good chance of not being found guilty; and that if found guilty no serious punishment is to be expected. In the only instance of massive infraction of free speech in which offenders were subject to disciplinary action, that of the Shockley case, experience lent support to some of these assumptions.

From the administration have come promptings that have at times been mixed and contradictory. It is true that in each of the crises reviewed and in many other critical situations during the troubled decade just ended President Brewster has voiced the University's commitment to freedom of expression, "to untrammelled individual initiative in preference to conformity," and to academic freedom generally. It is also true that the administration has never barred outright an invitation to speak; it has assigned halls on request, and has warned against disruption. In specific instances, however, statements by the President and the Corporation have been interpreted as assigning equal if not higher value to law and order, to town-gown relations, to proper motives, to the sensitivity of those who feel threatened or offended, and to majority attitudes. Some of the statements have placed blame for failure not only on the disrupters and their lawlessness, but also upon the inviters of the speakers and their motives, and on the

views of the proposed speakers as well. Moreover, the University's physical arrangements for deterring and detecting disrupters have proved inadequate. And finally, the faculty has not been as alert as it might have been to these problems.

This committee, therefore, finds a need for Yale to reaffirm a commitment to the principle of freedom of expression and its superior importance to other laudable principles and values, to the duty of all members of the University community to defend the right to speak and refrain from disruptive interference, and to the sanctions that should be imposed upon those who offend.

We agree with President Brewster's statement in his baccalaureate address of 1974, that "the prospects and processes of punishment" and the "lust for retribution" constitute no adequate solution — though we would urge clearer definition and more vigorous enforcement of rules. Rules and their enforcement must rest upon a consensus of the whole community on the principle of freedom of expression and a genuine concern over violations. To build this consensus we make the suggestions set forth in Part III of this report.

III

Of Ways and Means

The foregoing review has persuaded this committee that the time has come to revitalize our principles, to reaffirm and renew our commitment, and to find ways and means for the effective and vigorous defense of our values. To promote these ends we propose:

First, that a program of reeducation is required.

Some members of the university do not fully appreciate the value of the principle of freedom of expression. Nor is this surprising. In one of his most famous dissents, Mr. Justice Holmes spoke to the question:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . .

Abrams v. U.S., 1919

Education in the value of free expression at Yale is the business of all sectors of the University. Much needs to be done. The first need is for effective and continuing publication of the University's commitment to freedom of expression. At present, only two readily available documents address the subject and suggest standards of conduct: the Yale College "Undergraduate Regulations" and the "Rights and Duties of Members of the Yale Law School." We urge that all University catalogues, as well as the faculty and staff handbooks, include explicit statements on freedom of expression and the right to dissent, and that the attention of students should be directed to these statements each year at registration. We also urge that each school — its dean, its faculty, and its students — consider the most effective ways to clarify and discuss the relation of free expres-

sion to the mission of the University. These might include addresses to entering students, discussions in informal settings such as the residential colleges, and special attention to the subject in student publications.

Second, that individuals and groups who object to a controversial speaker should understand the limits of protest in a community committed to the principles of free speech. Let us therefore be clear about those limits.

1) It is desirable that individuals and groups register in a wide-open and robust fashion their opposition to the views of a speaker with whom they disagree or whom they find offensive. When such a speaker has been invited to the campus by one group, other groups may seek to dissuade the inviters from proceeding. But it is a punishable offense against the principles of the University for the objectors to coerce others physically or to threaten violence.

2) The permissible registration of opposition includes all forms of peaceful speech, such as letters to newspaper editors, peaceful assembly, and counter-speeches in appropriate locations. Furthermore, picketing is permissible outside of a building so long as it is peaceful and does not interfere with entrance to or exit from the building or with pedestrian or vehicular traffic outside of a building. It is important to understand, however, that picketing is more than expression. It is expression joined to action. Accordingly, it is entitled to no protection when its effect is coercive.

3) There is no right to protest within a university building in such a way that any university activity is disrupted. The administration, however, may wish to permit some symbolic dissent within a building but outside the meeting room, for example, a single picket or a distributor of handbills.

4) In the room where the invited speaker is to talk, all members of the audience are under an obligation to comply with a general standard of civility. This means that any registration of dissent that materially interferes with the speaker's right to proceed is a punishable offense. Of course a member of the audience may protest in a silent, symbolic fashion, for example, by wearing a black arm band. More active forms of protest may be tolerated such as briefly booing, clapping hands, or heckling. But any disruptive activity must stop when the chair or an appropriate university official requests silence. Failure to quit in response to a reasonable request for order is a punishable offense.

5) Nor does the content of the speech, even parts deemed defamatory or insulting, entitle any member of the audience to engage in disruption. While untruthful and defamatory speech may give rise to civil liability it is neither a justification nor an excuse for disruption, and it may not be considered in any subsequent proceeding against offenders as a mitigating factor. Nor are racial insults or other "fighting words" a valid ground for disruption or physical attack — certainly not from a voluntary audience invited but in no way compelled to be present. Only if speech advocates immediate and serious illegal action, such as burning down a library, and there is danger that the audience will proceed to follow such an exhortation, may it be stopped, and then only by an authorized university official or law enforcement officer.

6) The banning or obstruction of lawful speech can never be justified on such grounds as that the speech or the speaker is deemed irresponsible, offensive, un-scholarly, or untrue.

Third, the University could be more effective in

discharging its obligation to use all reasonable effort to protect free expression on campus. We submit that this obligation can be discharged most effectively in the following ways:

1) The University and its schools should retain an open and flexible system of registering campus groups, arranging for the reservation of rooms, and permitting groups freely to invite speakers.

2) It is entirely appropriate, however, for the President and other members of the administration to attempt to persuade a group not to invite a speaker who may cause serious tension on campus. This is best done by communicating directly with the inviting group. It is appropriate for the University official to explain to the group its moral obligations to other members of the community. It is important, however, for the official to make it clear that these are moral obligations for the inviters to weigh along with other considerations in deciding whether to go forward, and that a decision to go forward is one which carries no legal or disciplinary consequences nor risks of more subtle University reprisals.

3) Once an invitation is accepted and the event is publicly announced, there are high risks involved if a University official — especially the President — attempts by public or private persuasion to have the invitation rescinded. There is a risk that the public or private attempt will appear as an effort to suppress free speech, and also a risk that a public attempt will lend "legitimacy" to obstructive action by those who take offense at the speaker. Should the President or any other University official think it necessary to make such an attempt, however, it is important that he also make it plain that if his appeal is disregarded, (a) no disciplinary jeopardy will attach to the inviting group,

and (b) the University will make every effort to insure that the speech takes place.

4) Generally the inviting group should be free to decide whether the speech will be open to the public. However, if the administration has reasonable cause to believe that outsiders will be disruptive, it may appropriately limit attendance to members of the University. The duty of the administration is to uphold free speech within the university community and to insure that a speaker be heard. To discharge this duty it must have the power to impose sanctions against disrupters. It has little power against outside offenders against its rules.

5) The administration's obligation to protect freedom of expression also means that when it has reasonable cause to anticipate disruption, it may require that individuals produce University I. D. cards to gain admission. We suggest that such cards be issued to all members of the University and that they include a photograph.

6) Much can be done to forestall disruption if sufficient notice is given of the impending event. The administration and others can meet with protesting groups, make clear the University's obligations to free expression, and indicate forms of dissent that do not interfere with the right to listen. The inviting group can work closely with the administration to devise the time, place, and arrangements for admitting the audience (if there are any limits on who may attend) that will best promote order.

7) When the administration has reasonable cause to anticipate disruption, it should designate a particular hall as one best suited to protect a speaker from disruption and make that hall as secure as is reasonably possible. Effective arrangements for identifying offenders such as the use of cameras can serve as a deterrent.

8) A group inviting a speaker may close the meeting to the press. It also may invite the press. In either case, the administration should cooperate.

If a group wishes to arrange for television coverage, it should discuss the matter with an appropriate University official. Television should be permitted if the inviting group desires, unless the President or a person designated by him determines that the presence of television will itself make it substantially more likely that serious disruption will occur. If such a determination is made, it is the obligation of the administration to forbid television and to declare that the presence of television increases the risk of thwarting free expression and puts individuals and the property of the University at high risk.

9) The administration's responsibility for assuring free expression imposes further obligations: it must act firmly when a speech is disrupted or when disruption is attempted; it must undertake to identify disrupters, and it must make known its intentions to do so beforehand.

These obligations can be discharged in two ways. One, the administration may call the city police and the criminal law. This is undesirable except where deemed absolutely necessary to protect individuals and property, for police presence can itself lead to injury and violence. Two, the administration can make clear in advance that serious sanctions will be imposed upon those who transgress the limits of legitimate protest and engage in disruption. It is plain, however, that if sanctions are to work as a deterrent to subsequent disruption, they must be imposed whenever disruption occurs. They must be imposed and not suspended. They must stick.

10) Disruption of a speech is a very serious offense against the entire University and may appropriately

result in suspension or expulsion. Accordingly, one who is alleged to have committed such an offense should be tried before the University-Wide Tribunal. The Tribunal's jurisdiction should vest upon complaint by the President or Provost. The collective assent of the deans should not be required in cases of this sort.

We believe that the procedures established in the charter of the University-Wide Tribunal and the sanctions that the Tribunal may impose are well suited to so serious an offense as the disruption of free expression.

Steven A. Benner, Yale College, 1975

Elias Clark, Master of Silliman College, Lafayette S. Foster Professor of Law

James P. Comer, Associate Professor of Psychiatry, Associate Dean of the Medical School

Lloyd N. Cutler, Visiting Lecturer in Law, Chairman Yale Development Board

Robert A. Dahl, Sterling Professor of Political Science

Marjorie B. Garber, Associate Professor of English

Walter R. Rieman, Yale College, 1977

Philip J. Sirlin, Princeton, 1973, Graduate Student in Economics

Elisabeth McC. Thomas, Dean Pierson College, Assistant Dean of Yale College

Hillel Weinberg, State University of N.Y., Buffalo, 1973, Graduate Student in Political Science

Harry H. Wellington, Edward J. Phelps Professor of Law

C. Vann Woodward, Sterling Professor of History (Chairman)

A Dissenting Statement

It is with sincere regret that I find myself unable to join the Majority Report. I am forced to admit, however, that I thought its statement of principles too facile and simplistic, its historical section full of value judgements, and its recommendations vague and expedient.

The Majority's theory is a simple one: a university's primary purpose is to discover and disseminate knowledge; free expression is necessary to achieve this purpose; therefore free expression should always supersede any other values which might conflict with it. I would challenge this theory on several fronts.

A. The Majority view is based on a positivist belief that science is a mode of inquiry by which man comes to learn incontrovertible truths, by means of which people can manipulate others so as to bring the maximum amount of "efficiency" to the social order. In contradistinction to this view, philosophers and social scientists have been telling us for years that all knowledge is *relative*, the result of social conditioning. External psychological, social, and historical conditions predetermine our thoughts, depriving individual people of their rational autonomy. For example, Freud attacks the autonomy of our moral beliefs about sex, and McLuhan speaks of the formative influence of the media on our most basic conceptions of the world. And many social sciences model their research on the basis that a person's feelings, thoughts, and actions are *dependent* variables. Therefore how are we to believe that the rea-

sons we give for what we believe or think are reasons at all, if the real reasons are outside of us? Thus, the notion that free expression strains our ideas through a firing line of rational dialogue is too simplistic: even after this process, we might remain pre-conditioned in some sense.

Karl Mannheim develops the concept of ideology as another means by which an individual's social situation systematically distorts his way of thinking, thereby limiting the attainment of "objectivity" even if free speech is allowed. Mannheim concludes that knowledge is not a purely rational and disinterested theoretical enterprise, where praxis has no influence on theory. Instead, power relationships enter into our language and the theoretical structures by which we understand and appropriate our everyday experience. And technocratic thought forbids a discussion of ends — norms and values — in our political decision-making, so we have no *telos* — or general goal — for society, no system of ethics determined by *all* men and women in society, free from domination by ideology or technocracy. Until we have such a *telos*, free speech might be simply unrealizable because the neutrality of a purely *rational* interchange of ideas and arguments is impossible. Even if this extreme conclusion is not warranted, at the very least, before free speech can become a possibility, it will require liberation from and increased self-consciousness of the social and irrational factors that condition knowledge and pre-form the meanings and structures of language. Education, the "sociology of knowledge," and anti-ideological actions are in order to the extent that they can help achieve the "mental space" necessary for undominated discussion of options.

Marcuse would agree with J.S. Mill and the Majority that "the *telos* of tolerance is truth," i.e. that we

tolerate free speech because it furthers truth. But Marcuse goes on to argue that this implies that specific limitations of tolerance are justifiable if they further the pursuit of truth. Marcuse identifies such "truth" with the liberation of the oppressed and the achievement of true equality, (an identification which should not be too difficult for us all to agree with), so he is willing to justify censorship by the oppressed in order to further their own liberation. The "continued existence" of "the small and powerless minorities which struggle against the false consciousness and its beneficiaries" is "more important than the preservation of abused rights and liberties which grant constitutional powers to those who oppress these minorities." So if the elimination of oppression is a rational goal for society (and I think it is), and therefore also a rational goal towards which the exercise of free speech ought to be teleologically directed, then the extent to which free speech helps us reach this "truth" gives us a rational criterion for delimiting the extent to which free speech is to be tolerated. If democratic, undominated discussion within the community so determines, we may prohibit the malicious advocacy of racist or imperialist ideas. As Rev. William Sloane Coffin pointed out: "Unless social justice is established in a country, civil liberties, which always concern intellectuals more than does social justice, look like luxuries. The point is that the three ideals of the French revolution — liberty, equality, fraternity, cannot be separated. We have to deal with equality first."

From a *political* perspective, "rights" do not exist in the abstract, and the only concrete right to free speech is one which is backed up (usually with definite limitations) by those in power over a given community. Thus, because of the degree to which free speech is under-

mined by power relationships and ideological coloring, we should recognize that holding up a *pure model* of "free speech" to dissident oppressed groups (as the Majority does) often serves the cause of oppression more than that of free speech.

B. Even if "truth" were not colored by ideology and power relations, it is not clear that a "free marketplace of ideas" would discover this "truth" at all, much less discover it most efficiently. Fundamental to the Majority's argument is the notion that good ideas will beat out bad ideas in such a free marketplace, as the passage from *Areopagitica* (Part I) indicates and as the portion of the Holmes quote (at the beginning of Part III) which was conveniently excised from the final draft affirms: "The ultimate good desired is better reached by free trade in ideas — . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market." Such a market, like any other market, would require atomistic perfect competitors in order to most efficiently achieve the "truth." Yet *this* market contains a good deal of monopoly power, which can dominate the market and drive out weaker, albeit "true," ideas. This is most apparent with regard to the domination of the prevailing ideology discussed above: if the language and the prevailing structure of knowledge reflect the ideology of those in power, then the rational autonomy of the individual to think for himself is undermined, and free speech is pre-biased in favor of the prevailing ideology. But even if we liberated our consciousness of all ideological predispositions, there would still be people and classes with more political and economic power than others (including those who control the mass media and the educational institutions), and the ideas of these classes would

still be in a stronger position on the "market" than the ideas of the weaker oppressed classes.

The failure of the free marketplace of ideas is implicitly accepted by the Majority, in their desire to limit the free expression of opinion by the Yale Administration and especially by the President. If we can rely on the free market of ideas to achieve truth and if, therefore, we should let anyone say anything any time, then we should not try to prevent the President of the University from saying anything he wants to say, as forcefully as he wants to say it, and as critically (of Lux et Veritas, YAF, Westmoreland, etc.) as he desires. Why, then, does the Majority insist that the President, if he deems an invitation to speak at Yale irresponsible, "Make it plain that if his appeal is disregarded no stigma will attach to the inviting group"?

Furthermore, there are other interferences with the free market of ideas at Yale, which the Majority does not find the slightest bit troublesome: the article by Dr. Spock which the Alumni Magazine refused to print; the termination of the employment of such radical faculty members as Staughton Lynd (History), Mills and McBride (Philosophy), and Resnick, Hymer, Weisskopf (Economics); censorship by the Administration of the Yale Band; punishment of streakers.

C. Even if a free exchange of ideas were the best means of discovering truth, a University has other important purposes and values besides the discovery and dissemination of academic knowledge, and other functions besides merely research and discussion of academic theory. There are other kinds of knowledge, too, such as human knowledge. It is clearly one of Yale's goals to teach its students how to live responsibly in our modern society,

how to deal with other people in a context of mutual respect and harmony; Yale strives to acculturate people to the larger society outside the university community, and this includes the promulgation of racial harmony, religious tolerance, non-sexist attitudes, etc. Indeed, Yale has a responsibility to the rest of society which it must live up to, over and above its own interests. In addition to free expression, other moral questions must be dealt with. The Chairman of this Committee has (Daedalus, 1974) bemoaned the fact that "within the university are to be found members of faculty, student body, or administration whose concern for social welfare and minority needs outside their walls overcomes their concern for the protection of university privileges." I believe that the university *should* take a stand for its ideals on erupting national issues, and not merely cloister itself within the walls of knowledge-seeking. And I believe that the university's commitment to minority groups and to equal opportunity is at least as laudable a value as free expression.

It is not clear to me that relying, as the Majority does, on the inviting groups to exercise responsibility in this area, either through their own leadership or as a result of the "moral suasion" of fellow members of the University, is likely to lead to this kind of education and commitment. The University must play a leading role in the education of good and moral citizens, especially in light of the fact that a disproportionate number of Yale graduates will wind up in positions of power and influence in society. I have no confidence that the kind of "moral suasion" suggested by the Majority will proselytize as effectively for responsible invitations as it proselytizes for free expression. And if it does not, then the "chance" that the Majority is willing to take, — "that the results of free expression are to the gen-

eral benefit in the long run, however unpleasant they may appear at the time" — will entail severe short run costs in terms of other values which the University is interested in promoting. Whereas the Majority is willing to accept these short run costs by insisting that free expression be the "paramount" priority in a university, I would try to balance the conflicting interests in each case, and weigh the values which would be sacrificed in the "short run" against the potential "long-run" knowledge which might be gained by allowing the free expression. If, for example, Hitler was invited to Yale to discuss his research into the area of Aryan racial superiority, and his policy prescription of extermination of all non-Aryans, I would have a hard time justifying allowing him to speak. Even if I were confident that his theories would, if wrong, eventually be disproved in the "long run," I have learned from history that the "short run" costs would be overwhelming.

D. In determining the value of the knowledge which might potentially be gained in the long run, we must keep in mind that it is mainly "through research and teaching" that knowledge is discovered and disseminated, whereas people invited from outside the University to give public speeches — which is, after all, the problem which the Majority primarily addresses — further the University's purpose in only a peripheral way, if at all. For example, it is difficult to see how William Shockley's speech fits in to what Mr. Woodward (in the same Daedalus article) called "the traditional mission of the university . . . 'a unique fusion of the quest for knowledge through scholarship and the dissemination of this knowledge through teaching.' (Emphasis added.) The speech certainly was not intended to "discover" new knowledge, nor is it clear to whom the speech

was meant to "disseminate" any idea that had not already been disseminated many times in many different (public) places. Thus, while no one would dream of denying Shockley the right to think whatever "unthinkable" thoughts he wants, nor to discuss — on his campus, in the journals, on the Cavett show, or even in small seminars at Yale — "the unmentionable," I just cannot see why we have to feel obligated to provide a public podium for him.

A public podium, especially a forum at a prestigious university like Yale, provides sponsors and speakers with advantages not easily obtained elsewhere. The means to obtain an audience, publicity, and an auditorium are easily at hand at minimal expense. In addition, the practice at Yale has been to provide additional security forces without charge to the sponsoring group, although in some cases the expense has run to several thousand dollars. These advantages — financial, publicity, prestige — are separate and apart from a speaker's right to think what he wants to think and to express his views. The First Amendment, let us recall, only protects against government interference with expression; it does not create an obligation to provide a forum nor to guarantee a polite reception to all ideas. That is a question of academic courtesy, not free expression. Nor should a university feel obligated to go beyond the canons of academic freedom — i.e. non-interference with faculty research and teaching — by providing a forum for unscholarly or socially harmful ideas. It might even be said that an invitation to such a public forum goes beyond mere *speech*, into the realm of *action*, and therefore need not be protected the way speech and thoughts are. This fact, coupled with the advantages which a university podium bestows upon a speaker, creates a responsibility on

the part of both the university and the inviting group, to judge the expected benefits of its invitation against the possible adverse consequences, including any adverse national impact.

One important factor which must be considered before an invitation is "responsible" is the *political* implication. Putting aside any question of *motive* of the inviting group or of the speaker, even if someone like Shockley had no desire to provoke a confrontation or to promote racism, even if he merely wanted to discuss his genetic theory and its implications, still the very nature of his policy prescriptions transpose his expression from mere speech into action. Thus, on top of the political fact that racial theories like Shockley's will have the *actual* result of fanning racial hatreds (whether intended or not), Shockley's policy recommendation — that the government offer cash incentives to low-IQ individuals who agree to have themselves sterilized — is particularly pernicious at a time when legislation has been introduced which mentions sterilization and when individuals have taken it upon themselves to forcibly sterilize young black people. Like the Hitler example above, the costs of such a racist *political* campaign are prohibitive, and may justifiably be opposed by political means. The problem, then, is not that the speaker's ideas must surely be false, but that he is using vacuous questions to suggest pernicious action; not that it is wrong to permit dissemination of wrong and false ideas, but that there is something wrong in staging an event (a massively attended public lecture) which furthers his evil (political) ends. In the case of Shockley, another political implication of allowing him a *forum* at Yale (i.e. a place for the public discussion of current questions) is that it implicitly acknowledges that

the question of inherent inferiority of blacks is an unresolved, debatable topic, an acknowledgement which the National Academy of Sciences has twice refused to make.

Another factor to be considered in determining whether an invitation is responsible is the motivation of the inviters and of the speaker. If the motivation is not to discover or disseminate knowledge, but to provoke a confrontation, to arouse the black or radical community to protest so they will be expelled from Yale, or worse yet, to incite a riot, then the invitation is irresponsible. Even the Majority's "overriding university purpose" rationale fails to justify such a speech. There is also the question of what to do with groups which fail to adhere to the ethical considerations the Majority discusses in Part I, or groups which fail to consider these factors *fairly*, by giving their own interests undue weight or otherwise. I do not think that such an invitation is responsible, nor should it be condoned by the university. Reasonable individuals should be obliged not only to consider these factors, but also to act accordingly; procedural respect is insufficient without substantive respect. The Majority is afraid punishment of such irresponsible invitations would inhibit free expression or subordinate it to other values, none of which they believe to be more important than free expression. As I said earlier, I would weigh the different values to determine what an optimum policy should be in each case. (I do not think that the fact-finding problem here is as difficult as the Majority seems to think. Courts and juries always make findings of fact, including the question of motive. If juries were not capable of determining motive, most criminals could never be convicted.) As for the Majority's problem with formal sanctions chilling free expression, I fail to see why the informal sanctions which they recommend (moral suasion)

would not also chill free expression, too, though to a slightly lesser extent. Thus, extrapolating their argument for the *absolute* primacy of free speech above all other values, we are forced to conclude that even moral suasion should not be exercised against irresponsible invitations. The Majority is on a slippery slope and has to draw an arbitrary line between formal and informal sanctions.

If we extend the question from immoral motives to speech which is actually *illegal*, we find that the Majority has finessed the distinction between lawful and unlawful speech. Everyone must realize by now that the First Amendment, as interpreted by the Supreme Court, does not grant an absolute right to free expression; the right often depends upon the context of the situation. Military personnel, people in business relationships, slanderous and libelous utterances, fighting words, and pornography are not protected by the Constitution. No one may shout "fire" in a crowded theatre, nor speak in such a way as to create a clear and present danger of unlawful action. Despite these limitations on free expression for the purposes of the First Amendment, the Majority Report only mentions one limit on free expression for the purposes of Yale University: speech advocating immediate and serious illegal action. But why does the Majority make an exception here? why not allow the speech and merely stop the advocated action? If the Majority argues that free speech should dominate *all* other values, then free speech must dominate the values which lie behind the outlawing of certain speech — including the value of protecting the government from speeches creating a danger of violent overthrow. Thus the Majority, too, has a line-drawing problem. If they are willing to stop speech which advocates serious illegal action, why not also stop the advocacy of serious *immoral* action? And why rely on

university officials to determine what might be illegal action, how serious the action might be, or the likelihood that the audience will follow such exhortations? This sounds like the prior censorship the Majority seems to abhor. And if the university tries to stop such a speech but is unable to (or if the speech occurs before the Administration finds out about it, as is more likely), does the university punish the inviters? punish the disrupters? punish everyone?

The Majority says that defamatory speech does not create a right to disrupt, since civil remedies are available if the speech is proven to be illegal. But this ignores the fact, recognized by U.S. Courts, that racial minorities and other "suspect classifications" do not have the same opportunity to overturn policy by political means, due to their small numbers and relative lack of resources. Therefore the Courts apply a stricter standard of judicial scrutiny in cases which impinge upon fundamental rights of these groups. For the same reason, the Columbia Law Review's Model Defamation Statute stated: "False representations of fact about these groups (racial and other minorities) made in support of a cause of action impede the free interchange and wise choice of ideas because the enormity and repetition of such falsehoods have been shown to increase their acceptance." I would submit that, for similar reasons, Yale ought not to leave members of these minority groups to their civil remedies, without more. As a Dartmouth discipline committee said after Shockly was disrupted there two years ago, "A speech dealing with the slander of a racial group is not susceptible to academic discourse because verbal refutation cannot undo the damage caused by the utterance of this slander."

E. This brings us to the question of disruption. The Majority suggests that "any disruptive activity must stop" upon a reasonable request from the chair. This standard is as arbitrary as one might devise. Besides the fact that "disruptive activity" is not defined except by vague examples ("briefly booing," "heckling"), such a repressive scheme, leaving the determination of "reasonableness" of requests to a chair which is inevitably biased against the protestors, cannot help but chill the audience's right to protest, dissent, and assembly. Certainly the right to assemble publicly is meaningless if it cannot involve large masses, high emotions, roughness and even turbulence. Its value has been proved on countless occasions as a technique to propagate new, minority or unconventional opinions. How can this Committee stifle this and other forms of dissent in its desire to protect calmer forms of expression? We must remember, too, that dissent and assembly are of even more crucial significance to those groups which habitually lack majority status in almost every decision-making arena. Even the Majority's free-exchange-of-ideas theory holds that knowledge is furthered, not by lecturing to an absorptive audience, but by confronting questions and criticisms. Nor does that theory necessarily require compliance "with a general standard of civility," as the Majority demands. Anger, passion, and disagreement further the free interchange of ideas as we grope toward an understanding of truth.

The Majority also denies that either the content of the speech or the motivation of the speaker can be a mitigating factor in subsequent proceedings against disruptors. I fail to see why, if there are mitigating circumstances which might reduce a criminal charge from first degree murder to second degree or even manslaughter, why context and motivation cannot mitigate doing violence to

another's right of expression. If someone utters "fighting words" (such as "you dirty Jew bastard") and you hit him in the face, you are probably within your legal rights; the speaker's irresponsibility mitigates your assault. I see no reason why university punishment should not be mitigated, too. I do not believe that the disruption which Yale has witnessed in the last few years has been either frivolous or frequent. It has been an expression of moral outrage, and emotional reaction to something that was deeply felt to be wrong, not unlike the reaction of a bunch of revolutionary farmers who lined up against the British in 1775. Therefore I have a strong gut reaction against punishing opposition, on moral grounds based on profound belief in human dignity, to "irresponsible" (but "legal") speech, while refraining from punishing the inviters of the speech for their disregard of "mutual respect" amid "charitable relations." Of course, the best way for Yale to eliminate disrupters would be to screen out potential disrupters during the admissions process, and this alternative is no doubt being practiced to some extent here and elsewhere. But the cost to the ethnic and ideological diversity of the student body and therefore to the quality of the University would be considerable.

The constraints of time and the fact that the Chairman has asked me to try to limit my Minority Report to five pages forbid me to enumerate all of the difficulties I have with the historical section and the policy recommendations other than what is implicit in what I have already said. However, I do want to point out two problems with the history section which are quite important.

The Majority continually refers with obvious discontent to statements by President Brewster to the effect that he recognizes the existence of additional values within

the university community other than free speech. I find Mr. Brewster's commitment highly laudable (to the extent that it is not compromised by vacillation or by regressive policies in other areas), and I am surprised that the Majority remains unsatisfied, for it seems to me that most of the President's statements have conformed remarkably well to the inhibitions and disclaimers promulgated in Part III, Section 3, (2) and (3) of the Report.

A point which goes more deeply to the fundamental rationale of the Majority is the historical fact that the disruptions at Yale have not been stimulated by *academic* issues about which the Majority claims Yale has a duty to present factual, rational argument above all else, but by *political* issues which are a source of equally competent contention throughout American society, centering around morality, opinion and passion rather than intellectual fact. Thus, the Committee would do well to exclude these events from their definition of "academic" freedom, and decline to recommend such severe punishment for students who have felt bound by their consciences to disrupt these non-"academic" events.

In sum, I agree that free expression is an important value, which we must cherish and protect. But it is not the *only* value which we uphold, either in our society or in our universities. Under certain circumstances, free expression is outweighed by more pressing issues, including liberation of all oppressed people and equal opportunities for minority groups.

Respectfully submitted,

Kenneth J. Barnes, Harvard, 1970,
Law Student and
Graduate Student in Economics

EXHIBIT 6

Report of the Committee on Freedom of Expression

The Committee on Freedom of Expression at the University of Chicago was appointed in July 2014 by President Robert J. Zimmer and Provost Eric D. Isaacs “in light of recent events nationwide that have tested institutional commitments to free and open discourse.” The Committee’s charge was to draft a statement “articulating the University’s overarching commitment to free, robust, and uninhibited debate and deliberation among all members of the University’s community.”

The Committee has carefully reviewed the University’s history, examined events at other institutions, and consulted a broad range of individuals both inside and outside the University. This statement reflects the long-standing and distinctive values of the University of Chicago and affirms the importance of maintaining and, indeed, celebrating those values for the future.

From its very founding, the University of Chicago has dedicated itself to the preservation and celebration of the freedom of expression as an essential element of the University’s culture. In 1902, in his address marking the University’s decennial, President William Rainey Harper declared that “the principle of complete freedom of speech on all subjects has from the beginning been regarded as fundamental in the University of Chicago” and that “this principle can neither now nor at any future time be called in question.”

Thirty years later, a student organization invited William Z. Foster, the Communist Party’s candidate for President, to lecture on campus. This triggered a storm of protest from critics both on and off campus. To those who condemned the University for allowing the event, President Robert M. Hutchins responded that “our students . . . should have freedom to discuss any problem that presents itself.” He insisted that the “cure” for ideas we oppose “lies through open discussion rather than through inhibition.” On a later occasion, Hutchins added that “free inquiry is indispensable to the good life, that universities exist for the sake of such inquiry, [and] that without it they cease to be universities.”

In 1968, at another time of great turmoil in universities, President Edward H. Levi, in his inaugural address, celebrated “those virtues which from the beginning and until now have characterized our institution.” Central to the values of the University of Chicago, Levi explained, is a profound commitment to “freedom of inquiry.” This freedom, he proclaimed, “is our inheritance.”

More recently, President Hanna Holborn Gray observed that “education should not be intended to make people comfortable, it is meant to make them think. Universities should be expected to provide the conditions within which hard thought, and therefore strong disagreement, independent judgment, and the questioning of stubborn assumptions, can flourish in an environment of the greatest freedom.”

The words of Harper, Hutchins, Levi, and Gray capture both the spirit and the promise of the University of Chicago. 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 of Chicago 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 ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. 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. 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 a word, the University’s fundamental commitment is to the principle 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 wrong-headed. 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 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. 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. To this end, the University has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it.

As Robert M. Hutchins observed, without a vibrant commitment to free and open inquiry, a university ceases to be a university. The University of Chicago's long-standing commitment to this principle lies at the very core of our University's greatness. That is our inheritance, and it is our promise to the future.

Geoffrey R. Stone, Edward H. Levi Distinguished Service Professor of Law,
Chair

Marianne Bertrand, Chris P. Dialynas Distinguished Service Professor of
Economics, Booth School of Business

Angela Olinto, Homer J. Livingston Professor, Department of Astronomy and
Astrophysics, Enrico Fermi Institute, and the College

Mark Siegler, Lindy Bergman Distinguished Service Professor of Medicine and
Surgery

David A. Strauss, Gerald Ratner Distinguished Service Professor of Law

Kenneth W. Warren, Fairfax M. Cone Distinguished Service Professor,
Department of English and the College

Amanda Woodward, William S. Gray Professor, Department of Psychology
and the College

EXHIBIT 7

Kalven Committee:
Report on the University's Role in Political and Social Action

Report of a faculty committee, under the chairmanship of Harry Kalven, Jr. Committee appointed by President George W. Beadle. Report published in the Record, Vol. I, No. 1, November 11, 1967.

The Committee was appointed in February 1967 by President George W. Beadle and requested to prepare "a statement on the University's role in political and social action." The Committee conceives its function as principally that of providing a point of departure for discussion in the University community of this important question.

The Committee has reviewed the experience of the University in such matters as its participation in neighborhood redevelopment, its defense of academic freedom in the Broyles Bill inquiry of the 1940s and again in the Jenner Committee hearings of the early 1950s, its opposition to the Disclaimer Affidavit in the National Defense Education Act of 1958, its reappraisal of the criteria by which it rents the off-campus housing it owns, and its position on furnishing the rank of male students to Selective Service. In its own discussions, the Committee has found a deep consensus on the appropriate role of the university in political and social action. It senses some popular misconceptions about that role and wishes, therefore, simply to reaffirm a few old truths and a cherished tradition.

A university has a great and unique role to play in fostering the development of social and political values in a society. The role is defined by the distinctive mission of the university and defined too by the distinctive characteristics of the university as a community. It is a role for the long term.

The mission of the university is the discovery, improvement, and dissemination of knowledge. Its domain of inquiry and scrutiny includes all aspects and all values of society. A university faithful to its mission will provide enduring challenges to social values, policies, practices, and institutions. By design and by effect, it is the institution which creates discontent with the existing social arrangements and proposes new ones. In brief, a good university, like Socrates, will be upsetting.

The instrument of dissent and criticism is the individual faculty member or the individual student. The university is the home and sponsor of critics; it is not itself the critic. It is, to go back once again to the classic phrase, a community of scholars. To perform its mission in the society, a university must sustain an extraordinary environment of freedom of inquiry and maintain an independence from political fashions, passions, and pressures. A 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 teaching and research. It is not a club, it is not a trade association, it is not a lobby.

Since the university is a community only for these limited and distinctive purposes, it is a community which cannot take collective action on the issues of the day without endangering the conditions for its existence and effectiveness. There is no mechanism by which it can reach a collective position without inhibiting that full freedom of dissent on which it thrives. It cannot insist that all of its members favor a given view of social policy; if it takes collective action, therefore, it does so at the price of censuring any minority who do not agree with the view adopted. In brief, it is a community which cannot resort to majority vote to reach positions on public issues.

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. 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. 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.

Moreover, the sources of power of a great university should not be misconceived. Its prestige and influence are based on integrity and intellectual competence; they are not based on the circumstance that it may be wealthy, may have political contacts, and may have influential friends.

From time to time instances will arise in which the society, or segments of it, threaten the very mission of the university and its values of free inquiry. In such a crisis, it becomes the obligation of the university as an institution to oppose such measures and actively to defend its interests and its values. There is another context in which questions as to the appropriate role of the university may possibly arise, situations involving university ownership of property, its receipt of funds, its awarding of honors, its membership in other organizations. Here, of necessity, the university, however it acts, must act as an institution in its corporate capacity. In the exceptional instance, these corporate activities of the university may appear so incompatible with paramount social values as to require careful assessment of the consequences.

These extraordinary instances apart, there emerges, as we see it, a heavy presumption against the university taking collective action or expressing opinions on the political and social issues of the day, or modifying its corporate activities to foster social or political values, however compelling and appealing they may be.

These are admittedly 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 such as the Committee of the Council or the Council, whether in light of these principles the University in particular circumstances is playing its proper role.

Our basic conviction is that a great university can perform greatly for the betterment of society. It should not, therefore, permit itself to be diverted from its mission into playing the role of a second-rate political force or influence.

Harry Kalven, Jr., *Chairman*

John Hope Franklin

Gwin J. Kolb

George Stigler

Jacob Getzels

Julian Goldsmith

Gilbert F. White

Special Comment by Mr. Stigler:

I agree with the report as drafted, except for the statements in the fifth paragraph from the end as to the role of the university when it is acting in its corporate capacity. As to this matter, I would prefer the statement in the following form:

The university when it acts in its corporate capacity as employer and property owner should, of course, conduct its affairs with honor. The university should not use these corporate activities to foster any moral or political values because such use of its facilities will impair its integrity as the home of intellectual freedom.