

Written Statement

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***“The Right of The People Peacefully To Assemble:
Protecting Speech By Stopping Anarchist Violence”***

**Dirksen Senate Office Building
United States Senate
Committee on the Judiciary
Subcommittee on the Constitution**

August 4, 2020

I. INTRODUCTION

Chairman Cruz, ranking member Hirono, members of the Subcommittee on the Constitution, my name is Jonathan Turley, and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law.¹ It is an honor to appear before you today to discuss the growing threat to free speech in the United States from an array of growing extremist groups.

The protests in the aftermath of the killing of George Floyd have served to focus the nation on the transcendent issues of racial discrimination and police misconduct. It is an important moment, as we deal with the continuing scourge of racism, to achieve the promise of equal opportunity and equal treatment in our country. We cannot let this moment pass for a national dialogue on racial justice.

That dialogue, however, is increasingly turning into a diatribe on our campuses, on our streets, and in our media. We are losing this opportunity to reach a consensus because of rising violence and intolerance for opposing views. If we are to come together as a nation, we have to be able to speak to one another freely and without fear. That is not occurring due to the campaigns of intimidation and retaliation against those with dissenting views.

I come to this subject as an academic,² a litigator,³ and a columnist⁴ with a long history defending the exercise of free speech. As a litigator, I have also represented both

¹ I appear today on my own behalf and my views do not reflect those of my law school,

² See, e.g., Jonathan Turley, *Anonymity, Obscurity, and Technology: Reconsidering Privacy in the Age of Biometrics*, 100 B.U. L. REV. (forthcoming Dec. 2020) (discussing new concepts of privacy and anonymity to protect rights of free speech and association); Jonathan Turley *The Loadstone Rock: The Role of Harm In The Criminalization of Plural Unions* 64 EMORY L. J. 1905 (2015) (discussing free speech and free exercise protections from morality-based legislation); Jonathan Turley, *Registering Publicus: The Supreme Court and Right to Anonymity*, 2002 Supreme Court Review 57–83 (discussing free speech rights, including the right of anonymity).

protestors and law enforcement in past cases. In addition, for roughly fourteen years, I was one of the lead counsels in the World Bank protest litigation, which produced guidelines and case law currently applied in mass demonstration events.⁵ I recently testified on the legal precedent in relation to the controversy surrounding the protests in Lafayette Park on June 1, 2020.⁶

I welcome this hearing because I fear that we are at a crossroads in this country on free speech. We are witnessing unprecedented erosion of this defining right in our democracy. As a nation, we seem to be losing faith in free speech. Opposing views are dismissed as reactionary or racist. Even the expression of such views has been denounced as threatening to co-workers from universities to newsrooms. That eroding support for the First Amendment has created an opportunity for extremist groups, like Antifa, which reject free speech principles and indeed, view traditional notions of free speech as a tool of oppression.

It is important to note that this testimony is directed at the danger posed by Antifa and related groups to free speech, rather than the recent protests. The protests around the

³ I have served as lead counsel representing journalists, academics, and others sued or prosecuted for their exercise of free speech or the powers of the free press. This includes cases ranging from *United States v. Al-Timimi*, No. 14-4451, 2015 U.S. App. LEXIS 23053 (4th Cir. Aug. 4, 2015) (challenging a conviction for “violent speech”) to *Brown v. Buhman*, No. 14-4117, 2016 U.S. App. LEXIS 23522 (10th Cir. May 13, 2016) (challenging state law on various grounds including freedom of speech).

⁴ I have dozens of columns on free speech in newspapers or my blog, Res Ispa (www.jonathanturley.org). See, e.g., Jonathan Turley, *The destruction of statues comes with more attacks on free speech*, THE HILL (June 23, 2020, 11:00 AM), <https://thehill.com/opinion/civil-rights/504033-the-destruction-of-statues-comes-with-more-attacks-on-free-speech>; Jonathan Turley, *Op-Ed: Why Trump’s tweet about labeling ‘antifa’ a terrorist group is so dangerous*, LOS ANGELES TIMES (June 1, 2020, 4:14 PM), <https://www.latimes.com/opinion/story/2020-06-01/antifa-protests-donald-trump-terrorist-group>; Jonathan Turley, *Trump executive order retaliates against Twitter, but no one is defending free speech*, USA TODAY (May 28, 2020, 7:08 PM), <https://www.usatoday.com/story/opinion/2020/05/28/trump-takes-twitter-social-media-executive-order-free-speech-column/5278725002/>; Jonathan Turley, *Twitter and Trump raise stakes in fight over free speech in America*, THE HILL (May 28, 2020, 9:00 AM), <https://thehill.com/opinion/civil-rights/499874-twitter-and-trump-raise-stakes-in-fight-over-free-speech-in-america>; Jonathan Turley, *The New Censors: The Call For Banning Political Lies Threatens Free Speech*, RES ISPA (October 28, 2019), <https://jonathanturley.org/2019/10/28/the-new-censors-the-call-for-banning-political-lies-threatens-free-speech/>; Jonathan Turley, *France Emerges As One Of The World’s Greatest Threats To Free Speech*, RES ISPA (July 8, 2019), <https://jonathanturley.org/2019/07/08/france-emerges-as-one-of-the-worlds-greatest-threats-to-free-speech/>.

⁵ There are multiple lawsuits involved in this litigation. See, e.g., *Chang v. United States*, 738 F. Supp. 2d 83 (D.C. Cir. 2010); *Barham v. Ramsey*, 434 F.3d 565 (D.C. Cir. 2006). Our *Chang* case was the first filed and the last to settle.

⁶ *The U.S. Park Police Attack on Peaceful Protesters at Lafayette Square Park Hearing Before the H. Comm. on Natural Resources*, 116th Cong. (2020) (statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School), available at <https://www.congress.gov/116/meeting/house/110833/witnesses/HHRG-116-II00-Wstate-TurleyJ-20200629.pdf>.

country are largely peaceful and most protesters are genuinely seeking social and political change, including some who have self-identified as Antifa.⁷ Moreover, the violence that we are seeing across the country involves a wide array of groups across the political spectrum. The groups behind this violence can be deceptive, with convenient efforts to blame the other side for the responsibility.⁸ Indeed, the violent group mentioned in initial arrest documents (involving the possession of a Molotov cocktail) was from the extreme right.⁹ Likewise, the long-sought “Umbrella Man” videotaped in Minneapolis rioting proved to be not an Antifa member but an individual who is allegedly a Hell’s Angels member with connections to the extreme right.¹⁰ Conversely, a recent investigation by the Washington Post discovered that the purported right-wing activist responsible for riling up white supremacists and nationalists was actually an Antifa and Bernie Sanders supporter.¹¹ Both far right and far left groups are particularly adept at using social media and the Internet to sow disorder, often hiding their identities and framing opposing groups. Notably, in the last week, the Richmond Police Department identified both Antifa and Boogaloo Boys in the violent protests in that city.¹² It is all part of what Attorney General Bill Barr referred to as the “witches Brew of violent groups on both sides,” including “Antifa and other similar groups.”¹³

⁷ Alicia A. Caldwell, *Portland Protests Peaceful After Drawdown of Federal Agents*, WALL STREET JOURNAL (Aug. 2, 2020), <https://www.wsj.com/articles/portland-protests-peaceful-after-drawdown-of-federal-agents-11596302098>.

⁸ Kelly Weill, *Was This Rally Hijacked by White Supremacists?*, THE DAILY BEAST (July 30, 2020, 4:00 AM), <https://www.thedailybeast.com/was-richmond-rally-hijacked-by-white-supremacists-or-just-a-shitshow> (“Without clear organizers, the rally attracted a crowd of demonstrators at different—and sometimes opposing—points on the political spectrum: anti-fascists, a controversial Black Lives Matter group, and members of the “Boogaloo” movement . . .”).

⁹ *Id.* Indeed, there is also evidence of right-wing groups pretending to be Antifa. A report from the DHS noted that some sources pinning violence on Antifa come from questionable sources that may be seeking “to inflame tensions in the United States.” *See id.* For example, Twitter shut down an account of a white nationalist group that posed as Antifa online and made inflammatory tweets advocating violence. *See* Josh Margolin & Catherine Thorbecke, *Twitter removes account of white nationalist group posing as antifa online*, ABC NEWS (June 2, 2020, 5:27 PM), <https://abcnews.go.com/US/twitter-removes-account-white-nationalist-group-posing-antifa/story?id=71024345>.

¹⁰ Stephanie Pagonis, *Minneapolis 'Umbrella Man' who sparked AutoZone fire is Hells Angels member: police*, FOX NEWS (July 30, 2020), <https://www.foxnews.com/us/minneapolis-umbrella-man-autozone-fire-hells-angels-police>.

¹¹ Shawn Boburg & Dalton Bennett, *The Troll: A fake flag burning at Gettysburg was only his latest hoax*, WASH. POST (July 17, 2020), <https://www.washingtonpost.com/investigations/2020/07/17/gettysburg-antifa-flag-burning-troll/?arc404=true>.

¹² *Police chief believes Antifa, Boogaloo boys were at Richmond riot*, WTVR (July 26, 2020, 6:00 PM), <https://www.wtvr.com/news/local-news/antifa-white-supremacists-boogaloo-boys-blamed-for-richmond-riot-saturday-july-25>.

¹³ *See* Attorney General William P. Barr's Statement on Riots and Domestic Terrorism, DEP'T OF JUSTICE (May 31, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism>.

Given the involvement of both far right and far left groups in the recent violence, one can fairly ask why my testimony would focus on Antifa and its related groups. The reason is that groups such as Boogaloo or Proud Boys have not been nearly as successful as Antifa in our schools and on our streets in attacking free speech and the right to peaceful assembly. Antifa has an anti-free speech mission that is at the heart of its militancy and many are now supporting the same suppression of dissenting speech. It is the impact of Antifa in curtailing free speech over these years that should be the primary concern. Indeed, Antifa is arguably the most successful anti-free speech movement in our history, using physical threats and intimidation to silence those with dissenting views. This anti-free speech movement remains one of the greatest threats to intellectual and political exchange on our campuses and in our country.

As discussed below, many of the objectives sought in the *Antifa Handbook* have been achieved on our campuses, as witnessed in the silencing of conservatives and the intimidation of critics. Of course, the ultimate responsibility for the erosion of free speech values in our country is not really a direct accomplishment of Antifa. That ignoble distinction rests with academics, journalists, and others who seek to silence those with opposing views, or stand silent as their colleagues are harassed, investigated, or fired for their views. The attack on free speech is not nearly as damaging as the lack of active support for free speech, a dangerous passivity that has created the vacuum in which these groups operate and flourish.

Antifa fashions itself as the vanguard of a movement to silence “reactionary voices.” It remains a violent but relatively small core of individuals who seek to foster unrest. The problem is that the group is part of a broader anti-free speech movement in the United States. There is a comprehensive effort, from classrooms to newsrooms, to enforce a new orthodoxy in public discourse. Antifa furthers this movement by adding a menacing element of violence. It often seeks to trigger violent confrontations, particularly with the police. It is all part of achieving what Antifa calls “no platforming,” or denying people with opposing views the ability to be heard.

To Antifa, people like me are the personification of the classical liberal view of free speech that perpetuates a system of oppression and abuse. I wish I could say that my view remains strongly implanted in our higher educational institutions. However, you are more likely to find public supporters for restricting free speech than you are to find defenders of free speech principles on many campuses. It is a movement that has been silently growing with the direct or tacit support of academics who seek to deter speech of faculty and students. It has also enjoyed the tacit or direct support of some politicians.

Recently, the federal government arrested George Washington University student Jason Charter as the alleged “ringleader” who led efforts to topple statues in Washington, D.C., including the nearly successful effort to destroy the historic Andrew Jackson statue near the White House. Charter has been an active Antifa member on our campus for years, and, after his arrest, reportedly proclaimed “The Movement is winning.”¹⁴ He is right. A visit to virtually any college or university will expose that success. In my three

¹⁴ Jonathan Turley, “*The Movement Is Winning*”: *Alleged Ringleaders In Statue Attacks Claims Victory In Public Comments*, RES IPSA (July 4, 2020), <https://jonathanturley.org/2020/07/04/the-movement-is-winning-alleged-ringleader-in-statue-attacks-claims-victory-in-public-comments/>.

decades of teaching, I have never seen the level of fear and intimidation that we have today on our campuses. Many professors are afraid to voice dissenting views of the current protests or other issues out of fear that they could be accused of racism or even physically attacked. Some professors have indeed been assaulted or required police protection after voicing opposing views. To put it simply, Antifa and these other extremist groups are winning, and few people seem to be taking notice.

They are winning because universities are now effectively blocking conservative or opposing speakers to avoid violent clashes. They are winning because the media and politicians downplay such violence to avoid criticism. They are winning because local officials are ordering police to stand down or prosecutors to drop charges to avoid further conflict. They are winning because free speech itself is being viewed as a destabilizing factor in our schools and society. Antifa has achieved its anti-free speech agenda to a degree that even longtime critics never imagined possible. It only took inaction from our government and silence from our citizens.

I would like to briefly describe the agenda of Antifa and its history of violence in our country, including how recent violence fits into its militant philosophy. I would then like to suggest ways for the federal government to fill a vacuum left from the inaction of local and academic leaders in dealing with attacks on the rights of free speech and peaceful assembly. It is by no means an easy task since government enforcement itself can also chill free speech and free association rights. However, threats against free speech have reached a critical mass, from our schools to our streets. We can either act or remain passive pedestrians to what inevitably comes next.

II. AMERICA'S ANTI-FREE SPEECH MOVEMENT

The struggle for free speech in the United States is interwoven with our history, from the colonial period to the present day. From the outset, there was a clear concept of free speech, but not a clear commitment to protect it. Indeed, free speech was a rallying cry for patriots resisting colonial rule. Figures like Thomas Paine and John Peter Zenger raised many issues against the English Crown that are still debated today in conflicts over free speech and the free press.¹⁵ It is important to note that crackdowns on free speech have always come with the periods of our greatest abuses as a nation. I will spare the members a presentation of the roughly 300 years of struggle to protect rights of speech, association, and assembly. However, I would like to briefly touch upon a couple of periods that are strikingly analogous to the current controversies on our streets and in our schools.

A. America's Checkered History On Free Speech

The United States has gone through repeated periods of crackdowns and criminalization of free speech. Early in the Republic, the anti-sedition laws were used to not only to intimidate but to arrest those with opposing views. The use of the Sedition Act by President John Adams and the Federalists was recognized at the time as not just

¹⁵ See, e.g., Jonathan Turley, *Viewpoint : How likely is an Assange conviction in US?*, BBC (April 11, 2019), <https://www.bbc.com/news/world-us-canada-47874728>.

an abuse, but as the height of hypocrisy. Adams and the Federalists routinely engaged in false and malicious writings about Jefferson, including declaring that, if elected, “Murder, robbery, rape, adultery, and incest will be openly taught and practiced, the air will be rent with the cries of the distressed, the soil will be soaked with blood, and the nation black with crimes.”¹⁶ Thomas Jefferson and James Madison denounced the law, which made it illegal for anyone to “print, utter, or publish . . . any false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States . . .”¹⁷ Twenty-five leading Republicans were, arrested from journalists to politicians. All those convicted would later be pardoned by President Jefferson. The Sedition Act was never found unconstitutional, and, fittingly, expired on Adams’ last day in office as a lasting and indelible mark on his presidency.¹⁸

Prosecutions for unlawful speech continued periodically in the United States, with particularly abusive periods like the Civil War and other times of armed conflict. For example, under President Woodrow Wilson, the country experienced a crackdown on dissenting views when the United States entered World War I in April 1917. Wilson called for new laws to punish dissenters, dismissing free speech concerns by declaring that “[disloyalty] was not a subject on which there was room for . . . debate” since such disloyal citizens “sacrificed their right to civil liberties.”¹⁹ To carry out the crackdown on free speech, Wilson needed, and found, an eager partner in Congress. Congress enacted the Espionage Act of 1917, introducing the criminalization of any acts that “cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States” or willfully to “obstruct the recruiting or enlistment service of the United States.”²⁰ At the time, Attorney General Charles Gregory made clear the menacing intent of such laws declaring: “May God have mercy on them, for they need expect none from an outraged people and an avenging government.”²¹

The abuses during World War I were not simply a failure of the Executive and Legislative branches, the so-called “political branches,” to protect free speech. It was a complete three-branch failure with the acquiescence of the Supreme Court and lower courts. A well-known example is the decision of the United States for the Ninth Circuit decision in *Shaffer v. United States*²² where the court upheld the criminalization of clearly

¹⁶ Peter Onuf, *Thomas Jefferson: Campaigns and Elections*, MILLER CTR., <https://millercenter.org/president/jefferson/campaigns-and-elections>

¹⁷ Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798) (expired 1801).

¹⁸ GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 71 (2004).

¹⁹ PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 53 (1979).

²⁰ Espionage Act of 1917, Ch. 30, Tit. I, § 3, 40 Stat. 217, 219 (1917).

²¹ *All Disloyal Men Warned by Gregory*, N.Y. Times (Nov. 21, 1917) at 3, available at <https://www.nytimes.com/1917/11/21/archives/all-disloyal-men-warned-by-gregory-criminal-courts-will-handle.html>. For a discussion of this period, see Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939 (2009).

²² 255 F. 886 (9th Cir. 1919).

protected political speech. The defendant was charged with mailing copies of *The Finished Mystery*, a book with the following passage:

“If you say it is a war of defense against wanton and intolerable aggression, I must reply that . . . it has yet to be proved that Germany has any intention or desire of attacking us . . . The war itself is wrong. Its prosecution will be a crime. There is not a question raised, an issue involved, a cause at stake, which is worth the life of one blue-jacket on the sea or one khaki-coat in the trenches.”²³

That is clearly protected speech, but the Ninth Circuit blissfully dismissed the First Amendment claim while adopting a wildly attenuated analysis:

“It is true that disapproval of war and the advocacy of peace are not crimes under the Espionage Act; but the question here . . . is whether the natural and probable tendency and effect of the words . . . are such as are calculated to produce the result condemned by the statute . . . The service may be obstructed by attacking the justice of the cause for which the war is waged, and by undermining the spirit of loyalty which inspires men to enlist or to register for conscription in the service of their country . . . To teach that . . . the war against Germany was wrong and its prosecution a crime, is to weaken patriotism and the purpose to enlist or to render military service in the war.”²⁴

The Supreme Court engaged in the same willful blindness of constitutional violations in cases like *Schneck v. United States*²⁵ and *Debs v. United States*.²⁶ For many, these cases represent one of the lowest points in the Supreme Court’s history, as it yielded to hysteria and government abuse.²⁷ The Court upheld the conviction of Debs for speech that was the very essence of the First Amendment. Debs merely gave a speech opposing the war. Before the jury, Debs refused to back down in his exercise of free speech and reaffirmed his opposition to “the present government” and “social system”:

“Your honor, I ask no mercy, I plead for no immunity. I realize that finally the right must prevail. I never more fully comprehended than now the great struggle between the powers of greed on the one hand and upon the other the rising hosts of freedom. I can see the dawn of a better day of

²³ *Id.* at 887; *see also* Stone, *supra* note 21, at 943.

²⁴ *Id.*

²⁵ 249 U.S. 47 (1919).

²⁶ 249 U.S. 211 (1919).

²⁷ Jonathan Turley, *At Michigan rally, Bernie Sanders revels in his role as political successor to Eugene Debs*, USA TODAY (March 9, 2020, 4:51 PM), <https://www.usatoday.com/story/opinion/2020/03/10/bernie-sanders-michigan-rally-political-successor-eugene-debs-column/5000675002/>.

humanity. The people are awakening. In due course of time they will come into their own.”²⁸

Justice Oliver Wendell Holmes wrote for a unanimous Court that this was enough since the words had the “natural tendency and reasonably probable effect” of deterring people from supporting or enlisting in the war.

Outside of wartime crackdowns, our struggle to protect free speech hit another low during the Cold War and “Red Scare.” Again, this period revealed a total failure of all three branches in supporting a crackdown on free speech. The Executive Branch arrested suspected communists and Congress enacted new powers under the Internal Security Act to allow the mass detention of dissidents. The grand jury process was regularly used to target political dissidents and coerce people to reveal their associations and beliefs. Of course, the most visible abuses occurred in the hearings on “Un-American Activities” with figures like Senator Eugene McCarthy.

My reason for briefly noting this checkered history on free speech is to emphasize that we have continued to enjoy this fundamental right despite our best efforts to destroy it. It is the one right that is essential for a functioning democratic process and to the enjoyment of most other rights. Perhaps for that reason, it is this first right that is targeted in times of rage or division. The first inclination of many in divisive political periods is to silence those with opposing views.

In a curious way, we are living through a period reminiscent of the Red Scare period though socialism is now, by some polls, popular with almost half of voters²⁹ and a majority of Democratic voters.³⁰ That, in my view, is a good thing in terms of diversity and tolerance in our political system. However, there is now an inverse intolerance against conservative voices. The Red Scare was a period where writers and others were put on blacklists and denied employment for holding the “wrong” views. For many academics, there is a now an ever-present fear of being accused of being reactionary or racist in questioning any aspect of the current protests or their underlying demands. Professors have faced demands to be fired or removed from boards due to their criticism of Black Lives Matter as an organization, or for critiquing the evidence for systemic racism in law enforcement. Even criticizing rioting and looting has triggered campaigns for removal. Of course, where academics and writers were once targeted for their criticism of the government, it is more likely today that you will be denounced for being supportive of the government, particularly law enforcement. Positions from Hollywood to Harvard now depend on being openly and demonstrably “woke” in support of not just the Black Lives Matter Movement, but indeed, the full array of sweeping reforms demanded in protests.

²⁸ Michael E. Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1174 (1984).

²⁹ Mohamed Younis, *Four in 10 Americans Embrace Some Form of Socialism*, GALLUP (May 20, 2019), <https://news.gallup.com/poll/257639/four-americans-embrace-form-socialism.aspx>.

³⁰ Hunter Moyler, *76 Percent of Democrats Say They'd Vote for a Socialist for President*, NEWSWEEK (Feb. 11, 2020, 10:34 AM), <https://www.newsweek.com/76-percent-democrats-say-theyd-vote-socialist-president-new-poll-shows-1486732>.

B. Antifa and the Rise of the Anti-Free Speech Movement In The United States

I would now like to turn specifically to Antifa and its related groups in the anti-free speech movement. As previously noted, the movement has long embraced violence, which is often called “militant protest” or proactive “self-defense.” It rationalizes premeditated violent attacks as defensive acts by claiming ongoing threats of police abuse, racism, authoritarianism, and other social ills. It has been a consistent and defining element of this movement since its origins in Europe. It is still viewed as a violent group in Europe and Germany banned its website as an extremist site encouraging rioting like the attacks on the G20 summit in 2017.³¹ Antifa however has grown into a global movement with dozens of associated groups.

1. Origins and Evolution. The origins of the Antifa movement can be traced to Europe and the violent clashes between fascist groups on one side, and Marxist and anarchist forces on the other. The name is widely credited to the shortening of the German word *antifaschistisch* and traced to Antifaschistische Aktion, a Communist group that arose during the Weimar Republic before World War II. In the United States, the modern movement emerged through the “Anti-Racist Action” (ARA) groups, which were dominated by anarchists but included Marxists and other groups like the anarchist organization “Love and Rage.” Founded by former Trotskyite and Marxist followers, Love and Rage also has an international footprint, including Mexico’s *Amor Y Rabia*. The logo of ARA notably features a member firing a slingshot to emphasize its embrace of violent means to force social and political change.

At this juncture, it would be useful to note a point of nomenclature. There are a variety of closely aligned anarchist and anti-fascist groups that use the same violent tactics and oppose the exercise of free speech by those who hold opposing views. For clarity, when I use the term Antifa, I am referring to Antifa as inclusive of various self-described “anti-fascist” groups that often work in concert and display the same penchant for violence.³² As discussed below, Antifa was founded on a certain rejection of formal structures and leadership. Perhaps the oldest reference to “Antifa” in the United States was the Rose City Antifa (RCA) in Portland, Oregon. In 2013, various groups that were part of ARA, including RCA, formed a new coordinating organization referred to as the “Torch Network.” This lack of structure not only appealed to the anarchist elements in the movement but served the practical benefit of evading law enforcement and lawsuits. While some have attempted to hold such members accountable, like journalist Andy Ngo who sued RCA for assaulting him, such lawsuits struggle with finding witnesses and

³¹ Lukas Mikelionis, ‘Antifa’ website linked to G20 violence banned in Germany, FOX NEWS (Sept. 25, 2017), <https://www.foxnews.com/world/antifa-website-linked-to-g20-violence-banned-in-germany>.

³² While the term is capitalized by Oxford Dictionary and other sources, some in the media now opt to use a lower case for the word Antifa to reflect that it is more of a movement than a group. I capitalize the word because, while I agree that it is a loose coalition of individuals and groups, it is not some amorphous reference like “capitalists” or “communists.” It is a well-defined group that operates in an organized and consistent fashion. Many of those engaged in violent threats or actions identify themselves as Antifa and actively seek to conceal pathways for directions and organization.

assets for an effective case.³³ Using social media and dedicated followers, Antifa marshals forces through social media and word of mouth to surge forces against targets from colleges to statues to individuals. Thus, these loose associations are often difficult to track in police reports unless suspects self-identify as Antifa.³⁴

The self-labeling as a “anti-fascist” movement is bitterly ironic since Antifa embraces tactics that are the very signature of fascistic organizations—from attacking the homes of critics to beating journalists, academics, and opposing speakers. The Antifa movement is arguably one of most organized and most successful anti-free speech movements in our history. There have been many organizations that have targeted critics and retaliated against the exercise of free speech, from the Ku Klux Klan, to the John Birch Society, to Neo-Nazi groups. However, Antifa was expressly founded as a movement at war with free speech, defining the right itself as a tool of oppression. Free speech is viewed as shielding the enemies of radical social reconstruction. That purpose is evident in what is called the “bible” of the Antifa movement: Rutgers Professor Mark Bray’s *Antifa: The Anti-Fascist Handbook*.³⁵ Bray calls Antifa “social revolutionary self-defense,” “a pan-left radical politics uniting communists, socialists, anarchists and various different radical leftists together for the shared purpose of combating the far right.” Bray emphasizes the struggle of the movement against free speech: “At the heart of the anti-fascist outlook is a rejection of the classical liberal phrase that says ‘I disapprove of what you say but I will defend to the death your right to say it.’”

For many years, the targets of Antifa were white supremacists and Neo-Nazis.³⁶ Antifa members have justified their use of violence to combat the alt-right, arguing that “[if more] people brawled with actual Nazis then Hitler and the Nazi party would have never risen to power.”³⁷ Yet while these groups often emphasize opposition to white supremacy and authoritarianism, they see these threats as inherent (and, for some, synonymous with) the economic and political systems of the United States.

The signature of the group is a self-righteous, rage-fueled violence that parallels the fascistic groups that they claim to oppose. In 2002, ARA activists attacked a neo-Nazi demonstration. Twenty-eight ARA members were arrested but all of the charges were

³³ Shane Dixon Kavanaugh, *Conservative writer sues Portland antifa group for \$900k, claims ‘campaign of intimidation and terror’*, OREGONLIVE (June 4, 2020), <https://www.oregonlive.com/news/2020/06/conservative-writer-sues-portland-antifa-group-for-900k-claims-campaign-of-intimidation-and-terror.html>.

³⁴ For example, while President Trump alleged that a 75-year old man who was shoved by Buffalo police was a member of Antifa, see Tommy Beer, *51 Protesters Facing Federal Charges—Yet No Sign Of Antifa Involvement*, FORBES (June 10, 2020, 10:55 AM), <https://www.forbes.com/sites/tommybeer/2020/06/10/51-protesters-facing-federal-charges-yet-no-sign-of-antifa-involvement/#4d19816d4138>, it is equally possible that he is not or identifies not as Antifa per se, but as part of the coalition of far left anarchist or anti-fascist groups.

³⁵ MARK BRAY, *ANTIFA: THE ANTI-FASCIST HANDBOOK* (Melville House 2017).

³⁶ See Seth G. Jones, *Who Are Antifa, and Are They a Threat?*, CTR. FOR STRATEGIC & INT’L STUD. (June 4, 2020), <https://www.csis.org/analysis/who-are-antifa-and-are-they-threat>.

³⁷ Robin Young & Serena McMahon, *What is Antifa? Separating Fact From Fiction*, WBUR (June 11, 2020), <https://www.wbur.org/hereandnow/2020/06/11/what-is-antifa-trump-protests>.

later dropped. In 2005, ARA protested National Socialist Movement (NSM) members in what became known as the 2005 Toledo Riot.³⁸ Such counter protests by Antifa routinely result in violence. For example, in 2012, ARA members attacked a meeting of the Illinois European Heritage Association with hammers, bats and other weapons. Five members were convicted of assault and other crimes.³⁹ That same year, almost two dozen members of the Hoosier Anti-Racist Movement, part of ARA, broke into the “Fifth Annual White Nationalist Economic Summit and Illinois White Nationalist Meet-and-Greet,” a group containing white supremacists and white nationalists.⁴⁰ The attack on the Ashford House Restaurant led to criminal convictions of five members. In 2016, a confrontation between neo-Nazi groups and Antifa counter protesters resulted in a violent brawl.⁴¹ Seven people were stabbed and nine others were injured.⁴² Although the exact affiliation of each of the victims is unknown, both neo-Nazis and Antifa members were among the victims.⁴³ In 2017, Antifa members joined an otherwise nonviolent counter protest and attacked five neo-Nazis, kicking, punching, and pepper spraying them until stopped by police.⁴⁴ Thirteen individuals were arrested on charges including assault with a deadly weapon, obstructing a police officer, and other violations.⁴⁵ On July 13, 2019, an Antifa member showed up at a privately owned ICE detention center and began “throwing incendiary devices at vehicles . . . and attempting to burn down buildings and a propane tank.”⁴⁶ He was ultimately killed after pointing a gun at police.⁴⁷ Antifa have also attacked

³⁸ *Anti-Supremacist Protest Turns Into Riot in Toledo*, ASSOCIATED PRESS (Oct. 16, 2005, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2005-oct-16-na-toledo16-story.html>.

³⁹ Ashley Ruff, *Five Indiana men indicted in attack at Tinley Park restaurant*, CHI. TRIBUNE (June 12, 2012, 2:59 PM), <https://www.chicagotribune.com/news/breaking/chi-tinley-park-restaurant-attack-indiana-story.html>.

⁴⁰ Steve Huff, *Anti-Racist Action Group Claims Credit for Attack Inside Chicagoland Restaurant*, OBSERVER (May 20, 2012, 10:31 AM), <https://observer.com/2012/05/anti-racist-action-group-claims-credit-for-attack-inside-chicagoland-restaurant/>.

⁴¹ Ralph Ellis, *At least 10 injured -- some stabbed -- at California rally, authorities say*, CNN (June 27, 2016, 9:17 AM), <https://www.cnn.com/2016/06/26/us/brawl-at-california-rally/>.

⁴² James Queally, *Violence in Sacramento shows old and new faces of white extremism*, LA TIMES (June 27, 2016, 3:51 PM), <https://www.cnn.com/2016/06/26/us/brawl-at-california-rally/>.

⁴³ Ellis, *supra* note 41.

⁴⁴ Kyle Swenson, *Black-clad antifa members attack peaceful right-wing demonstrators in Berkeley*, WASH. POST (August 28, 2017, 3:47 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2017/08/28/black-clad-antifa-attack-right-wing-demonstrators-in-berkeley/>.

⁴⁵ *Id.*

⁴⁶ Brianna Sacks, *The Man Killed In An Attack On An ICE Jail Said He Was Fighting "Against The Forces Of Evil"*, BUZZFEED NEWS (July 16, 2017, 2:23 AM), <https://www.buzzfeednews.com/article/briannasacks/ice-detention-attack-killed-washington-antifa-manifesto>.

⁴⁷ Marisa Iati & Hannah Knowels, *ICE detention-center attacker killed by police was an avowed anarchist, authorities say*, WASH. POST (July 19, 2019, 1:53 PM), <https://www.washingtonpost.com/nation/2019/07/19/ice-detention-center-attacker-killed-by-police-was-an-avowed-anarchist-authorities-say/>.

journalists, including conservative journalist Andy Ngo, who was punched and hit with bear spray while trying to cover one protest.⁴⁸

Antifa mayhem is well-known to the courts. Violence between Antifa and Alt-Right protestors was addressed in Virginia, where “people were hurt and beaten on both sides” after Antifa members attacked protesters with baseball bats, mace spray, canes, sticks, bricks, bottles, and a metal pipe.⁴⁹ The Ninth Circuit recently reversed a lower court that dismissed a battery claim against an Antifa member, who allegedly helped “unnamed assailants who attacked Plaintiff with pepper spray, bear mace, and flag poles, by participating in surrounding Plaintiff and by shining her flashlight in such a way as to enable the direct attacks,” may be liable on an aiding and abetting theory.⁵⁰ In Arizona, Antifa members threw rocks, bottles, tear gas, an incendiary device, and a spear-like object at officers who set up a perimeter around a rally held by President Trump.⁵¹

Before the recent protests, Antifa had gradually expanded its targets for violent opposition from white supremacists to those who are deemed supportive of the system of white supremacy, authoritarianism, or other social ills.⁵² As Antifa and its associated groups descended on campuses, they became more open and menacing in their opposition to free speech principles.

2. *The Anti-Free Speech Movement.* While Professor Bray says that he does not follow the “authoritarian position” of many anti-fascists on free speech, he was denounced at Dartmouth for condoning violence at a time when Antifa and related groups were attacking other academics and conservative speakers.⁵³ On Meet the Press, Bray defended the militarism of Antifa by stating “when pushed, self-defense is a legitimate response to white supremacist and neo-Nazi violence.”⁵⁴ The problem is that such “self-

⁴⁸ Kavanaugh, *supra* note 33.

⁴⁹ Kessler v. City of Charlottesville, No. 3 :19-cv-00044, 2020 U.S. Dist. LEXIS 31420, at *12–13 (W.D. Va. Feb. 21, 2020).

⁵⁰ Robles v. City of Berkeley, No. 19-15148, 2020, U.S. App. LEXIS 21582, at *7 (9th Cir. July 10, 2020)

⁵¹ Puente v. City of Phx., No. CV-18-02778-PHX-JJT, 2019 U.S. Dist. LEXIS 169865, at *7 (D. Ariz. Sep. 30, 2019). Although the conduct of Antifa members here was obviously unacceptable, the court certified a class action against the city of Phoenix as the police’s attempts to disperse the Antifa members with gas or chemical agents hit many nonviolent bystanders, potentially chilling their free speech rights. *Id.* at *17–25.

⁵² See *Who are Antifa?*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/who-are-antifa>.

⁵³ Dartmouth President Philip Harlon declared “Recent statements made by Lecturer in History Mark Bray supporting violent protest do not represent the views of Dartmouth. As an institution, we condemn anything but civil discourse in the exchange of opinions and ideas.” Office of the President, *Statement on Lecturer Mark Bray*, DARTMOUTH UNIVERSITY (August 21, 2017), <https://www.dartmouth.edu/president/announcements/2017-0821.html>.

⁵⁴ Derek Hawkins, *A Dartmouth antifa expert was disavowed by his college president for ‘supporting violent protest,’ angering many faculty*, WASH. POST (Aug. 29, 2017, 6:00 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2017/08/28/a-dartmouth-antifa-expert-was-disavowed-by-his-college-president-for-supporting-violent-protest-angering-many-faculty/>;

defense” is often practiced offensively and preemptively in attacking opponents of Antifa (which now often include individuals viewed as supporting the current economic and political systems). This “self-defense” also includes violence against police. In a recent Washington Post opinion editorial criticizing President Trump’s attacks on Antifa as “delegitimizing militant protest,” Bray stated:

“I believe it’s true that most, if not all, members do wholeheartedly support militant self-defense against the police and the targeted destruction of police and capitalist property that has accompanied it this week. I’m also confident that some members of antifa groups have participated in a variety of forms of resistance during this dramatic rebellion.”⁵⁵

It is not violence, but violence without discipline and purpose, that Bray warns against in the *Antifa Handbook*.⁵⁶

The fact that Antifa regularly resorts to violence reflects its rejection of debate and dialogue with opposing views. Tellingly, the *Antifa Handbook* starts with the following quote from Buenaventura Durruti: “fascism is not to be debated, it is to be destroyed.”⁵⁷ Bray admits that the movement has a strong anti-free speech foundation and remains focused on fighting voices on the right of the political spectrum:

“Anti-fascism is pan-revolutionary left politics applied to fight the Far Right. Therefore, a number of socialist traditions coexist under this umbrella. Since the establishment of ARA and its growth in the nineties, most Americans antifa have been anarchists or antiauthoritarian communists. Certainly some have been Stalinists and other kinds of authoritarians who have supported the efforts of the Soviet Union and similar regimes to very narrowly delineate the range of acceptable speech. From that standpoint, ‘free speech’ as such is merely a bourgeois fantasy unworthy of consideration.”⁵⁸

Fascism itself is a term that often morphs into a wide range of issues deemed unacceptable by Antifa from capitalism to patriarchy to police.⁵⁹ Indeed, in France and

see also Ana Radelat, *Author of antifa handbook defends antifascist violence*, CONN. MIRROR (Aug. 18, 2017), <https://ctmirror.org/2017/08/18/author-of-antifa-handbook-defends-antifascist-violence/> (stating that “[Antifa] members are justified in using violence, even to the point of arming themselves, to combat ‘fascist violence.’”).

⁵⁵ Mark Bray, *Antifa isn’t the problem. Trump’s bluster is a distraction from police violence*, WASH. POST (June 1, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/06/01/trump-antifa-terrorist-organization/>.

⁵⁶ Bray, *supra* note 35, at 193 (“Any movement that engages with violence must remain vigilant against the tendency for the violence to overtake political goals.”).

⁵⁷ *Id.* at *i*.

⁵⁸ *Id.* at 148.

⁵⁹ *Id.* at 159.

other countries, Antifa considers all of the major parties as having “manifested fascistic traits.”⁶⁰ Moreover, *Antifa Handbook* states “Anti-fascists don’t oppose fascism because it is illiberal in the abstract, but because it promotes white supremacy, hetero-patriarchy, ultra-nationalism, authoritarianism, and genocide.”⁶¹ Thus, all of these opposing figures are deemed fascistic and thus unworthy of being heard.

Antifa members in the United States often specifically denounce free speech in their protests. As Bray explains in the *Antifa Handbook*, it is clear that anti-fascism opposes this principle in its absolutist form “i.e., that all abridgements of speech are wrong.”⁶² Indeed, “many anti-fascists make the illiberal argument: “no free speech for fascists.”⁶³ One such individual dismissed the notion that conservatives might also have a right to speak as a “nonargument . . . you have the right to speak but you also have the right to be shut up.”⁶⁴

There was a time when this position was anathema on campuses across the country. Universities long maintained adherence to the “classical liberal” view that most Antifa supporters vehemently reject. That has now changed at an alarming rate at universities. The most disturbing aspect is not just the presence of Antifa on our campuses, including my own, but rather the rise of anti-free speech views that mirror those of Antifa. Stopping others from speaking has become a demonstration of faith in the anti-racism movement. Students at Northwestern University stopped a speech by former Attorney General Jeff Sessions, declaring “There’s a limitation to free speech. That ends at overtly racist old white dudes.”⁶⁵ Student editors at Wellesley College endorsed the possible use of violence to stop conservative speakers, stating “hostility may be warranted” to prevent such events.⁶⁶ At William & Mary, students stopped the executive director of the state ACLU from speaking on free speech while chanting “Liberalism is White Supremacy.”⁶⁷ There are dozens and dozens of such protests and editorials that have been based on the same anti-free speech views. What is important to stress is that most of these students are not Antifa members. They may not even define themselves as primarily antifascist. But they are anti-free speech and these extremist groups are feeding on the growing animosity toward the exercise of free speech.

Even more chilling is the fact that academics are now espousing the same intolerance for free speech. I have debated respected academics like NYU Professor

⁶⁰ *Id.* at 159.

⁶¹ *Id.* at 162.

⁶² *Id.* at 153.

⁶³ *Id.* at 153.

⁶⁴ *Id.* at 150.

⁶⁵ Dom Calicchio, *Jeff Sessions escorted from Northwestern U. under heavy security amid 'cancel culture' protest*, FOX NEWS (Nov. 6, 2020), <https://www.foxnews.com/politics/jeff-sessions-escorted-from-northwestern-u-under-heavy-security-amid-cancel-culture-protest>.

⁶⁶ *Free Speech Is Not Violated At Wellesley*, THE WELLESLEY NEWS (April 12, 2020), <https://thewellesleynews.com/2017/04/12/free-speech-is-not-violated-at-wellesley/>.

⁶⁷ *After a Speaker Is Shouted Down, William & Mary Becomes New Flash Point in Free-Speech Fight*, THE CHRON. OF HIGHER EDUC. (Oct. 5, 2017), <https://www.chronicle.com/article/after-a-speaker-is-shouted-down-william-amp-mary-becomes-new-flash-point-in-free-speech-fight/>.

Jeremy Waldron, who maintain that free speech includes the right to stop others from speaking through heckling or other disruptive means. Likewise, at CUNY Law School, a law professor was prevented from speaking about “the importance of free speech” as protesters chanted “F**k the law.”⁶⁸ CUNY Law Dean Mary Lu Bilek insisted that disrupting such speeches on free speech was free speech. Students and faculty now regularly prevent conservatives from speaking with no response from universities beyond silent acquiescence.⁶⁹ In Texas, over a dozen college presidents and members of the Higher Education Council of San Antonio signed a letter stating that speech that provokes people is not protected by free speech and that they would no longer protect the “disingenuous misrepresentation of free speech.”⁷⁰ Deans and professors have been fired, removed from boards, or stripped of teaching responsibilities for expressing opposing views of the current protests or Black Lives Matter as an organization.⁷¹

While silencing conservatives and free speech advocates on campuses, these same groups have also succeeded in pushing long-held demands into the mainstream media and politics. For example, the *Antifa Handbook* discusses the defunding of police as a core objective. Indeed, Bray tied this effort to the rejection of free speech over social justice in the West:

“They aim to create a classless, post-capitalist society . . . By not devoting resources to prisons, police, and the military, such a post-capitalist society would be able to put far more into supporting education, the arts, and collective expression and inquiry. While the creation of a classless society would eliminate the majority of crime stemming from capitalist antagonisms, antifa argue that methods of restorative justice should replace police and prisons in addressing conflicts that persist.”⁷²

⁶⁸ Scott Jaschik, *Shouting Down Talk on Campus Free Speech*, INSIDE HIGHER EDUC. (April 16, 2018), <https://www.insidehighered.com/news/2018/04/16/guest-lecture-free-speech-cuny-law-school-heckled>.

⁶⁹ *Id.* (“CUNY Law students are encouraged to develop their own perspectives on the law in order to be prepared to confront our most difficult legal and social issues as lawyers promoting the values of fairness, justice, and equality.”).

⁷⁰ *Hate Speech Is Not Free Speech*, UTSA (Dec. 13, 2017), <https://www.utsa.edu/president/2017/12/HECSAstatement.html>.

⁷¹ These cases are too numerous to include in this testimony but are detailed as part of the “free speech” library on my blog, Res Ipsa (www.jonathanturley.org). See e.g., Jonathan Turley, *Penn Professor Faces Calls For His Removal After Questioning An Anti-Racism Statement*, RES IPSA (July 23, 2020), <https://jonathanturley.org/2020/07/23/penn-professor-faces-calls-for-his-removal-after-questioning-an-anti-racism-statement/>; Jonathan Turley, *Writers and Academics Call For Removal Of Chicago Professor For Criticizing BLM and Defunding Police*, RES IPSA (June 11, 2020), <https://jonathanturley.org/2020/06/11/writers-and-academics-call-for-removal-of-chicago-professor-for-criticizing-blm-and-defunding-police/>; Jonathan Turley, *Harvard Professor Under Fire In Latest Attack On Free Speech*, RES IPSA (July 9, 2020), <https://jonathanturley.org/2020/07/09/harvard-professor-under-fire-in-latest-attack-on-free-speech/>.

⁷² Bray, *supra* note 35, at 149.

Defunding the police is not only a major policy initiative, it has been adopted in a variety of cities from Seattle to New York City.

Antifa bears strong resemblance to groups that emerged during earlier periods of attacks on free speech. Simply replacing anti-communism with anti-fascism does not materially change the same anti-free speech purpose of these movements. The purpose of governmental or non-governmental threats are the same in seeking to not only silence opponents, but to deter others from joining them. The absolutism of their goals is used to justify any means to achieve them. Specifically, Antifa's categorical rejection of opposing views as worthy of protection is strikingly similar to the view of anti-Communists during the Red Scare. Antifa followers refuse to recognize the views of opponents as legitimate or "a difference of opinion." Their goal is not co-existence but, as stated in the *Antifa Handbook*, "to end their politics." Bray and other academics are liberating students from the confines of what they deem the false "allegiance to liberal democracy." Once freed of the values of free speech and democratic values, violence becomes merely politics by other means. It is the very mindset that was once used against communists and Marxists in the 1950s.

The violent protests launched by Antifa and other groups on campuses have reduced the presence of conservative voices on campus, voices that already comprise a small minority on most faculties. The targets tend to be largely Republican. Notably, Bray admits that Antifa uses a "political lens" that shuts down Republican, but not Democratic, events. He acknowledges that "I don't know of any Democratic Party events that have been 'no platformed,' or shut down by anti-fascists" but refers to such bias as something "people will quibble about."

Those "quibbles" have resulted in only conservative speakers being targeted and prevented from speaking on campuses like Berkeley. Indeed, Bray himself cited Berkeley as one of the introductions of most Americans to the organization when "masked antifascists smashed windows to shut down Milo Yiannopoulos in Berkeley." That disruption was viewed as a great triumph of Antifa, not only by its members, but also by those who support its anti-free speech agenda.⁷³ Some universities have effectively caved to Antifa violence. Some simply barred conservative speakers. That changed as litigation forced state universities to end such content-based discrimination. Schools responded by finding ways to ban events indirectly by charging excessive "security fees" and insurance requirements. Others simply declared that they could not guarantee the protection of speakers and therefore prevented them from speaking. Indeed, political leaders like Speaker Nancy Pelosi have encouraged the revocation of permits for conservative groups on the same "security" concerns.⁷⁴

As with past violent groups in history, the rise of Antifa and related extremist groups has been fostered by the silence or passivity of political leaders. Because Antifa

⁷³ Bray, *Antifa Isn't The Problem*, *supra* note 55.

⁷⁴ *Pelosi calls on National Park Service to reconsider permit for right-wing rally in SF*, S.F. EXAMINER (Aug. 15, 2017, 12:00 AM), <https://www.sfexaminer.com/news/pelosi-calls-on-national-park-service-to-reconsider-permit-for-right-wing-rally-in-sf/> (quoting Speaker Pelosi as stating "[t]he NPS should reevaluate its decision and its capacity to protect the public during such a toxic rally.").

primarily targets Republicans, they have not been a major concern for some leaders.⁷⁵ After all, they are not coming for liberals or Democrats. They are coming for conservatives, Republicans, or those of us in the free speech community. What has been even more disconcerting is the expressions of support from some elected officials. Despite the movement's anti-free speech position and violent history, influential politicians, like former Rep. Keith Ellison, D-Minn., then the deputy chair of the Democratic National Committee, posed with the handbook to give the group a shout out. The now Minnesota Attorney General tweeted that Antifa would "strike fear in the heart of @realDonaldTrump." This was after Antifa had been involved in countless violent acts and its website banned in Germany. Likewise, Ellison's son, Minneapolis council member Jeremiah Ellison, declared his allegiance to Antifa at the height of the violent riots in the city this year.⁷⁶ At the same time, leaders are dismissing the violent acts being directed by Antifa and other groups. Speaker Nancy Pelosi was recently asked whether she would condemn the destruction of statues including the Christopher Columbus statue pulled down and thrown into the harbor in Baltimore. Pelosi responded that "people will do what people will do."⁷⁷ It was precisely the type of passive response that Antifa seeks to generate from elected officials. They fill the vacuum left by the withdrawal of responsible leadership and enforcement. While Speaker Pelosi said, "if the community doesn't want the statue, the statue shouldn't be there," this is not the "community" pulling down statues. It is a mob and the mob is often led or supported by members from Antifa.

Enabling politicians do not understand that Antifa is no ally to them or the political establishment. Antifa members are specifically told that they should never be co-opted by "liberal antifascists." As Bray wrote in the *Antifa Handbook*: "[M]any people ascribe to a kind of 'liberal antifascism,' whether they know it or not. By 'liberal anti-fascism' I mean a faith in the inherent power of the public sphere to filter out fascist ideas, and in the institutions of government to forestall the advancement of fascist politics."⁷⁸ Antifa members point to Hitler and Mussolini to justify rejecting the political process to combat fascism and as proof of "the fallibility of reasoned argument and parliamentary government to forestall fascism."⁷⁹

⁷⁵ Other countries have experienced the same debate over politicians who align themselves with Antifa, particularly after President Trump denounced the group. *See, e.g.,* Mark Hallan, *Trump's 'Anifa' Accusations Spark Debate in Germany*, DW (June 3, 2020), <https://www.dw.com/en/trumps-antifa-accusations-spark-debate-in-germany-the-movements-birthplace/a-53665573>.

⁷⁶ Jonathan Turley, *Revolution Redux? How A Movement For Reform Is Becoming A Platform For Radicalism*, RES IPSA (June 5, 2020), <https://jonathanturley.org/2020/06/08/welcome-to-french-revolution-2-0-how-a-movement-for-reform-is-becoming-a-platform-for-radicalism/>.

⁷⁷ Kaelan Deese, *Pelosi On Baltimore's Columbus Statue: 'If the community doesn't want the statue, the statue shouldn't be there,'* THE HILL (July 9, 2020, 1:34 PM), <https://thehill.com/homenews/house/506585-pelosi-responds-to-columbus-statue-thrown-in-baltimore-harbor-people-will-do>.

⁷⁸ Bray, *supra* note 35, at 172.

⁷⁹ *Id.*

Antifa does “strike fear in the heart” but that campaign of intimidation is not just confined to one political target. It is a movement of intimidation that has struck fear in the hearts of academics, writers, and others who believe that they are no longer able to express their views freely. Ultimately, Antifa and other anti-free speech groups do not require the type of direct support from leaders like Attorney General Ellison to succeed. It only requires acquiescence and passivity from those in power. It requires silence as others, including free speech advocates, are targeted by these extremists. While these groups cannot directly threaten all of us, they know they can intimidate many who do not want to risk being targeted or labeled a fascist or racist for opposing their agenda.

III. THE ROLE OF ANTIFA IN THE RECENT PROTESTS

One of the most distressing aspects of the media coverage of the protests and rioting around the country was the recurring insistence by reporters and analysts that the involvement of Antifa is some type of fabrication. House Judiciary Committee Chairman Jerry Nadler has publicly insisted that accounts of Antifa violence in places like Portland are a “myth” and, on the floor, called the accounts “imaginary.”⁸⁰ For those of us who have followed by Antifa for years, the involvement of Antifa and related groups was obvious, including symbols related to Antifa, ARA, and other anarchist groups that are part of Torch.⁸¹ The decentralized organization and fluid communications used by Antifa groups gives superficial support for such denials. In the absence of a press release or spokesperson or traditional hierarchy claiming Antifa’s responsibility, various commentators denied Antifa was playing a role in the violence. It is certainly true that many of us first look for Antifa when there is spontaneous and concentrated violence. They are the usual suspects because they are often the culprits. The group has always sought to achieve what the character Virgil said about the villain, Keyser Söze, in the movie *The Usual Suspects*: “The greatest trick the Devil ever pulled was convincing the world he didn’t exist.”⁸² Antifa does exist and the last few weeks demonstrate just how adept they are in the role of the Keyser Sözes of social unrest.

Antifa actively trains members to remain anonymous, including teaching them to use their clothing to prevent the identification of individuals by law enforcement: “This effect of anonymity-by-mass has allowed for the offensive side of bloc tactics to

⁸⁰ Victor Garcia, *Ex-Antifa member slams Nadler for calling far-left group 'imaginary': 'That's just false'*, FOX NEWS (June 27, 2020), <https://www.foxnews.com/media/gabriel-nadales-jerrold-nadler-claims-antifa-imaginary>.

⁸¹ Antifa and anarchist symbols have been readily observable in violent crowds including recent rioting that injured police officers in Los Angeles. *Officers struck by projectiles, protesters shot with nonlethal rounds in downtown LA*, FOX11 (July 26, 2020), <https://www.foxla.com/news/officers-struck-by-projectiles-protesters-shot-with-nonlethal-rounds-in-downtown-la>. Many signs directly refer to Antifa or show the red or black flags of the movement while others feature the anarchist symbol of a red “A.” Those symbols are also evident in graffiti left after rioting.

⁸² In fairness, the general statement should be credited to the French writer Charles Baudelaire who said, “One of the artifices of Satan is, to induce men to believe that he does not exist.”

flourish.”⁸³ The *Antifa Handbook* describes why Antifa is so difficult to track due its loose coalition of groups that have been massed for some of the most violent protests, including The Chelsea East Boston Antifascist Coalition (CEBAC), Smash Racism DC, and others. Indeed, as discussed below, African American leaders have complained that these activists have infiltrated or “coopted” Black Lives Matter protests to push crowds into violent confrontations with police.

Once again, my testimony is focused on the growing anti-free speech movement in the United States rather than Antifa’s specific role in the recent protests. However, the continuing violence is a signature of Antifa’s tactics and also shows how these groups consider police and the establishment to be per se “fascists.” For example, Bray describes antifascists organizing to disrupt the Trump inauguration. He also states that anyone celebrating the inauguration was a per se “fascist,” and that the goal was destroy “iconic” corporate images:

“Fascists in tuxes were pelted with eggs and several MAGA hats set on fire. The next morning, an ‘anti-capitalist and anti-fascist’ black bloc – that is, a mass of anonymous, black-clad militants—set off from Logan Circle to disrupt ‘business as usual,’ while a man whom liberals had bemoaned as a literal fascist was being sworn into the White House. Some of the black bloc, though certainly not all, engaged in target property destruction of corporate enterprises to smash Trump’s ‘façade of legitimacy.’ Most notably, the glass storefronts of Starbucks and Bank of America were rapidly demolished, similar destruction forced a McDonald’s to shut down and ATMS and other corporate property spray-painted or destroyed. The most iconic moment of the day may have been when a limousine was set ablaze.”⁸⁴

That passage is telling in a number of respects. It shows the fluidity of the term “fascist” to include conservatives and Republicans. It also shows the fluidity of the organization. It describes how these groups are marshaled to appear and operate under their own insular identities rather than an Antifa umbrella organization. Thus, arrested individuals are most likely to be listed on police reports as members of Smash Racism or as an unaffiliated protester. Indeed, asking arrestees about their ideological views or associations is limited or barred in many jurisdictions. Thus, many attacks, like the recent stabbing of a conservative journalist in Portland, are blamed on Antifa, but it is difficult to confirm such accounts absent an arrest.⁸⁵ Other cases, like some recent arrests in Austin, Texas for looting and rioting, were part of known Antifa groups.⁸⁶

⁸³ Rick Paulas, *Why Antifa Dresses Like Antifa*, NEW YORK TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/style/antifa-fashion.html>.

⁸⁴ Bray, *supra* note 35, at 116.

⁸⁵ Jessica Chasmar, *White Man Charged With Stabbing Black Trump Supporter*, WASH. TIMES (July 27, 2020), <https://www.washingtontimes.com/news/2020/jul/27/blake-hampe-43-charged-with-stabbing-black-trump-s/>; Megan Sheets, *Conservative journalist, 25, is stabbed in the back by Portland protester who he accused of following him*, DAILY MAIL (July 30, 2020),

There is a pattern of many of the recent attacks. For example, marches and events supporting law enforcement have been repeatedly attacked and successfully blocked or curtailed. At a law enforcement support event in Portland, speakers were attacked and the event had to be canceled.⁸⁷ In New York, a march of clergy and religious groups in unity with the police was attacked, leaving various officers injured.⁸⁸ Just this week, a Back to Blue rally was attacked in Rockford, Illinois in two days of violence to prevent the event.⁸⁹ Numerous stories have covered how people have been attacked for advocating “Blue Lives Matter” or publicly supporting police. Likewise, people wearing MAGA hats or conservative political slogan have been attacked. The tactics are the same as is the overriding message that certain groups should be silenced – a category that has grown from the original fascist and white supremacist groups to now include conservative, libertarian, pro-police and other groups. There is also a sense of license to engage in violence and property destruction in the name of resisting the status quo.

The recent arrest of the alleged “ringleader” of the effort to topple statues in Washington, D.C. is an example of the typical profile. Jason Charter is a George Washington University student who has openly declared “IamAntifa.”⁹⁰ Charter maintains his innocence and his case is now pending in federal court. However, Charter was previously present at a violent incident on campus as part of the D.C. Anti-Fascist Coalition. In 2017, an alleged Antifa supporter, Sydney Ramsey-LaRee, 24, was charged with simple assault after allegedly biking up and hitting Jack Posobiec, the Washington bureau chief of Rebel Media, a conservative group. The incident occurred near our Lisner Auditorium near the center of our campus. According to *The Hatchet*, Charter was present and Posobiec said that the masked members of the D.C. Anti-Fascist Coalition were calling him a “Nazi” when Ramsey-LaRee rode up and screamed “Where’s the Nazi? Where’s the Nazi?”⁹¹ Posobiec said that the group pointed at him and said “He’s

1:13 PM), <https://www.dailymail.co.uk/news/article-8574813/Conservative-journalist-stabbed-Portland-protests.html>.

⁸⁶ *Three individuals arrested for looting, burglary, property damage at Austin Target store*, CBS AUSTIN (June 6, 2020), <https://cbsaustin.com/news/local/three-antifa-group-members-arrested-for-looting-at-target-store-in-austin> (“The three people arrested are known members of a local anti-government group, which is a self-identified communist/socialist ANTIFA group”).

⁸⁷ Danielle Wallace, *Anti-cop ‘mob’ swarms Back the Blue event in Denver, bloodying several: reports*, N.Y. POST (July 20, 2020, 9:45 PM), <https://nypost.com/2020/07/20/anti-cop-mob-swarms-back-the-blue-event-in-denver-bloodying-several/>.

⁸⁸ Graham Rayman et. al., *NYPD chief of department among four cops injured in Brooklyn Bridge melee with Occupy City Hall protesters as ‘Power of Prayer’ march turns ugly*, NY DAILY NEWS (July 15, 2020, 5:39 PM).

⁸⁹ Ken DeCoster & Kevin Haas, *Protesters arrested for second straight day in Rockford*, *Rockford Star* (Aug. 2, 2020, 10:34 AM), <https://www.rrstar.com/news/20200801/protesters-arrested-for-second-straight-day-in-rockford>.

⁹⁰ Jonathan Turley, *GWU Student Accused of Leading Attack On Jackson Statue*, RES IPSA (July 3, 2020), <https://jonathanturley.org/2020/07/03/gwu-student-accused-of-leading-attack-on-jackson-statue/>.

⁹¹ Justine Coleman, *Man arrested after allegedly punching right-wing activist at demonstration*, GW HATCHET (Apr. 24, 2017, 7:38 PM),

the Nazi. He's the Nazi" and Ramsey-LaRee attacked him. It was a common feature of Antifa attacks involving the "Punch A Nazi" game. Notably, in 2020 when Charter was arrested for his role in violent protests, the FBI cited videotapes that allegedly showed Charter in a familiar outfit with googles and black coverings.⁹² He was deriding a journalist who turned out to be the same person previously attacked on the GW campus. It is notable that in the film of the effort to topple and burn the statue of Albert Pike in Washington on June 19, the FBI cites how Charter appears to be leading the effort and even directing people to step back just before the statue is set afire.

The skill of Antifa is to facilitate or trigger violence, seeding large demonstrations with members who push crowds to take direct and violent action. Many of those present at these demonstrations would not necessarily identify as Antifa. Many would express support for anarchist or antifascist goals, but there are not card-carrying members of Antifa. Indeed, there are no Antifa cards, let alone card-carrying Antifa members. Thus, it is not surprising that a FBI document leaked on June 2, 2020 stated that the FBI was unable to find any "intelligence indicating Antifa involvement/presence" in the D.C. area protests that occurred on May 31.⁹³ On June 10, 2020, a review of 51 charging documents of individuals involved in nationwide protests found no mention of Antifa affiliation.⁹⁴ As discussed above, Antifa has always relied on loose associations of groups and supporters. However, as arrests have increased, Antifa members are being identified in some of the worst hot spots of rioting around the country.

Business owners have faced demands for the payment of "fees" or "taxes" by groups, including one that reportedly distributed a list of businesses to be destroyed. This included one business called "Uncle Ike's Pot Shop." The owner Ian Eisenberg is quoted as saying "You can tell they're not scared of anything happening to them."⁹⁵ In an incident last week in Portland, an African American Marine was followed back to his home by alleged Antifa supporters who told him not to continue counter protesting after he took his American flag to the courthouse.⁹⁶ The rioting in Richmond last weekend also involved identified Antifa members.⁹⁷

<https://www.gwhatchet.com/2017/04/24/man-arrested-after-allegedly-punching-right-wing-activist-at-demonstration/>.

⁹² It is a familiar uniform for Antifa supporters. *See* Paulas, *supra* note 83 ("Black work or military boots, pants, balaclavas or ski masks, gloves and jackets, North Face brand or otherwise. Gas masks, goggles and shields may be added as accessories, but the basics have stayed the same since the look's inception.").

⁹³ *See* Ken Klippenstein, *The FBI Finds 'No Intel Indicating Antifa Involvement' in Sunday's Violence*, THE NATION (June 2, 2020), <https://www.thenation.com/article/activism/antifa-trump-fbi/>.

⁹⁴ *See* Beer, *supra* note 34.

⁹⁵ *Businesses damaged, looted during protest on Capitol Hill*, KIRO7 (July 23, 2020, 12:54 PM), <https://www.kiro7.com/news/local/businesses-damaged-looted-during-protests-capitol-hill/4HWMBWRRUFC65OFKPP3G36GZDU/>.

⁹⁶ Teny Sahakia, *Marine vet holds US flag high amid chaotic Portland protest, gets followed home by Antifa*, FOX NEWS (July 23, 2020), <https://www.foxnews.com/media/flag-bearing-marine-veteran-recalls-horrific-experience-within-portland-riots>.

⁹⁷ WTVR, *supra* note 12.

Antifa members have been identified in various arrests. In Portland, the Rose City Antifa group was critically involved in demonstrations that became violent a year before the current unrest.⁹⁸ That group is also involved in the current protests, and federal authorities have arrested individuals with pipe bombs and other devices.⁹⁹ As noted, a self-identified Antifa supporter discussed above was charged with the vandalizing of a statute in Washington, D.C.'s Lafayette Park.¹⁰⁰ Three people were arrested for looting a Target in Austin, Texas, one of which was a known Antifa member.¹⁰¹ Police at the scene of violent clashes in Los Angeles this weekend reported seeing Antifa members among the protesters.¹⁰² The New York Times reported last week that “activists operating under the umbrella of Antifa” were instrumental in the violence consuming cities like Portland.¹⁰³ Antifa protests were not just organized in large cities. It targeted the home of the mayor of a small Mississippi town after he made comments on the death of George Floyd as possibly linked to his drug use.¹⁰⁴ The groups reportedly were a coalition composed of “AntiFa South Mississippi, Occupy Mississippi, and Mississippi Rising Coalition.”¹⁰⁵

Some civil rights leaders have not been blind to the real motivations of violent Antifa members and related groups at these protests. The president of Portland's NAACP, E.D. Mondaine, wrote in the Washington Post to denounce what he called a “white spectacle” of violence:

“Unfortunately, “spectacle” is now the best way to describe Portland's protests. Vandalizing government buildings and hurling projectiles at law enforcement draw attention — but how do these actions stop police from killing black people? What are antifa and other leftist agitators achieving for the cause of black equality? The “Wall of Moms,” while perhaps well-

⁹⁸ *Portland rally: Far-right and antifa groups face off*, BBC (Aug. 18, 2019), <https://www.bbc.com/news/world-us-canada-49382386>.

⁹⁹ *Acting Secretary Wolf Condemns The Rampant Long-Lasting Violence In Portland*, DHS (July 16, 2020), <https://www.dhs.gov/news/2020/07/16/acting-secretary-wolf-condemns-rampant-long-lasting-violence-portland>.

¹⁰⁰ Alexander Mallin, *DOJ arrests man for alleged vandalism of Andrew Jackson statue*, ABC NEWS (July 2, 2020, 2:28 PM), <https://abcnews.go.com/Politics/doj-arrests-man-alleged-vandalism-andrew-jackson-statue/story?id=71578899>.

¹⁰¹ Jody Barr, *'Known ANTIFA' group member nabbed in Austin Target looting investigation*, KXAN (June 12, 2020, 9:30 AM), <https://www.kxan.com/investigations/known-antifa-member-nabbed-in-austin-target-looting-investigation/>.

¹⁰² *Protest Held in Westwood After Skirmish in Downtown LA*, NBC LOS ANGELES (July 26, 2020, 5:48 PM), <https://www.nbclosangeles.com/news/local/ore-protests-planned-sunday-after-3-injured-in-demonstrations/2402705/>.

¹⁰³ Mike Baker, *Chaotic Scenes in Portland as Backlash to Federal Deployment Grows*, N.Y. Times (July 21, 2020), <https://www.nytimes.com/2020/07/21/us/portland-protests.html>.

¹⁰⁴ *Antifa Plans Protest in South Mississippi Against Local Mayor's Comments*, NEWSBREAK (May 29, 2020), <https://www.newsbreak.com/mississippi/petal/news/1574818323731/antifa-plans-protest-in-south-mississippi-against-local-mayors-comments>.

¹⁰⁵ See *Mayor Hal Marx Protest*, <https://www.facebook.com/events/3118674578176398/>

intentioned, ends up redirecting attention away from the urgent issue of murdered black bodies.”¹⁰⁶

Similarly, Black Lives Matter representatives in Sacramento denounced outside groups that were “breaking things for no reason” in protests involving Antifa members.¹⁰⁷ Once again, those escalating the violence escaped arrest, and thus identification. In Portland, a Black Lives Matter speaker pointed to violent protesters and declared “What’s going on over there is a white movement . . . that’s taking over Black Lives Matter.”¹⁰⁸ Reporters noted the involvement of Antifa in the protests.¹⁰⁹ The rising tension between BLM and these extremist groups reflects a growing awareness that they are not fighting for the same cause. Antifa is about revolutionary change and using demonstrations to trigger greater social unrest. They follow the same purpose once stated in a Freudian slip by former Chicago Mayor Richard Daley after the riots surrounding the 1968 Democratic Convention: “The police are not here to *create* disorder, they’re here to *preserve* disorder.” Antifa fuels and feeds upon violence. The cause is ultimately less important than the conditions that such demonstrations afford to members to, as stated by Professor Bray, “participate in a variety of forms of resistance during this dramatic rebellion.”¹¹⁰

IV. PROTECTING FREE SPEECH IN AN AGE OF RAGE

The greatest threat to free speech in this country remains the original threat: silence. Silence kills free speech. It is the silence of professors who watch as their colleagues are threatened, harassed, investigated, fired, or sent into mandatory “training” for voicing dissenting views.¹¹¹ It is the silence of other students as their colleagues are attacked for voicing their own beliefs in columns or on social media.¹¹² It is the silence of

¹⁰⁶ E.D. Mondainé, *Portland’s protests were supposed to be about black lives. Now, they’re white spectacle.*, WASH. POST (July 23, 2020, 1:51 PM), <https://www.washingtonpost.com/opinions/2020/07/23/portlands-protests-were-supposed-be-about-black-lives-now-theyre-white-spectacle/>.

¹⁰⁷ Vincent Moleski, *City Hall, jail vandalized during Sacramento march*, SACRAMENTO BEE (July 26, 2020, 3:51 PM), <https://www.sacbee.com/news/local/crime/article244503162.html>.

¹⁰⁸ Noelle Crombie, *After-hours chaos at Portland protests overshadows Black Lives Matter message: ‘Our movement has been co-opted’*, OREGONLIVE (July 26, 2020), <https://www.oregonlive.com/portland/2020/07/after-hours-chaos-at-portland-protests-overshadows-black-lives-matter-message-our-movement-has-been-co-opted.html>.

¹⁰⁹ *Id.*

¹¹⁰ Bray, *Antifa isn’t the problem*, *supra* note 55.

¹¹¹ *See, e.g., supra* note 71.

¹¹² *See, e.g.* Jonathan Turley, *Princeton Student Reportedly Denied Job After Signing Letter Defending Free Speech*, RES IPSA (July 14, 2020), <https://jonathanturley.org/2020/07/14/princeton-student-reportedly-denied-job-after-signing-letter-defending-free-speech/>; Jonathan Turley, *Georgetown Student Association Condemns Conservative Student For Criticizing BLM and The Bostock Ruling*, RES IPSA (July 10, 2020), <https://jonathanturley.org/2020/07/10/georgetown-student-association-condemns-conservative-student-for-criticizing-blm-and-the-bostock-ruling/>.

reporters who watch as their colleagues are fired or forced to retire for writing opposing views.¹¹³ However, most importantly, it is the silence of state officials who refuse to protect the exercise of free speech or refuse to prosecute those who use force to stop opposing views from being heard. The question is whether Congress should now consider enacting federal measures to enhance the protection of civil liberties, similar to how it has done so in the area of civil rights. Even without new legislation, the federal government has the ability to investigate local governments that are not making arrests for attacks on individuals or events or dropping the charges in the aftermath of such attacks. The conscious decision not to arrest or prosecute violent individuals creates a vacuum that is allowing the anti-free speech movement to grow in this country.

1. Federal Enforcement

The challenge is to find a federal role that does not itself threaten free speech values. Once again, I have opposed the classification of Antifa as a terrorist organization¹¹⁴ and I have specifically opposed terrorism charges in cases from Charlottesville,¹¹⁵ to New York,¹¹⁶ to Seattle,¹¹⁷ to Oklahoma City.¹¹⁸ Most Antifa members are demonstrably anti-free speech, but some are not violent. I have also opposed the use of federal offenses for local crimes, like arson, as inimical to federalism principles.¹¹⁹ However, that debate highlights a gap in our federal laws, which often seem to be a choice between acquiescence or overreach; a choice between no criminal charge or a terrorism charge. The federal government will generally prosecute the burning of a municipal police vehicle in Chicago as a federal arson offense, but not a violent campaign to block speeches or events. If anything, the denial of a civil liberty protected

¹¹³ See, e.g., *Bari Weiss resigns from The New York Times, Andrew Sullivan to leave New York*, THE WEEK (July 14, 2020), <https://theweek.com/speedreads/925465/bari-weiss-resigns-from-new-york-times-andrew-sullivan-leave-new-york>.

¹¹⁴ Turley, *Why Trump's tweet about labeling 'antifa' a terrorist group is so dangerous*, *supra* note 4.

¹¹⁵ Jonathan Turley, *Should protesters be classified as terrorists?*, THE HILL (Aug. 13, 2017, 6:00 PM), <https://thehill.com/blogs/pundits-blog/civil-rights/347702-opinion-should-protesters-be-classified-as-terrorists>.

¹¹⁶ Jonathan Turley, *"Gasoline Is Awfully Cheap": Police Action Against "Ace Burns" Raises Free Speech Concerns*, RES IPSA (June 8, 2020), <https://jonathanturley.org/2020/06/08/gasoline-is-awfully-cheap-police-action-against-ace-burns-raises-free-speech-concerns/>.

¹¹⁷ Jonathan Turley, *How Seattle autonomous zone is dangerously defining leadership*, THE HILL (June 15, 2020), <https://thehill.com/opinion/judiciary/502576-how-seattle-autonomous-zone-is-dangerously-defining-leadership>.

¹¹⁸ Jonathan Turley, *Oklahoma Teens Charged With Terrorism For Breaking Windows*, RES IPSA (July 22, 2020), <https://jonathanturley.org/2020/07/22/oklahoma-teens-charged-with-terrorism-for-breaking-windows-during-protests/>.

¹¹⁹ See, e.g., Jonathan Turley, *"Joker" Case In Chicago Shows New Expansive Claim Of Federal Jurisdiction*, RES IPSA (June 4, 2020), <https://jonathanturley.org/2020/06/04/joker-case-in-chicago-shows-new-expansive-claim-of-federal-jurisdiction/>.

under the Bill of Rights in Chicago should be more of a federal concern than the torching of a police cruiser.

Recently, the Sixth Annual Law Enforcement Appreciation Day in Denver was cancelled after speakers, including state legislators, were physically assaulted.¹²⁰ Not only was there little coverage of the attack, but there were allegations that the police “stood down” as a mob descended on the speakers.¹²¹ The event was successfully blocked. The individuals who sought to speak at a properly permitted event were denied their First Amendment rights and they found little interest or support in their exercise of free speech. This is different from the many individual cases of intimidation from Antifa’s favorite game of “Punch a Nazi,” or following counter protesters to their homes to threaten them.¹²² These are premeditated attacks designed to “no platform” opposing views, particularly those who wish to express support for law enforcement. Such attacks have occurred in other cities, including the beating of police officers present at a unity march with religious groups across the Brooklyn Bridge, which resulted in serious injuries to three officers.¹²³ While the counter protesters were linked to a Defund The Police encampment, there was no confirmation of the groups responsible for the attack.¹²⁴

Whether addressed under state or federal law, the primary concern must be to afford ample room for political expression and to avoid a countervailing chilling effect from government enforcement. We do not want to see free speech protections used as a license to curtail free speech. Indeed, that would be no better than the current hypocrisy voiced by academics today who claim that stopping the exercise of free speech on campus is itself free speech. That is why federal efforts must be narrowly construed to apply only to violent threats and actions targeting individuals or events that seek to prevent the exercise of free speech.

The problem for the victims of extremist groups is that, absent local protection and prosecution, they have few options. It is extremely difficult to sue for the failure to arrest and virtually impossible to sue for the failure of prosecute cases. Such decisions are viewed as discretionary decisions. Ironically, these cases often fail after the invocation of immunity defenses, which are the focus of much of the criticism in current protests. The vast majority of these cases involve alleged unconstitutional malfeasance, not unconstitutional nonfeasance, and still failed. The Supreme Court has ruled that “implicit in the idea that officials have some immunity -- absolute or qualified -- for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to state that it is better to risk some error and possible injury from such error than not to decide or

¹²⁰ Wallace, *supra* note 87.

¹²¹ Bradford Betz, *Denver police union head: 'Stand-down' order was in effect when pro-cop rally attacked*, FOX NEWS (July 22, 2020), <https://www.foxnews.com/us/denver-police-union-head-stand-down-order>.

¹²² Sahakia, *supra* note 96.

¹²³ Myles Miller et. al., *Top NYPD Cop Among Officers Hurt in Bloody Brooklyn Bridge Scuffle With Protesters*, NBC NY (July 16, 2020, 11:09 PM), <https://www.nbcnewyork.com/news/top-nypd-cop-among-officers-hurt-in-scuffle-with-protesters/2517385/>.

¹²⁴ *Id.*

act at all.”¹²⁵ Prosecutorial discretion is treated as virtually absolute by the courts under these immunity cases.¹²⁶

State and federal actions (like Section 1983 lawsuits) often focus on the denial of constitutional rights. For example, California allows recovering for:

“Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages . . .”¹²⁷

The problem is that the “interference” is by third parties, but the current complaint is for the failure to address that “interference.” Alternatively, private citizens do not have the investigative capacity or tools to determine the names and associations of those who violently stop “platforming.” As a result, absent state enforcement and prosecution, citizens have little recourse to the denial of core constitutional rights.

The lack of state enforcement and biased prosecution was one of the reasons for the enactment of federal civil rights legislation allowing the federal government to bring its own cases for the denial of constitutional protections. While state prosecutors and police had the authority to investigate and prosecute for attacks based on race or other forms of discrimination, they failed to do so—leaving citizens to be victimized by both criminal acts and acts of nonfeasance. The Justice Department routinely acts in parallel or unilaterally in cases where equal rights are violated, particularly in cases of racist attacks. There has not been a similar collateral system of enforcement for civil liberties like free speech. Despite years of expanding federal crimes and jurisdiction, this is not an area where Congress has sought to ensure parallel federal guarantees for the protections under the First Amendment as it has under the Fourteenth Amendment.

Instead, the federal government has turned to the most extreme criminal charge in the federal arsenal. President Trump recently tweeted that “the United States of America will be designating ANTIFA as a Terrorist Organization.”¹²⁸ As noted previously, I do not support the use of terrorism powers against groups like Antifa. Yet, due in part to the lack of options, the federal government currently is expanding terrorism investigations under 28 C.F.R. 0.85(l) which defines terrorism as

“acts of violence that [violate] the criminal laws of the United States or any state, committed by individuals or groups without any foreign direction, and appear to be intended to intimidate or coerce a civilian population, or influence the policy of a government by intimidation or

¹²⁵ Scheuer v. Rhodes, 416 U.S. 232, 242 (1974).

¹²⁶ Will v. Michigan Dep’t of State Police, 491 U.S. 58 (1989); *see also* Kipp v. Saetre, 454 N.W.2d 639 (Minn. Ct. App. 1990).

¹²⁷ CAL. CIV. CODE § 52.1(b) (West 2013).

¹²⁸ *See id.*

coercion, and occur primarily within the territorial jurisdiction of the United States.”

The FBI has gradually broadened the scope of these investigations to include radical political groups, including in 2017, “black identity extremism” (BIE) groups.¹²⁹ This work by the Joint Terrorism Task Forces (JTTFs) is a legitimate concern for free speech advocates. Even though we have not seen criminal cases brought solely on the exercise of free speech, the investigations can cause a chilling effect on various groups. For example, despite being a long and vocal critic of Antifa, I do not believe that all members of this movement are engaged in criminal conduct, or that the movement meets what should be a narrow definition of terrorism.¹³⁰ Some of these individuals may be properly charged with terroristic acts, but Antifa itself is viewed by many as more of a movement than a single group. There are loosely associated individuals who appear at these protests. Moreover, our current laws seem to make a quantum leap from insular crimes like statue destruction to terrorism. Recently, Attorney General Barr confirmed in testimony before the House Judiciary Committee that the JTTFs were designated as the “principle means” to investigate these groups, providing for the use of criminal and civil actions under the Racketeer Influenced and Corrupt Organizations (RICO) Act.¹³¹ Terrorism cannot be the primary weapon against Antifa. If so, we have the problem captured in the old military adage that if you only have a hammer, every problem looks like a nail. If you only have enforcement powers with regard to terrorism, every wrongdoer looks like a terrorist.¹³²

¹²⁹ CONG. RESEARCH SERV., DOMESTIC TERRORISM: AN OVERVIEW (2019); CONG. RESEARCH SERV. IN FOCUS, FBI CATEGORIZATION OF DOMESTIC TERRORISM (2017).

¹³⁰ However, those Antifa members who do not commit crimes still view others as “ethical” in doing so. Paulas, *supra* note 83.

¹³¹ *Hearing With The Honorable Attorney General William Barr, Before the H. Comm. On the Judiciary*, 116th Cong. (2020) (statement of William Barr, Attorney General).

¹³² It is also worth noting that Antifa is not known for killing people and indeed right-wing extremists are responsible for more terrorist incidents in the United States. *See* Young, *supra* note 37. A review of data suggests that their violence, while serious and unlawful, is not closely comparable to terrorist attacks perpetuated within the United States:

“Based on a CSIS data set of 893 terrorist incidents in the United States between January 1994 and May 2020, attacks from left-wing perpetrators like Antifa made up a tiny percentage of overall terrorist attacks and casualties. Right-wing terrorists perpetrated the majority—57 percent—of all attacks and plots during this period, particularly those who were white supremacists, anti-government extremists, and involuntary celibates (or incels). In comparison, left-wing extremists orchestrated 25 percent of the incidents during this period, followed by 15 percent from religious terrorists, 3 percent from ethno-nationalists, and 0.7 percent from terrorists with other motives. In analyzing fatalities from terrorist attacks, religious terrorism has killed the largest number of individuals—3,086 people—primarily due to the attacks on September 11, 2001, which caused 2,977 deaths. In comparison, right-wing terrorist attacks caused 335 fatalities, left-wing attacks caused 22 deaths, and ethno-nationalist terrorists caused 5 deaths.” *See* Jones, *supra* note 36.

Given the broad reach of RICO, it is possible that the pattern of criminal acts by Antifa groups constitutes “an enterprise.”¹³³ Among the list of 35 predicate federal and state offense crimes are acts like extortion and arson that have been raised in areas with some of the most severe rioting.¹³⁴ The use of the law, however, is a concern given its broad application with only two required crimes for a pattern. Antifa does not ordinarily direct, as an organization, particular acts of arson or property destruction. The danger is that political organizations or groups could be treated as racketeering enterprises based on loose association with the misconduct of supporters.

Antifa, however, is undeniably committed to, and encourages, systemic violent and criminal acts. “Punch a Nazi” games and violent protests are the signature of its members who are taught to cover their faces and identifying tattoos with hoodies and masks. While once focused on countering neo-Nazi and white supremacist events, these extremist groups have expanded their campaigns of intimidation with what is now considered de facto racist or fascist organizations or positions. They are committed to denying the exercise of one of the most important rights in our system and they are succeeding due to the failure of action by local leaders. The federal government is already ramping up prosecution for insular offenses like defacing or damaging statues or federal property. Yet, these insular offenses are part of a more damaging strategy to block the exercise of constitutional rights.

The use of violence to prevent lawful assemblies or speeches should be addressed as, not just state, but federal offenses. Specifically, they should be charged for using violence or threats of violence to stop lawful assemblies or speeches. This is not some localized injury, but the denial of the rights guaranteed to all citizens of the United States. Citizens have the ability to go to court to challenge content-based denials of permits. However, groups like Antifa can still achieve the same result by threatening violence against anyone who tries to assemble for the permitted event. Antifa is entirely protected in peacefully protesting speakers under the very free speech principles that it has worked to destroy. However, it is the engaging in physical intimidation or threats to stop others from speaking, which is the denial of a federal guaranteed right.

There is a striking disconnect in the federal government charging crimes like “arson” (that can be prosecuted on the local level) while leaving the denial of free speech generally state or individual legal actions. One is the loss of a vehicle and other the denial of a constitutional right. The latter should receive as high a priority in federal enforcement.

The federal code does address “Federally Protected Activities” but expressly recognizes that protection of such activities remains a state and local matter:

“(a)(1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section

¹³³ Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985).

¹³⁴ Scheidler v. National Org. for Women, Inc., 537 U.S. 393 (2003).

be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.”¹³⁵

However, the law reserves federal authority to protect the right of people “participating lawfully in speech or peaceful assembly” but it prefaces the exercise of such rights “without discrimination on account of race, color, religion or national origin.”¹³⁶ Thus, these laws are directed at discriminatory policies on non-ideological grounds. It also focuses on the individuals committing unlawful conduct rather than the cities for failing to enforce laws or protect speech.

Notably, past Justice Department officials have sought the expansion of the federal law by relaxing the necessity of showing that the act was intended to prevent citizens from “participating lawfully in speech or peaceful assembly.”¹³⁷ Yet, there has not been a push to allow enforcement when the denial of such lawful speech and assembly is based on viewpoint discrimination. Such federal enforcement is lacking even when cities or states passively enable such denials by a lack of enforcement or refusal to permit certain groups due to their political, religious, or social views.

Federal enforcement could also include civil rather than criminal actions. However, the focus may have to be on cities rather than Antifa. The threat of a civil action against these extremist groups has only marginal impact. While there have been some successful lawsuits against white supremacist groups with identified leaders, the anarchist and Antifa groups are designed to avoid organizational structures or clearly identified leadership. This is done to frustrate any effort to hold members accountable. Instead, greater pressure could be brought against cities for systemic failures to protect the exercise of free speech, particularly with regard to lawfully permitted events. Local enforcement is the best way to stop violence at protests. Federal civil actions could be used to compel cities to meet this responsibility in cases where there is a pattern of police “standing down” or declining protect permitted events.

There should be a better legal regimen for the Justice Department to seek injunctive relief to address the failure of local governments to protect the freedom of speech and assembly. This is not some matter left to the discretion of states under federalism principles. These are bedrock rights that define American citizenship and

¹³⁵ 18 U.S.C. § 245 (a)(1) (2020).

¹³⁶ *Id.* (a)(5).

¹³⁷ See *Testimony on Hate Crimes Prevention Act of 1999 S. 622 Before the Senate Comm. on the Judiciary*, 106th Cong. (1999) [hereinafter *Senate Testimony on S. 622*] (statement of Eric H. Holder, Jr., Deputy Att’y Gen.).

identity. The role of the federal government in fashioning consent decrees to protect civil liberties can be enhanced and encouraged by Congress.

2. Federal Funding

The easiest avenue for action is to use the power of the purse to support the right of free speech. Congress should allow for the withholding of federal funds for law enforcement and justice programs when states or cities fail to protect the exercise of the rights of free speech and assembly. If a city told police to stand down and not protect minority populations, they would be subject to immediate federal action and the suspension of federal funding. The same should be true of the denial of the right to exercise core constitutional rights of speech and assembly. Some local politicians have decided to avoid any backlash that would come from protecting events like the recent rallies for law enforcement. This is a political calculation, often reframed as an effort to avoid further confrontations. However, the cost is borne by those who are denied that ability to assemble peacefully and express their viewpoints.

There is no reason why the American taxpayer should support municipal and state governments with law enforcement subsidies when these leaders withhold protection from certain citizens. The problem, as previously noted, is that courts offer little support since the refusal to enforce laws is often treated as a discretionary, and therefore immunized, decision. Congress could create an avenue for these citizens to present their grievances to federal officials in the systemic failure to protect lawful, permitted events. Otherwise, as on college campuses, politicians can continue to blame the risk of violence by extremist groups for declining to arrest and prosecute members of those groups like Antifa.

Even with federal conditional funding, there is only so much that the federal government can do to protect citizens from the anti-free speech views of their elected officials. Citizens always have the recourse of legal actions on the denial of constitutional rights. However, there are a myriad of subtle ways that state and local officials can undermine free speech. That is why Congress should reinforce the traditional areas where free speech has flourished: our college and universities campuses. Historically, while local politicians have sought to limit free speech, this right has been protected on our campuses as an essential element to our intellectual mission of free and open discourse. By defending free speech rights on campuses, Congress can guarantee protected enclaves for free speech even in those jurisdictions where local officials are not inclined to support the exercise of this right.

Absent some form of reinforcement, however, these enclaves will continue to collapse. Diversity of viewpoints was the most cherished characteristic of higher education—until recently. In the last decade, we have reached a tipping point in higher education as faculty have imposed greater and greater limits on free speech, often targeting the speech of conservative or libertarian professors or students. The level of intimidation is now greater on our campuses than society at large. It is by design. Many faculty and students are now unsure of what they can say and thus say nothing. One recent Harvard study found only 35 percent of Republican or conservative students felt

comfortable expressing their views.¹³⁸ Another study at the University of North Carolina found that conservative students were 300 times more likely to self-censor their political views.¹³⁹

By reinforcing free speech rights on our campuses, Congress can ensure that, in every state and most cities, free speech will thrive on our campuses. Once again, any federal effort to protect free speech and other rights must be narrowly tailored and enforced to avoid curtailing free speech in the name of protecting it.¹⁴⁰ That does not mean, however, that the government cannot refuse to directly support such institutions. I would strongly support the denial of the use of federal subsidies and grants, for example, for universities which discriminate against applicants on the basis of their race or other classifications. The recent executive order on free speech protections on campus does not have the weight or authority of an actual federal law.¹⁴¹ It generally requires that listed agencies “take appropriate steps, in a manner consistent with applicable law, including the First Amendment, to ensure institutions that receive federal research or education grants promote free inquiry through compliance with all applicable federal laws, regulations and policies.” The executive order is not viewed as imposing meaningful limits for universities and colleges in the absence of a clear legislative foundation. There should also be a legitimate concern of Congress in the funding of law enforcement or academic programs that actively deny the exercise of free speech. As much as I favor support for our universities, I do not see why this country, roughly half of which is comprised of individuals with conservative or libertarian views, should fund universities that allow the barring of speakers or disciplining of academics with such views.

This should not be a partisan matter. Congress could require that universities adopt a list of basic protections for the exercise of free speech as a precondition for any federal funding, from grants to tuition support. The specific free speech guarantees

¹³⁸ *Harvard Youth Poll Finds Majority of Young Americans Support Impeachment and Removal of President Trump*, HARV. KENNEDY SCHOOL IOP (Nov. 19, 2019), <https://iop.harvard.edu/about/newsletter-press-release/harvard-youth-poll-impeachment-nov18-2019>.

¹³⁹ Jennifer Larson, *Free Expression and Constructive Dialogue At The University of North Carolina at Chapel Hill* (March 2, 2020), available at <https://fecdsurveyreport.web.unc.edu/files/2020/02/UNC-Free-Expression-Report.pdf>.

¹⁴⁰ For that reason, I have long opposed the use of the tax code and other designations to punish organizations based on their religious beliefs or free speech expression, even for organizations with offensive views. *See, e.g.*, Jonathan Turley, *The patent office goes out of bounds in Redskins trademark case*, WASH. POST (June 20, 2014), https://www.washingtonpost.com/opinions/the-patent-office-goes-out-of-bounds-in-redskins-trademark-case/2014/06/20/e0001ee8-f7bd-11e3-8aa9-dad2ec039789_story.html; Jonathan Turley, *Are Non-Discrimination Policies Discriminatory*, THE HILL (April 16, 2010). Those measures deal with the status of organizations, or their trademarks, based on the content of their views. As a free speech advocate, such content-based discrimination is a threat to the exercise of both free speech and free exercise.

¹⁴¹ *See* Andrew Kreighbaum, *Trump Signs Broad Executive Order*, INSIDE HIGHER EDUC. (March 22, 2019), <https://www.insidehighered.com/news/2019/03/22/white-house-executive-order-prods-colleges-free-speech-program-level-data-and-risk>.

should be the result of another hearing. However, as a starting point for this discussion, I would suggest ten possible conditions that could be included in some form:

1. Require schools to allow speakers to appear on campus under the same costs and conditions, regardless of their views (or opposition to their views).
2. Require the disciplinary action of students or faculty who block classes, lectures or speeches by violent acts or threats of violence.
3. Require the expulsion or termination of students or faculty who physically assault speakers or others seeking to exercise free speech or the right to peaceful assembly.
4. Require the disciplinary action of students or faculty who block classes, lectures, or speeches through disruptive conduct inside classrooms, halls or other spaces reserved for such presentations.
5. Require a presumption that the exercise of free speech outside of the school (including statements on social media) for faculty or students is not a matter for school sanctions or termination.
6. Require a process for due process of students and faculty who are disciplined for exercising free speech rights, including the right to discovery of patterns of bias or inconsistent treatment in other controversies.
7. Bar restrictive “free speech zones” and other exclusionary zones for free expression (other than rules barring demonstrations, disruptions or exhibits in classrooms, halls, or other spaces used for lectures, presentations and events).
8. Bar student governments or organizations from sanctioning or censuring fellow students for their exercise of free speech without a clear and narrowly tailored standard as well as the approval of a university body.
9. Bar faculty from sanctioning, censoring, or retaliating against students for their political, social, or religious statements or values (subject to protected exceptions for religious-based institutions).
10. Bar faculty from requiring that students adhere to, adopt, or endorse political, social or religious positions as a condition for any class, program, or benefit (subject to protected exceptions for religious-based institutions).

At one time, requiring the expulsion or termination of students or faculty for physical assaults or attacks would have seemed ridiculously obvious. There could be no greater contradiction for an institution of higher education than a professor attacking someone on campus. However, we have seen such physical attacks by both students and faculty go without actions from Administrators. One of the most egregious cases involved University of California professor Mireille Miller-Young who pleaded guilty to

assaulting pro-life advocates and destroying their display on campus.¹⁴² Not only did many faculty and students support Miller-Young, but some rejected the right of the women attacked to speak on campus, including comparisons of pro-life advocates to terrorists. Miller-Young was not only kept on the faculty, but other schools honored her leadership in advocacy.¹⁴³ Much like the failure of local officials to prosecute criminal acts, the failure of universities to take action against violent faculty and students serves to increase the threatening environment for dissenting voices on campuses. The message is clear: if you are physically attacked for controversial views, the university might not take action. This fuels both the violence and the resulting intimidation for faculty and students alike.

These principles do not supplant the universities in determining when violations have occurred. It does not compel university verdicts or adjudications, but rather an obligation to address and document such cases. They also do not include elements that might intrude into academic freedom and judgment even when schools have limited the ideological range of the faculty. For example, there is no requirement of ideological diversity on faculties. Such a requirement would intrude into academic freedom and judgment. It is highly doubtful, therefore, that most schools will become more ideologically diverse. The percentage of Republican or conservative or libertarian professors is quite small on most faculties, particularly top schools. Liberal faculties routinely dismiss candidates who advance opposing views as intellectually unsound or simply not as intellectually “promising” as more liberal candidates. It is the same coded language that was once used to bar minorities and liberal candidates from faculties decades earlier. Once the tipping point favored more liberal views, the range of ideological diversity has become narrower and narrower.¹⁴⁴ Yet, I would oppose any

¹⁴² Jonathan Turley, *Professor Miller-Young Sentenced To Probation and Anger Management Classes For Attack On Pro-Life Advocates*, RES IPSA (Aug. 18, 2014), <https://jonathanturley.org/2014/08/18/professor-miller-young-sentenced-to-probation-and-anger-management-classes-for-attack-on-pro-life-advocates/>.

¹⁴³ Jonathan Turley, *California Professor Who Assaulted Pro Life Advocates Is Featured By Oregon*, RES IPSA (Oct. 17, 2018), <https://jonathanturley.org/2018/10/17/california-professor-who-assaulted-pro-life-advocates-is-featured-by-oregon-to-help-students-embrace-the-radical-potential-of-black-feminism-in-our-everyday-lives/>.

¹⁴⁴ For example, a recent study by Harvard Crimson found only 1.46% of the Harvard faculty identified as conservative. Some 79.7% identified as “liberal” or “very liberal.” James S. Bikales & Jasper G. Goodman, *Plurality of Surveyed Harvard Faculty Support Warren in Presidential Race*, HARVARD CRIMSON (Mar. 3, 2020), <https://www.thecrimson.com/article/2020/3/3/faculty-support-warren-president/>. One Yale professor estimated the percentage at Yale as “0%.” James Freeman, *Yale Prof Estimates Faculty Political Diversity at ‘0%’*, WALL STREET JOURNAL (Dec. 9, 2019, 4:16 PM), <https://www.wsj.com/articles/yale-prof-estimates-faculty-political-diversity-at-0-11575926185>. One study showed a 95:1 ration in Democratic over Republican donations. Jonathan Turley, *Study: Professors Donate To Democrats Over Republicans By 95:1 Ratio*, RES IPSA (Jan. 23, 2020), <https://jonathanturley.org/2020/01/23/study-professors-donate-to-democrats-over-republicans-by-a-951-ratio/comment-page-1/>. It is absurd to continue to pretend that this virtual exclusion of conservative views on faculties is anything other than a system ideological litmus test.

effort by the either the federal or state governments to attempt to regulate such academic appointments.

In addition, such conditions would not in any way limit protests of faculty, classes or events, so long as such actions do not prevent others from attending or listening to the targeted speakers. Blocking others from speaking or preventing others from listening to opposing view is not the exercise of free speech. It is the very antithesis of free speech. Rather, it would focus on the ability of opposing views and speakers to be expressed on campuses. Moreover, such a threshold condition for federal funds could be linked to a process of grievance to a specially mandated board or commission under the auspices of the Department of Education or the Justice Department. This would allow for some independent body to review these controversies, particularly when students or academics are disciplined for comments outside of the classroom. University administrators have largely failed to protect these rights, and indeed often lead the attack on faculty or students with opposing views. The American Association of University Professors (AAUP), and the American Bar Association have failed to meaningfully address this trend. An independent board could be empowered to demand answers from universities and the type of supporting material often denied to students and faculty by Administrators.

A narrowly tailored standard would allow ample ability for universities to protect against racist or offensive comments in classes or on campus. The guidelines would focus on a number of key elements, such as whether remarks were made off campus. They would monitor the ability of all viewpoints to be expressed on campus and address the use of collateral limits such as mandatory insurance or security fees to bar certain speakers. Most importantly, the guidelines would allow a comparison between remarks tolerated and remarks censored by universities. Finally, it would give the public a basis for comparing colleges in their state to allow for a more informed debate. The only truly independent means for such review today is the courts, but such claims are often limited if the university is not a public institution, subject to First Amendment restrictions. A federal body and system of certification would allow faculty and students at private institutions to have greater ability to challenge university actions.

As shown in the ten proposal principles, federal conditional funding can be crafted to avoid the danger of government management of universities. Federal conditions would be confined to the most basic protections of free speech. Of course, if private universities want to regulate speech, they can do so, but cannot expect the support of tax dollars for programs that discriminate against large populations of students and academics. As someone who has only taught at private institutions for over 30 years, I feel that, without some outside action, private institutions will increasingly become hostile and unhealthy environments for many students. Indeed, I have a growing concern that many students will increasingly be forced to look only to public institutions for their education due to the added protections for free speech. With the exception of schools like the University of Chicago that maintain fierce protections for free speech, private institutions are becoming models of orthodoxy and intolerance.¹⁴⁵ A conservative student,

¹⁴⁵ Jonathan Turley, *Free speech should not be big news*, USA TODAY (Aug. 30, 2016, 6:13 PM), <https://www.usatoday.com/story/opinion/2016/08/29/free-speech-university-of-chicago-trigger-safe-space-censorship-diversity-microaggressions-jonathan-turley/89515984/>.

like the one recently ostracized at Georgetown University,¹⁴⁶ must often chose between remaining silent for four years, embracing accepted truths, or risk being the subject of actions that could limit his or her future opportunities. This Faustian choice is not acceptable to many who want to experience college without fear of abuse or retaliation. This trend will result in the Balkanization of our educational programs, where private institutions become echo-chambers for orthodox viewpoints, while state institutions afford free speech protections as required by the First Amendment. We are already seeing this fear become a reality for parents and students who can no longer assume that they will be free to express themselves at private institutions.

Many administrators are clearly not up to his task. An independent commission (and the corresponding threat to federal funding) would give administrators an incentive (and in some cases, needed cover) to stand with free speech and academic freedom. In three decades of teaching, I never thought that such an incentive would be required. As academics, we once were united in our belief in free speech. That has changed. What was once an atmosphere of pluralism and tolerance has become one of orthodoxy and retribution. Our failing as academics has created the dangerous vacuum that is enabling extremist groups to control the scope of allowable speech on campus.

V. CONCLUSION

Across the country, there is dwindling support, and even patience, for the exercise of free speech. On campuses, universities are largely passive enablers of attacks on faculty and students who voice dissenting views. We are living in a time reminiscent of Attorney General Charles Gregory's statement during the Red Scare that dissenters should speak at their own risk: "May God have mercy on them, for they need expect none from an outraged people and an avenging government."¹⁴⁷ The "avenging" elements in our society are now found in the Antifa movement, and a growing number of writers, academic, and others who are embracing orthodoxy over diversity of thought. If we are to preserve this defining right, Congress must do something that it has historically failed to do: protect the free speech rights of political minorities in our school and on our streets. Antifa and related groups thrive through intimidation, but they prevail through inaction. All that is required for free speech to die in America is for America to be silent.

Once again, thank you for the honor of appearing before you to discuss these important issues. I am happy to answer any questions that you might have on the underlying legal standards that apply to this controversy.

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¹⁴⁶ Jonathan Turley, *Georgetown Student Senate Condemns Conservative Student For Criticizing BLM and The Bostock Ruling*, RES IPSA (July 10, 2020), <https://jonathanturley.org/2020/07/10/georgetown-student-association-condemns-conservative-student-for-criticizing-blm-and-the-bostock-ruling/>.

¹⁴⁷ *Supra* note 21.