

PREPARING FOR A POTENTIALLY TUMULTUOUS FALL ON CAMPUS: A CONVERSATION WITH A FORMER PRESIDENT, GENERAL COUNSEL AND CAMPUS POLICE CHIEF WHO HAVE BEEN THERE BEFORE

With the spring term's protests, encampments, and arrests in the rearview mirror and students soon returning to campus for a fall term that will wrap around a historical presidential election and the first anniversary of the October 7 massacres in Israel, American Council on Education (ACE) Vice President and General Counsel **Peter McDonough** posed some top-of-mind questions to **Frederick M. "Fred" Lawrence**, former president of Brandeis University and dean of The George Washington University Law School, current secretary and chief executive officer of The Phi Beta Kappa Society, and a distinguished lecturer at Georgetown University Law Center—where he teaches courses on higher education and the law and free speech on campus; **Stephen S. "Steve" Dunham**, vice president and general counsel emeritus of The Pennsylvania State University, former vice president and general counsel at both Johns Hopkins University and the University of Minnesota, and former chair of the national law firm of Morrison and Foerster; and **Steven J. Healy**, chief executive officer of The Healy+ Group and a nationally recognized expert on campus safety who previously served as director of public safety and chief of police at Princeton University, chief of police at Wellesley College, director of operations at the Department of Public Safety at Syracuse University, and president of the International Association of Campus Law Enforcement Administrators.

Peter: Steve and Fred, you both have experienced a ton of unexpected things during your many years on campuses, and I suspect that relatively little surprises you. That said, were there two or three things last year that had you thinking, "Wow, I didn't see that coming"?

Steve: Beginning during the last fall term and continuing throughout the spring, I had two conflicting reactions as to whether the campus protests and demonstrations related to the Israel-Hamas war raised new and surprising issues. On the one hand, most of the key legal and practical issues that confronted college leaders were similar to questions and challenges that confronted their predecessors during protests and demonstrations in prior years. It may be helpful briefly to identify these recurring issues since they will likely continue into the upcoming school year:

- (1) Free speech/First Amendment considerations, including that hate speech is protected; the narrow and hard-to-define exceptions for disruption of

This issue brief was prepared in July 2024 by the American Council on Education.

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operations, conduct, true threats, actionable harassment, imminent and likely violence and lawlessness; and time, place, and manner restrictions

(2) Allegations of disparate enforcement for different groups and their speech

(3) Whether the institution should take positions on controversial topics and the related issue of a college's own right to freedom of speech

(4) The scope and application (and ambiguities) of student conduct codes and related disciplinary policies and procedures

(5) Policies on building occupations, tent encampments, and structures

(6) Demands that the institution's endowment should divest from certain investments

(7) Whether and when to call law enforcement

(8) The importance of crisis management and communications plans

(9) Constructive engagement with student and community groups in advance of controversies

(10) Using protests as an educational opportunity

(11) Whether and when to dialogue and seek a resolution with protesters—even those who are violating college policies and/or the law

None of these issues are new. In one form or another, they have been germane to challenges faced by campus leaders going back to the 1960s, '70s, and '80s and continuing through the demonstrations and protests of the last decade. But I was surprised by three developments that—though not altogether new—seemed to add to the tensions.

First, the cultural—and I think it is fair to say political—divisions in our society added a toxic element to the events on campus. Certainly, there were political and societal divisions during [the] Vietnam [War] and the Civil Rights Movement—and, indeed, some would argue that campus protests played a role in the 1968 presidential election. More recently, those divisions were present in the demonstrations related to race and policing. But the degree of the politicizing of the First Amendment and of the harassment and discrimination issues on campus as well as the responses to the protests—for example, in congressional hearings and the resulting news coverage and opinion pieces—has been louder and more consequential than I recall in earlier protests. Who knew that student conduct codes would compete with inflation and immigration for political and press attention? The politics have created a kind of third rail that affects the language that is used by administrators and protesters alike, and this has contributed to, or at least complicated, how colleges respond to protests on campus.

Second—and not unrelated to the first—I have been surprised by the extent to which the key legal and campus community standards and issues have been redefined to suit the politics of the moment. The result is more uncertainty and confusion and less helpful guidance for college and university leaders. I offer two examples. Many have argued with some cause that campuses are too politically one-sided and the free speech rights of some have been chilled or limited in various ways, including by student conduct and harassment

policies and codes that are too quick to punish speech that should be protected by the First Amendment. These voices have further argued that free speech rights have been infringed by decisions and actions taken in response to disruptions of speeches on campus, with claims that colleges discourage and silence alternative and dissenting voices. These complaints have led to criticism of higher education institutions for being overprotective of certain groups and not compliant with the absolute protections of the First Amendment. Yet in connection with the protests and demonstrations on campus during the last academic year, many politicians and others—including, arguably, regulators—actually appear to have aligned with a polar opposite view that universities should punish or restrict a broader category of speech rather than protect and enable it. Surprisingly to me, these new arguments have suggested expansion of one or more exceptions to the First Amendment and greater protection of individuals and groups who are harmed by hostile and harassing speech that many would have presumed to be protected by principles of freedom of expression.

A third development that I might not have seen coming is the increased attention to Title VI of the Civil Rights Act of 1964, which prohibits discrimination in education based on “race, color, and national origin.” Compared to Title IX, the analogous law for “sex,” Title VI has received relatively little attention in recent years from regulators and politicians, though it has been interpreted by the two most recent federal administrations to apply to shared ancestry national origin. Specifically in connection with last year’s campus protests related to the Israel-Hamas war, the Office of Civil Rights [OCR] of the Department of Education has explained in a guidance document and elsewhere how Title VI applies to students based on their shared ancestry or ethnic characteristics, including students of Jewish, Palestinian, Muslim, Arab, and/or South Asian descent. OCR has also sought to explain how its view of Title VI harassment relates to First Amendment protections. This increased attention to Title VI is a welcome development for many, but it does appear to create what some might argue are new or at least newly developing legal standards for both harassment [and] discrimination and First Amendment protections that apply to the protests.

In sum, while protests and demonstrations over the past year raise many of the same challenges and questions we have seen for decades, they have also resulted in increased political attention to—and less deference to and more criticisms of—the decisions of colleges and universities as well as new legal perspectives related to both the First Amendment and Title VI. College and university leaders and their counsel would be well advised to track both of these developments.

Fred: I agree with Steve that many of the challenges of this past year have echoes of earlier times, especially campus protests of the 1960s and early 1970s. There are some distinctive features of the recent events, but I think that they fall less into the category of, “Wow, I didn’t see that coming” and more in the related category of, “Wow, we *should* have seen that coming.” I would mention four particular examples of ways in which developing phenomena of the past years were manifested this year.

First, although partisan politics has its roots in the early days of the country, it is fair to say that ours is a hyper-partisan climate, where positions held on a wide range of issues flow from a partisan identity. Higher education, of course, has not been immune from this phenomenon. Thus, we should not have been surprised by the highly partisan nature of much of the policymaker response to events on campus. Because hyper-partisan response may have become so typical, it is worthwhile to imagine how it might have productively been different. For instance, congressional committees charged with education oversight might have used their convening authority to gather university administrators and other experts to share experiences and views in an effort to produce best practices for campuses [that are] embroiled in controversy and, in some cases, violence. Instead, for largely partisan purposes, hearings became more political theater than substantive deliberation, failing to aid universities and in some instances hindering them.

A second trend over the past years that manifested itself in dramatic fashion last year is the plummeting public confidence in the higher education sector. Criticism of campus responses to protests and encampments—in some cases not without justification—found fertile soil in an overall distrust of university administrators and faculty. Stories of campuses embroiled in controversy received wide attention, while institutions that managed to navigate the past year peacefully received little or no comment.

Third, the contours of free expression have been severely tested on our campuses. While universities have a responsibility to respond to threats, they also have a responsibility for allowing expression that is challenging—and perhaps even offensive to certain members of the campus community. Efforts have been made to silence speakers or keep speakers away from campus because their very presence made some students feel unsafe. This past year [we] saw a wide range of students make such claims of threats to safety, and sometimes these claims were in conflict with one another with different groups on campus [that] sought to silence each other. The answer, and challenge, for campus administrators and faculty is not to prohibit free speech but to mentor and guide students as learners when confronted with expression that challenges their intellectual framework. Perhaps ironically—and as Steve notes—this view of free expression permeated the realms of state and federal governmental officials, where those who had been arguing for free speech on campus turned around and argued that campuses had done a poor job of restricting and punishing certain forms of expression. Many of us who have advocated for unwavering support of free expression in the absence of actual threats or harassment or undue interference with the operation of the university found ourselves in the unusual position of being considered left wing for defending expression by progressives, whereas not long ago we were critiqued for being right wing in defending expression by conservatives. In truth, the core value of free expression on our campuses is neither left nor right wing but rather an assertion of the essential mission of academic institutions. Asserting this aspect of a university's mission to a wide range of constituencies this fall and beyond—including to students, faculty, alumni—may have the added salutary effect of helping to dial down the temperature on our campuses even as we confront increasingly contentious issues.

The fourth example of an evolving trend that played a major role on campus last year was the ever-increasing impact of social media. What happened on one campus inspired behavior on other campuses almost immediately. Moreover, the line between on campus and off campus became hard to draw. Indeed, the concept of controversies quieting down over breaks in the academic calendar no longer applies as it once did. Students may leave campus, but they never leave their screens.

All of these phenomena contributed to the scope and intensity of the events engulfing many of our campuses this past year. Looking back on it now—if we were surprised, we probably should not have been.

Peter: Steven, it seems that the folks in charge of campus policing and security often found themselves in a “damned if you do, damned if you don’t” position last year. Is that inevitable, or can it be avoided—or at least minimized—going forward?

Steven: Based on the conversations I’ve had with several colleagues who were at the center of some of the more publicized events last year, I know there is a strong sense that campus safety executives are in tough positions, with conflicting and often confusing guidance from campus leadership. I haven’t quite understood why the recent protests and encampments have caused us to stray from best practices and lessons learned from past similar situations.

Having said this, I believe there absolutely are opportunities for eliminating ambiguity that can arise during critical decision processes. This has to start now—before the fall term begins—by establishing clear and straightforward roles and responsibilities for campus partners during events and incidents and by reestablishing the norms we expect all campus members to abide by in these situations. Furthermore, it is important

to establish in advance a mutual understanding amongst decision-makers of the sorts of circumstances and conditions that ought be construed as inconsistent with expectations. Obviously, this means institutions should be reviewing all their potentially implicated policies. This includes not just those that deal directly with time, place, and manner regulations but also those that deal with other issues that arose last year, such as discrimination based on ethnicity, religious affiliation, national origin, et cetera, as Fred and Steve mention. Student codes of conduct certainly are implicated here, and we know that many students are still embroiled in conduct proceedings from situations that arose during the recent spate of activities.

I also think it is vitally important for each institution's leadership—presidents, chancellors, and board members—to understand and approve, before a need arises, the process decision-makers will use during rapidly unfolding events like a confrontation between opposing groups, a building sit-in or takeover, or an encampment. As importantly, they need to communicate clearly and unequivocally down the line to those who they invest with campus safety responsibility that they also have requisite authority.

Naturally, I would expect institutions to use an emergency management framework and approach, as these provide the best possible infrastructure for pan-institutional decision-making during critical incidents. An emergency operations center, as an example, which requires participation from a wide range of institutional decision-makers, is one of the best models for real-time communications between those on the front line of these events and decision-makers who may have varying perspectives on how certain actions may escalate or de-escalate a situation. If a situation may need coordination with or response by local or state authorities, joint decision-making efforts can be enhanced by establishing in advance a multiagency coordination group (MAC group), sometimes called a policy group, typically consisting of external agency administrators and campus officials. These MAC groups can provide policy guidance to incident personnel, support resource prioritization and allocation, and enable discussion and decision-making among elected and appointed officials and senior campus executives. When successful, this approach helps address questions of control while ensuring the tactical approach is consistent with mutual expectations.

Administrators across the institution should work collaboratively to identify open areas, facilities, and buildings that may have been historically used as places for disruptive activities and take steps to mitigate or prevent future opportunities. Such activities should include strengthening the physical security of the space within the interdependent elements of structural components—barriers, fencing, bollards, et cetera; electronic components—such as access control, cameras, and alarms; as well as human components—visitor management, campus safety officers, et cetera. While these should always be a part of a broader risk management and vulnerability assessment strategy, identifying such areas and proactively addressing any gaps can mitigate risks during anticipated free speech challenges or disruptive activities.

A number of campus safety executives have reported success with their institution's creation of a demonstration response team (DRT). This team, made up of student affairs staff members and others from across the institution, is responsible for being onsite during demonstrations, staying attentive to participants' free speech and assembly rights, advising demonstrators if they are violating campus policies or laws, and coordinating the staging of the event including with the MAC group, if necessary. DRT members should seek to make contact with organizers before or as an event unfolds to ensure mutual understanding of the institution's expectations and the general rules of engagement. While the precise team membership varies from campus to campus, team members should receive specialized training for their roles.

Whatever approaches an institution chooses to use, one of the most important outcomes needs to be a definitive understanding regarding who is making decisions about matters that directly impact campus safety. Is it the chief of police or head of campus safety; is it the provost, president, or chancellor; or is it some

combination of all the above? I've heard from colleagues that this has been quite a shell game, and we need to eliminate this ambiguity for the sake of everyone involved—including those participating in protest activities.

Finally, campus safety executives need to be very clear with senior leaders about the potential need and the implications of activating mutual aid (i.e., calling in municipal, state, or other police) to assist in maintaining peace on campus, dismantling an encampment, or providing other types of support. The further we allow prohibited behavior to continue, the more complicated an intervention becomes. So, institutions need to have bright-line triggers regarding when and how they will request support, and they need to have this in place before the need arises—ideally via agreements with law enforcement partners about what they can provide, the timing of that support, and the rules of engagement once the partner agency activates support. Importantly, institutional leaders—along with media commentators and policymakers who may grill them after-the-fact about police response to campus unrest—must recognize that once institutional leaders request mutual aid, they will cede most of the control over the situation and, thus, the direction the event will take. That said, we must acknowledge that there is no university police department in the United States that can appropriately manage a large-scale demonstration without support from their external law enforcement counterparts; however, calling in the cavalry—as we have heard it referred—is not a panacea.

Peter: Fred, when you were a college president, I suspect that student safety was top of mind and your worst nightmare involved a death on campus. As a free expression scholar, you may view efforts to limit—or worse, silence—the voices of college students and inhibit their passion as a last resort. How ought presidents, chancellors, and their boards be thinking about the tension and the importance of both?

Fred: Campus safety is always top of mind for a college president. Ultimately, it is the president who is responsible for the safety of all members of the campus community: students, faculty, and staff. During my tenure at Brandeis, we experienced the Boston Marathon bombing, during which our campus and surrounding towns were in lockdown while the search for presumed highly dangerous suspects took place.

When thinking about the tension between safety and free expression, it is useful to begin with the recognition that free expression and academic freedom are fundamental to the mission of institutions of higher education. If one looks at the range of university mission statements, most include some version of the discovery and creation of knowledge and the transmission of that knowledge through teaching and scholarship for the education of our students and the benefit of our local, national, and even global communities. Robust free inquiry and free expression are essential for the execution of this mission. Although this may sound obvious, it is easy to lose sight of it during times of campus crisis. We can obtain a level of clarity with respect to a wide range of issues when refracting a particular question through the lens of how this does or does not advance the mission of the institution. For example, there were words and slogans expressed last year—some extreme—that were critiqued from those outside the academy who asked why students were even allowed to express such views. The mission of the university provides at least two sets of answers. First, institutions of higher learning exist, in part, to raise questions as to conventionally accepted views. Students participating in this process should not be over-deterred. Second, if positions advocated by students are without factual basis, the first reaction of the institution should be to educate these students, not to punish them.

Where student expression is involved, remembering that expression is essential for the institution's mission helps clarify that we do not just weigh the merits of the expression to decide whether to permit it but rather we presume that the expression is protected. The mission of the institution also helps to locate the boundaries of free speech or—to put it in legal terms—determine whether the presumption of protecting expression has been rebutted. Expression is not to be protected when it constitutes actual threats, harassment, incitement

of violence, or undue disruption of the operations of the university. The lines can be sometimes difficult to draw, but in some instances the lines are clear. For example, demonstrating in front of a building is protected, but blocking or occupying a building is not. Expressing sentiments that cause another to be upset or even offended is protected, whereas targeted behavior that threatens, intimidates, or demeans a person is not. There is one further level of refinement to be added. A university may enforce content-neutral rules that further its mission. For example, noise levels outside of a classroom building or library during certain hours could be limited so not to interfere with instruction. But such rules must be applied irrespective of the content of the speech and must be enforced evenly by the institution.

Returning to the specific issue of safety, students are entitled to be physically safe but not necessarily intellectually safe. Whether in a classroom or on the quad, students may be confronted with unpleasant written or oral expression, including views that challenge their most deeply held beliefs. But no one may threaten or harass another on campus, and the university has both the right and obligation to see that they do not.

Peter: Can a college reconcile and manage the fact that speech and behavior could be legally protected under the First Amendment for public institutions or protected under a private institution's definition of free speech yet still be a violation of an institution's student code of conduct?

Steve: As a general matter and before considering caveats and explanations, I think the correct legal answer is no. If after considering the context and all of the circumstances, the college decides that particular speech is protected by the First Amendment or under an institution's legally binding policy or commitment to free speech, then the college cannot punish a student for engaging in such speech in violation of the student conduct code. Full stop.

However, since we know that such an unconditional statement can be taken out of context and used against a college leader who does not cloak it in qualifications—politically correct or otherwise—I offer several limitations and suggestions for how to answer such a question in public discourse.

First, faced with speech that is hostile and offensive but likely protected by the First Amendment, the school may take various actions short of discipline. In fact, faced with allegations of verbal harassment that creates a hostile environment under Title VI, including shared ancestry—and even before concluding that the speech is protected—the school is required to investigate and assess whether the speech constitutes actionable harassment under the appropriate legal standards. Even if it concludes that the speech is protected under the First Amendment and the school cannot punish the speaker, the school may decide to take other remedial action.

Second, a college leader, dean, or other spokesperson can qualify any conclusion or statement that particular speech is protected and not disciplinable by the admonition that they denounce and reject the particular offensive speech. The college has its own free speech rights and can exercise them to distance itself from protected speech that it finds abhorrent. This is somewhat inconsistent with the view held by some that colleges should not take positions on matters of current public interest, but this too depends on the circumstances, such as the degree of connection between the speech at issue—Is it off-campus, on private social media, by a member of the campus community?—and the campus, which might justify the college's statement. Also, institutional speech can be viewed as chilling First Amendment rights if directed at a student whose own speech is protected but criticized and might therefore itself be a violation of the student's First Amendment rights. This is a classic catch-22. If the school stays silent in the face of offensive but protected speech, it might seem to approve the offending speech. If it speaks out, it could be accused of chilling protected speech. At the end of the day, what avenue a school chooses depends on the particular facts and its policies, practices, and risk analysis. The point here is that a school need not just say that offensive speech is protected and leave it

at that. It should at least consider issuing its own condemnation of the offensive but protected speech so that there is no misunderstanding of its position or values.

Third, a school may distinguish between policies like a student conduct code where a violation leads to discipline and policies such as a set of principles or core values that are not used in disciplinary or employment decisions. The former would be subject to a First Amendment analysis because there are official consequences, but the latter would not be. A good example is that it may be a core value to act with civility, but punishing a student or employee for speech that is uncivil probably violates the First Amendment.

Fourth, unless the law of the state applies the First Amendment to a private college—as the Leonard Law does in California, but not to religious schools—a private school, even if committed to free speech, may have more flexibility than a public institution to actually prohibit and therefore discipline protected speech.

Fifth, in response to offensive speech that is protected by the First Amendment and not disciplinable under a student conduct code, a school may require training or education for all or a group of students and employees—not just the accused individual, who cannot be singled out and punished. It can provide support for students who may feel harmed by the offensive speech, and it can take other action to create a welcoming environment.

In short, in connection with any public statement by an institution or one of its leaders regarding a particular hostile and offensive speech being protected by the First Amendment and not punishable under the college's student conduct code, the school should consider including appropriate qualifications or actions. Most importantly, these actions and explanations can improve the climate on campus and provide protection for students going forward. They also avoid the false appearance that the college does not care and/or is not taking any action.

Peter: Is it even possible to describe in clear and understandable terms to students, faculty, and others in the campus community what constitutes permitted speech without consequences to the speaker, and what constitutes speech with consequences? Is it worth doing?

Fred: It is certainly worth articulating the institution's approach to free expression clearly, but I would suggest that the two categories alluded to in this question are incomplete.

The articulation of free expression rules should be grounded in the university's mission. As I discussed, universities should begin with a strong presumption that speech will be protected because free inquiry and free expression are essential to the accomplishment of the institutional mission to create, discover, and transmit knowledge. This presumption will be overcome if the speech involves actual threats, harassment, and incitement of violence and/or if it causes an undue interference with the operations of the university. Examples often aid in providing clarity. As mentioned earlier, demonstrating in front of a building would be protected, whereas blocking others from entering or leaving the building or occupying the building would not be.

There are two major additional factors that must be taken into account to create a fuller and more nuanced approach to expression issues. First, there is a difference between what students *may* say and what they *should* say. For example, students may have a right to say rude things to one another, but a college that believes in educating the full person may try to find a way to influence students not to exercise that right. Your question spoke in terms of consequences. If we think of consequences in the disciplinary sense, then no, a student should not suffer disciplinary sanctions for being rude. But if we expand our sense of consequences to include counseling—perhaps a conversation with a dean, professor, or dormitory adviser—then yes, a student should receive the benefit of mentoring as opposed to punishment. We are not primarily disciplinary or punitive institutions; we are primarily educative institutions.

Second, up until now, we have been talking about free expression and primarily about students. Faculty—on issues not related to their professional competence—receive largely similar protection. The rules are different when we consider faculty expression on issues within their areas of academic expertise, both in their scholarship and in the classroom. To take a simple example: As a matter of free expression, I may say that the moon is made of green cheese. But if I were a professor of astronomy, I should not be surprised that this statement may press against or over the edges of academic freedom and have significant professional consequences, affecting whether I am promoted or tenured or even hired in the first place. Whereas free expression is grounded in the human need to communicate, academic freedom is grounded in the mission of the university to discover and create knowledge. Free expression is mapped on the axis of self-expression versus harm to others; academic freedom is mapped on the axis of professional competence and the ability to advance the mission of the institution.

Peter: What about explaining to campus leaders and their staff the obligations and responsibilities they may have when hateful or otherwise objectionable speech makes some students feel uncomfortable or even distressed but is permissible and without consequences to the speaker? Is this necessary to do?

Steve: As noted in my answer about the student conduct code, I think this is a good idea. The school needs to avoid defaming or chilling a student whose speech may be protected, but education and training about a school's obligations and responsibilities, including under Title VI, is almost always appropriate and a good idea. Since the institution has a legal obligation in the eyes of OCR to do some kind of analysis of allegations of hostile environment harassment and discrimination, it is necessary to communicate this responsibility and the legal standards under both the First Amendment and Title VI to campus leaders and their staff. Recent Title VI guidance from OCR underscores the college's legal responsibility to assess and evaluate claims of hostile environment harassment, including speech that is alleged to make students feel unwelcome. This is necessary as part of the Title VI analysis, and it seems clear that it also needs to be done even before a college may conclude that disciplinary action is not an available alternative because of the First Amendment.

Peter: Could today's students—and perhaps some faculty as well—benefit from a primer on civil disobedience and the expectation and acceptance of consequences flowing from it?

Fred: There is a misconception that civil disobedience is a defense to the normal consequences of rule- or lawbreaking. In his celebrated essay "[Letter from a Birmingham Jail](#)," Dr. Martin Luther King [Jr.] famously wrote that "[o]ne who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty." Dr. King spoke of those who broke the law "in order to arouse the conscience of the community over its injustice." He said that in doing so and in "willingly accept[ing] the punishment of imprisonment," the civil disobedient expresses "the highest respect for [the] law."

It would benefit our campus communities to have the essence of civil disobedience and its relationship to punishment more clearly articulated. That said, as I stated, our colleges and universities are not punitive institutions—they are educative institutions. Thus, all punishment should be imposed in light of educative goals. Moreover, the intent of the actor is typically a factor in mitigating the level of punishment for a violation of a rule or law. Campus leaders who approach rules violation with a sense of counseling and educating rather than investigating and punishing are likely to be more successful in accomplishing their mission with respect to students who have violated the university's rules. To be sure, this approach has been made more difficult by the climate that we discussed earlier. Counseling and educating students on contentious issues is hard enough under any circumstances, but it is significantly harder when it takes place in the glare of public attention and of some policymakers' suspicions.

Peter: How important is clarity regarding consequences and consistency in following through with them?

Steve: I would distinguish between—on the one hand—clarity about the scope of the First Amendment and relevant policies and laws applicable to protests and demonstrations and—on the other hand—consistency in application. Clarity in policies that may lead to discipline is essential for reasons of due process and fundamental fairness. Students and employees should not be disciplined for violation of vague or ambiguous standards that they do not know about or understand. Of course, this is easier said than done, particularly with changing standards or at least perceptions such as we currently see with respect to the First Amendment, Title VI, and Title IX. That said, clarity about legal and institutional obligations should be the goal.

Consistency in application is more nuanced and difficult. On the one hand, the First Amendment prohibits discriminatory enforcement based on viewpoint. Inconsistency in application at public institutions may be, in fact, a First Amendment violation. And to tell an administrator to pick and choose against whom to enforce a policy is asking for trouble because subjective decision-making can lead to inconsistent application, making it more easily attacked as discriminatory. But the facts always matter, and administrators need to have some discretion as to when and under what circumstances to take enforcement actions. Applicable legal standards are not always clear, and administrators need to exercise some judgment in applying the law and institutional policies. Even when the rules and facts are clear, rigid decision-making that, for example, leads to arrests whenever a protester violates a time, place, and manner rule is not in the best interests of the institution because there are just too many variables for a one-size-fits-all application.

When and how to exercise discretion in enforcement is a large and complex subject with respect to all rules in society. On campuses, certainly the decision-making process might include consultation with law enforcement and student conduct officials, an analysis of the seriousness of the infraction, the amount of notice provided prior to enforcement, the clarity of the obligation, the distinction between criminal enforcement and initiation of student conduct proceedings, the number of individuals involved, the harm to others, whether or not there are other bad acts, precedent, reputational consequences, et cetera.

Peter: Let's talk face coverings. Last spring, lots of videos and photos appeared from campus protests and encampments of individuals with face coverings, presumably to preserve anonymity and avoid consequences. Can colleges and universities prohibit or limit face coverings on campus? Should they?

Steve: This topic begins with the need to identify and analyze state and local law. There are 15 to 20 states—and some cities—with anti-masking laws, some of which date from attempts to respond to unlawful conduct by the Klu Klux Klan. If a state has such a law, then the institution should consult with law enforcement in deciding if it applies on its campus and whether to enforce it. Some of these statutes have been struck down by courts based on First Amendment or overbreadth concerns, though others—such as a New York law, now repealed—have been upheld.

If there is no state or local law, then—consistent with consultation with law enforcement—the school may wish to consider whether to adopt a policy prohibiting masks in certain situations. There are competing considerations, and the institution will need to balance the interests of law enforcement, including the need to identify individuals who commit criminal acts, with the privacy and speech rights of individual protesters. Protesters may argue that anonymity is critical for them to exercise their free speech rights or that wearing a mask is itself an expressive act of speech. They may also argue that a newly adopted policy is in retaliation for a group exercising their First Amendment rights or is discriminatory based on viewpoint or Title VI.

If a school does decide to adopt an anti-masking policy, it may want to limit its application to individuals who are engaged in other criminal conduct. Some of the existing statutes are so limited. This may help to

deflect constitutional challenge as well as objections from campus groups. A school might consider adding to the scope of such a policy a provision that prohibits the wearing of masks by individuals who are engaged in harassment or intimidation, though these terms risk being challenged as overbroad. Also, if an anti-masking policy applies to a student engaged only in a student conduct code violation and is not used to cover up other criminal behavior, then the arguments in favor of the policy—or enforcing such a policy—are less strong.

In evaluating the costs and benefits of an anti-masking policy that goes beyond ongoing criminal conduct and applies to otherwise legal conduct of students and employees—as opposed to third parties, who can more easily be regulated—a college should consider the reputational costs in addition to the First Amendment risks. The appearances of such a policy suggest more of a police state or Big Brother image than the institution may wish to adopt.

Peter: Steven, what sorts of preexisting agreements tend to exist between a college’s campus safety department and external law enforcement? Are there lessons learned from some experiences last year that ought inform the review of those agreements and perhaps changes, additions, or clarifications to them?

Steven: Unusual occurrences, campus emergencies, and some more routine events—e.g., sporting events—on campus may require augmented law enforcement capabilities to restore order, protect property, assist victims, or generally provide for the safety of the campus community and visitors. Memoranda of understanding and mutual aid agreements are formal mechanisms to coordinate multi-jurisdictional responses by clearly outlining agency roles and expectations. While many institutions already have these agreements, this is a good moment to review and ensure they remain current, particularly within the context of anticipated events. Agreements should provide all of the necessary information to initiate mutual aid activities on behalf of the institution. For example, they should address questions relating to who can request mutual aid, under whose control mutual assistance is responsible, and where mutual aid will report. Furthermore, such agreements should have procedures for radio communication, as well as documenting—reporting—activities. All of this is essential for establishing clear lines of authority and avoiding ambiguity.

Over two-thirds of the colleges and universities in the United States that enroll more than 2,500 students have sworn and armed campus police departments. They serve particular and unique communities within a community. As distinct and scope-limited operations, these departments differ in many ways from their surrounding municipal, county, and state law enforcement agencies. Yet, fundamentally, they are charged with a similar duty to protect. Mission success on campus and in adjacent municipal areas of responsibility requires a clear, preexisting understanding of roles and expectations and consistent communication and coordination with partner agencies.

There is an adage in emergency management about not wanting to exchange business cards in a command post. While business cards are quickly becoming a relic of the past, the sentiment inferred—that the time to meet your partners is not when you need them—is quite apropos in these scenarios. In addition to having robust agreements in place, it is highly desirable for campuses to develop strong relationships with partners. These should include functional and full-scale exercises where participants react to realistic simulated events and implement the plan and procedures. What’s more, these type of exercises test collaboration among the agencies and participants, public information systems, communications systems, and equipment. The organic outcome of such activities should be robust partnerships, building trust, and reaching mutual understanding about the unique service roles of each entity. Moreover, this well-coordinated effort bolsters community confidence and safety on and off campus through a more effective public safety response. From previous events, we have all learned valuable lessons relating to the specificity included within these agreements as well as the need for broad collaboration and buy-in from internal campus as well as external community stakeholders. What

this means is that the time to make connections between various impacted entities is not when the agreement is invoked but rather when you put it into place.

Peter: A related question—when external policing resources are deployed to a campus, whether in response to a request for assistance or otherwise, what’s typical in terms of who has strategic and tactical control? Can this be negotiated in advance?

Steven: As I suggested earlier, campuses and external agency administrators should establish MAC groups that can provide policy guidance to incident personnel, support resource prioritization and allocation, and enable decision-making by those directly responsible for incident management. This approach allows the campus and its community’s needs to be represented in decision-making and in command and control processes. When successful, this approach helps address questions of control while ensuring the tactical approach is consistent with mutual expectations. However, as noted earlier, requesting mutual aid from external law enforcement is likely to carry with it ceding ultimate control over the situation.

Peter: Within an already fractured country, we have a presidential election coming up as well as lots and lots of down-ballot elections. Ahead of November 5, there will be voter registration initiatives, invited and uninvited candidates, issue advocacy, rampant social media activity, early voting and election day polling locations, and vigorous, often emotional debate and discussion among students, faculty, and staff about all of this. Steve, do campus leaders need to think differently about safety, security, and free expression in this context than they do in others?

Steve: As a general matter, I think the free expression/First Amendment issues are the same for speech and protests related to political activity as they are for speech and protests that are not tethered to such activity. So, if protests and demonstrations relate to appearances by candidates or surrogates, or to voter registration drives, or even to polling places on election day, the same free speech standards apply. There are additional legal restrictions and protections that apply to election-related activity, such as state laws that prohibit campaigning within certain distances from a polling booth and wearing signs in a voting place, and these other laws may help inform the application of First Amendment principles. But the First Amendment protections would still apply, subject to these more specific laws. Several Supreme Court cases test the constitutional reach of such laws.

The election-related activities this fall on campus will offer, in a sense, a forum or opportunity for protesters and demonstrators to be heard. As with graduation ceremonies, they increase the likelihood of protests and disruptions and underscore the need to be prepared.

The expected tensions from the presidential election also increase the risks that parties and candidates and their supporters will find blame with how colleges handle political activity and related protests and demonstrations. Colleges can expect challenges for alleged differential treatment based on political affiliation. With respect to the constraints on campaign-related activities, ACE’s issue brief titled *Student Voting and College Political Campaign–Related Activities in 2024* is the gold standard for information and advice and should be the first resource for college leadership.

To go to the heart of the matter, the Internal Revenue Service prohibits private colleges from directly or indirectly participating—that is, supporting or opposing candidates—in political campaign activity, and many publics have similar constraints based on their policies and/or state laws.¹ As applied to protests and

1 See American Council on Education, *Student Voting and College Political Campaign–Related Activities in 2024* (Washington, DC: American Council on Education, 2024), 8.

demonstrations, this means that colleges may not favor or disfavor a candidate or party in how it handles protesters and counter-protesters at campaign events. Unequal practices would likely constitute supporting or opposing. Does the college apply an even hand to hecklers? The same level of protection and security for speakers? Does it apply policies on structures and masks equally? Does it analyze safety and security concerns in the same way? Does it apply the same standard for harassment and discrimination at one political demonstration or counter demonstration as it does to an opposing or competing rally? And so forth.

Colleges should assume that every decision they make about protests and demonstrations related to political activities will be evaluated under this legal requirement of no preferential treatment. Some candidates may welcome the opportunity to make a complaint and accuse a college or university of unequal treatment.

Beyond this standard of equal treatment and no preference or interference, as suggested, colleges should recognize that there are a multitude of laws that apply uniquely to political activities on campus. There are state and federal laws that apply to voter registration, interfering with voting, campaigning within a certain distance of a voting place, wearing signs in a polling place, and so on. These laws are outside the scope of this issue brief, but they could be implicated by political protests and demonstrations. For example, demonstrators could block voters from exercising their right to vote or engage in acts of intimidation. Legal issues related to the violation of such election laws would mostly fall to state and federal officials, although college leaders and college law enforcement might well be involved.

Given the heightened tensions related to the upcoming elections and the increased risk that the protests and demonstrations we witnessed this past year will continue into the fall and could overlap with political activities of various kinds, it might make sense for college officials to communicate with local, state, and federal election officials in advance of the fall elections. This is particularly true for those colleges that will host polling locations on their campuses.

Peter: We hear a lot about policies, and last term we even heard about tenting policies. Who knew? What key things ought be on a checklist of policy reviews and updating, with an eye toward correcting things that went wrong this past academic year and trying to anticipate new wrinkles to come?

Steve: Over the past couple of decades, there has been a significant increase in the attention paid to institutional policies at colleges and universities. This is due to several factors, including the increased focus on compliance, risk management, best practices, and, yes, legal issues. As a result, many institutions—formally or informally—have policy offices or gatekeepers, policy committees, regular policy reviews, and the like. These structures help ensure that policies are updated and gaps are filled as needed. I suggest putting someone in charge of policies and even, depending on the size of the institution, adopting a policy on policies. This is the best way to avoid gaps and fill them when identified. Here is a partial list of some of the more important categories of policies and practices that it might make sense for a college to review with an eye toward issues that arose during last year's protests and demonstrations and/or might arise in the near future.

A free expression policy is useful both to establish standards and to educate the community. It could be narrow or broad but should at least include a cross-reference to various other policies that might bear on free speech. It could include a statement of principles; hypotheticals to illustrate difficult situations; who makes what decisions; the relationship to academic freedom; the relationship to laws such as Title VI and Title IX; designations of different parts of campus that allow gatherings such as protests and demonstrations, including whether or not structures and tents are allowed; speakers

invited by student groups and/or paid with student fees; special rules on demonstrations [related to] approval, loudspeakers [etc.]; and time, place, and manner restrictions applicable to various activities.

Nondiscrimination policies may need to be updated in light of new perspectives and/or changes in Title VI and Title IX.

The *student conduct code* should be scrubbed for consistency with the freedom of expression and discrimination/harassment policies and informed by new guidance from governmental authorities, such as OCR.

The *student disciplinary process(es)* should be revisited, having in mind issues that can be anticipated such as effect on graduation, what happens over the summer, when suspension is appropriate, and the relationship to criminal proceedings.

Orientation and training materials should be reviewed and updated to reflect legal developments, amended policies, recent experiences, compliance obligations, et cetera—at least as they may be relevant to demonstrations and protests.

Crisis management and emergency preparedness plans as well as *communications plans* should be reviewed to be sure notice of events, such as protests and demonstrations, is provided to the right people and they are included in decision-making.

Fred: Steve has provided a comprehensive and very useful list of categories for consideration by universities and colleges as they look forward. Let me add just a few additions to this list.

Over the past years, a number of institutions have adopted formal systems of enterprise risk management [ERM], identifying the key risks to the university and the stakeholder with primary responsibility for addressing these risks. Those who have not done so should consider this as a good time to commit to such an approach. But even for those who have engaged in ERM, there is a tendency to focus on financial or structural issues, such as maintaining net tuition revenue in a time of falling enrollments, increasing operation costs, or the constellation of challenges revealed by the COVID[-19] pandemic. In an era of increased campus activism, ERM must include academic and student affairs professionals and an evaluation of a range of reputational and safety risks presenting by protests and demonstrations.

As mentioned, the increased role of social media and remote participation in the academic and social life of the university challenges previous notions of on-campus versus off-campus activities. Policies concerning a wide range of student and faculty issues should be examined as to the breadth of their applicability. For example, campus code concerning harassment may plausibly apply to conduct that physically never occurred on or near campus.

It seems simple to say that time, place, and manner regulations must be content neutral. But content neutrality can be a complex matter. Rural campuses may have traditionally permitted or even encouraged camping out on campus. Last year's encampments may be hard to distinguish from such activity without reference to the content of the demonstration's expression. Rules regulating the time, place, and manner of expression should be subject to a version of a stress test, applying a wide range of hypothetical cases to make certain that the university is prepared to enforce the rule consistently and in a content-neutral manner.

Throughout this discussion, we have been focusing on students, faculty, and staff. Some of the most troubling events of the last year involved non-campus community members joining in demonstrations and even the occupation of buildings. Universities would do well to evaluate their policies toward outsiders. For private universities, this can be as straightforward as invoking trespass laws. But even for public universities, rules setting out the boundaries of a limited public forum may be helpful going forward. Once again, questions of content neutrality may be particularly challenging. Restrictions of campus activities by outsiders cannot be based on the content of their expressive activities. Finally, in drafting policies concerning outsiders, universities must give particular attention to special groups of outsiders who are in fact stakeholders in the institution, such as alumni and parents of current students.

Peter: Most college campuses have no fences around them. Essentially, they are open to the public, and, speaking of outsiders, we saw last year a comingling of community members and people who had no connection to the institution within protest and encampment areas as well as vandalizing property and being arrested. Steven, is there anything that can and should be done to prepare for outsiders on campus in the fall?

Steven: It is incumbent upon campuses to establish clear policies and guidelines on accessing and using its facilities, precisely because most college campuses do not have fences around them and instead aim to create and maintain open and inclusive environments. The institution's department of campus safety is rarely the owner of these policies. Therefore it is of equal importance for the appropriate policy owner to collaborate with the campus safety department on a routine basis. We have found that such collaboration often results in appropriate steps to enforce these policies occurring consistently and uniformly, recognizing that the right to protest does not include the right to engage in conduct that intentionally or recklessly interferes with the campus's operations or infringes on the rights of other members of the community.

Policies should be straightforward and clear that visitors—as well as faculty, staff, students—who intentionally act to impair, interfere with, or obstruct the orderly conduct, processes, and functions of the institution may be subject to appropriate institutional action, including criminal prosecution. These policies should clearly establish the activities that the institution will not permit and the actions it may take to address them. Furthermore, campuses should socialize these policies with constituencies both through traditional means—e.g., student handbooks, new student orientations, new employee orientation, faculty meetings—as well as through social media and community organizations.

Peter: We've all heard the phrase "expect the unexpected." Okay, fine. But how might campus leaders plan for the unexpected this fall?

Steve: In a real sense, planning for the unexpected is a central purpose of ERM that Fred mentions. ERM plans are intended to predict and plan for risks and harm that will arise in the future. As a first step, colleges and universities should consider whether protests and demonstrations should be identified as a discrete risk in their ERM plan and, if so, whether mitigation plans are in effect. This might include any of the suggestions noted in this issue brief, such as a review and clarification of policies, engagement with student and community groups, and clear communication with law enforcement.

In creating ERM programs, many institutions follow a process that seeks input from a wide range of offices and individuals. This ensures taking advantage of group wisdom, and it also helps connect the dots and avoid gaps. I would suggest such a process be used as part of any risk management program but also more specifically for identifying risks within the category of protests and demonstrations. In doing so, colleges may wish to pay special attention to advice from their student affairs professionals and law enforcement as well as their legal, compliance, risk management, and communications offices.

Finally, in anticipating risks and developments in the future, it is particularly important for college leaders to follow best practices of good leadership and governance. I think this would include the following—admittedly general—practices: keep up with current developments in the news; talk to your peers; confer regularly with a wide range of your colleagues on campus; engage with student and community groups; open and maintain dialogue with individuals and groups you disagree with on current issues of the cultural and social divide; respect differing viewpoints; ask questions and listen; spend time thinking about the future; welcome and own change; be particularly attentive to crisis management, emergency planning, and communications; don't blame the messenger; as an individual, you don't know best; you are only as good as your team and your community; follow the mission; and, with respect to all of the matters discussed in the issue brief, presidents should communicate with their boards—or board leadership, depending on the institution—regarding significant risks and developments that may bear on the board's own fiduciary duties.

Steven: I have seen many campuses that have built comprehensive emergency operations plans in a “set it and forget it” fashion. Living, actionable plans rely upon the concerted efforts of various offices and officials across the campus. It is paramount that each affected group is familiar with their role and responsibilities within the plan and is comfortable acting accordingly. Dwight D. Eisenhower famously said, “Plans are worthless, but planning is everything.” Campus leaders need to lean into this philosophy, as it is during the planning process that institutions often identify gaps in their approach and can adjust appropriately so that when the plan is enacted, it is ready to go.

We recommend that institutions rely heavily on the U.S. Department of Education's *Guide for Developing High-Quality Emergency Operations Plans for Institutions of Higher Education*. The critical components of the institution's emergency operations plan should become second nature to campus officials who are charged with its implementation. Everyone involved in the plan should know their roles and responsibilities before, during, and after an emergency. Each campus community member should be assigned specific roles in the plan requiring special skills, such as first aid, threat assessment, using an incident command system, and providing personal assistance services for students and staff with disabilities and others with access and functional needs. At least once a year, each institution should hold meetings to educate all involved parties on the plan. These meetings should include campus administration; department heads; the public information officer; student affairs; community partners such as first responders, emergency managers, and public and mental health officials; other community entities and stakeholders; and the media. Coincident with these meetings, campus senior leadership should review the plan to familiarize themselves with it and with these stakeholders.

As an aside and reminder, the Clery Act requires all institutions receiving Title IV funding to test its emergency response and evacuation procedure on at least an annual basis. This process forms the basis of an all-hazards approach to preparedness, allowing the campus to respond appropriately to the unexpected.

Peter: So, what about things that are, in fact, reasonable to expect? Looking ahead to the fall term, which will wrap around the November elections, as well as the anniversary of the October 7 attacks, what two or three things do each of you see as most crucial for campus leaders to anticipate and plan for?

Steve: Colleges and universities can anticipate that they will continue to be the subject of attacks by politicians and other critics. This includes but is certainly not limited to their handling of protests and demonstrations. In response, I think campus leaders need to stay laser-focused on their institutional missions. They have to do their best to manage the conflicts, but they should strive to demonstrate and communicate to their communities and to the public the good that colleges and universities contribute to society, including by maintaining an open and welcoming climate.

I would anticipate increased internal divisions on many college campuses. The disagreements and disruptions on campus over the Israel-Hamas war may become worse, and/or new divisions will emerge. Conflicts between student groups are particularly concerning. In response, I would urge campus leaders to consider how to use dialogue and education as constructive ways to respond both to the underlying conflicts and to particular protests and disruptions. Campus leaders should begin or continue discussions with student groups as soon as possible so that avenues of communication are open. They should celebrate freedom of expression by welcoming the opportunity to learn, to educate, and to dialogue with others, including protesters and others with whom they may disagree.

Steven: We should expect the rhetoric and expressive activities to ramp up to levels rarely seen in recent times. It will be essential for any campus actions to be informed by an intelligence-led approach based on situational awareness. Campuses should engage fully with their communities to understand the community, its tolerances, and boundaries. Campuses should establish clear policies and training programs for crowd situations to facilitate free expression, de-escalate violence, and resolve conflict peacefully to ensure public safety and protect the First Amendment rights of free speech and assembly. These plans should address lawful and unlawful crowd control situations. In the event a crowd situation is determined to be a peaceful protest or demonstration, wherein participants are exercising their rights to free speech in a lawful manner, the policy should be to facilitate the event to the extent possible. Campuses should prioritize establishing communication lines with the demonstrators before and during the crowd situation and consider social media as one means of communication.

Conversely, policies and protocols for addressing a crowd situation that is unlawful should address appropriate responses by various campus leaders and their staffs, including those in student affairs, campus safety, and law enforcement. We believe these policies must be particularly attentive to scenarios where a lack of action may lead to escalating criminal behavior and violence. Furthermore, the policies must include steps to restore order, including monitoring with minimal police presence—or alternatively a strong police presence—selective arrest of those committing crimes, or a dispersal order.

Lastly, there should be an emphasis on opportunities to de-escalate by moving from a crowd control approach to a crowd management one. Whereas crowd control focuses on restoring order by restricting or limiting the behavior of a group, crowd management focuses on preventing crowd disasters, such as assessing and planning for capacities, escape routes, and signage. Institutions must continually evaluate these distinct yet interconnected strategies by considering all available resources and deploying them flexibly.

Fred: As my colleagues have said, we should expect a highly contentious environment on our campuses this coming year, especially in the fall. There are two noteworthy aspects of this that bear mention. First, unlike last October, there is time to prepare. Most if not all campuses are using this summer to anticipate challenges in a way that was not possible last year when many institutions found themselves on the back foot beginning on October 7 and had a hard time recovering thereafter.

Second, the major drivers of campus conflict—the 2024 election and the conflict in the Middle East—are taking place well beyond campus and will preoccupy the society more generally. It can be helpful to remind constituencies beyond campus, such as alumni and trustees, that campuses are dealing with the same factors as the society at large. When I am asked, “Why are these things [demonstrations, protests, uncivil conversation, etc.] happening on our campuses?” I usually begin my answer with, “As opposed to where?”

Much of our conversation in this issue brief has provided a range of strategies for campus leadership. But none is more important than the task of promoting civil discussion and building trust between and among

groups on campus so that dialogue across differences is more possible. Campuses that weathered last year the best typically were engaged in such efforts for years before. It may be true, as the cliché goes, that a crisis is a terrible thing to waste, but a crisis is also a very difficult time to begin to build trust. Knowing what the fall is likely to hold, now is a good time to engage with student and faculty leadership to chart a course for meaningful engagement without suspicion or antagonism. Such engagement could include planning for faculty expert presentation or outside speakers followed by breakout groups. It could occur during orientation or during the semester. Such programs are not expected to nor even necessarily designed to reach agreement on the contentious and divisive issues of our time. But if we proceed by the principles of what I have called vigorous civility, our campuses have the opportunity to address these challenges in the context of their educative missions.

The three rules of vigorous civility are disagreement without delegitimization; begin by challenging others' ideas, not their motives; and begin difficult conversations by a forced exercise of expressing shared positions, however limited they may be. The leaders of our colleges and universities themselves have the obligation to model civil discourse and debate. This coming fall will likely provide ample opportunities to do so, and now is the time to prepare the articulation of these core values.

Vigorous civility is not a replacement for the important steps to provide for safe campuses. But as we have discussed, our task is not only to provide for safety but to further the mission of the institution. While it is essential that we keep our students physically safe, that is not enough. Our colleges and universities must teach our students how to confront the seemingly intractable problems of our moment in a constructive way and—in doing so—to model for a divided society how this might be done.