FIRE
Foundation for Individual Rights in Education

September 9, 2021

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Office of the Chancellor
University of Massachusetts Medical School
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Sent via Electronic Mail (officeofthechancellor@umassmed.edu)

Dear Chancellor Collins:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned by the University of Massachusetts Medical School's recent implementation of a policy restricting how faculty may talk about executions. The "UMMS School of Medicine Statement Regarding Teaching Faculty and Capital Punishment" attempts to align faculty conduct with the updated stance of the American Medical Association (AMA)[1] on this controversial issue, but does so in a way that violates the First Amendment rights of UMMS faculty members. Such a policy could be easily redeployed to censor faculty on any number of controversial issues, including abortion care and physician-assisted suicide.

Whatever limits a public university might impose on direct participation in an execution, it cannot restrict faculty members' speech even if information they impart may ultimately be used by others for purposes that the university, faculty members, or the public believe unjust or immoral. Accordingly, FIRE calls on UMMS to rescind this policy or revise it in a manner consistent with its legal obligations as a public institution.

I. UMMS Bans Teaching About Capital Punishment

The following is our understanding of the pertinent facts, which is based on public information. We appreciate that you may have additional information to offer and invite you to share it with us.

[1] Capital Punishment, Code of Medical Ethics Opinion 9.7.3, AM. MED. ASS'N (2021), *available at* https://www.ama-assn.org/delivering-care/ethics/capital-punishment.

This summer, UMMS Vice Provost and Senior Associate Dean for Educational Affairs Anne Campbell Larkin sent an email notifying students and faculty of the "Statement Regarding Teaching Faculty and Capital Punishment" (the "Statement").[2]

The Statement, quoting with approval AMA Code of Medical Ethics Opinion 9.7.3,[3] requires that UMMS "teaching faculty must not engage in any professional activity which could serve to 'contribute to the ability of another individual to cause the death of the condemned' or to 'render technical advice regarding execution[.]'" That requirement "includes, but is not limited to, providing such information to governments engaged in execution by lethal injection."

The Statement cites the university administration's position regarding "stark racial inequities in the implementation of the death penalty in the US" and says that it "see[s] capital punishment as a violent instrument of institutional racism." As a result, the Statement says that "even lawful activities that could enable governments in some way to perform executions [are] contrary to the professional standard for" faculty, and that the administration "support[s] all efforts to see [the death penalty] ended." The Statement pledges that this position will be made "known to all" faculty and that the administration "will require all to acknowledge and abide by this position in the future."

The "position" is effective as of July 21, 2021, but "will not be applied to behaviors and actions that took place prior to the effective date."

II. The First Amendment and Academic Freedom Protect the Dissemination by University Faculty of Factual Information about Capital Punishment

As a public university bound by the First Amendment, UMMS cannot prohibit its faculty members from providing information to the public, other academics, or state officials, other than in very narrow exceptions not relevant here. UMMS' Statement sharply limits faculty members' speech about capital punishment, exceeding any cognizable state interest that would justify curtailing faculty members' expressive rights.

A. The First Amendment Applies to UMMS as a Public University

It has long been settled law that the First Amendment is binding on public institutions of higher education like UMMS.[4] Accordingly, the decisions and actions of a public university, including the maintenance of policies implicating student and faculty expression,[5] must be consistent with the First Amendment.

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[2] E-mail from Anne Campbell Larkin, Vice Provost and Senior Assoc. Dean for Educational Affairs, Univ. of Mass. Med. Sch., to unidentified recipients (on file with author).

[3] Capital Punishment, *supra* note 1.

[4] *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'") (internal citation omitted).

[5] *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

B. Faculty Members' Speech Enjoys Robust Protection Under the First Amendment and UMMS' Academic Personnel Policy

Faculty members at public universities do not "relinquish First Amendment rights to comment on matters of public interest by virtue of government employment."[6] Instead, the First Amendment and UMMS' Academic Personnel Policy protect faculty members' expression, including both academic intramural speech (as employees) and extramural speech (as citizens) on matters of public concern. Both are implicated by the Statement, which encompasses both academic speech and speech as a private citizen.

i. The First Amendment protects faculty members' speech.

When faculty members speak as academics—such as in lectures or publications, for example—their speech is protected by academic freedom, which is of "a special concern of the First Amendment[.]"[7] As the Supreme Court has held, universities "occupy a special niche in our constitutional tradition,"[8] and academic freedom is an area "in which the government should be extremely reticent to tread."[9] One federal appellate court put it more bluntly, unequivocally rejecting as "totally unpersuasive" any "argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction."[10]

The First Amendment also protects faculty members when they speak as citizens on matters of public concern—for example, on social media, in public debates, in media commentary, or in speech directed to government officials.[11]

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[6] *Connick v. Myers*, 461 U.S. 138, 140 (1983).

[7] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

[8] *Grutter v. Bollinger*, 547 U.S. 306, 329 (2003).

[9] *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

[10] *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001). The Supreme Court's decision in *Garcetti v. Ceballos* does not alter this approach, as *Garcetti*'s employee-speech exception is narrow in the academic context, if it applies at all. In *Garcetti*, the Supreme Court upheld the power of non-academic government employers to regulate their employees' speech that is pursuant to their employment duties. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). However, the *Garcetti* Court acknowledged that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests[.]" *Id.* at 425. In doing so, the *Garcetti* Court acknowledged Justice Souter's concern that the employee-speech doctrine should not "imperil First Amendment protection of academic freedom in public colleges and universities," including "the teaching of a public university professor." *Id*. at 438 (Souter, J., dissenting). Accordingly, as federal courts applying *Garcetti* have explained, its general rule does not apply in the "academic context of a public university," *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011), to expression "related to scholarship or teaching," *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014), or to faculty "engaged in core academic functions, such as teaching and scholarship." *Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021). *See also, e.g.*, *Van Heerden v. Bd. of Supervisors of La. State Univ.*, No. 3:10-cv-155, 2011 U.S. Dist. LEXIS 121414, at *19–20 (M.D. La. Oct. 20, 2011) (sharing "concern that wholesale application of the *Garcetti* analysis . . . could lead to a whittling-away of academics' ability to delve into issues or express opinions that are unpopular, uncomfortable or unorthodox"); *Sheldon v. Dhillon*, No. C-08-03438, 2009 U.S. Dist. LEXIS 110275, at *14 (N.D. Cal. Nov. 25, 2009) (terminated community college instructor's lecture on heredity and homosexuality was protected by the First Amendment if it was "within the parameters of the approved curriculum and within academic norms" and the punishment "not reasonably related to legitimate pedagogical concerns.").

[11] *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

ii. UMMS' Academic Personnel Policy protects faculty members' speech.

UMMS's academic freedom policy recognizes these important interests. Its Academic Personnel Policy adopts the AAUP's "1940 Statement of Principles on Academic Freedom and Tenure, with 1971 Interpretive Comments,"[12] which in turn provides that teachers "are entitled to full freedom in research and in the publication of the results" and are "entitled to freedom in the classroom in discussing their subject[.]"[13] The Academic Personnel Policy broadly reaches "Academic Activities," including "formal lectures, seminars," and other teaching, as well as "research" and "publication(s)."[14]

The 1940 Statement similarly protects extramural speech, recognizing that when teachers "speak or write as citizens," they are to "be free from institutional censorship or discipline[.]"[15] This "stringent standard" is sufficiently "strict, in fact, that extramural utterances rarely" amount to a clear demonstration that the faculty member is unfit for his or her position.[16] In this sense, it is coextensive with the First Amendment: as one federal appellate court explained, the 1940 Statement was "intended to assure a professor his full measure of [F]irst [A]mendment rights" in extramural expression.[17] Accordingly, institutions cannot impose "professional standards" on "statements made as a citizen."[18]

This commitment supersedes any directive issued by the UMMS administration, as faculty members may not be "otherwise-penalized, if said action would constitute a material breach or infringement of" the medical school's commitment to academic freedom.[19] Further, UMMS' adoption of these standards creates a contractual obligation—in addition to its constitutional obligation—to protect its faculty members' academic freedom.[20]

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[12] UNIV. OF MASS. MED. SCH., ACADEMIC PERSONNEL POLICY OF THE UNIV. OF MASS. MED. SCH. Art. 1, § 1.4 (rev. Dec. 8, 2017) ("ACADEMIC PERSONNEL POLICY"), *available at* https://www.umassmed.edu/globalassets/office-of-faculty-affairs/documents/academic-personnel-policy.pdf.

[13] AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (rev. Apr. 1970) ("1940 STATEMENT"), *available at* https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure.

[14] ACADEMIC PERSONNEL POLICY at Art. 1, §1.4.

[15] 1940 STATEMENT.

[16] *McAdams v. Marquette University*, 914 N.W.2d 708, 732 (Wis. 2018) (cleaned up).

[17] *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975)

[18] *Starsky v. Williams*, 353 F.Supp. 900, 922 (D. Ariz. 1972), *aff'd in relevant part*, 512 F.2d 109, 118 (9th Cir. 1975) (affirming district court's decision that the "discharge was invalid" and remanding for further review on other grounds).

[19] ACADEMIC PERSONNEL POLICY at Art. 1, §1.4.

[20] *See, e.g.*, *McAdams v. Marquette University*, 914 N.W.2d 708, 732 (Wis. 2018) (private university breached its contract with a professor over a personal blog post because, by its adoption of the 1940 AAUP Statement of Principles on Academic Freedom, the post was "a contractually-disqualified basis for discipline").

C. The Policy Concerns Speech on Matters of Academic and Public Concern

Capital punishment is a matter of significant public and academic concern. Efforts to narrow or abolish the death penalty have divided the Supreme Court,[21] state legislatures,[22] public opinion,[23] and academia.[24] Faculty members' speech concerning capital punishment as a subject is speech on a matter of public concern, which encompasses "matters [which] can be fairly considered as relating to any matter of political, social, or other concern to the community[.]"[25] That others find a viewpoint or statement to be of an "inappropriate or controversial character . . . is irrelevant to the question of whether it deals with a matter of public concern."[26]

D. The Policy Does Not Advance Cognizable Government Interests

Because capital punishment is a matter of public concern, UMMS' regulation of faculty speech meets First Amendment scrutiny only where it demonstrates that its interests "as an employer, in promoting the efficiency of the public services it performs through its employees" outweighs the interest of the employee, "as a citizen, in commenting upon matters of public concern[.]"[27] As long employees are speaking about matters of public concern, "they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."[28] Disapproval of the speech at issue is insufficient.[29]

UMMS' Statement fails this evaluation, curtailing a broad range of academic and extramural expression otherwise protected by the First Amendment in service not of an efficient government function, but of administrators' conception of the propriety of capital punishment.

i. The Statement broadly curtails academic and extramural speech.

The Statement broadly reaches otherwise "lawful" speech if it "*could* enable . . . in some way" the implementation of capital punishment, including by providing "information" to "governments engaged in execution by lethal injection," or which could otherwise

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[21] *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (acknowledging "the overwhelming weight of international opinion against the juvenile death penalty" in forbidding imposition of capital punishment on offenders who were minors at the time of the offense).

[22] *See generally* DEATH PENALTY INFO. CTR., *State by State*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Sept. 7, 2021) (listing states' abolition or retention of the death penalty).

[23] *See, e.g.*, Megan Brenan, *Record-Low 54% in U.S. Say Death Penalty Morally Acceptable*, GALLUP (June 23, 2021), https://news.gallup.com/poll/312929/record-low-say-death-penalty-morally-acceptable.aspx.

[24] For an example of academic argument that professional organizations should not set bright-line ethical standards prohibiting participation in executions, *see, e.g.*, Stanley L. Brodsky, Tess M.S. Neal & Michelle A. Jones (2013) A REASONED ARGUMENT AGAINST BANNING PSYCHOLOGISTS' INVOLVEMENT IN DEATH PENALTY CASES, ETHICS & BEHAVIOR, 23:1, 62-66, DOI: 10.1080/10508422.2013.757954.

[25] *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

[26] *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)

[27] *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

[28] *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

[29] *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.").

"contribute to the ability of another" to carry out capital punishment. Although offered in "support" of the AMA's opinion on capital punishment,[30] the Statement represents that it is "not limited to[] providing" information identified in the AMA opinion, and it makes no effort to otherwise delineate its outer contours.

Because the Statement does not endeavor to identify with precision what speech falls outside of the policies, it reaches a wide range of academic and extramural expression. The policy would reach any research or publication (a "professional activity") that "could" contribute to a government actor's knowledge about how to carry out an execution, even if the faculty member did not intend its use in that manner—or even if that research was intended to dissuade the use of capital punishment. For example, if a faculty member published research on which manufacturers' drugs are more likely to result in a painful execution,[31] that information "could" be used by government actors in selecting alternative manufacturers to avoid legal challenges under the Eighth Amendment's prohibition on cruel and unusual punishment.

Even if some cognizable purpose could be ascertained, the Statement's broad scope would render it unconstitutionally overbroad, as "it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate."[32] Even if UMMS could regulate behavior it deems objectionable, the policy also impacts a great deal of speech that may only theoretically contribute to the implementation of capital punishment.

ii. The Statement does not serve to promote efficient or effective UMMS services.

As an initial matter, the Statement does not appear to serve the efficient and effective operation of a medical school, except insofar as failing to expressly oppose capital punishment may be "hurtful" to "students, staff, and patients whose race or ethnicity may cause them or their families to be inequitably targeted by" capital punishment.

This rationale subordinates academic freedom to the possibility that students, staff, or patients may be morally opposed to research or speech which contributes to the ability of state actors to carry out capital punishment. Yet the possibility or even likelihood that one or more students will be morally, even justifiably, opposed to particular acts—for example, capital punishment, abortion, war, or animal research—is not a constitutionally cognizable basis to curtail inquiry or expression. Such a limit would not directly advance the efficient

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[30] The AMA's opinion largely concerns active and direct participation in an execution, such as "automatically" causing a specific execution, monitoring vital signs during an execution, administering medications as part of an execution, and supervising an execution. To the extent these prohibitions implicate conduct, as opposed to speech, they do not directly implicate First Amendment concerns. Other aspects of the AMA opinion, such as its application to the "[r]endering of technical advice" or "[c]onsulting with" personnel, may raise First Amendment concerns if effectuated by government actors. Because UMMS' policy reaches substantially beyond the AMA's opinion, this letter does not endeavor to evaluate whether the AMA's opinion, if implemented by a public university, would withstand First Amendment scrutiny.

[31] *See, e.g.*, Jonathan Allen, *Special Report: How the Trump administration secured a secret supply of execution drugs*, REUTERS (July 10, 2020), https://www.reuters.com/article/us-usa-executions-specialreport/special-report-how-the-trump-administration-secured-a-secret-supply-of-execution-drugs-idUSKBN24B1E4.

[32] *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864 (E.D. Mich. 1989), citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

operation of the institution, and the "difference of opinion" cannot justify state actors' decision to "burden protected expression in order to tilt public debate in a preferred direction."[33]

If moral opposition to research or expression did provide a sufficient basis to curtail academic freedom, it would quickly be utilized to suppress a wide range of protected speech. For example, administrators in conservative states might be pressured to limit faculty expression that advances abortion. This is not idle speculation: lawmakers in North Dakota have limited the ability of faculty at public universities to work with entities that "promote" abortion.[34]

iii. Providing information that "could enable" an execution "in some way" is not unprotected incitement.

While certain "historical and traditional categories" of speech are outside of the First Amendment's protection,[35] none provides a legitimate justification for the Statement. To the extent that it relies on the exception for incitement, which applies only to speech "directed to inciting or producing imminent lawless action" which is "likely to incite or produce" that action,[36] the Statement is overbroad, encompassing speech well outside incitement's legal parameters.

The "incitement" exception applies only to speech which "specifically advocate[s]" particular action,[37] yet the Statement limits speech which "could enable" an execution, irrespective of whether the faculty member intends to do so. As a result, speech which contributes to generalized knowledge may run afoul of the policy even if the faculty member does not foresee its use in that manner, imposing a negligence standard on academic expression. Even if a faculty member did intend their research to aid in an execution, the incitement exception applies only to speech likely to result in "imminent" action, not action that may occur "at some indefinite future time[.]"[38] Moreover, even if a faculty member's speech were intended to and likely to cause an imminent execution, the incitement exception applies only to advocacy of *lawless* action; capital punishment is lawful in twenty-seven states and in the federal carceral system.[39]

III. Conclusion

Universities committed to academic freedom may not require faculty members to adopt a "position" on matters of public concern. At public universities, this freedom is reinforced by the First Amendment, which prohibits regulations that would impose a "pall of orthodoxy"

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[33] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 555 (2011).

[34] Michelle Griffith, *NDSU accuses lawmakers of infringing on academic freedom*, GRAND FORKS HERALD (Mar. 31, 2021), https://www.grandforksherald.com/news/education/6963826-NDSU-accuses-lawmakers-of-infringing-on-academic-freedom.

[35] *United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

[36] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

[37] Nwanguma v. Trump, 903 F.3d 604, 610 (6th Cir. 2018).

[38] *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

[39] DEATH PENALTY INFO. CTR., *State by State*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Sept. 7, 2021). Because the AMA's opinion does not carry the force of law, its breach cannot be said to be "lawless" action.

over academic speech.[40] While UMMS' administration may abhor capital punishment, it cannot foreclose faculty speech in hopes of frustrating its use by the criminal justice system. The First Amendment protects even speech that the authorities "loathe and believe to be fraught with death."[41]

We request receipt of a response to this letter no later than the close of business on Friday, September 24, 2021, confirming that UMMS will retract or revise this policy and will not punish faculty who merely exercise their First Amendment rights.

Sincerely,

Adam Steinbaugh
Director, Individual Rights Defense Program

Cc: Terence R. Flotte, School of Medicine Executive Deputy Chancellor, Provost, and Dean
Anne Campbell Larkin, Vice Provost and Senior Associate Dean for Educational Affairs
Martin T. Meehan, University of Massachusetts President

[40] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).
[41] *Abrams v. United States*, 250 U.S. 616, 630, (1919) (Holmes, J., dissenting).