



FIRE

Foundation for Individual
Rights and Expression

March 28, 2023

M. Roy Wilson
Office of the President
Wayne State University
656 West Kirby
4200 Faculty/Administration Building
Detroit, Michigan, 48202

URGENT

Sent via U.S. Mail and Electronic Mail (president@wayne.edu)

Dear President Wilson:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by Wayne State University's suspension of Professor Steven Shaviro following a post he made on his personal Facebook account, as well as your administration's referral of his post to law enforcement. While Shaviro's criticism of "right-wing speakers" and those who protest them may be offensive to some, it does not fall into a category of speech unprotected by the First Amendment.

On March 26, Shaviro posted on his personal Facebook account criticizing "right-wing speakers" on college campuses and discussing the merits of protestors' responses to them.² Shaviro wrote, "Although I do not advocate violating federal and state criminal codes, I think it is far more admirable to kill a racist, homophobic, or transphobic speaker than it is to shout them down."³ He added that by shouting down an allegedly bigoted speaker, protestors "are indulging their own moral sense of validity at the expense of actually strengthening the very bigots against whom they are protesting."⁴ He concluded by arguing that Sholem Schwarzbard, a Jewish poet who was arrested and acquitted for the assassination of former Ukrainian leader

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² The recitation of facts here reflects our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. To these ends, please find enclosed an executed privacy waiver authorizing you to share information about this matter.

³ Steven Shaviro, FACEBOOK (March 26, 2023) (on file with the author).

⁴ *Id.*

Symon Petilura,⁵ was a prime example of someone who kills individuals with opposing views rather than shouting.

Yesterday, you sent an email to the Wayne State community claiming Shaviro's post "exceeds the bounds of reasonable or protected speech," and stating that Wayne State had suspended him with pay and referred his post to law enforcement agencies for review and investigation.⁶

However, it has long been settled law that the First Amendment binds public universities like Wayne State.⁷ Employees of government institutions like Wayne State do not "relinquish First Amendment rights to comment on matters of public interest by virtue of government employment."⁸ Instead, faculty members retain a First Amendment right to speak as private citizens on matters of public concern.⁹

The first inquiry is whether Shaviro spoke "pursuant to [his] official duties" or as a private citizen.¹⁰ In other words, the query focuses on whether the speech was that which the "employer itself has commissioned or created."¹¹ This remains true where the speaker's employer or chosen profession is identifiable, or even the subject of the speech itself.¹²

Shaviro's post is inarguably not that of a public employee speaking on behalf of his employer, but that of a private citizen discussing his personal political viewpoints. Shaviro's post neither identifies his employer nor purports to speak on behalf of the university, but instead broadly comments on the climate at universities with respect to controversial speakers. Universities do not ordinarily employ their faculty to share their political or cultural analysis with their Facebook friends. And it is unlikely Wayne State is paying him to post or that a reasonable member of the public would believe his post to be speech on behalf of the institution.

Because Shaviro's post was made in his capacity as a private citizen, it remains protected because it addressed matters of public concern. "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern

⁵ *Shwarzbard, Sholem*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/schwarzbard-sholem> [<https://perma.cc/27W8-47VW>].

⁶ Email from M. Roy Wilson, President, to Wayne State University community (March 27, 2023) (on file with the author).

⁷ *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, 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).

⁸ *Connick v. Myers*, 461 U.S. 138, 140 (1983).

⁹ *Id.*; *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

¹⁰ *Garcetti v. Ceballos*, 547 U.S. 410, 421, (2006)).

¹¹ *Id.* at 413.

¹² *Pickering*, 391 U.S. 563, 576–78 (1968) (high school teacher's letter to the editor discussing his employment was speech as a private citizen); see also, e.g. *Higbee v. E. Mich. Univ.*, 399 F. Supp. 3d 694, 702 (E.D. Mich. 2019) (history professor's Facebook post to commenting on his university's response to recent racial incidents was not within the professor's official duties.).

to the community[.]”¹³ That others find the statements to be of an “inappropriate or controversial character . . . is irrelevant to the question of whether it deals with a matter of public concern.”¹⁴

There can be no dispute that the state of free expression and controversial speakers on higher ed campuses are matters of public concern.¹⁵ While others may find Shaviro’s contribution to the public discourse inflammatory, offensive, or otherwise objectionable, the principle of freedom of expression does not exist to protect only non-controversial expression. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted merely because some or even many find it to be offensive or disrespectful. For example, in holding that burning the American flag was expression protected by the First Amendment, the Supreme Court urged that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹⁶

This principle applies with particular strength with respect to public institutions of higher education. For example, the Supreme Court unanimously upheld as protected speech a student newspaper’s front-page use of a vulgar headline (“Motherfucker Acquitted”) and a “political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice.”¹⁷ These images were no doubt deeply offensive at a time of profound political polarization, yet “mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”¹⁸ Expressive rights, in short, may not be curtailed on the basis that others find them offensive or outrageous.

Second, contrary to the suggestion in your email, Shaviro’s post does not amount to an unprotected true threat or incitement. Political discourse has long been steeped in themes of violence. Perhaps most famously, Thomas Jefferson—a principal author of what ultimately became the First Amendment¹⁹—predicted that revolution and violence would be necessary to preserve liberty, writing: “The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is [its] natural manure.”²⁰ Because rhetoric tinged with violent

¹³ *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

¹⁴ *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (expression of hope that President Ronald Reagan might be assassinated was protected against retaliation).

¹⁵ See, e.g., David French, *Free Speech Doesn’t Mean Free Rein to Shout Down Others*, N.Y. TIMES (March 23, 2023) <https://www.nytimes.com/2023/03/23/opinion/free-speech-campus.html>; Rebecca Boone, *Experts say attacks on free speech are rising across the US*, WASH. POST (March 15, 2023) https://www.washingtonpost.com/politics/2023/03/15/first-amendment-free-speech-censorship-mccarthyism/bdd1b9c8-c331-11ed-82a7-6a87555c1878_story.html.

¹⁶ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

¹⁷ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

¹⁸ *Id.*

¹⁹ *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947).

²⁰ Letter from Thomas Jefferson to William Stephens Smith, Nov. 13, 1787, *available at* <https://founders.archives.gov/documents/Jefferson/01-12-02-0348>. See also, e.g., the license plate and state motto of New Hampshire, suggesting that residents “live free or die” in defense of liberty. *Wooley v. Maynard*, 430 U.S. 705, 722 (1977).

themes often intersects with charged political expression, and the “language of the political arena . . . is often vituperative, abusive, and inexact,” the First Amendment imposes an exacting standard before a statement constitutes an unprotected “true threat” or “incitement.”²¹ Courts approach “with extreme care” claims that “highly charged political rhetoric lying at the core of the First Amendment” falls into either category.²²

A “true threat,” by definition, includes only those statements through which “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”²³ This exception does not include speech which amounts to rhetorical hyperbole or the endorsement of violence.²⁴ In *Watts v. United States*, for example, an investigator for the Army Counter Intelligence Corps heard the defendant remark that if he were ever forced to carry a rifle, “the first man I want to get in my sights is L. B. J.”²⁵ The Supreme Court held the speech remained protected by the First Amendment. The Court warned that “[w]hat is a threat must be distinguished from what is constitutionally protected speech,” including “political hyperbole” like that “indulged” in by the speaker, because of our country’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks.”²⁶ As such, Watts’ “very crude offensive method of stating a political opposition to the President” did not amount to a true threat, and remained protected speech.²⁷

Shaviro’s post, likewise, may have been “crude [or] offensive” to some. Yet his statement that it is more admirable to kill “a racist, homophobic, or transphobic speaker” than shout them down is hypothetical and not directed at any person in particular, nor does it constitute a sincere expression of intent to undertake violence. If the *Watts* draftee’s hyperbolic rhetoric about assassinating the President of the United States is protected, so, too, is charged political rhetoric theoretically endorsing violence against controversial speakers in certain hypothetical situations.

Shaviro’s post also falls far short of the First Amendment’s demanding standard for unprotected incitement. Speech is only “incitement” where it is “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.”²⁸ If it is “not directed to any person or group of persons” in particular, it cannot be said to be directed at

²¹ 394 U.S. 705, 708 (1969).

²² *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926–27 (1982).

²³ *Virginia v. Black*, 538 U.S. 343, 359 (2003).

²⁴ *Watts*, 394 U.S. at 708 (rejecting “political hyperbole” as a true threat; *Noto v. United States*, 367 U.S. 290, 297–98 (1961) (the “abstract teaching” of the “moral propriety or even moral necessity for a resort to force or violence” was protected speech)).

²⁵ *Watts*, 394 U.S. at 706.

²⁶ *Id.* at 707–08.

²⁷ *Id.* at 708.

²⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

commanding or urging any person to take action.²⁹ Shaviro’s post, while musing on when violence might be more justifiable than censorship, was not “directed to” calling for others to take unlawful action, or likely to result in imminent unlawful action. And even if he could be said to be encouraging others to act violently in certain scenarios, the “mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment.”³⁰

While Shaviro’s post may have been offensive to some members of the Wayne State community, it remains protected by the First Amendment. Given Wayne State’s ongoing violation of Shaviro’s First Amendment rights, we request a substantial response confirming that the university has reinstated Shaviro no later than the close of business on Tuesday, April 11, 2023.

Sincerely,



Anne Marie Tamburro
Program Officer, Campus Rights Advocacy

Cc: Julie Miller, Secretary to the Board of Governors and University Secretary

Encl.

²⁹ *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973).

³⁰ *Claiborne Hardware Co.*, 458 U.S. at 927 (emphasis in original).

Authorization and Waiver for Release of Personal Information

I, STEVEN SHAVIRO, do hereby authorize Wayne State University (the "Institution") to release to the Foundation for Individual Rights and Expression ("FIRE") any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights and Expression, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

If the Institution is located in the State of California, I request access to and a copy of all documents defined as my "personnel records" under Cal. Ed. Code § 87031 or Cal. Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept in my name in any and all Institution or District offices; (2) any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable; and (3) any and all phone, medical or other records in which I am personally identifiable.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights and Expression, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:
STEVEN SHAVIRO
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Signature

3/27/2023

Date