



December 13, 2024

David Lassner  
Office of the President  
University of Hawai'i at Manoa  
2500 Campus Road  
Honolulu, Hawaii 96822

*Sent via U.S. Mail and Electronic Mail (david@hawaii.edu)*

Dear President Lassner:

FIRE, a nonpartisan nonprofit dedicated to defending freedom of speech,<sup>1</sup> is concerned by the University of Hawai'i at Manoa's handling of an anonymous complaint against Professor Kenneth Lawson regarding his use of a hypothetical to teach the legal concept of *mens rea* and transferred intent.<sup>2</sup> Specifically, we are alarmed by UH's decision to summon Lawson to a mandatory meeting that concluded with an acknowledgement that while Lawson's hypothetical may not have violated university policy, he still would be required to change his pedagogy. Because the First Amendment's protections of academic freedom guarantee Lawson's right to determine how to approach his subject material, we urge UH to refrain from mandating any changes to Lawson's course content.

On September 18, an anonymous person filed a complaint about Lawson's recorded presentation for his criminal law class on the concept of *mens rea* and transferred intent.<sup>3</sup> The complaint stated that Lawson's presentation contained a hypothetical in which photos of two university deans were used, one of whom "shoots with intent to kill" another dean, but accidentally hits Professor Lawson.<sup>4</sup>

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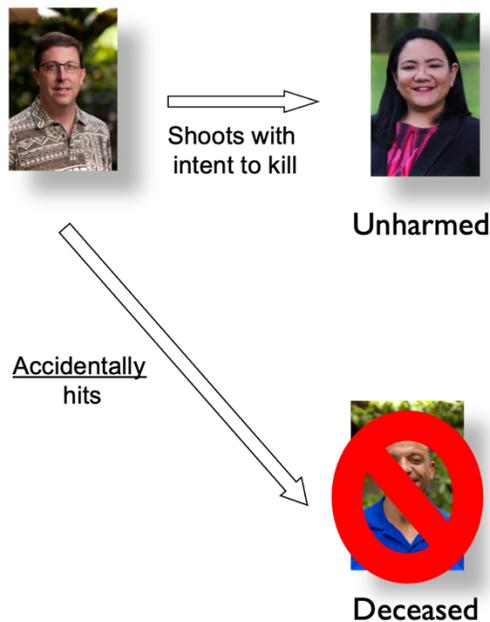
<sup>1</sup> For more than 20 years, FIRE has defended freedom of expression, conscience, and other individual rights on America's university campuses. You can learn more about our mission and activities at [thefire.org](https://thefire.org).

<sup>2</sup> The recitation reflects our understanding of the pertinent information. 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.

<sup>3</sup> See generally, *Case: 901 – Hotline Web* (Sept. 18, 2024) (on file with author). *Mens rea* is a commonly taught legal concept in criminal law. See, e.g., Michael A. Foster, *Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses*, CONG. RSCH. SERV. (July 7, 2021), <https://crsreports.congress.gov/product/pdf/R/R46836..>

<sup>4</sup> *Case: 901 – Hotline Web, supra* at What is the general nature of this matter?. Lawson has been using a version of this hypothetical for nearly a decade. For example, during another class, he used the example of

## “Transferred Intent” — Common Law



### ▶ What should the verdict be?

- ▶ A = 1 count of attempted murder
- ▶ B = 1 count of murder
- ▶ C = 1 count of attempted murder and 1 count of murder

The anonymous complainant claimed to find the hypothetical “really disturbing in light of recent shootings at schools on the mainland and [the] recently found body near campus with gunshot wounds.”<sup>5</sup> The complainant also added that Lawson “didn’t even laugh or make light of” the hypothetical, and questioned how the class was supposed to know that he was not serious about the deans being murdered.<sup>6</sup>

On November 4, Dean Camille Nelson notified Lawson that the university had received a “concern” through the university’s Whistleblower Hotline that Lawson “inappropriately used individuals from the Law School to illustrate the concept of transferred intent” in a video for one of his classes.<sup>7</sup> On November 14, Lawson met with Nelson and Vice Provost for Student Success Kapa Oliveira to discuss the anonymous complaint. Ahead of the meeting, Nelson told Lawson and his union representative the meeting was “an opportunity for him to provide his

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one dean shooting at another dean, but accidentally hitting and killing Lawson. He then asked the class what crime the shooter would be charged with. *See* video recording of Lawson’s class, on file with author.

<sup>5</sup> *Case: 901 – Hotline Web, supra* note 3 at What is the general nature of this matter?

<sup>6</sup> *Id.*

<sup>7</sup> Email from Camille Nelson, Dean, to Kenneth Lawson, Professor (Nov. 4, 2024, 12:04 PM) (on file with author).

perspective on the concerns raised,” and that Lawson was “expected to attend the meeting.”<sup>8</sup> Nelson added that Lawson could decline to give any answers that could “implicate [him] in a crime.”<sup>9</sup>

At that meeting, Nelson informed Lawson that the hypothetical and photos of the deans “had not violated any policy or law” but still ordered Lawson to change the example.<sup>10</sup> In a follow-up letter to Lawson, Nelson further stated that even when a faculty member’s decisions may not be illegal or violate university policy, “the University can still counsel, educate, and advise the faculty member to modify their behavior when it is not appropriate in a professional educational setting.”<sup>11</sup> Nelson added that “the University can and should remove content from its technology systems that may be disturbing and harmful to students, faculty and/or staff.”<sup>12</sup> Nelson also instructed Lawson to “either remove or re-record that portion of the video,” and to refrain from using any university students, faculty, or staff in his examples.<sup>13</sup> If he declined to do so, the university would work with the video provider to remove it.<sup>14</sup>

UH’s demand that Lawson change the hypothetical violates his pedagogical autonomy—which is protected by the First Amendment’s protections of academic freedom<sup>15</sup>—to determine whether, when, and how to approach material that may be challenging, upsetting, or deeply offensive, but is nonetheless germane to the topic of the course.<sup>16</sup> The Supreme Court has also stressed the critical importance of academic freedom to the very fabric of our society, writing in 1957:<sup>17</sup>

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and

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<sup>8</sup> Email from Nelson to Wade Zukeran, University of Hawaii Professional Assembly Representative et al. (Nov. 11, 2024, 6:28 PM) (on file with author).

<sup>9</sup> *Id.*

<sup>10</sup> Email from Lawson to Nelson and Kapa Oliveira, Vice Provost for Student Success (Nov. 16, 2024, 1:46 PM) (on file with author).

<sup>11</sup> Letter from Nelson to Lawson (Nov. 20, 2024) (on file with author).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> As a public institution, UH is legally bound to uphold the First Amendment. *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). UH is also accredited by the WASC Senior College and University Commission, which requires that an accredited institution “maintains, publishes, and adheres to policies on academic freedom. 2023 WSCUC Handbook, Integrity and Transparency, WASC ACCREDITING COMM’N FOR SCH., <https://wascsenior.app.box.com/s/jdbd53vlf3mf32kwfy6ngvczdpmr6f3> [<https://perma.cc/H5CS-JPN4>].

<sup>16</sup> *See, e.g., Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 683 (6th Cir. 2001).

<sup>17</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation ... Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Indeed, in warning against “laws that cast a pall of orthodoxy over the classroom,” the Supreme Court called academic freedom “a special concern of the First Amendment” and a principle “of transcendent value to all of us and not merely to the teachers concerned.”<sup>18</sup> Lawson’s use of familiar figures from the university to illustrate the hypothetical and help students retain the information is common practice in American law schools, and such an exercise is clearly pedagogically relevant to a criminal law class about *mens rea* and transferred intent.

UH administrators are certainly free to discuss pedagogical concerns with faculty members. However, to avoid compromising academic freedom, they must refrain from any suggestion that faculty members will be disciplined for their protected speech, or that their speech will be silenced. The critical question is not whether the institution actually metes out formal punishment, but whether its actions “would chill or silence a person of ordinary firmness from future First Amendment activities[.]”<sup>19</sup> While Nelson claimed that Lawson was not being threatened with formal discipline, she also told Lawson that he was “expected” to attend the meeting, raising the specter of a required investigation that could carry with it disciplinary measures. That the process resulted in an ultimatum from UH to Lawson only provides further cause for alarm.

Taken together, this treatment of Lawson’s protected pedagogical expression is unquestionably chilling—not simply because of the implicit threat of discipline,<sup>20</sup> but because UH has made clear that it will simply erase expression to which the university objects. This undoubtedly meets the “ordinary firmness” test set forth under the law.<sup>21</sup> Not only will Lawson have no choice but to self-censor in making future presentations for his courses or see his expression simply wiped away, but other faculty members aware of this situation will have every reason to believe that engaging in similar speech will result in discipline and will self-censor accordingly.

Under the standard UH has applied to Lawson, neither he nor any other professor can possibly have reasonable notice as to what lectures, examples, materials, or fleeting comments could lead to student complaints and potential coercive disciplinary measures, because it is

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<sup>18</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

<sup>19</sup> *Mendocino Env’tl Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

<sup>20</sup> *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992).

<sup>21</sup> *Speech First, Inc. v. Fenves*, 979 F.3d 319, 333 (5th Cir. 2020). Further, the First Amendment bars any “adverse government action against an individual in retaliation for the exercise of protected speech activities” which “would chill a person of ordinary firmness from continuing to engage in that activity.” *Keenan v. Trejeda*, 290 F.3d 252, 258 (5th Cir. 2002).

impossible to know what examples or comments will be subjectively offensive to individuals in a campus community boasting a broad range of backgrounds, experiences, and beliefs. This cannot help but adversely affect the quality of education at UH, doing a profound disservice to faculty and students alike.

We request a substantive response to our letter no later than January 3, 2025, confirming UH will rescind its order to Lawson to remove the hypothetical from his course and will not unilaterally impose impermissible changes to faculty pedagogy.

Sincerely,

A handwritten signature in black ink, appearing to read "Graham Piro". The signature is fluid and cursive, with the first name "Graham" and last name "Piro" clearly distinguishable.

Graham Piro  
Faculty Legal Defense Fund Fellow

Cc: Camille Nelson, Dean

Encl.