

Free Speech at the University of Minnesota: Addendum to the Four Core Principles

Faculty Consultative Committee
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The Theory, Law, and Practice of Freedom of Speech

The production and dissemination of knowledge through teaching, learning, and researching is the highest function of the University. That function serves the search for truth, the exercise of individual autonomy and liberty, and the varied other important interests of Minnesota and of the entire country.

Many University activities contribute to the production and dissemination of knowledge. But among these commitments, none is more essential than an unshakable commitment to protecting the freedom of expression. Free speech is a predicate to, and preservative of, all other University functions. It is so essential to the functioning of a public university that it is enshrined in the state and federal constitutions and in the governing documents of the University itself.

The constitutional commitment to free speech is well known, if not always well understood. The First Amendment to the United States Constitution mandates that government and its institutions “shall make no law . . . abridging the freedom of speech, or of the press . . .” Article I, Section 3 of the Minnesota Constitution similarly guarantees that “. . . all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.” Freedom of expression is the fundamental constitutional right of every citizen.

Speech includes all modes of communication. It includes the right to speak orally, to write, to display images, and to engage in symbolic conduct. The freedom of speech also includes the right not to speak.

Our constitutional tradition absolutely forbids the regulation of otherwise protected speech that is merely uncivil, uninformed, or unwise. It protects offensive and even hateful speech. The term “hate speech” may describe extreme forms of bigoted expression but such expression remains fully constitutionally protected. Justice Oliver Wendell Holmes famously declared: “If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”¹

What applies to government applies equally to government-owned institutions like a public university. Under the Constitution, no public university may suppress speech on the grounds that officials, administrators, or other members of the University

¹ *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes dissenting).

community vehemently dislike its subject or its viewpoint. That much is the minimum commitment the University must make.

To be sure, not all speech is protected at all times and places. For example, speech that explicitly advocates and imminently threatens illegal acts, that is obscene, that defames an individual, or that actually threatens or harasses an individual, may be prohibited. Like any institution that must govern itself and operate effectively, the University may also limit the times and places that even protected speech is heard, as long as such limitations leave open ample opportunity for expression and so long as no distinction is made based on the content of the expression. But such limitations on the freedom of speech are the rare exception, not the rule.

Historic Challenges to the Freedom of Speech at the University of Minnesota

Every age confronts the temptation to allow a little less expression in order to have a little more of something else thought more important. The censor never comes calling without reasons. In American history, examples of censorship in the service of supposed higher values could be voluminously and tediously catalogued. To illustrate the dangers, though, it should suffice to mention just a few at the University of Minnesota.

In another time, the University believed that winning the First World War was so critical that it terminated an anti-war professor. The day before yesterday, the menace of a nuclear-armed enemy was feared so much that University faculty members were dismissed in a wave of McCarthyism.² Yesterday, the University deemed a person publicly declaring his marriage to another person of the same sex not fit to work in the library. A judge reviewing the case called his marriage a “socially repugnant concept.”³

That each of these deeply felt imperatives and values was allowed to supersede the commitment to freedom of expression, that each was widely accepted in its time, that each is now almost universally regarded as a source of embarrassment and shame to the University, and that one was recently called “reprehensible” by the University President,⁴ is another proof of Justice Holmes’ famous dictum that “time has upset many fighting faiths.”⁵

Historical experience should be sufficient reason for profound skepticism that the deeply felt imperatives of the present day, any more than the deeply felt imperatives of yesterday, justify a re-calibration of the University’s commitment to free speech.

Contemporary Challenges to the Freedom of Speech

² *Report of the Task Force on Academic Freedom*, University of Minnesota, p. 4 (April 2004) (available at <http://www1.umn.edu/usenate/fcc/acadfreedomreport.html>).

³ Erick Eckholm, “The Same-Sex Couple Who Got a Marriage License in 1971” (*New York Times*, May 16, 2015) (available at <http://www.nytimes.com/2015/05/17/us/the-same-sex-couple-who-got-a-marriage-license-in-1971.html>)

⁴ “Celebrating the McConnell Files,” Oct. 28, 2015 (remarks of University President Eric Kaler) (available at <http://www.continuum.umn.edu/2015/10/celebrating-the-mcconnell-files/>)

⁵ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes dissenting).

Today, threats to free speech come from several directions, including government and social and political activists, who claim that other values must prevail. For example, perceived threats to national security in the war on terrorism may be used as justifications for curtailing academic investigation and expression. Social and health science research about certain groups (notably gay men) or behaviors (including substance abuse) have been challenged by those who object on moral or faith-based grounds.⁶ Still others claim that a history of discrimination, powerlessness, or marginalization of a group justifies restrictions on speech they regard as offensive or hateful to that group.

The values of civility, inclusion, and respect for others are matters of human decency and dignity. These values also contribute to the University's mission of producing and disseminating knowledge by facilitating the expression of diverse viewpoints. Regents policy commits the University to establishing "an environment for faculty, staff, students, and visitors that actively acknowledges and values equity and diversity and is free from racism, sexism, ageism, homophobia, and other forms of prejudice, intolerance, or harassment."⁷

There are many steps the University may appropriately and lawfully take to create a welcoming climate, including by fostering diversity in its faculty and staff. But no person or group, merely by claiming offense, may bring down the disciplinary machinery of the University to prohibit or punish speech on that account.

Just ten years ago, a University production of the play, "The Pope and the Witch," drew harsh criticism from many who found it deeply offensive and bigoted toward the Catholic faith. The president of the University was asked to cancel the production, but he refused. "Universities are places where people of very different, and sometimes very unpopular, points of view can present their ideas, and where others who disagree with those ideas can join in the critical dialogue and the debate as it ensues," the University President explained. "That is as it should be in a University committed to the free exchange of ideas and academic freedom."⁸

The values of promoting a welcoming climate and protecting speech are not necessarily or usually in tension. Part of creating an appropriate climate at any university is cultivating norms of debate and intellectual testing. But, just as the Woodward Report concluded 42 years ago, where the values are in tension protecting speech must be paramount. As a matter of law and good policy, the University's answer to the tension cannot be to prohibit speech. The cure for the ills of speech is more speech, not less.

⁶ *Report of the Task Force on Academic Freedom.*

⁷ Board of Regents Policy, "Equity, Diversity, Equal Opportunity, and Affirmative Action," Sec. II (c) (as amended July 8, 2009) (available at http://regents.umn.edu/sites/regents.umn.edu/files/policies/Equity_Diversity_EO_AA.pdf)

⁸ "University play proves controversial," *Minnesota Daily* (Sept. 18, 2006) (statement of University President Robert Bruininks) (available at <http://www.freerepublic.com/focus/f-religion/1704954/posts>).

Another value urged now is the claimed need to level the playing field for persons and groups thought not to enjoy an equal position of power or access to the mediums by which speech is disseminated. While such imbalances exist, they also do not justify speech regulation. The Constitution forbids restricting expression on the basis of a speaker's identity or relative power. Who is unequal? What are the criteria by which inequality is judged? How much speech must be suppressed or enhanced in order to equalize it? And most importantly, who will decide the answers to these questions? The questions are unanswerable. Certainly we cannot entrust government officials or University administrators to answer them.

The concerns behind these “structural inequality” claims about speech are also misbegotten. There has been no better political friend of marginalized groups than free speech. Identity-based social movements—from the black civil rights movement to the women's movement to the LGBT rights movement—have relied heavily on the protections provided by the First Amendment. These and other movements in positions of political weakness have used speech to dismantle traditions and practices of invidious discrimination. And through their powerful critiques of inequality and injustice they have mobilized their fellow citizens to join their efforts. Ironically, unpopular and minority causes would be most vulnerable in a world where mobs and legislative majorities felt authorized to decide who may speak and how much.

The Forms of Suppressing the Freedom of Speech

While the justifications for suppressing speech may vary, the timeline by which suppression happens is constant. Attempts to shut down expression may come before it occurs, while it occurs, or after it occurs. Each point on the timeline presents distinct challenges for a university community dedicated to fostering and protecting a vibrant exchange of ideas.

1. *Before speech*

The most effective way to suppress ideas is to make sure they are never aired. A common tactic to prevent objectionable speech or silence speakers on campuses all over the country has been to pressure schools or groups not to invite them (or, if already invited, to “disinvite” them). Another form of this tactic is to discourage organizations from even holding panel discussions or symposia about controversial topics. These maneuvers are used by groups across the political spectrum to stifle speech they deem objectionable.

These approaches are *negative* ones in the sense that they are used to prevent speech through importuning organizers, hosts, or University officials. Negative tactics are themselves a form of protected speech. The Constitution does not allow government to bar such efforts, and thus the University may not suppress such efforts or subject organizers to discipline for organizing them. But that is not the only metric by which to judge them. Negative campaigns make it less likely that the University will be able to

attract speakers on matters of serious public policy debate. That potentially impoverishes discourse at the University.

Ordinarily, therefore, members of the University community should take *positive* steps to challenge ideas or speakers they disagree with through peaceful protest, non-disruptive counter-speech at the forum, and critical questioning. Objectors may also urge the University or department to take positive steps to invite a more diverse array of speakers, so as to avoid the impression that the University is adopting a single view. The University should carefully consider such requests and devote its resources to making sure that opposing viewpoints are heard. The University benefits from hearing more speech, not less. In general, positive counter-speech is preferable to negative counter-speech because it exposes members of the University community to ideas they might not otherwise consider.

2. *During Speech*

Once speech is underway, it can also be suppressed by serious disruption from those who oppose it. This disruption may take the form of chanting, persistent heckling, or other noisy demonstrations that make it difficult or impossible for the audience to hear what the speaker is saying.⁹

While such disruptions by private individuals do not constitute government action violating the Constitution, they are fundamentally inconsistent with the free exchange of ideas at a public university and thus are deeply illiberal. There is no right to shout down a speaker, whether at a formal academic lecture, at a panel discussion, or in a more informal setting. On the other hand, non-disruptive forms of protest—including, for example, sign-carrying pickets outside of the event—are perfectly appropriate forms of counter-speech that contribute to the richness of debate at the University.

Serious speech disruption violates existing University rules of decorum. The University must thoroughly investigate and consistently punish such offenses. That is necessary to deter it. But even if the disruption is punished, the effect of serious disruption may be to chill future expression on the same or similar topics. So the University must rely on the good faith and judgment of the community that shutting down speech is deeply illiberal. At the same time, the University must guarantee the right to protest the presence of a speaker or forum in ways that are non-disruptive

3. *After Speech*

After the speech has been completed, it may be the target of efforts by University officials to punish or at least to publicly condemn it. Offended members of the University community may file complaints about the speech through University investigatory

⁹ Recently, an academic lecture was shouted down at the law school. Maura Lerner, “Protesters disrupt Israeli professor’s lecture at University of Minnesota,” *Minneapolis StarTribune* (Nov. 4, 2015) (available at <http://www.startribune.com/protesters-disrupt-israeli-professor-s-lecture-at-university-of-minnesota/340437581/>).

offices. For example, the Office of Equal Opportunity and Affirmative Action (EOAA) helps to ensure that the University obeys federal and state civil rights laws and that all members of the community comply with University policy on equal opportunity, equity, and diversity. The EOAA investigates complaints about harassment, sexual violence, and increasingly, concerns about campus climate. It may recommend discipline for any violations. These violations may consist of speech as well as acts. In fact, in some circumstances University investigatory offices have urged that speakers be publicly condemned by their deans even when the speech is constitutionally protected and violates no University policy, but nevertheless offends some members of the community.¹⁰

When protected speech is the basis for such a complaint, First Amendment values are implicated. If the speaker is punished, or threatened with punishment, the effect may be to chill freedom of expression. The University must ensure that such investigations do not threaten the climate for free speech on campus.

Even short of formal discipline against the speaker, a University official may decide to publicly condemn the speech. Of course, no speech is immune from criticism or counter-speech. Criticism is itself essential to vigorous debate. But University officials should proceed with caution.

It is one thing when private individuals criticize ideas or the modes by which they are expressed. It is another thing entirely when a University official does so. Such condemnations often implicitly carry with them the threat of disciplinary action, denial of tenure, or erosion of other benefits the University provides. When a person is officially criticized as having attacked the deepest values of the University community, he or she may reasonably fear that the community (through its governing officials) will mobilize to punish that offense.

The practical effect of public censure by University officials can be coercive even if it is not explicitly punitive. It may cause the speaker to calculate that expressing unpopular ideas is not worth the cost to his or her career at the University. This may have a chilling effect on the speech. The speech stays at the margins and in the shadows, where it cannot be exposed as benighted or affirmed as beneficial. The whole community, including members of offended groups, loses the benefit of hearing dissent. Unless even bad or distasteful expression can be heard and evaluated, the production and dissemination of knowledge is itself impaired.

While extreme cases of bigoted or ill-informed statements may call for public censure, University officials should exercise great caution and restraint before condemning protected speech. When they do criticize speech as inconsistent with the

¹⁰ An example is the EOAA's recommendation that faculty members be publicly condemned by their dean for using an image of the cover of *Charlie Hebdo* magazine depicting Mohammed, published in the aftermath of a deadly terrorist attack on the magazine's offices. The flyer publicized an academic panel on the very topic of protecting free speech after the massacre. Maura Lerner, "Poster for free-speech forum sets off debate at University of Minnesota," *Minneapolis StarTribune* (May 5, 2015) (available at <http://www.startribune.com/poster-for-free-speech-forum-sets-off-debate-at-university-of-minnesota/302689691/>).

University's values, moreover, University officials should couple the condemnation with a reaffirmation of the speaker's right to express his or her views.

Ordinarily, University officials should let the community itself debate the worthiness of ideas or the manner and tone by which they are expressed. They should trust those who comprise the University community to assess the merits of the speech.

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