

## Free Speech at the University of Minnesota: Recommendations

Faculty Consultative Committee  
April 21, 2016

We offer recommendations below for action by the University to protect the freedom of speech in light of contemporary challenges. Some of our recommendations are intended to assist the University in promoting a climate of vibrant, respectful, and open debate of ideas. Other recommendations deal more with protecting individual members of the University community against threats to their freedom of expression. The University should take concrete steps now to ensure that speech is promoted and protected at every stage of its production: before, during, and after it occurs.<sup>1</sup>

1. *Foster understanding of the meaning and value of free speech at the University.* It is painfully obvious that many members of the University community do not understand or appreciate the freedom of expression. The University must continually publish and explain its commitment to free speech. To that end, we recommend that the University include the text of “Free Speech at the University of Minnesota: Four Core Principles,” in all orientation materials, all University catalogues, and all employee handbooks. Students should be directed to these statements each year at registration. We also urge that each school—its dean, its faculty, and its students—consider the most effective ways to clarify and discuss the relationship of free expression to the mission of the University. These might include addresses to entering students, discussions in informal settings, and special attention to the subject in student publications. The school might provide specific examples of controversial or offensive speech that is nevertheless protected expression.

Finally, all administrative and investigatory offices of the University should specifically be instructed that they have an obligation to protect free speech in carrying out their duties and exercising their powers. The text of the Four Core Principles should be prominently displayed on their web pages.

2. *Encourage a climate of respectful debate about controversial topics.* The University should model disciplined debate. We recommend that the University intensify its efforts to sponsor structured debates about controversial topics. Every reasonable effort should be made to ensure that a diversity of viewpoints is heard at these forums.

3. *Vigorously protect free speech when serious disruption is anticipated or*

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<sup>1</sup> Similar recommendations regarding the related matter of academic freedom were included in the 2004 *Report of the Task Force on Academic Freedom*. Other recommendations herein are modeled on recommendations for protecting free speech included in the Woodward Report. Report of the Committee to the Fellows of the Yale Corporation, C. Vann Woodward, Chairman (1974) (available at <http://www.yale.edu/sites/default/files/files/freedom1975.pdf>).

*actually occurs*. “Serious 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. It does not include peaceful protest outside the room or hall where the speech occurs, wearing armbands or other clothing opposing the speech, holding up signs outside the hall or room where speech occurs, or asking critical questions of the speaker during an event formatted to include a question-and-answer session.

The University must ensure that speakers can be heard. Protection of speakers can be achieved in the following ways:

- a. Much can be done to prevent serious disruption when it is anticipated. The group inviting a speaker or sponsoring a forum can work closely with the University to devise the time, place, and arrangements for admitting the audience. The administration and others can meet with protesting groups, make clear the University’s obligations to free expression, and indicate forms of dissent that do not interfere with speech.
- b. Where serious disruption is reasonably anticipated, the University should make effective arrangements to protect the speaker and the right of the audience to hear the speech.
- c. If speech is seriously disrupted, the University should: (1) undertake to identify disrupters; and (2) impose appropriate sanctions as called for in University rules.
- d. The University should recognize the need not to chill counter-speech in the interest of preventing serious disruption. The University should make it clear at any event where disruption is anticipated that protestors have the right to engage in non-disruptive counter-speech.

4. *Create a position of free-speech advocate or vest the powers of a free-speech advocate within the existing faculty governance structure.* University grievance and climate-complaint procedures must internalize the duty imposed on all administrative offices to protect the freedom of expression. Investigations by various University offices—including but not limited to EOAA and Human Resources—sometimes implicate free speech values. Yet despite the potential threat to free speech posed by such investigations, it is not clear that University investigatory offices see it as their duty to consider the effect of their investigations on the climate for free speech. They do not necessarily internalize the value of free speech at a public university. Their focus is on cleansing public discussion so that it is inoffensive. Otherwise, they fear, the University will be unwelcoming to some in the community. The effect is to create an imbalance by which protected speech is subordinated to other values. But speech may not be curtailed simply because it is offensive. And it is the duty of every member of the University community—including those with investigatory power—to respect and protect speech.

To ensure that free-speech values are respected, the University should appoint a free-speech advocate whose role is to ensure that freedom of expression is respected and protected during any investigation in which the investigative office determines that all or part of the basis for the complaint is expression (whether or not the office determines that the expression is constitutionally protected). The role of free-speech advocate could be assigned to an independent officer or to a person/committee within the existing faculty governance structure.

While the details of the procedures for oversight by the free-speech advocate are not specified here, several principles should govern the creation and oversight of this office:

- a. The free-speech advocate should be independent of the University's various investigative offices. The advocate should not be appointed, supervised, disciplined, or terminable by the investigative offices.
- b. In cases where the University investigative office determines that expression is all or part of the basis for the complaint, the investigative office should refer all recommendations for discipline or public censure arising from the complaint to the free-speech advocate prior to issuing such recommendations. The notification to the free-speech advocate should include any factual or other decisional basis for the recommended discipline or censure.
- c. Within a reasonable time after receiving the draft recommendation, the free-speech advocate should determine whether the proposed action is consistent with the University's (i) legal obligation to protect free speech and (ii) its larger normative commitment to the free exchange of ideas. For example, a recommendation by an investigative office may be constitutionally permissible but nevertheless hostile to the University's desire to promote the free expression of ideas.
- d. If the free-speech advocate finds that the proposed action is inconsistent with the University's (i) legal obligation to protect free speech or (ii) its larger normative commitment to the free exchange of ideas, the free-speech advocate should so inform the investigative body and explain the reasons for the conclusion. The free-speech advocate should provide a copy of the conclusion and basis for it to the University Provost and University General Counsel.
- e. If the free-speech advocate concludes that the proposed action is consistent with the University's (i) legal obligation to protect free speech and (ii) its larger normative commitment to the free exchange of ideas, the free-speech advocate should so inform the investigative office.
- f. In either case, the investigative office may issue its proposed action unless otherwise instructed not to do so by the University.

5. *Establish minimum procedural protections for faculty, students, and others subject to investigation.* University offices do not uniformly have or make public the procedures by which they conduct investigations that involve speech. Those accused of speech or other offenses against individuals or the community are not informed about what procedures govern. They are not told what their rights or privileges are. This lack of basic procedural safeguards is completely unacceptable, especially when the factual basis for a complaint is speech.

Investigations of faculty, students, and others by University offices should be governed by clear and transparent procedures that are made publicly available on the websites of all University offices with investigative powers. Failure to proceed without adequate procedural safeguards can create a chilling environment that undermines the freedom of speech, among other substantive University values.

To ensure that this duty is accounted for there must be formal, written procedures that (i) convey the process to be used in investigating the complaint, (ii) protect and adequately inform the faculty member or other University member of the basis for the complaint, and (iii) allow a meaningful rebuttal with the help of legal or other counsel, during the investigation process itself. While the details of these procedural safeguards are not specified here, they should include at least the following:

- a. The accused should have the right to be informed of what the investigative process entails, including any applicable steps or timeline.
- b. The accused should be informed of the nature of, and basis for, the complaint. This should take the form of an anonymized version of the complaint itself. It should include a citation to any University rules or policies that may have been violated.
- c. The accused should be informed of his or her rights in the investigation process.
- d. The accused should have the right to refuse to answer queries, whether by email, by telephone, or in person.
- e. The accused should have the right to know what the powers of the investigatory office are in the event of such a refusal to cooperate in the investigation. For example, the accused should be informed that the investigative office may decide to continue its investigation even if the accused refuses to respond to inquiries.
- f. The accused should be given the opportunity to have another person present as counselor or advisor during any interviews by the investigative office.
- g. The accused should have the right to access any record made of interviews, including any recording, notes, or minutes.

h. The accused should have the right to be informed about the punitive measures or other recommendations that might result from the investigation.

i. The accused should be informed of the right to appeal any conclusion reached, or recommendation made, by the investigative office. The accused should be told how and to whom an appeal may be made.

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