

Navigating Free Speech Issues On Public College Campuses

Presented by

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Agenda

- Overview of the law
- Developing speech and distribution policies
- Handling on-campus speech issues



The First Amendment - U.S. Constitution

- "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."



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Art. I, Sec. 3 – Wisconsin Constitution

- "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press."



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Application to Public College Campuses

- "The 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 constitution freedoms is nowhere more vital than in the community of American schools."

- *Papish v. Board of Curators of Univ. of Missouri* (S. Ct. 1973).

- Similarly, the Wisconsin Supreme Court has found that the state constitution guarantees the same freedom of speech protections as the First Amendment.

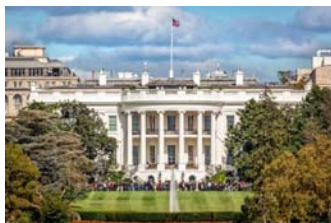
- *Board of Regents-UW System v. Decker* (Wis. 2014).



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Application to Public Colleges, Cont.

- On March 21, 2019, President Trump signed an executive order that holds colleges that receive federal research or education funding accountable for protecting free speech.
- "We must encourage institutions to appropriately account for th[e] bedrock principle [of free speech] in their administration of student life and to avoid creating environments that stifle competing perspectives, thereby potentially impeding beneficial research and undermining learning."
- "To advance th[is] policy...the heads of covered agencies shall...take appropriate steps, in a manner consistent with applicable law, including the First Amendment, to ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable Federal laws, regulations, and policies."



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Striking the Right Balance

- Desire to encourage an open, robust, and critical environment for speech which supports academic quest for truth.
 - "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." *Sweezy v. New Hampshire* (Sup. Ct. 1957).
- Desire to maintain civility, respect, and human dignity.
- At times, a tall order, given that colleges bring together diverse students, staff, and faculty of different demographics and with different political persuasions and varying beliefs.

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Application to Public College Campuses

- Prohibited Speech Restrictions:
 - Speech codes that are vague or overbroad;
 - E.g., those that prohibit speech simply because it is unseemly or offensive
 - Implementing and enforcing overly restrictive "free speech zones"
 - *Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams* (S.D. Ohio, 2012).
 - Maintaining overly-inclusive harassment policies that prohibit "offensive" speech and conduct that causes "emotional distress."
 - *McCauley v. Univ. of the Virgin Islands* (3rd Cir. 2010).
 - *DeJohn v. Temple Univ.*, 537 F.3d 301 (3rd Cir. 2008).



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It's Not a Free-For-All

- Certain categories of speech are impermissible:

1. Obscenity;
 - Whether the average person, applying contemporary community standards, would find the work appeals to prurient interests;
 - Whether the work depicts or describes sexual conduct; and
 - Whether the work lacks serious literary, artistic, political, or scientific value
2. Libel and Defamation;
 - False statement about another,
 - Unprivileged publication to a third party,
 - Negligence, and
 - Harm



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It's Not a Free-For-All (Cont.)

- Certain categories of speech are impermissible:

3. Speech inciting or producing *imminent* lawless action and which is *likely* to incite or produce such action;
 - Abstract advocacy of crimes is not generally enough
 - A remote or speculative possibility that a statement might be dangerous is not enough
4. Fighting words;
 - Their very utterance can lead to injury or tend to incite an immediate breach of the peace;
 - Ordinary people know that the words are likely to cause a fight; or
 - Statements that constitute a direct, personal insult directed at a specific person
 - NOTE - Racial or sexual epithets are fighting words only if they tend to provoke a violent response



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It's Not a Free-For-All (Cont.)

- Certain categories of speech are impermissible:

5. True threats;
 - The speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular group or individual
 - Generally, words, writings, or illustrations on their own will not constitute a true threat when not reasonably believable
6. Speech *resulting* in a substantial disruption of or material interference with school activities; and
 - Results in physical exclusion of victim from an educational program or activity;
 - So undermines/detracts from the victim's educational experience as to effectively deny her access to the College's resources and opportunities; or
 - Has a concrete, negative effect on the victim's ability to participate in an educational program or activity
7. Plagiarism and cheating



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It's Not A Free-for-All (Cont.)

- Even if speech does not fall into a prohibited category, limitations may be permissible depending on *where* the speech occurs
1. Public Forum: public sidewalks and streets, the campus quad
 - Rule: speech restrictions must serve a *compelling government interest* and be *narrowly tailored*
 2. Limited Public Form: classrooms, auditoriums, etc.
 - Rule: speech restrictions are permissible so long as they are content-neutral, reasonable, and governed by a written policy
 3. Nonpublic Forum: locations that have not been open to the public, e.g., private offices
 - Rule: speech may be restricted if it is incompatible with the purpose of the location, but restrictions must be content-neutral

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The Long-Story, Short:

- On-campus speech limitations should be narrowly tailored and content neutral
 - Prohibiting students from wearing hats in the classroom might be ok. Prohibiting only pink pussycat hats or MAGA hats, would not be ok.
 - *Tinker v. Des Moines Independent School District* (S. Ct. 1969)



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The College's Duty to Prevent and Address Discrimination

- Title VI of the Civil Rights Act of 1964:
 - "No person...shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving Federal financial assistance"
- Title IX of the Education Amendments of 1972: protects people from discrimination based on sex in education programs or activities that receive Federal financial assistance

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Hostile Environment Harassment

- A "hostile environment" occurs when harassing conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities, or privileges provided by a recipient
 - Speech or conduct must be objectively and subjectively harassing:
 - A reasonable person with the same protected characteristics would find the environment hostile and abusive, and
 - The victim finds the environment hostile and abusive
 - Generally a higher bar for a college student, as opposed to a high school student



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The College's Duty to Respond to Harassment

- A violation occurs when the College has effectively caused, encouraged, accepted, tolerated, or failed to correct a hostile environment of which it has actual notice
 - The College's duty to respond is triggered when a responsible agent or employee of the College receives actual notice of a hostile environment
 - The College may become legally liable if its personnel have notice of a hostile environment on campus and the College fails to take reasonable steps to respond to the situation

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Striking the Right Balance

- While higher education institutions seek to ensure a campus environment free of unlawful harassment, they must be cautious not to improperly stifle free speech
- Generally, simply expressing views, words, or symbols that someone finds offensive is not, on its own, actionable harassment
 - Note that speech on social media sites enjoys the same level of constitutional protection as all other speech.
 - See *Reno v. ACLU* (S. Ct. 1997).



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The Intersection of Free Speech and Anti-Harassment

- Before the College restricts or initiates discipline against a student in response to potentially harassing speech it must:
 1. Determine whether the issue involves speech, expressive conduct, expressive association, or access to speech forums;
 2. Determine whether the involved speech falls under the prohibited categories;
 3. Determine the forum in which the speech occurred; and
 4. Determine whether the College's speech/distribution policies have been violated



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The College Has First Amendment Rights Too

- Colleges should encourage students to protect institutional values, but cannot prohibit all expressions inconsistent with those values
- Even where disciplinary action may not be appropriate, the College's rights include the right to express its views on discrimination, harassment, and the importance of diversity and inclusion on campus

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Free Speech & Peaceful Assembly Policies

- Public colleges should develop and enforce a policy, which:
 - Recognize the constitutional right to engage in free speech and to assemble in groups for peaceful purposes
 - Identify categories of unprotected speech (e.g., threats of violence, incitement to imminent lawless action) and the potential disciplinary consequences of engaging in the same
 - Prohibit against conduct which:
 - Endangers the health or safety of others;
 - Interferes with or disrupts the normal functioning of the College;
 - Results in damage to College property;
 - Denies or unreasonably interferes with rights of others on College premises;
 - Results in unauthorized access to nonpublic areas on College premises or personal property

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Free Speech & Peaceful Assembly Policies (Cont.)

- The policy should identify reasonable time, place, and manner restrictions:
 - Prohibit:
 - Blocking entrances or interfering with free flow of traffic;
 - Unauthorized entry/possession/use of College services, equipment, properties;
 - Weapons, unlawful use of alcohol/drugs, and other unlawful activities;
 - Camping or lodging on property;
 - Climbing or rappelling down trees, buildings, structures; and
 - Participating in indecent exposure/public nudity
 - Permit expression when campus is open
 - Restrict sound amplification
 - Consider further limitations for commercial speech



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Free Speech & Peaceful Assembly Policies (Cont.)

- Your policy should identify guidelines covering distribution of printed materials and display tables
 - Distribution of non-commercial printed materials by members of the College community should generally be permitted when campus is open
 - Such distribution should not interfere with the orderly conduct of the College's affairs, the maintenance of property, or the free flow of traffic
 - Non-affiliated individuals/groups or those wishing to distribute commercial materials should obtain permission from the College's designated representative
 - Such permission needs to be granted or denied on a non-discriminatory basis
 - It is acceptable to prohibit distribution in certain areas, including in the library or in classrooms while class in session



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Free Speech & Peaceful Assembly Policies (Cont.)

- Your policy should also identify guidelines covering postings on College property
 - Consider identifying reasonable:
 - Permitted locations (e.g., not permitted on doors, windows, posts, waste receptacles, trees, or on stakes without written permission);
 - Size limitations;
 - Permissible duration of posting (e.g., all removed on a monthly basis); and



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Hypothetical Scenario

- ABC is a public college located in Wisconsin. Recognized student organizations at ABC receive an annual stipend for recruitment and social events and have access to ABC bulletin boards and display cases for promoting activities and events.
- Last month, a recognized student organization, SO, used a portion of their annual stipend to host a costume party at a location immediately adjacent to, but off, campus. At the party, members of SO came dressed as Native American chiefs, wearing headdresses above red painted faces. In addition, these members of SO shouted anti-Native American epithets and slurs throughout the party.
- ABC's Student Affairs Office was aware that the student organization had utilized a display case to endorse the Removal Act of 1830 and to advocate for proposed or pending legislation arguably harmful to the Native American population.

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Hypothetical Scenario (Cont.)

- The week after the party, students gathered outside the College Center to protest SO's party and their display case. The protest occurred during regular operating hours. Students attending the protest called on ABC to withdraw recognition of SO and censure its members.
- Within days of the protest, a handful of Native American Students visited the Student Affairs Office and stated that they were having difficulty concentrating in class, felt uncomfortable on campus, but were determined to finish the term. The students are contemplating whether to file a formal complaint.
- Days later, fliers depicting a Native American Axe and the text "scalp 'em" appear around campus, including on classroom windows, trees, and trash bins. An instructor sees the fliers and contacts maintenance to have them removed. A local journalist on campus for an event also sees the fliers.

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Analyzing the Hypothetical

1. Do the events at ABC rise to the level of a hostile environment?
2. At what point does ABC have a duty to take action?
3. What action can/should ABC take?
4. Can/should ABC deny recognition or funding to SO because of the behavior of its members at the costume party?
5. What communication, if any, should ABC engage in with students about the incidents?

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QUESTIONS?

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