

The First Amendment on Campus

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Introduction

- Q: What may a university do to address discriminatory speech on campus, consistent with the First Amendment?
- A: Universities may not prohibit hate speech, but they may take certain other steps without offending freedom of speech and academic freedom.
- Road map:
 - Cornell as a private actor
 - Free speech values + rules
 - Are universities special?
 - How universities may respond to discriminatory speech

Is Cornell Subject to the First Amendment?

- Several courts have held that Cornell University is not a state actor for purposes of civil rights laws.
- However, some universities adopt constitutional limitations by code, and/or seek to conform to First Amendment values.

Free Speech Values

- Democratic self-governance
- Search for truth
- Individual autonomy and actualization

Free Speech Rules

- Content and viewpoint discrimination is presumptively prohibited.
 - Speech may not be regulated simply because it is offensive.
 - Hate speech is fully protected under current law.
- Categories of unprotected speech:
 - Incitement to illegal activity
 - Fighting words
 - True threats
 - Defamation
 - Obscenity
 - Child pornography
 - Speech owned by others (intellectual property)

Government Speech and Public Forums

- Traditional public forums: time, place, and manner of speech may be regulated.
 - Restrictions must be reasonably related to a significant government interest.
 - Content and viewpoint discrimination are prohibited.
 - Alternative channels for speech must remain open.
- “Designated” or “limited” public forums: government may support speech on the basis of content.
 - Limits must be reasonably related to the purposes of the forum.
 - Viewpoint discrimination is prohibited.
- Government speech: the Speech Clause does not apply.
 - Even viewpoint discrimination is permitted.

How Do Universities Differ?

- Universities support the professional discovery, and the pedagogical transmission, of knowledge.
- Academic freedom guarantees the expression of ideas consistent with those two goals.
 - Content discrimination must be permitted: scholars and students differentiate subject matters and they must be able to distinguish worthwhile ideas.
 - Yet students and faculty must have the freedom to take unpopular positions.
- See AAUP 1940 Statement of Principles on Academic Freedom.

How May Universities Respond to Discriminatory Speech?

Hate speech is protected by courts, which have invalidated several university code provisions.

- Stanford, for example, prohibited speech that
 - a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
 - b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
 - c) makes use of insulting or "fighting" words or non-verbal symbols.
- A court found this violated a California law that applied First Amendment standards against private universities.

How May Universities Respond to Discriminatory Speech?

- Illegal conduct can be punished, whether accompanied by speech or not.
 - And illegal conduct that is motivated by bias toward protected groups may be subject to elevated punishment.
- The university's own speech may condemn discrimination.
- Reasonable time, place, and manner restrictions may ensure that speech does not interfere with university functions.

How May Universities Respond to Discriminatory Speech?

“True threats” can be disallowed.

- According to SCOTUS, “‘true threats’ encompass those statements when the speaker means to communicate a serious intent to commit an act of unlawful violence to a particular individual or group of individuals.”
- These can be proscribed because they amount to conduct—they elicit fear of physical harm.
- Assessment is based on whether a reasonable person would have felt threatened.

How May Universities Respond to Discriminatory Speech?

Harassment is not protected.

- Sexual harassment in the workplace has 5 elements:
 - Verbal or physical conduct of a sexual nature
 - The conduct is unwelcome
 - The conduct is directed at an individual because of their sex
 - The conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment
 - The employer knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action
- Federal law prohibits sex- and race-based harassment on campuses.

Specific Issues

- Protests on campus
- Classroom speech: trigger warnings
- Off-campus and online speech
- Invited speakers
- Safe spaces
- Sensitive terms / microaggressions
- Nondiscrimination requirements for student groups