New Challenges to Freedom of Expression in Higher Education

2018 Hot Topics in Higher Education Webinar Series

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CAMPUS SPEECH
The First Amendment applies on college campuses

“[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”

-- Healy v. James, 408 U.S. 169, 180 (1972)

Content-neutral regulations

- Rights of the speaker
- Limits on speech and authority of administrators

Public Forums
Invited Speakers

• Public v. private institutions
  - Constitutional rights
  - Policy and contractual parameters
  - Community expectations

• Type of forum
  - Related policies
  - Regulation of time, place, manner
  - Notice
Invited Speakers

• Other considerations
  - Team
  - Designated spokesperson
  - Disinviting speakers
    • Safety
    • Alternatives
    • Communication
    • Costs
  - Crowds, protests
    • Disciplinary issues
  - Relationship with local law enforcement
Protest Rallies

- Hate speech is protected; hate crimes are not
- “Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate.”

_Matal v. Tam, U.S. ___, 137 S. Ct. 1744, 1764 (2017)_

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# Unprotected Speech

## Fighting Words
- “Personally abusive epithets”— generally face-to-face interactions
- “Tend to incite an immediate breach of the peace”
- “Invitation to exchange fisticuffs”

## True Threats
- “serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals”
- Threat itself that is the crime
- Protects from fear of violence

## Incitement
- Speech that is:
  - “Directed at inciting or producing imminent lawless action”
  - “likely to incite or produce such action”

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Policies Affecting Expression

• Speech-related university policies
  - “Speech codes”
    • Policies intended to limit harassment or enforce certain conducts but may impact speech
  - Free speech zones
    • Constitutional time, place and manner restriction, or unconstitutional ban on student expression?
Faculty Speech

- Academic freedom

- Speech within the classroom
  - *Pickering v. Board of Education*, 391 U.S. 563 (1968): (1) Does the speech relate to a matter of public concern and (2) Does faculty member’s interest in exercising the speech outweigh the institution’s interest in regulating the speech?

- Competing harassment and discrimination policies
  - *OCR’s July 28, 2003 DCL on the First Amendment*: “Some colleges and universities have interpreted OCR's prohibition of “harassment” as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.”
Scenario:

- Professor A teaches Chemistry and is an active user of Twitter. Recently, Professor A has been following with interest the #metoo movement and thinks it has “gone too far.” He begins tweeting regularly about his views regarding individuals who report alleged sexual harassment.

- A group of students in Professor A’s class and two of Professor A’s colleagues are concerned about the tweets and file Title IX complaints alleging that Professor A’s presence on campus is creating a hostile environment for them.

- How should the institution handle these complaints?
Faculty Speech

• Considerations:
  - Is the institution public or private?
  - Is an investigation necessary or appropriate?
    • Could an investigation have a chilling effect?
  - Is the analysis different if Professor A makes these comments in class, rather than online?
  - Educating campus constituents
LIABILITY FOR PUBLICATIONS
Student Publications

- Rights and limitations of student press
- Defamation
- Shield laws
- Anonymous Speech
- Subpoenas
Ways To Use Copyrighted Materials

1) Obtain permission from the copyright owner
or
2) Obtain a license to use the image from the copyright owner
or
3) It is a “fair use”
Fair Use

First, always attempt to clear rights to use when you can, and clear again if you re-use the content.

When you can’t clear rights, to determine whether use of a particular work may be "fair" consider these questions:

✓ Are you making a point of artistic, cultural or public interest?
✓ Are you using the existing work to make or illustrate that point?
✓ Are you using only as much of the existing work as is reasonable in the circumstances to make your point?
✓ Is your use of the work transformative, such that it does not replace the market/audience for the original work?
Thank you for attending.

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