

2017

Balancing First Amendment Rights with an Inclusive Environment on Public University Campuses

Gerald S. Kerska

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Kerska, Gerald S., "Balancing First Amendment Rights with an Inclusive Environment on Public University Campuses" (2017).
Minnesota Law Review. 166.
<https://scholarship.law.umn.edu/mlr/166>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Foreword

Balancing First Amendment Rights with an Inclusive Environment on Public University Campuses

Gerald S. Kerska*

How should public universities strike a balance between First Amendment values and their mission to establish a diverse and inclusive environment? Recent events from the University of Minnesota bring this question into focus.

In the spring of 2015, just a few months after the *Charlie Hebdo* massacre, a group of University of Minnesota professors set up a panel discussion entitled “Can One Laugh at Everything? Satire and Free Speech After Charlie.”¹ To promote the event, the organizers designed and distributed posters featuring the now famous cover of a *Charlie Hebdo* magazine that depicted the prophet Muhammad.² The organizers added a twist, putting the word “censored” in red ink across the magazine cover.³ Several hundred students and numerous faculty mem-

* Symposium Articles Editor, *Minnesota Law Review* Volume 101. My most sincere thanks to the speakers, panelists, and moderators who made this year’s Symposium a success. I am tremendously grateful to the faculty, staff, and administration at the University of Minnesota for their help with this event. Particular appreciation goes to Professors Dale Carpenter, Kristin Hickman, and Heidi Kitrosser for their invaluable wisdom during the planning process. Finally, I am thankful for the counsel and encouragement of Editor-in-Chief Alysha Bohanon during the entire planning and execution of the Symposium. Copyright © 2017 by Gerald S. Kerska.

1. Colleen Flaherty, *Take It Down*, INSIDE HIGHER ED (May 5, 2015), <https://www.insidehighered.com/news/2015/05/05/u-minnesota-responds-student-complaint-about-posters>; Maura Lerner, *Poster for Free-Speech Forum Sets off Debate at University of Minnesota*, STAR TRIB. (May 5, 2015), <http://www.startribune.com/poster-for-free-speech-forum-sets-off-debate-at-university-of-minnesota/302689691>.

2. See sources cited *supra* note 1.

3. See sources cited *supra* note 1.

bers filed complaints with the university's Office of Equal Opportunity and Affirmative Action.⁴

The next major incident took place in the fall of 2016. It was election season. The political tension on campus "was like wet wool."⁵ Every September, University of Minnesota student groups paint panels on a foot bridge spanning the Mississippi River to advertise their organizations. The Minnesota College Republicans painted the slogan "Build the Wall" across its panel, a nod to Donald Trump's controversial campaign.⁶ This upset many students and led to protests and teach-ins. Someone vandalized the panel in response, writing "Stop White Supremacy" in spray paint.⁷

What would be a proper response by university officials to these incidents? On the First Amendment side of the ledger, the University of Minnesota maintains four key core principles of free speech. They are: (1) "A public university must be absolutely committed to protecting free speech, both for constitutional and academic reasons"; (2) "Free speech includes protection for speech that some find offensive, uncivil, or even hateful"; (3) "Free speech cannot be regulated on the ground that some speakers are thought to have more power or more access to the mediums of speech than others"; and (4) "Even when protecting free speech conflicts with other important University values, free speech must be paramount."⁸

But reflexive protection of hateful or offensive speech often comes at a human cost, and the University of Minnesota must, as President Eric Kaler claimed, "be a safe and welcoming campus for all students."⁹ The effects of offensive speech surely inhibit achieving that objective. Muslim members of the University of Minnesota community felt that a depiction of the

4. Flaherty, *supra* note 1.

5. DAVID FOSTER WALLACE, *Getting Away from Already Being Pretty Much Away from It All*, in *A SUPPOSEDLY FUN THING I'LL NEVER DO AGAIN* 83, 83 (1st ed. 1997).

6. Scott Jaschik, *The University of Minnesota Is Standing by 'Build the Wall' Messages as Protected, Free Speech*, *BUS. INSIDER* (Oct. 3, 2016), <http://www.businessinsider.com/the-university-of-minnesota-protects-trump-supporters-free-speech-2016-10>.

7. *Id.*

8. Faculty Consultative Comm., *Free Speech at the University of Minnesota: Four Core Principles* (March 10, 2016), http://usenate.umn.edu/usenate/docs/160505free_speech_core_principles.pdf.

9. E-mail from Eric W. Kaler, President, Univ. of Minn., to all University of Minnesota students and faculty (Nov. 3, 2016, 2:33 PM) (on file with author).

prophet Muhammad affronted their dignity and disparaged their sincerely held religious beliefs.¹⁰ Nor can anyone doubt that many latinx members of the University of Minnesota felt marginalized and wounded by the “Build the Wall” sign.¹¹ The La Raza Student Cultural Center wrote, in a letter to University President Kaler, that the sign sends a message that “our lives here on campus and in the United States don’t matter, and that we do not belong in the U.S.”¹²

The University of Minnesota is not the only institution to face these tough choices—indeed, similar events took place all over the United States in 2015 and 2016. Last year alone, high-profile skirmishes between students and administrators took place at Missouri, UCLA, Cincinnati, and Ithaca College, just to name a few.¹³ These disputes arose out of events such as students posting pictures on social media in blackface, writing “build the wall” on free speech boards, and posting racist remarks on Twitter.¹⁴

During this same time period, student demands for “safe spaces,” “trigger warnings,” and punishment of “microaggressions” became part of popular discourse.¹⁵ These requests, which involve some measure of curtailing speech or academic freedom to promote diversity and inclusion, formed part and parcel of the more public struggles (i.e., protests) about campus climate between students and administrators.¹⁶ Here, too, universities need to make weighty value judgments.

10. Flaherty, *supra* note 1.

11. See Open Letter from the Department of Chicano and Latino Studies, Univ. of Minn. (Oct. 1, 2016), <https://cla.umn.edu/chicano-latino/news-events/announcement/solidarity-letter-against-build-wall>; *Why the ‘Build the Wall’ Mural at the University of Minnesota Is Shameful, Insulting and Racist*, LATINO REBELS (Oct. 3, 2016), <http://www.latinorebels.com/2016/10/03/why-the-build-the-wall-mural-at-the-university-of-minnesota-is-shameful-insulting-and-racist>.

12. La Raza Student Cultural Ctr., *A Vandalism on Our Humanity*, MINN. DAILY (Oct. 3, 2016), <http://www.mndaily.com/article/2016/10/a-vandalism-on-our-humanity>.

13. Scott Jaschik, *Epidemic of Racist Incidents*, INSIDE HIGHER ED. (Sept. 26, 2016), <https://www.insidehighered.com/news/2016/09/26/campuses-see-flurry-racist-incidents-and-protests-against-racism>.

14. *Id.*

15. See Sophie Downes, *Trigger Warnings, Safe Spaces and Free Speech Too*, N.Y. TIMES (Sept. 10, 2016), https://www.nytimes.com/2016/09/11/opinion/trigger-warnings-safe-spaces-and-free-speech-too.html?_r=0.

16. See *id.*; Jenny Jarvie, *Trigger Happy*, NEW REPUBLIC (March 3, 2014), <https://newrepublic.com/article/116842/trigger-warnings-have-spread-blogs-college-classes-thats-bad>.

Based on the salience of these disputes between students and administrators about the proper balance between First Amendment rights and diversity and inclusion, the fall of 2016 was the perfect time to hold a forum discussing those issues in greater detail. And a campus acutely affected by these events, such as the University of Minnesota, seemed the perfect place to hold that discussion.

On October 21, 2016, the *Minnesota Law Review* hosted its annual Symposium, entitled “Balancing First Amendment Rights with an Inclusive Environment on Public University Campuses.” The *Law Review* brought together a collection of the nation’s finest professors, advocates, and judges to discuss topics ranging from campus conduct codes to academic freedom. We hoped that a discussion of these topics between the country’s foremost experts could bring clarity to the issues in this debate and further the dialogue already taking place on our campus and in our classrooms.

The Symposium began with an introduction by Dean Garry Jenkins, who set the stage for the panel discussions that followed by articulating several themes of campus First Amendment debates. He observed that free speech incidents on campus often pit First Amendment values against palpable harms suffered by students. Dean Jenkins also noted those on either side of the debate view the world quite differently. Some see a generation of students trampling on the First Amendment; others see students vigorously engaging in counter-speech. Some see a generation of coddled students; others view campus climate debates as furthering needed dialogue.

Following Dean Jenkins’s introduction, the Symposium moved into its first panel discussion, entitled “University Code of Conduct Policies That Limit Student Speech.” Will Creeley, Vice President of Legal and Public Advocacy at Fire, began the discussion. Mr. Creeley first explained that nearly half of all campus speech codes would not pass First Amendment muster. He then moved into a discussion of several under-the-radar threats to student speech, such as threats of administrative discipline levelled at both students and faculty, administrative veto power over invited speakers, and the use of trigger warnings as a political weapon by persons of all ideological stripes.

Next, Mary-Rose Papandrea—professor and associate dean of academic affairs at the University of North Carolina School of Law—presented her paper, *The Free Speech Rights of Uni-*

versity Students.¹⁷ Dean Papandrea initially observed that punishing or sanctioning students is not an optimal remedy for in-temperate speech. She instead explained how free speech incidents may become teachable moments through open dialogue and debate. Dean Papandrea then focused on an overview of the latitude afforded to universities in limiting speech by current precedent. Specifically, she noted a trend in the lower federal courts towards providing deference to professional school decisions to enforce academic program rules through curtailing the speech rights of students—in her view, a disturbing development.

Professor Alexander Tsesis of Loyola University Chicago School of Law concluded the first panel by presenting his paper, *Campus Speech and Harassment*.¹⁸ Tsesis started his presentation by recognizing that universities have both a goal of furthering debate, but also a legal obligation to avoid creating a hostile environment. He noted that concepts like safe spaces and trigger warnings, when narrowly tailored, help universities further both of those objectives. Professor Tsesis spent much of his time outlining the acceptable ways in which universities may address worries about a hostile environment. Supreme Court precedent gives administrators ample authority to prohibit true threats, incitement, and conduct creating a hostile environment.

Switching gears, the Symposium's second panel, "Perspectives on the First Amendment and Public Universities," brought together a diverse set of panelists—two professors, a federal judge, and a social justice advocate—to provide broader perspectives on campus speech. Professors Richard Delgado and Jean Stefancic, a husband and wife duo from the University of Alabama School of Law, co-presented their paper, *Four Ironies of Campus Climate*.¹⁹ Delgado and Stefancic opened with a question: Why do conversations about hate speech and campus climate fail to go anywhere? Delgado and Stefancic answered that legal formalism and First Amendment absolutism stifle productive debate. And from that observation, they set

17. Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801 (2017).

18. Alexander Tsesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863 (2017).

19. Richard Delgado & Jean Stefancic, *Four Ironies of Campus Climate*, 101 MINN. L. REV. 1919 (2017).

forth four ironies of campus speech. Their Article, which discusses this topic in detail, appears later in this Issue.

Providing a perspective from the bench, Judge Alex Kozinski of the Ninth Circuit discussed the consequences of creating an environment hostile towards disagreeable and otherwise offensive speech. Judge Kozinski began by referencing Justice Holmes's famous dissent in *Abrams v. United States*,²⁰ noting that we protect false, offensive, and disagreeable speech because it may turn out to be the prevailing view. He then focused on defending low-value speech, i.e., false or offensive speech, on its own merits.²¹ Judge Kozinski closed by warning that the First Amendment is on the run and that our loss of spirit in defending First Amendment values impoverishes our public discourse.

Former law professor, social justice advocate, and civil rights lawyer Nekima Levy-Pounds concluded the second panel, providing observations about campus speech based on her experience with the Black Lives Matter movement. Professor Levy-Pounds provided context for the debate over campus climate. She observed that students of color, in the context of campus debates, often feel marginalized, oppressed, and as though their concerns are not taken seriously. And there is speech, according to Professor Levy-Pounds, that is far enough outside the boundaries of reasonable disagreement that it exacerbates the challenges faced by those students. Universities must, she argued, take into account that campuses are composed of and run by white majorities, designed for white people, and often leave students of color feeling subject to systemic racism. By way of example, she noted that when students of color push for the creation of safe spaces or the ouster of administrators, they often face backlash from their campus communities and harsh sanctions. Professor Levy-Pounds closed by urging universities to take into account our nation's unrectified racial history when forming student conduct codes and when punishing student protest.

After the second panel, Nadine Strossen—professor at New York Law School and former president of the ACLU—delivered the Symposium's keynote address. In her address, "Why Should

20. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

21. For an extended discussion of false speech's value, the reader is directed to Judge Kozinski's self-described "quite brilliant" and "funny" concurring in *United States v. Alvarez*. See 638 F.3d 666, 673 (9th Cir. 2011) (Kozinski, C.J., concurring in the denial of rehearing en banc).

We Defend ‘Freedom for the Thought That We Hate’?,” Strossen began by expressing distress at the idea that we can create a more inclusive environment by silencing voices. She also noted that we must hope people will use free speech responsibly, but the price of our freedom is to feel discomfort when they do not. Strossen then focused her discussion on how current ignorance and hostility towards free speech might result from advocates failing to fully explain First Amendment principles. According to Strossen, free speech advocates must clarify that much hateful and offensive speech can be punished consistent with First Amendment principles. They must also make clear that just because one has the right to say something does not mean it is “right” to do so, and they should explain more fully why we should not empower officials to repress the residual category of hate speech. In defense of the last point, Strossen explained that curing hate speech and the palpable harms it causes through administrative enforcement may lead to discriminatory and uneven enforcement and may ultimately chill non-hate speech.

The Symposium’s final panel, “Academic Freedom,” asked how universities may balance the creation of a safe and welcoming environment with academic freedom. More specifically, how may a university, if at all, shape professorial conduct through its policies? Dean Vikram David Amar of the University of Illinois College of Law started off the panel by presenting his paper, *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, co-authored by Alan E. Brownstein.²² Throughout his talk, Dean Amar questioned whether the term “academic freedom” is really a meaningful concept in First Amendment jurisprudence. Amar posited that if academic freedom means something, then one would expect to find extra First Amendment protections for students and faculty. He then led the audience through relevant Supreme Court precedent and explained that universities have a good deal of latitude to regulate both faculty and student speech.

University of Minnesota Professor Heidi Kitrosser went second and presented her paper, *Free Speech, Higher Education, and the PC Narrative*.²³ Rather than focusing on free speech or

22. Vikram David Amar & Alan E. Brownstein, *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943 (2017).

23. Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*,

academic freedom itself, Professor Kitrosser's presentation explored popular discussions about those topics. She noted that the cultural purchase of the ideas underlying the First Amendment is strong, which makes larger discussions about these topics important. She presented three main descriptive claims. First, despite the heated nature of debates about the First Amendment, speakers rarely define the terms in question with any precision—for example, what exactly are safe spaces or trigger warnings? Second, the more parties drill down into the precise definitions of those concepts, the more common ground they tend to find. Third, a lot of pushback against so-called PC culture actually involves criticism of students using constitutionally protected counter-speech. For Professor Kitrosser's normative arguments based on these observations, the inquisitive reader is directed to her excellent Article in this Issue.

Robert M. O'Neil—professor and president emeritus at the University of Virginia School of Law—closed the panel discussion by presenting his paper, *Academic Freedom To Deny the Truth: Beyond the Holocaust*.²⁴ Professor O'Neil's presentation examined university responses to professors who take positions far outside the mainstream—e.g., Sandy Hook or Holocaust deniers. O'Neil presented two interesting cases of such professors, James Tracy (Sandy Hook) and Arthur Butz (the Holocaust). The universities employing these two academics reacted very differently. Tracy was fired, while Butz continues to serve at Northwestern University. From these cases, and others, O'Neil observed that medium of expression and whether professors make outrageous statements within their academic areas at least partially determine whether administrators take action against the speaker.

In the end, the *Minnesota Law Review's* 2016 Symposium illustrated several important themes for campus First Amendment debates. First, universities have non-trivial discretion to prohibit student speech—a point illustrated by Professor Tthesis, Dean Papandrea, and Dean Amar. But even though universities have discretion, our speakers parted ways on whether universities should exercise that authority to limit student or faculty speech; compare, for example, the views of Judge Kozinski and Professor Strossen with those of Professor

101 MINN. L. REV. 1987 (2017).

24. Robert M. O'Neil, *Academic Freedom To Deny the Truth: Beyond the Holocaust*, 101 MINN. L. REV. 2065 (2017).

Levy-Pounds. Third, many of our presenters pointed to the lack of clarity in debates over campus climate and stressed the importance of defining crucial terms like safe spaces and trigger warnings, among others. At the end of the day, the Symposium surely raised as many questions as it provided answers. We hope that our event inspired further discussion among those who attended, and we are thrilled to continue the dialogue in this print edition.