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Speech on Campus [1]

The First Amendment to the Constitution protects speech no matter how offensive its content. Restrictions on speech by public colleges and universities amount to government censorship, in violation of the Constitution. Such restrictions deprive students of their right to invite speech they wish to hear, debate speech with which they disagree, and protest speech they find bigoted or offensive. An open society depends on liberal education, and the whole enterprise of liberal education is founded on the principle of free speech.

How much we value the right of free speech is put to its severest test when the speaker is someone we disagree with most. Speech that deeply offends our morality or is hostile to our way of life warrants the same constitutional protection as other speech because the right of free speech is indivisible: When we grant the government the power to suppress controversial ideas, we are all subject to censorship by the state. Since its founding in 1920, the ACLU has fought for the free expression of all ideas, popular or unpopular. Where racist, misogynist, homophobic, and transphobic speech is concerned, the ACLU believes that more speech — not less — is the answer most consistent with our constitutional values.

But the right to free speech is not just about the law; it's also a vital part of our civic education. As Supreme Court Justice Robert Jackson wrote in 1943 about the role of schools in our society: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our

government as mere platitudes." Remarkably, Justice Jackson was referring to grade school students. Inculcating constitutional values — in particular, the value of free expression — should be nothing less than a core mission of any college or university.

To be clear, the First Amendment does not protect behavior on campus that crosses the line into targeted harassment or threats, or that creates a pervasively hostile environment for vulnerable students. But merely offensive or bigoted speech does not rise to that level, and determining when conduct crosses that line is a legal question that requires examination on a case-by-case basis. Restricting such speech may be attractive to college administrators as a quick fix to address campus tensions. But real social change comes from hard work to address the underlying causes of inequality and bigotry, not from purified discourse. The ACLU believes that instead of symbolic gestures to silence ugly viewpoints, colleges and universities have to step up their efforts to recruit diverse faculty, students, and administrators; increase resources for student counseling; and raise awareness about bigotry and its history.

QUESTIONS

Q: The First Amendment prevents the government from arresting people for what they say, but who says the Constitution guarantees speakers a platform on campus?

A: The First Amendment does not require the government to provide a platform to anyone, but it does prohibit the government from discriminating against speech on the basis of the speaker's viewpoint. For example, public colleges and universities have no obligation to fund student publications; however, the Supreme Court has held [2] that if a public university voluntarily provides these funds, it cannot selectively withhold them from particular student publications simply because they advocate a controversial point of view.

Of course, public colleges and universities are free to invite whomever they like to speak at commencement ceremonies or other events, just as students are free to protest speakers they find offensive. College administrators cannot, however, dictate which speakers students may invite to campus on their own initiative. If a college or university usually allows students to use campus resources (such as auditoriums) to entertain guests, the school cannot withdraw those resources simply because students have invited a controversial speaker to campus.

Q: Does the First Amendment protect speech that invites violence against members of the campus community?

A: In *Brandenburg v. Ohio* [3], the Supreme Court held that the government cannot punish inflammatory speech unless it **intentionally** and **effectively** provokes a crowd to **immediately** carry out violent and unlawful action. This is a very high bar, and for good reason.

The incitement standard has been used to protect all kinds of political speech, including speech that at least tacitly endorses violence, no matter how righteous or vile the cause. For example, in *NAACP v. Clairborne Hardware* [4], the court held that civil rights icon

Charles Evans could not be held liable for the statement, "If we catch any of you going in any of them racist stores, we're going to break your damn neck." In *Hess v. Indiana* [5], the court held that an anti-war protestor could not be arrested for telling a crowd of protestors, "We'll take the fucking street later." And In *Brandenburg* itself, the court held that a Ku Klux Klan leader could not be jailed for a speech stating "that there might have to be some revengeance [sic] taken" for the "continued suppression of the white, Caucasian race."

The First Amendment's robust protections in this context reflect two fundamentally important values. First, political advocacy — rhetoric meant to inspire action against unjust laws or policies — is essential to democracy. Second, people should be held accountable for their own conduct, regardless of what someone else may have said. To protect these values, the First Amendment allows lots of breathing room for the messy, chaotic, ad hominem, passionate, and even bigoted speech that is part and parcel of American politics. It's the price we pay to keep bullhorns in the hands of political activists.

Q: But isn't it true you can't shout fire in a crowded theater?

People often associate the limits of First Amendment protection with the phrase "shouting fire in a crowded theater." But that phrase is just (slightly inaccurate) shorthand for the legal concept of "incitement." (Although, if you think there's a fire — even if you're wrong — you'd better yell!) The phrase, an incomplete reference to the concept of incitement, comes from the Supreme Court's 1919 decision in *Schenck v. United States* [6]. Charles Schenck and Elizabeth Baer were members of the Executive Committee of the Socialist Party in Philadelphia, which authorized the publication of more than 15,000 fliers urging people not to submit to the draft for the First World War. The fliers said things like: "Do not submit to intimidation," and "Assert your rights." As a result of their advocacy, Schenck and Baer were convicted for violating the Espionage Act, which prohibits interference with military operations or recruitment, insubordination in the military, and support for enemies of the United States during wartime.

Writing for the Supreme Court, Justice Oliver Wendell Holmes Jr. held that Schenck's and Baer's convictions did not violate the First Amendment. Observing that the "most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic," Holmes reasoned by analogy that speech urging people to resist the draft posed a "clear and present danger" to the United States and therefore did not deserve protection under the First Amendment. This is the problem with the line about shouting fire in a crowded theater — it can be used to justify suppressing any disapproved speech, no matter how tenuous the analogy. Justice Holmes later advocated [7] for much more robust free speech protections, and *Schenck* was ultimately overruled. It is now emphatically clear that the First Amendment protects the right to urge resistance to a military draft, and much else.

Q: But what about campus safety? Doesn't the First Amendment have an exception for "fighting words" that are likely to provoke violence?

A: The Supreme Court ruled [8] in 1942 that the First Amendment does not protect "fighting words," but this is an extremely limited exception. It applies only to intimidating speech directed at a specific individual in a face-to-face confrontation that is likely to

provoke a violent reaction. For example, if a white student confronts a student of color on campus and starts shouting racial slurs in a one-on-one confrontation, that student may be subject to discipline.

Over the past 50 years, the Supreme Court hasn't found the "fighting words" doctrine applicable in any of the cases that have come before it, because the circumstances did not meet the narrow criteria outlined above. The "fighting words" doctrine does not apply to speakers addressing a large crowd on campus, no matter how much discomfort, offense, or emotional pain their speech may cause.

In fact, the Supreme Court has made clear that the government cannot prevent speech on the ground that it is likely to provoke a hostile response — this is called the rule against a "heckler's veto [9]." Without this vital protection, government officials could use safety concerns as a smokescreen to justify shutting down speech they don't like, including speech that challenges the status quo. Instead, the First Amendment requires the government to provide protection to all speakers, no matter how provocative their speech might be. This includes taking reasonable measures to ensure that speakers are able to safely and effectively address their audience, free from violence or censorship. It's how our society ensures that the free exchange of ideas is uninhibited, robust, and wide-open.

Q: What about nonverbal symbols, like swastikas and burning crosses? Are they constitutionally protected?

A: Symbols of hate are constitutionally protected if they're worn or displayed before a general audience in a public place — say, in a march or at a rally in a public park. The Supreme Court has ruled that the First Amendment protects symbolic expression, such as swastikas, burning crosses, and peace signs because it's "closely akin to 'pure speech.'" The Supreme Court has accordingly upheld the rights [10] of students to wear black armbands in school to protest the Vietnam War, as well as the right [11] to burn the American flag in public as a symbolic expression of disagreement with government policies.

But the First Amendment does not protect the use of nonverbal symbols to directly threaten an individual, such as by hanging a noose over their dorm room or office door. Nor does the First Amendment protect the use of a non-verbal symbol to encroach upon or desecrate private property, such as by burning a cross on someone's lawn or spray-painting a swastika on the wall of a synagogue or dorm. In *R.A.V. v. City of St. Paul* [12], for example, the Supreme Court struck down as unconstitutional a city ordinance that prohibited cross-burnings based solely on their symbolism. But the Court's decision makes clear that the government may prosecute cross-burners under criminal trespass and/or anti-harassment laws.

Q: Isn't there a difference between free speech and dangerous conduct?

A: Yes. Speech does not merit constitutional protection when it targets a particular individual for harm, such as a true threat of physical violence. And schools must take action to remedy behavior that interferes with a particular student's ability to exercise their right to participate fully in the life of the university, such as targeted harassment.

The ACLU isn't opposed to regulations that penalize acts of violence, harassment, or threats. To the contrary, we believe that these kinds of conduct can and should be proscribed. Furthermore, we recognize that the mere use of words as one element in an act of violence, harassment, intimidation, or invasion of privacy does not immunize that act from punishment.

Q: Aren't restrictions on speech an effective and appropriate way to combat white supremacy, misogyny, and discrimination against LGBT people?

A: Historically, restrictions on speech have proven at best ineffective, and at worst counter-productive, in the fight against bigotry. Although drafted with the best intentions, these restrictions are often interpreted and enforced to oppose social change. Why? Because they place the power to decide whether speech is offensive and should be restrained with authority figures — the government or a college administration — rather than with those seeking to question or dismantle existing power structures.

For example, under a speech code in effect at the University of Michigan for 18 months, there were 20 cases in which white students charged Black students with offensive speech. One of the cases resulted in the punishment of a Black student for using the term "white trash" in conversation with a white student. The code was struck down [13] as unconstitutional in 1989.

To take another example, public schools throughout the country have attempted to censor pro-LGBT messages because the government thought they were controversial, inappropriate for minors, or just wrong. Heather Gillman's school district banned her from wearing a shirt that said "I Support My Gay Cousin." The principal maintained that her T-shirt and other speech supporting LGBT equality, such as "I Support Marriage Equality," were divisive and inappropriate for impressionable students. The ACLU sued the school district and won [14], because the First Amendment prevents the government from making LGBT people and LGBT-related issues disappear.

These examples demonstrate that restrictions on speech don't really serve the interests of marginalized groups. The First Amendment does.

Q: But don't restrictions on speech send a strong message against bigotry on campus?

A: Bigoted speech is symptomatic of a huge problem in our country. Our schools, colleges, and universities must prepare students to combat this problem. That means being an advocate: speaking out and convincing others. Confronting, hearing, and countering offensive speech is an important skill, and it should be considered a core requirement at any school worth its salt.

When schools shut down speakers who espouse bigoted views, they deprive their students of the opportunity to confront those views themselves. Such incidents do not shut down a single bad idea, nor do they protect students from the harsh realities of an often unjust world. Silencing a bigot accomplishes nothing except turning them into a martyr for the principle of free expression. The better approach, and the one more consistent with our constitutional tradition, is to respond to ideas we hate with the ideals we cherish.

Q: Why does the ACLU use its resources to defend the free speech rights of white supremacists, misogynists, homophobes, transphobes, and other bigots?

A: Free speech rights are indivisible. Restricting the speech of one group or individual jeopardizes everyone's rights because the same laws or regulations used to silence bigots can be used to silence you. Conversely, laws that defend free speech for bigots can be used to defend civil rights workers, anti-war protestors, LGBT activists, and others fighting for justice. For example, in the 1949 case of *Terminiello v. City of Chicago* [15], the ACLU successfully defended an ex-Catholic priest who had delivered a racist and anti-Semitic speech. The precedent set in that case became the basis for the ACLU's defense [16] of civil rights demonstrators in the 1960s and 1970s.

Q: How does the ACLU propose to ensure equal opportunity in education?

A: Universities are obligated to create an environment that fosters tolerance and mutual respect among members of the campus community, an environment in which all students can exercise their right to participate meaningfully in campus life without being subject to discrimination. To advance these values, campus administrators should:

- speak out loudly and clearly against expressions of racist, sexist, homophobic, and transphobic speech, as well as other instances of discrimination against marginalized individuals or groups;
- react promptly and firmly to counter acts of discriminatory harassment, intimidation, or invasion of privacy;
- create forums and workshops to raise awareness and promote dialogue on issues of race, sex, sexual orientation, and gender identity;
- intensify their efforts to ensure broad diversity among the student body, throughout the faculty, and within the college administration;
- vigilantly defend the equal rights of all speakers and all ideas to be heard, and promote a climate of robust and uninhibited dialogue and debate open to all views, no matter how controversial.

Links
[1] https://www.aclu.org/other/speech-campus
[2] https://en.wikipedia.org/wiki/Rosenberger_v._University_of_Virginia
[3] https://en.wikipedia.org/wiki/Brandenburg_v._Ohio
[4] https://en.wikipedia.org/wiki/NAACP_v._Claiborne_Hardware_Co.
[5] https://en.wikipedia.org/wiki/Hess_v._Indiana
[6] https://en.wikipedia.org/wiki/Schenck_v._United_States
[7] https://en.wikipedia.org/wiki/Abrams_v._United_States
[8] https://en.wikipedia.org/wiki/Chaplinsky_v._New_Hampshire
[9] https://en.wikipedia.org/wiki/Heckler%27s_veto
[10] https://en.wikipedia.org/wiki/Tinker_v._Des_Moines_Independent_Community_School_District
[11] https://en.wikipedia.org/wiki/Texas_v._Johnson
[12] https://en.wikipedia.org/wiki/R.A.V._v._City_of_St._Paul
[13] http://www.bc.edu/bc_org/avp/cas/comm/free_speech/doe.html
[14] https://www.aclu.org/cases/gillman-v-holmes-county-school-district?redirect=lgbt-rights_hiv-

aids/gillman-v-holmes-county-school-district-case-profile
[15] https://en.wikipedia.org/wiki/Terminiello_v._City_of_Chicago
[16]
https://en.wikipedia.org/wiki/American_Civil_Liberties_Union#Civil_liberties_revolution_of_the_1960s