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## Legitimate Limits on Free Expression

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In the United States, we are conditioned to think of ourselves as constitutionally free to speak (or write) our minds, but that freedom is not absolute. Legally, we are constrained from uttering words that have great potential for harming individuals or for harming the society that supports our freedoms. In addition to the more obvious restrictions against yelling “Fire” in a crowded movie theater if the statement is unwarranted and those against speech that incites riots or advocates the violent overthrow of the government, “fighting words” are exempt from First Amendment protections.

The U.S. Supreme Court has recognized for more than forty years that some speech is not worthy of protection.

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>1</sup>

Legal limitations are different from reasoned judgment about what constitutes appropriate action. The legal system that allowed child labor and discrimination against minority groups operated in a way that was

not ethical. Law describes what behavior we may be held accountable for in a particular society at a particular time; sometimes it is based on what is moral, sometimes not.

Ethical imperatives, on the other hand, withstand the variables of place and time. What constitutes "fighting words," for example, depends somewhat on context, but the imperative to refrain from the use of language that carries the reasonable expectation of insult or injury does not. Along with moral obligations not to harm individuals, there are obligations to refrain from action that is likely to destroy the forum that allows speech to occur. The concept of free speech is meaningless if hecklers make it impossible for an unpopular speaker to have his or her say. The speaker's message *adds* to public discussion. The hecklers *impede*.

We have conventional restrictions on free expression as well. For example, it is convention, not law, that inhibits one from screaming, "Fuck you!" in church. For that matter, it is conventional restraint that makes it unusual to see such an expression in an academic book.

It is an appreciation of community standards, not law, that stops an editor from printing a graphic picture of a local child killed by a speeding car. And it is not unusual for the editor to balance understanding of what the community *wants* to see or read with editorial judgment of what the community *needs* to see or read. Successful editors understand and respect conventions of the community.

College and university campuses are identical to other communities in that some conventions that restrain expression are set by tradition and by the nature of the individuals who govern, work, and live in that community; other legitimate limits stem from the need to protect individuals and the community. However, colleges and universities are different from other communities in that the nature of higher education forces interaction among a more diverse group of people than an individual may otherwise choose. In addition, college and universities are communities with the specific goal of transmitting and advancing knowledge and of creating, both internally and for the society at large, a more informed and thoughtful populace.

The purpose of this chapter is to argue guidelines for determining what categories of speech should not be allowed on college or university campuses. A look at some recent situations in which questions of free expression were raised in higher education illustrates that not all speech should be protected.

1. A number of campus newspapers or administrations have been faced with the decision of whether to run advertisements from companies selling term papers. California State University-Fullerton, The University of Mississippi, New York University, and

Northwestern University are among the schools that have chosen not to run such advertisements.<sup>2</sup>

2. The student newspaper at UCLA included a cartoon rooster that claimed he had been admitted to the school through "affirmative action." Two editors were suspended for twenty-four hours on the grounds that the comic strip was "racially insensitive."<sup>3</sup>
3. A publisher of the California State University-Los Angeles student newspaper charges that she was fired in a series of administrative actions designed to pressure the newspaper into dropping investigative stories that showed the university administration in a negative light.<sup>4</sup>
4. The adviser for the Compton (California) Community College student newspaper stepped down after accusing the administration of censoring a story on stolen midterm exams. The adviser said that he was told by an administrator to withhold the story and understood that he would be fired if he didn't do so.<sup>5</sup>
5. The student newspaper at Duquesne University ran a Family Services ad after being directed by its student governing board to refrain from doing so. The editor was fired and the administration barred the staff from access to the newspaper offices.<sup>6</sup>
6. Students who attend the School of the Ozarks in Point Lookout, Missouri, will be fined \$5 for displaying "vulgar or obscene bumper stickers." The dean of students said that such behavior is "not appropriate."<sup>7</sup>

While all these cases impinge on freedom of expression, there are substantive differences. I believe there is legitimate reason for disallowing ads from term paper companies and for punishing racially insensitive remarks, that it is not legitimate to suppress speech that calls official administrative action into account, and that questions of taste, community standards, and convention fall into a gray area with a strong bias toward allowing rather than disallowing such expression. The differences can be clarified through an examination of the special nature of educational institutions and by application of basic moral obligations toward individuals.

Educational communities are not random groupings but groups created through purposeful self-selection. People gather on college and university campuses with the express purpose of assuming particular roles in the transmission and advancement of knowledge. Priorities differ with the roles—a fellow or research scholar will have primary interest in introducing new understanding within some area of study, undergraduate students are concerned primarily with their own acquisition of knowledge—but the roles reflect the primacy of knowledge-related goals.

While one can argue that knowledge and the pursuit of knowledge have intrinsic worth, knowledge is also an undeniable instrumental good within a democratic society. Self-governance depends on an active, engaged citizenry. Education that provides students with foundational knowledge and training in critical thought and action helps to form citizens who are equipped to be leaders in public discussion or debate. Research and scholarship developed through institutions of higher education provide new questions and help set the agenda for those discussions.

Colleges and universities, therefore, play a significant role in protecting and advancing the democratic ideal. If an objective of higher education is to encourage graduates to become active participants in the democratic process, active participation must be nurtured, developed, and encouraged through the process of education. It makes little sense to proclaim active participation as a desired end of the educational process and then to stifle controversy to ensure an apathetic but tension-free educational community.

Colleges and universities should foster and model the best democratic principles: open discussion with a free flow of ideas, tolerance for unpopular views, and an administration and faculty who invite critical analysis, and participatory decision making, and who are responsive to the community. In this respect, institutions of higher education have a special obligation to uphold civil liberties. However, they should also jealously protect the milieu in which integrity of knowledge and its quest are its primary values.

This understanding of the special nature of college and university communities implies certain guidelines for the conditions under which expression should be limited.

1. Expression that questions official action or policy internal or external to the college should be encouraged. Procedures for student participation are vital so that real education for democracy can take place. Dissent should be heard. All necessary restrictions on time, place, and manner of critical expression should be determined by representatives of the community, with opportunity for periodic review by all members.
2. Expression that has strong potential for interfering with the advancement or integrity of knowledge should not be permitted. For example, written or oral expression that includes presentation of another person's work as one's own or that encourages that type of expression is parasitic in a system that depends on honest intellectual risk.
3. A diversity of expression should be encouraged, even if the opinion expressed is false or conflicts with the beliefs of the

majority. John Stuart Mill expressed the need for diversity of expression in his essay, "On Liberty of Thought and Discussion":

The peculiar evil of silencing the expression of opinion is that it is robbing the human race, posterity as well as the existing generation—those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.<sup>8</sup>

However, these guidelines that emerge from the special nature of college campuses are not sufficient. They are adjunct to moral obligations owed to individuals by all other people. While the constitutional exception to "fighting words" alludes to this obligation, the exception is correct because it rests on a basic moral concept, not because the law says so.

Major ethical theories differ from one another in important ways, but all hold that people should not cause physical or mental pain to one another. This is not an absolute rule; justifiable exceptions exist. One twentieth-century moral philosopher, Bernard Gert, expresses the justification of exceptions this way:

Everyone is always to obey the [moral] rule except when an impartial rational person can advocate that violating it be publicly allowed. . . . For almost all violations by individuals, if it is clear that publicly allowing this kind of violation would result in more evil being suffered than not publicly allowing it, then no impartial rational person would advocate that it be publicly allowed. If it is clear that less evil would be suffered, then all impartial rational persons would advocate that it be publicly allowed.<sup>9</sup>

Gert defines evil as "the object of an irrational desire. . . . No rational person . . . desires any evil for himself without a reason."<sup>10</sup>

Of course, there will always be some areas of disagreement about what counts as an evil or how to balance conflicting evils. Incarceration certainly causes pain for those imprisoned, but rational people would publicly allow that violation, at least in the case of a person who poses a clear physical danger to others. However, it is not so clear as to how to quantify or qualify the evil suffered or prevented through the capital punishment of a murderer.

Areas of disagreement will occur on campuses as well, but the imperative, "Don't cause pain," and justificatory procedure for exceptions provide a start in determining when it is legitimate to restrict expression. First, one needs to consider what sorts of expression cause pain. A campus newspaper story that truthfully reports that a class treasurer has been charged with misuse of funds may cause pain to the individual, the class, and to the institution but a rational person would

publicly allow such an exception in this and like cases. Expression that details a violation of public trust alerts the community, inspires action to prevent future violations, and provides for public discussion on how the community should deal with the situation. Ignorance in a self-governing community is a greater evil than that suffered by breaking the moral rule.

Negative teaching evaluations may cause pain to the professor or department, but they are justifiable because evaluations provide a way of holding professors and academic departments accountable for their responsibility to facilitate learning. Poor grades may cause pain, but are justifiable because a greater evil is suffered if students do not have honest assessments of their progress.

On the other hand, speech that has the intention or foreseeable consequence of humiliating or intimidating another person, with or without reference to the individual's role in the community, is not a justifiable exception to the moral rule, "Don't cause pain." As with the more limited "fighting words" in society at large, the evil that is caused by such speech is not offset by any appreciable prevention of evil.

Thus, we have an additional guideline:

4. Expression that causes pain to individuals within the community should not be allowed unless an impartial rational person would publicly allow the exception on the basis that the evil suffered through violation of the moral rule is less than the evil prevented.

The problem of how to protect civil rights without limiting expression has been widely considered in its application to sexual harassment. M. J. Small stated the conflict succinctly in a recent article:

The most complicated category of behavior affected by an institutional policy on sexual harassment is that of speech. Such policies tend to limit the freedom to express absolutely any thought which crosses one's mind or to indulge in any form of humor one enjoys. Since freedom of speech characterized as academic freedom is a central and sacred value in American higher education, those who would limit such freedom bear a heavy burden in proposing that the communal good requires inhibitions.<sup>11</sup>

Small solves the dilemma thus:

If one assumes the institution's primary purpose is to create an environment in which teaching and research can be successfully pursued, then sexual harassment strikes at the heart of its mission. Students cannot learn, faculty and staff members cannot work, if they are being pressured for sexual favors or have to exist in a milieu in which sex is an objectionable constant.<sup>12</sup>

Some colleges and universities have formal or informal expressions of policy that use this argument in a field larger than sexual harassment. In reaction to anti-black and anti-gay graffiti in a dormitory at Brown

University this spring, Brown President Vartan Gregorian wrote to parents:

Brown has a long tradition of openness and tolerance for all points of view and has steadfastly defended the first amendment rights of all our students. That, in fact, is the essence of any university. We welcome the open exchange of opinions and we cherish everyone's freedom of speech and expression. But we do not and will not condone nor tolerate those who attempt to subvert this freedom by resorting to clandestine or anonymous activities designed to subvert or abridge the rights of others, as well as sow distortion and confusion aimed at poisoning our community.<sup>13</sup>

Emory University's policy statement on discriminatory harassment includes the following:

Discriminatory harassment includes conduct (oral, written, graphic or physical) directed against any person or group of persons because of their race, color, national origin, religion, sex, sexual orientation, age, handicap, or veteran's status and that has the purpose or reasonably foreseeable effect of creating an offensive, demeaning, intimidating or hostile environment for that person or group of persons. Such conduct includes, but is not limited to, objectionable epithets, demeaning depictions or treatment, and threatened or actual abuse or harm.<sup>14</sup>

Stanford, on the other hand, has tipped the balance in favor of expression:

We are embarked on a quest for a community in which we all enjoy, and afford each other, full civil rights: not only tolerance, but appreciation for the entire range of cultural and personal diversity; not only civility, but freedom from the insidious effects of bigotry, stated and unstated; not token or marginal tenancy, but citizenship—the true sense of being a welcome and valued member of the whole. It is a frightening quest, because we have the sense that if the goal cannot be achieved here, in a university, it cannot be achieved anywhere. But if it is to be achieved in a university, it must be done by our traditional tools—discussion, education, persuasion. The great value of our struggle to become first an example—proving that it can be done—and then a model for its being done elsewhere, lies in the fact that we are attempting to achieve civil rights without compromising civil liberties.<sup>15</sup>

The problem with Stanford's absolutist argument is that the policy ignores the unique characteristics of the college or university community. Community members do not have the freedom of association (or nonassociation) that is enjoyed outside the community. Professors cannot choose the race or gender of their students, students cannot choose the sexual preference or political beliefs of classmates in a graduate seminar.

Active participation in the community's common goal can occur only when people feel free to engage in public discussion of the issues on

hand. A high tolerance for diversity is necessary for the successful role interaction that allows higher education to take place. Expression that prevents an individual from participation in the public discussion is pseudospeech

#### CASE ANALYSIS: THE DARTMOUTH REVIEW

The *Dartmouth Review* is a conservative student newspaper produced since 1980 by Dartmouth undergraduates and supported through alumni and advertising. It began, as did other conservative campus alternatives, in protest to what its founders considered a too-liberal slant in the daily student newspaper.<sup>16</sup> It has sparked discussions concerning the limits of freedom of expression and student press rights, particularly through the following incidents:

- A 1982 article condemning affirmative action with the headline, "Dis Sho' Ain't No Jive Brother." The article included the following, "And who be mouthin' 'bout us not bein' good read: I be practicly knowin' Roots cova to cova, til' my mine be boogying to da words! An' I be watchin' the Jeffersons on TV til I be blue in da face."
- The 1984 publication of transcripts from a meeting of a Dartmouth gay student association, despite a request that the content of the meeting be kept confidential. A *Review* staffer surreptitiously taped the meeting.
- The 1986 destruction by *Review* staffers of shanties erected on the college commons area to protest apartheid.
- A 1987 undercover investigation by *Review* staffers that resulted in underage students being served alcoholic beverages at the college-owned Hanover Inn.
- A February 1988 article criticizing the teaching style of music professor William Cole. The article contained the following passages: "You can tell that this is not a laughing matter because his face wrinkles like a mud pie and his goatee quivers. But you could tell the Reverend Cole was just warming up because he hadn't started to mix up his verb tenses."
- An October 1988 editorial entitled "Ein Reich, Ein Volk, Ein Freedmann," which compared Dartmouth President Freedman to Hitler.

These examples provide a case for application of the guidelines, suggested earlier in the paper.

Dissenting voices on campus should be encouraged, as should investigative work that holds the college administration up to the standards that it claims it holds. The availability of liquor to



underage students, while embarrassing to the college administration, is a problem that should be exposed.

In a similar vein, if physical forms of protest such as the construction of shanties is allowed, so too should be the destruction of the shanties by others. Manner, timing, and content of allowable speech cannot be determined by the popularity of the view being expressed.

Deception, however, is a *prima facie* wrong and needs justification. *Review* staffers might argue that they were acting in their role as students (or minors) when ordering alcoholic beverages or attending the gay student organization meeting. But they were certainly acting *qua* journalists when they reported on those activities in the *Dartmouth Review*.

Sometimes it is necessary for journalists to know that they are present in their role as journalists, sometimes not. The students did not tell the bartender they were ordering drinks in their role of investigative reporters, but they had no obligation to tell. The campus restaurant is a public place; anything that happens or is said there is open to public scrutiny. While one might hope that the patrons would not have to worry about others eavesdropping on their conversations, they have no reason for trusting that anything overheard would be protected.

The gay student meeting, however, is different. Regardless of whether a request for confidentiality is made outright (and in this case, it was), there is an assumption in some student gatherings that, while open to any interested student, the content of the discussion should not be publicly shared. The assumption is that students who attend such gatherings (the need for confidentiality can be inferred from content, size of group, and other factors) do so only as students. A graduate student collecting ethnographic material in an undercover way for her dissertation would be no more justified than the undercover newspaper reporter.

It is reasonable to expect a deeper level of trust on college campuses than in the community at large. Members of the college or university community are encouraged to take intellectual risks. It is natural that a greater degree of personal risk taking follows.

Writings in the *Dartmouth Review* that include personal attacks on individuals or minorities should not be tolerated unless the writers can show that more evil is prevented by breaking the moral rule "Don't cause pain" than the amount suffered. Evil is not prevented by presenting black students in a degrading manner, by insulting a professor's appearance or manner of expression, or by invoking historical and personal pain by comparing a man who is Jewish to Adolf Hitler.

Admissions policies, classroom performance, and administrative

style and action are all legitimate areas for student investigation and expression. But expression that stifles continued dialogue is not speech. It is verbal noise and only masquerades as speech when its advocates ask for protection.

## NOTES

1. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
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3. Dirk Johnson, "Censoring Campus News," *New York Times*, 6 November 1988, education section, pp. 57–58.
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5. *Newsletter on Intellectual Freedom* (Chicago: Intellectual Freedom Committee of the American Library Association), July 1988, p. 154.
6. P. McMasters, "Where is the Outrage?" *Quill*, May 1989.
7. *Newsletter on Intellectual Freedom*, July 1988, p. 125.
8. J. S. Mill, *On Liberty* (Indianapolis: Hackett Publishing, 1978), 16.
9. B. Gert, *Morality* (New York: Oxford University Press, 1988), 284–285.
10. *Ibid.*, 48.
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12. *Ibid.*, 43.
13. Letter from Brown University President Vartan Gregorian to parents of Brown University students dated 3 May 1989.
14. Emory University Policy Statement on Discriminatory Harassment, adopted 31 August 1988.
15. J. Schwartz, and I. Brest, "First Amendment Principles and Prosecution for Offensive Expression Under Stanford's Student Disciplinary System," unpublished paper, February 1989.
16. Albert Scardino, "A look at the Conservative Alternative," *Columbia Journalism Review*, September/October 1986, 35–39.