

The First Amendment on Campus

The mission of the University of Vermont is “To create, evaluate, share, and apply knowledge and to prepare students to be accountable leaders who will bring to their work dedication to the global community, a grasp of complexity, effective problem-solving and communication skills, and an enduring commitment to learning and ethical conduct.”

As noted in University’s policy, *“Within the University setting more than any other, the appropriate means for conflict resolution is rational discourse. The processes fundamental to the existence of the University cannot be abandoned under stress, especially since they represent the most effective means for progress. Further, the criteria employed to seek lawful interests must grant special attention to the central mission of the University: learning and teaching.”*

Applicable law and the mission of the University establish the framework within which disagreement, dissent, demonstration, and advocacy may, and indeed must, occur. For humankind to progress, the educational process must be dynamic even if fraught with controversy, for change cannot take place until the first question is raised. The discovery of new propositions or new solutions may be followed by passionate advocacy. Such advocacy must not, however, compromise the ability of the University to provide safe access to its educational programs and activities.” [From: UVM Campus Demonstration Policy, February 1, 2017].

The First Amendment of the U.S. Constitution protects the right of freedom of speech and expression from governmental censorship and interference, including by state-affiliated entities, such as public universities. Freedom of speech protects the right to express ideas and opinions, while the right of expression includes the freedom to receive, listen, and seek ideas and information. On a

college campus, these freedoms mean that members of the university community may speak their mind, and may engage others in speaking, debating, and hearing ideas they favor as well as ideas with which they disagree.

The fundamental purpose behind the First Amendment protections for speech and expressions is to prohibit regulation or censorship of the “public mind”¹ so that individuals can freely “think, speak, and write”² without government interference or fear of retaliation. At its core, the First Amendment is about creating “breathing space”³ to “exchange ideas and information for citizens to shape public opinion.”⁴ In doing so, it creates, enforces, and advances the diversity of a “marketplace of ideas.”⁵ It encourages individuals to step forward when speech is offensive, repugnant, and hurtful to cure the bad speech with better, more persuasive speech. The First Amendment does not permit the public or government entity to determine which speech is preferred or offensive through restrictions or censorship.

This is not to say that speech as described above is absolute or that there can be no restrictions on speech. Certain types of speech may be prohibited, the U.S. Supreme Court has held, and some speech may be regulated. The Court has identified categories of speech that are not protected by the First Amendment. They include: defamation, obscenity, criminal conduct (such as when speech crosses the line into conduct and there is destruction of property,⁶ or encourages or engages in violent behavior), and when the speech presents “a clear and present danger.”⁷ In addition, the Court has held that even when the speech is protected, it is subject to reasonable regulation as to the time, place, and manner of the expression in order to protect the normal functioning of the institution, provided the regulations are content neutral.⁸

Regarding the fourth exception to free speech—the “clear and present danger” test—the law has recognized the following requirements that must be present before the exception applies. There must be a threat of life or injury or violence, or incitement of illegal activity. Paramount for this exception is the overriding protection of the safety and security of all people in the public area. The notion here is that “the insulting or fighting words [are] those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁹

In short, the courts have drawn a clear distinction between hate speech and hate crimes.¹⁰ There must be a “true threat” with a genuine, serious imminent harm and reasonable fear for public safety, and where “the speaker means to communicate a serious intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹¹ Moreover, the right to speech does not include the right to engage in harassment¹² of a person that is “directed,” “repeated”, and forms a “pattern of discrimination”.¹³ Finally, the right of expression noted above does not protect the right to shout down or interfere with the speech of an invited speaker; the so called “heckler veto” is not protected speech.¹⁴

The venue of the speech also is relevant in determining the legality of governmental restrictions. Some public spaces are “*traditional public forums*,” generally open to people to express themselves by forms of communication such as speech-making, demonstrating, or leafleting. Speakers may be excluded from traditional public forums “only when the exclusion is necessary to serve a compelling state interest¹⁵ and the exclusion is narrowly drawn to achieve that interest.” Government restrictions on speech in a *designated public forum*¹⁶ are subject to the same strict scrutiny as restrictions in a traditional public forum. A

final category of forum is public property that is not by tradition or designation a forum for public communication: in such a place, the government may impose restrictions on speech that are reasonable and viewpoint-neutral.¹⁷

In summary, the freedoms of speech and expression are the “bedrock” of a free and open society; they are essential to maintain a democratic society¹⁸ and are the very foundation of a university. Our University must be a place of open inquiry that offers an environment, indeed a culture, where rigorous, respectful debate and robust deliberation will flourish, where perspectives are expressed without suppression or retaliation, even when ideas are found by some to be offensive, hateful, unwise, ill-considered, or simply wrong. Anything less will compromise the University’s ability to fulfill its stated mission.

A list of relevant UVM policies is accessible here:

<https://www.uvm.edu/deanofstudents/demonstration-protest-policies>

¹ Floyd Abrams, The Soul of the First Amendment (2017) at p.11, quoting Justice Robert H. Jackson.

² Id at p. 12, quoting Justice Hugo Black.

³ Id at p.15.

⁴ Id at p.18, citing Justice Stephen Breyer’s book, Active Liberty: Interpreting Our Democratic Constitution (2006).

⁵ The diversity of viewpoint expression was articulated early in 1920 by Justice Holmes and Justice Brandeis. See F. Abrams at p.32. See also Erwin Chemerinsky and Howard Gillman, Free Speech on Campus (2017) at p.38-39, 148.

⁶ Id at p.23.

⁷ Id at p.90

⁸ Id at p.20, 125-129, 131.

⁹ Id at p.91. See also p.82-110.

¹⁰ Id at p.82-110, 87 97, 116.

¹¹ Id at p.116-118.

¹² Id at p.118-122.

¹³ Id at p.118, 123.

¹⁴ H. Gillman and E. Chemerinsky, Does Disruption Violate Free Speech? Chronicle of Higher Education, (Oct. 17, 2017); E. Chemerinsky and H. Gillman, p.124.

¹⁵ Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 800 (1985); Perry Education Assn. v. Perry Local Educators’ Assn., 460 U.S. 37, 45 (1983).

¹⁶ Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

¹⁷ Perry Education Assn., 460 U.S. at 46; Summum, previous note.

¹⁸ E. Chemerinsky and H. Gillman, at p.25, 27, 60, citing John Dewey. (“Since freedom of mind and freedom of expression are the root of all freedom, to deny freedom in education is a crime against democracy.”)