

WHEN FREE SPEECH AND CIVILITY COLLIDE

A Case Study

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DEAN OF
STUDENTS

exceptional
STUDENT AFFAIRS
extraordinary
STUDENT EXPERIENCE

Justice Robert H. Jackson:

- “Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order”

Freedom of Speech



Outcomes

- Understanding of protected vs unprotected speech
- Understanding of OCR's view point on expressive speech activities based on 2003 letter
- Knowledge of how to manage events with expressive speech
- Have knowledge to create a First Amendment Action Plan

Quiz

- Which of these is **not** guaranteed in the First Amendment?
 - ☐ Freedom of the press
 - ☐ Right to freedom of speech
 - ☐ Freedom of assembly
 - ☐ Right to privacy

Quiz

- Which of the following categories of speech is NEVER protected by the First Amendment?
 - ☐ Expression likely to incite imminent lawless action
 - ☐ True threats
 - ☐ Clear and immediate threats to national security
 - ☐ All of the above

The First Amendment

“Congress shall make no law respecting an establishment of *religion*, or prohibiting the free exercise thereof; or abridging the *freedom of speech*, or of *the press*; or the right of the people peaceably to *assemble*, and to *petition* the Government for a redress of grievances.”

How can we determine if it is a First Amendment Issue?

Forum Analysis

- Open Public Forum
- Non Public Forum
- Designated Public Forum
- Limited Public Forum

Open Public Forum

- Government property - traditionally open to public for speech, assembly, debate
- No content or view point discrimination allowed
- Time, place, manner restrictions allowed
- Examples: public streets, sidewalks, parks, city squares

Non Public Forum

- Government buildings/property not traditionally designated for open public communications
- Used for business, education or dedicated purposes
- Subject matter and content based restrictions permissible - viewpoint discrimination is not
- Examples: courthouses, government offices, public university offices, public schools

Designated Public Forum

- Government intentionally designates and opens non-public forum to expressive activity by class of speakers
- Neither content nor viewpoint discrimination are allowed
- Time, place, manner restrictions permissible
- Examples: UA buildings with open meetings, University Mall and other outdoor areas, unreserved speech area

Limited Public Forum (sub category)

- Sub-category of designated public forum- refers to type of nonpublic forum that government intentionally opens for certain groups for certain topics
- Subject matter and content based restrictions are permitted. View point discrimination is not
- Examples: forum open to students only for discussion of immigration and politics

Restrictions

Time, Place and Manner Restrictions

- Limits that government can impose on the occasion, location, and type of individual expression in some circumstances.

Free Speech Test

- Is it compatible with the environment/activity?
- If it isn't - offer alternatives

What is disruptive behavior?

- Behavior that is incompatible with the activity
- Heckling to extent that speaker/audience can't hear
- Provocation
- Harassment Sexual or Racial (severe, pervasive, repetitive to ONE PERSON)
- Threatening
- Incitement
- Imminent violence

What about Hate Speech?

- 1st Amendment restricts us from placing selective limitations on speech/expression if it is insensitive, boorish or expressive view points on disfavored subjects
- 1st Amendment forbids University from regulating or punishing speech or expression of ideas/messages because they are offensive or controversial

What Can We Address?

- Speech which is likely to incite imminent lawless action
- Speech which is harassing (severe, pervasive, persistent, hateful toward 1 person)
- Speech which is disruptive/not appropriate to the forum
- Discrimination, harassment, retaliation against an individual based on a protected class

Office of Civil Rights 2003 Letter

- OCR statutes "intended to protect students from invidious discrimination not to regulate the content of speech"
- Offensiveness of a statement does not equal harassment or a hostile environment
- Harassment must be so severe, persistent, pervasive to limit or deny student's ability to participate in or benefit from educational program
- Harassment must go beyond mere expression of views, words, symbols, thoughts someone finds offensive



Case Study



Case Study

- Wed. at Noon in April - Sexual Assault Awareness Week
- Campus "Preacher" - is a student
- Holding sign "You Deserve Rape"
- Large crowd (200-300), taunting, getting in his face/ space
- After event - over 100 complaints re sign statement
- Online petition to have him expelled
- Huffington Post picks up story/video
- President has called upon you as Dean of Students for response

Lessons Learned

- You will be recorded
- Even your colleagues/faculty may not understand and may criticize
- You don't have to defend or agree with what they say - just their right to say it
- Sometimes you do make FIRE happy
- This is challenging work that can make you question your values
- Developing a plan quickly is essential

Counter Speech with Speech



Action Plan Development (Bird, Mackin & Schuster)

- Who's safety/welfare at risk and what needs to be done now?
- Who needs to be notified externally/ internally of what?
- What information do we need to know and how can we get it?
- Who needs to be part of initial response?
- What messages do we want to send?

Action Plan Development con't

- Who is the media contact?
- Is this incident actionable in any way?
- Who are primary stake holders and how are they likely to respond?
- How does institutional mission effect response?
- How will we systematically gather feedback/ responses to this incident?
- Is there a campus history/culture that is relevant to this event?

Action Plan Continued

- Have there been similar instances other places?
- How does the current campus climate effect this situation?
- What campus policies are relevant to this situation?
- What resources are available as we deal with this?
- What else do we anticipate happening as a result and what do we need to do about this?
- What other concerns/issues/needs could result from this incident?

References / Resources

- Office of Civil Rights, Department of Education. (2003, July 28). First Amendment: Dear Colleague
- Bird, L.E., Mackin, M.B., & Schuster, S.K., (2006) (Eds.) The First Amendment on Campus: A Handbook for College and University Administrators. National Association of Student Personnel Administrators, Inc.