

Free Speech on Campus
The American Law Institute
Geoffrey R. Stone
May 17, 2016

Academic freedom is *not* a law of nature. It is not something to be taken for granted. It is, rather, a hard-bought acquisition in a lengthy struggle for academic integrity.

Indeed, until well into the 19th century, real freedom of thought was neither practiced nor professed in American universities. To the contrary, any real freedom of inquiry or expression in American colleges in this era was smothered by the prevailing theory of “doctrinal moralism,” which assumed that the worth of an idea must be judged by what the institution’s leaders thought its moral value to be. Thus, through the first half of the nineteenth century, American higher education squelched any notion of free discussion or intellectual curiosity. Indeed, as the nation moved towards Civil War, any professor or student in the North who defended slavery, or any professor or student in the South who challenged slavery, could readily be dismissed, disciplined, or expelled.

Between 1870 and 1900, though, there was a genuine revolution in American higher education. With the battle over Darwinism, new academic goals came to be embraced. For the first time, to criticize, as well as to preserve, traditional moral values and understandings became an accepted function of higher education. By 1892, William Rainey Harper, the first president of the University of Chicago, could boldly assert: “When for any reason the administration of a university attempts to dislodge a professor or punish a student because of his political or religious sentiments, at that moment the institution has ceased to be a university.”

But, despite such sentiments, the battle for academic freedom has been a contentious and a continuing one. In the closing years of the 19th century, for example, businessmen who had accumulated vast industrial wealth began to support universities on an unprecedented scale. But that support was not without strings, and during this era professors who offended wealthy trustees by criticizing the ethics of their business practices were dismissed from such leading universities as Cornell and Stanford.

Then, during World War I, when patriotic zealots persecuted and even prosecuted those who questioned the wisdom or the morality of the war, universities collapsed almost completely in their defense of academic freedom. Students and professors were systematically expelled or fired at such institutions as Columbia and Virginia merely for “encouraging a spirit of indifference towards the war.”

Similar issues arose again, with a vengeance, during the age of McCarthy. In the late 1940s and 1950s, most universities excluded those even suspected of entertaining Communist sympathies from university life. Yale President Charles Seymour went so far as to boast that “there will be no witch hunts at Yale, because there will be no witches. We will neither admit nor hire anyone with Communist sympathies.”

We now face a similar set of challenges. We live today in an era of political correctness in which students themselves demand censorship, and colleges and universities, afraid to offend their students, too often surrender academic freedom to charges of offense.

To give just a few examples, several colleges and universities, including Brown, Johns Hopkins, and Williams, have recently withdrawn speaker invitations because of student objections to the views of the invited speakers, Northwestern University recently subjected a professor to a sustained sexual harassment investigation for publishing an essay in the Chronicle of Higher Education criticizing Northwestern’s sexual harassment investigations, Colorado College suspended a student for making a joke that mocked feminism, William & Mary, De Paul University, and the University of Colorado all disciplined students for criticizing their affirmative action programs, and the University of Kansas disciplined a professor for condemning the National Rifle Association.

At Wesleyan University, after the school newspaper published a student op-ed criticizing the Black Lives Matter movement, other students demanded that the University defund the school paper, at Amherst College, students demanded that the administration remove posters stating that “All Lives Matter,” at Emory University students demanded that the university punish other students who had chalked “Trump in 2016” on the university’s sidewalks because, in their words, a university is “supposed to be a safe place and this made us feel unsafe,” and at Harvard African-American students demanded that a professor be taken to the woodshed for saying in class that he would be “lynched” if he gave a closed book examination.

The latter is an example of so-called micro-aggressions – words or phrases that may make students uncomfortable or may make them feel “unsafe.” Saying “off the reservation” has been deemed a micro-aggression to Native Americans, saying “America is a melting pot” has been deemed a micro-aggression to new immigrants, and saying “As a woman, I know what you must go through as a racial minority” has been deemed a micro-aggression to racial minorities. Such micro-aggressions, whether used by faculty or students, have been deemed punishable by colleges and universities across the nation. A recent survey revealed that 72% of current college students support disciplinary action against any student or faculty member who expresses views that they deem “racist, sexist, homophobic or otherwise offensive.”

Another recent invention is the trigger warning. A trigger warning is a requirement that before professors assign readings or hold classes that might make some students feel uncomfortable, they must warn students in advance that the readings or the class will deal with such sensitive topics as rape, affirmative action, abortion, murder, slavery, the holocaust, religion, homosexuality, or immigration. The idea is that students who would be upset can then avoid having to deal with such emotionally fraught material.

So, where did all this come from? It was not too long ago when college students were demanding the right to free speech. Now, they demand the right to be free from speech that they find to be offensive, upsetting, or emotionally disturbing. The current phenomenon is based on the assumption that students should not be made to feel uncomfortable or unsafe.

One often-expressed theory is that this has happened because students of this generation, unlike their predecessors, are weak, fragile, and emotionally unstable. The explanation is that this generation of young adults has been raised by so-called helicopter parents, who have protected, rewarded, and celebrated them in every way from the time they were infants. They have therefore never learned to deal with challenge, defeat, uncertainty, anxiety, stress, insult, or fear.

On this view, this generation of college students is, in fact, emotionally incapable of dealing with challenge. But if this is so, the proper role of a university is not to protect and pamper them, but to prepare them for the challenges of the real world. The goal should not be to shield them from discomfort, insult, and insecurity, but to enable them to be effective citizens of the world. On this view, if their parents have, indeed, failed them, then their colleges and universities should save them from themselves.

There is, however, another possibility. It is that students, or at least some students, have always felt this way, but until now they were too intimidated, too shy, too deferential to speak up. On this view of the matter, this generation of college students deserves credit, because instead of remaining silent and oppressed, they have the courage to demand respect, equality, and safety.

My own view, for what it's worth, is that there is an element of truth in both of these perspectives, but I am inclined to think that the former view explains more of the current reality than the latter.

Faced with the ongoing challenge to academic freedom at American universities, University of Chicago President Robert Zimmer charged a faculty committee last year with the task of drafting a formal statement for the University of Chicago on Freedom of Expression. The goal of that committee, which I chaired, was to stake out the University of Chicago's position on these issues. The Committee consisted of seven very distinguished faculty members from across the University. After broad consultation, we produced a brief, three-page Report. At the risk of being self-indulgent, I want to read you some excerpts from that Report:

“Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. Of course, the ideas of different members of the University community will often and quite naturally conflict. But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.

Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

The freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, wherever they wish. The University may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the core functioning of the University. But these are narrow exceptions to the general principle of freedom of expression, and it is vitally important that these exceptions never be used in a manner that is inconsistent with the University’s commitment to a completely free and open discussion of ideas.

In a word, the University’s fundamental commitment is to the principle that robust debate and deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose. Indeed, fostering the ability of members of the University community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University’s educational mission.

As a corollary to the University’s commitment to protect and promote free expression, members of the University community must also act in conformity with the principle of free expression. Although members of the University are free to criticize and contest the views expressed on campus, and to criticize and contest speakers who are invited to express their views on campus, they may not obstruct or otherwise interfere with

the freedom of others to express views they reject or even loathe. To this end, the University has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it. As University of Chicago President William Rainey Harper observed 125 years ago, without a vibrant commitment to free and open inquiry, a university ceases to be a university.

Interestingly, when we wrote this Report, we were thinking only about the University of Chicago. To our surprise, the Report has had a national and even international impact. Indeed, I'm pleased to say that our Report has since been adopted by a range of other universities, including such diverse institutions as Princeton, Purdue, Johns Hopkins, American University, the University of Wisconsin, and Louisiana State University.

But now that I've finished congratulating myself, let me elaborate a bit. Why should a university take the position that members of the university community should be free to advance any and all ideas, however offensive, obnoxious, and wrong-headed they might be? For lawyers, the reasons are familiar.

First, one thing we have learned from bitter experience is that even the ideas we hold to be most certain might in fact turn out to be wrong. As confident as we might be in our own wisdom, experience teaches that certainty is different from truth.

Second, history teaches that suppression of speech breeds suppression of speech. If today I am permitted to silence those whose views I find distasteful, I have then opened the door to allow others down the road to silence me. The neutral principle of no suppression of ideas protects us all.

Third, a central precept of free expression is the concern with chilling effect. That problem is especially acute today because of the effects of social media. It used to be the case that students and faculty members were generally willing to take controversial positions because the risks were relatively modest. After all, one could say something provocative, and the statement soon disappeared from view. But in a world of social media, where every comment you make can be circulated to the world and can be called up by prospective employers or graduate schools or neighbors with the click of a button, the potential costs of speaking courageously - of taking controversial positions, of taking risks - is greater than ever before in history. Indeed, according to a recent survey, 65% of all college students now say that it is unsafe for them to express unpopular views, and this clearly has an effect on faculty as well. In this setting, it is especially important for universities to stand up for free expression.

So, how should this work in practice? Should students be allowed to express whatever views they want – however offensive they might be to others? Yes. Absolutely. Should those who disagree and who are offended by the views and speech of others be allowed to condemn that speech and those speakers in the most vehement terms? Yes. Absolutely. Should those who are offended and who disagree be allowed to demand that the university punish those who have offended them? Yes. Absolutely. Should the university punish those whose speech annoys, offends, and insults others? Absolutely not. That is the core meaning of academic freedom.

But what should a university do? A university should educate its students about the importance of civility and mutual respect. These are core values for students, for professors, for citizens, and even for lawyers. But these are values that should be reinforced by education and example, not by censorship. Moreover, a university should encourage disagreement, argument, and debate. It should instill in its students and faculty the importance of winning the day by facts, by ideas, and by persuasion, rather than by force, obstruction, or censorship.

The bottom line is this: For a university to fulfill its most fundamental mission, it must be a SAFE SPACE for even the most loathsome, odious, offensive, disloyal, arguments. Students should be encouraged to be tough, fearless, rigorous and effective advocates and critics.

At the same time, though, a university has to recognize that, our society being flawed as it is, the costs of free speech will often fall most heavily on those groups and individuals who feel the most marginalized, unwelcome, and disrespected.

All of us feel that way sometimes, but in our often unjust society the individuals who most often bear the brunt of free speech – at least of certain types of free speech – tend to be racial minorities; religious minorities; women; gays, lesbians and transsexuals; immigrants; and so on. Universities must be sensitive to this reality. Even if they cannot “solve” this problem by censorship, this does not mean that they can’t take other steps to address the special challenges faced by groups and individuals who are most often made to feel unwelcome and undervalued by others.

Universities should take this challenge seriously. They should support students who feel vulnerable, marginalized, silenced, and demeaned. They should help those students learn how to speak up, how to respond effectively, how to challenge those whose attitudes, whose words, and whose beliefs offend, appall, and outrage them. This is a core responsibility of universities, for the world is not a space space, and it is our job to enable our graduates to win the battles they will need to fight in the years and decades to come. This is not a challenge that universities can or should ignore.

Having said all of this, I don’t mean to suggest that there aren’t hard cases. As you well know, as simple as it may be to state a principle, it is always much more

difficult to apply to concrete situations. So, as a law professor, let me leave you with a few hypothetical situations for you to mull over on your own.

First, suppose a sociology professor gives a talk on campus condemning homosexuality as immoral and calling on “normal” students to steer clear of fags, perverts, and sexual degenerates. What, if anything, should Chair of the Sociology Department do?

Second, suppose a student hangs a Confederate flag, a swastika, an image of an aborted fetus, or a vote for Trump sign on the door to his dorm room? What, if anything, should the Resident Head do?

Third, suppose the Dean of a University’s Law School goes on Fox News and says “Abortion is murder. We should fire any woman faculty member and expel any woman student who has had an abortion.” The President of the University is then inundated with complaints from alumni saying, in effect, “I’ll never give another nickel to your damn school as long as she remains Dean of the Law School.” What, if anything should the President of the University do?

As these hypotheticals suggest, there are, in fact, interesting cases. But we should not let the marginal cases obscure the clarity of our core commitment to academic freedom. That commitment is now seriously and dangerously under attack. It will be interesting to see whether our universities today have the courage, the integrity, and the fortitude to be true universities. It does remain to be seen.

Thank you.