

Freedom of Speech, Academic Freedom, & DEI

A complicated relationship



Dr. Sandra Miles

Head of Practice – Diversity, Equity, and Inclusion

Academic Impressions

Sandra@academicimpressions.com

she/her - @sandramilesphd

Ground Rules

- The facilitator's frame of reference is centered on experiences as a career administrator that occur in the United States. We acknowledge that there are participants from other countries and/or in faculty ranks who may have other experiences.
- We agree that I'm not here to teach you how to not be racist or biased or accuse you of being racist or biased.
- I will assume that everyone participating today is a good person.
- We need to agree that we are safe and not in any danger, even if we feel uncomfortable.
- We need to be willing to be uncomfortable.
- We will be honest in a way that prioritizes honesty, not what people think of us.
- We will resist the urge to get defensive.
- We will share and consider examples of our own behavior.
 - The Devil does not need an advocate in this space.
- We will give grace.



#1

What is the 1st Amendment?

An agreement between the U.S. government and its citizens

Prohibits the United States Congress from making laws infringing, limiting, or prohibiting:

- The free exercise of religion
- Freedom of speech
- Freedom of the press
- The right to peaceably assemble
- The right to petition the government for a redress of grievances

An agreement between the U.S. government and its citizens

- Under the First Amendment, an individual can exercise their freedom of speech rights to express their opinions publicly without government interference.
- Private entities such as businesses, organizations, private schools, or private individuals are not limited by the 1st amendment.
- Public universities, which are created by state governments, are considered governmental entities, and therefore cannot limit the speech rights of students.

Can Public Universities Discipline Employees for Speech?

Public employers may discipline those whose speech adversely impacts the integrity or functions of the employer or adversely affects morale. They must “arrive at a balance” between interests of the (public employee) as a citizen commenting upon matters of public concern, and the interest of the State, as an employer, in promoting efficiency of public services. This means that when speech is discriminatory or obscene, public employers can likely discipline without offending the First Amendment.

The key for employers is consistency. Notifying employees in advance through well-drafted policies should limit the number of instances of polarizing speech in the workplace, as well as provide protection from wrongful discharge suits.

<https://www.mcafeetaft.com/free-speech-rights-in-the-workplace/>

Free Speech and DEI

- The Civil Rights Movement largely benefitted from the protections afforded under the 1st Amendment
 - The protestors of the time were directly challenging local, state, and federal laws
- In more recent years, protestors and activists remain protected by the 1st Amendment
 - Ex: Saying, tweeting, or displaying “Black Lives Matter” before it became widely accepted
- Simultaneously, the 1st Amendment continues to protect subversive, hate, and otherwise offensive speech.

https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/fall2020/race-and-first-amendment-compendium-resources/

Does the 1st Amendment apply to “hate speech”?

- Under the 1st Amendment’s protection for freedom of expression, there is no exception for hate speech, unless the speech is direct, personal, targeted, and either truly threatening or violently provocative. The 1st Amendment to the Constitution protects speech no matter how offensive its content.
- Symbols of hate are generally protected “speech” if they are worn or displayed before an audience in a public space. However, the 1st Amendment does not protect the use of these symbols to directly threaten or violently provoke an individual, such as hanging a noose over a student’s residence hall room.



Why is it difficult to regulate hate speech?



The First Amendment provides the greatest degree of protection to political speech, disallows discrimination against speech based on viewpoint, and generally prohibits the passage of vague or broad laws that impact speech. Laws must not sweep too broadly and must define key terms so that speakers know when their speech crosses the line into illegality.

Unprotected Categories

Incitement

incitement to imminent lawless action

True threats

speech that threatens serious bodily harm

Fighting words

speech that causes an immediate breach of the peace



#2

So What About Academic Freedom?

■ Academic Freedom

Faculty are entitled to freedom in the classroom to provide instruction on topics related to their subject-area expertise but are advised not to portray themselves as experts on matters that fall outside of their subject.

■ Academic Freedom

University educators are citizens AND employees. When they speak or write as citizens, they are free from institutional censorship or discipline, but they must remember that the public may judge their profession and their institution by their PERSONAL opinion.

■ Academic Freedom

When speaking or writing as a citizen, faculty and staff should be reminded to make every effort to indicate that they are not communicating for the campus. Including a statement such as: “*All views expressed here represent exclusively my own views and not those of my employer*”



Scenario: Trigger Warnings

- **Prof. Know Wheatall has been teaching an introductory English Literature Course at Freedom Univ for the last 25 years**
- **During this course they always share the Margaret Atwood Short Story entitled “Rape Fantasies” during the 3rd week of class**
- **This semester, a student in the class reports the professor and the assignment to the Title IX office**
- **When it is brought to Prof. Wheatall’s attention, they are immediately dismissive of the concern because they have never received this type of complaint in the past and they believe asking them to change their course plan is a violation of their academic freedom**
- **The Title IX Coordinator is aware, but cannot disclose that the student who filed the report was sexually assaulted during Welcome Week.**
- **You are the Dean. The Title IX Coordinator is a trusted colleague and has requested your assistance in working with the Faculty Member. You don’t know all the details, but you trust that there is a reason the Title IX Coordinator is pursuing this. What is your advice?**

GROUP DISCUSSION



Report Out:

- 1. How did your group handle the conversation?**
- 2. What was the most difficult aspect of managing this conversation?**



#3

Protections and Limitations

Protections and Limitations on Campuses

- **Disruptive Activity:** Any act that unreasonably interferes with the rights of others to peaceably assemble or to exercise the right of free speech, disrupts the normal functioning of the University, damages property, or endangers health or safety is specifically prohibited.
- **Reasonable Access:** The College/University is required by law to provide and maintain reasonable access to, and exit from any office, classroom, laboratory, or building. This access must not be obstructed at any time.

What Can a Person Do When They are Offended by Certain Speech?

- Symbolic Protest:** Displaying a sign, gesturing, wearing symbolic clothing, or otherwise protesting silently is permissible unless it is a disruptive activity or impedes access to facilities. In addition, such acts should not block the audience's view or prevent the audience from being able to pay attention to a lawful assembly and/or an official University event.
- Counter Programming:** Scheduling a program at the same or a different time that offers different viewpoints.
- Engaging in Dialogue and/or Debate:** Exercising their own 1st Amendment Rights within all previously stated legal parameters

BREAKOUTS



Knowing what we know about the legal safeguards and parameters of free speech, how can we support students, faculty, and staff who feel unsafe or unsupported as a result of speech that is protected.

How to respond to expressions of hate

- **VERIFY**

Amass as much information as possible about the origins of the hateful messages. Determine whether the speech in question represents an imminent threat of violence or potential hate crime, and coordinate with law enforcement as appropriate.

- **LISTEN**

When emotions run high, the community might not be receptive to hearing you, but you should nonetheless listen to them. Be active, present, and visible. An immediate public response, even if only to say that the administration is aware, concerned, and investigating, is important.

- **CONSULT**

Reach out to all relevant stakeholders (affected students, student groups, faculty, the diversity office) and confer with them to arrive at a response that reflects their input and the full range of duties of the university.

- **WEIGH**

Consider a range of responses. Some cases may demand a strenuous, public condemnation, while others may raise concerns that amplifying a hateful act will bring it outside attention. In determining a response, keep in mind that even if some individuals take offense, that is not sufficient grounds to limit the offensive speech.

- **LEAD WITH INCLUSION**

When communicating about instances of hateful speech, starting with a defense of free speech can be alienating for those who feel hurt. It is better to first characterize the hateful speech as morally offensive and only then, and as appropriate, make clear that it is nonetheless a protected form of speech.

- **AFFIRM VALUES**

In messages sent out to the campus community or shared on public platforms, assert core values, such as inclusion, tolerance, and mutual respect.

- **SUPPORT**

Engage in specific outreach to targeted communities and express support for and solidarity with them. Provide them with information about campus counseling services and other resources.

- **DISCIPLINE**

Depending on the type of incident, consider whether any disciplinary measures are appropriate, in line with campus policies. For hate crimes, harassment, and any other conduct that violates the law, an aggressive disciplinary response is warranted.

- **KEEP TALKING**

Create spaces for community reflection and healing. Consider organizing opportunities for community members to speak out against hate. Any formal responses will spark conversation; be as transparent as possible and continue engaging with the community.

- **ASSESS**

Establish mechanisms to review and evaluate the effectiveness of the university's response.

<https://campusfreespeechguide.pen.org/resource/how-to-respond-to-expressions-of-hate-on-campus/>

Campus Policy/Statement Examples and Resources

<https://www.esu.edu/diversity/first-amendment.cfm>

<https://diversity.berkeley.edu/taking-back-our-first-amendment>

<https://www.mtu.edu/diversity-center/resources/free-speech/>

<https://www.aclu.org/other/speech-campus>

<https://campusfreespeechguide.pen.org/resource/how-to-respond-to-expressions-of-hate-on-campus/>

<https://www.mcafeetaft.com/free-speech-rights-in-the-workplace/>

https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/fall2020/race-and-first-amendment-compendium-resources/

<https://www.aft.org/position/academic-freedom>

[US Department of Education position on Academic Freedom - https://files.eric.ed.gov/fulltext/ED535445.pdf](#) (added)

<https://www.aaup.org/our-programs/academic-freedom/resources-academic-freedom> (added)

https://www.supremecourt.gov/DocketPDF/21/21-418/215386/20220302122658190_21-418_Amicus%20Brief.pdf (added)

TAKEAWAYS

- **Offensive is in the eye of the beholder.**
- **Speech that incites, threatens, or causes a breach of peace is never protected.**
- **Academic freedom does not equal freedom from supervision nor does it protect opinions that are unrelated to the speaker's area of expertise.**
- **Free speech applies to the offensive and the offended.**



QUESTIONS?

Thank you!

Please remember to complete the event evaluation.
Your comments will help us continually improve the
quality of our programs.

<https://forms.office.com/r/trtTRWY5MX>

Freedom of Speech, Academic
Freedom, and DEI: A Complicated
Relationship

