

Free Speech Issues Remained Front and Center for Campus Communities

By Steve Chaplin 📅 February 21, 2023 💎 Feature, Organizational Leadership, Social Justice 🗣️

With seemingly no end in sight, the tug-of-war over free speech rules, protections, and practices across the United States was even more intense on college campuses—and particularly in the courtyards, greenspaces, and plazas adjacent to student centers—as students challenged and confronted one another and the campus community wrestled with policies, procedures, and protocols related to the topic.

Several statewide university systems offered surveys to their students on the topic of free expression (although fewer than 1 in 10 responded), even more states enacted new laws prohibiting the designation of free speech zones, and state and federal courts heard free speech case arguments involving student organizations, campus bias response teams, and college professors and the content they teach.

By the end of the year what remained clear was that some of the most basic tenets of the campus free speech environment were unscathed:

- Hate speech is protected speech. It's a different matter if the speech involves defamation, incitement to commit a crime, obscenity, threats, or harassment, but no exception can be made for speech that some may view as hateful.
- Some scope of protection remained for campuses in the form of restrictions that may be put in place regarding time, place, and manner. “This is most commonly done by requiring permits for meetings, rallies, and demonstrations,” according to the American Civil Liberties Union. “But a permit cannot be unreasonably withheld, nor can it be denied based on content of the speech.”
- If not already in place and publicly available, universities continued to provide detailed policy statements addressing freedom of expression on their campuses by providing definitions for terms like “third-party event” and “expressive activity,” and setting out descriptions for what amounted to spontaneous free speech, planned or organized free speech, and unlawful and disruptive speech.
- Just as speech that some would consider hurtful, hateful, or distasteful must be permitted, those opposed to that speech also have the right to express their distaste for the language if it does not unduly interfere with the speaker. Just as free speech guidelines and “time,

place, and manner” limitations have been defined, universities also developed corresponding protest and demonstration policies.

But even as campuses worked to maintain guardrails for free speech and public assembly to occur in a safe manner, both the threat of violence and property damage, along with actual events, occurred on campuses over the past year. Evidence of protestors invoking the “heckler’s veto” during organized speaking events was witnessed (University of North Texas), property damage was noted in relation to appearances by speakers (University of Wisconsin–Madison), threats of violence led to speaker cancellations (Pennsylvania State University), and students reported violent acts by other students during campus events (University of Iowa).

In turn, some campus student affairs divisions expanded efforts to educate campus communities through free speech-centric programming focusing on education, compassion, and outreach. Outside at the Lory Student Center Plaza, students supporting the university’s First Amendment Working Group distributed the newly published “Talk, Talk, Talk: A Quick Guide to Free Speech at Colorado State University” to their peers. The guide was an accompaniment to a new “Your Voice. Your Vote. Your Rights.” website that included information on bystander intervention strategies and other student support services.

At the University of Wisconsin–Milwaukee, a Care, Respect, and Expression Standing Committee co-led by Michael Rogers, director of advocacy and engagement in the division of student affairs, is maintaining a free speech, rights, and responsibilities website that includes the university’s campus free speech statement and a mechanism for reporting hate or bias-related incidents. In association with the reporting platform, students can also access an incident response blog site to learn about specific incidents and how the university responded.

“The purpose behind this blog is for transparency with students, so they can find out about any incident on campus: what took place, what the details are, and all of the steps that were taken by the institution,” explained Rogers to the university news division. “Sometimes there will be confidential details that can’t be shared, but all the information that we can share will be included, and students can look at the progress.”

A series of monthly “Courageous Conversations” were also sponsored by the Office of Student Involvement to provide students a space to “take the conversation where they want it to go and explore each other’s perspectives in a completely judgment free zone.”

At Stockton University, a Demonstration Action Response Team (DART) was developed to help maintain safe spaces while balancing the right to freedom of expression. The team provides education on the parameters of freedom of expression and campus regulations, works closely with demonstrators, and serves in an advisory capacity before and during events. Jeff Wakeman, director of student development at Stockton University, explained DART during an ACUI webinar.

“As a general concept at Stockton, the more you plan, the more rights you have on campus, and the business of the university and academic classes take priority over other activities. This is where DART comes into play because DART team members make sure that what the students are planning or what the group is planning won’t impact academic classes or other activities,” he said.

The team consists of student affairs, faculty, and public safety professionals trained in crowd management, de-escalation techniques, First Amendment rights, campus regulations, and safety protocols. Members work closely with campus police during event planning and on site. Police address safety and legal issues, while the DART team is responsible for negotiating and planning to ensure events occur smoothly and safely. After an event is complete, DART collects information to aid in future planning.

“One of the most important things we do is complete post-event reports and use them for training the DART team, the campus police, and everyone else on how we protect and react when we have a spontaneous demonstration,” Wakeman said.

A bias response team at the University of Central Florida, composed of campus administrators and police officers, was found by a federal appellate court to have implemented a discriminatory harassment policy “that effectively polices adherence to intellectual dogma” and was “almost certainly unconstitutionally overbroad.” The university agreed to disband the team after the court ruled the plaintiffs, the conservative activist group Speech First filing on behalf of three Central Florida students, had standing to seek an injunction against the team. The suit was one of six brought by Speech First against universities with bias response teams; in four of those cases, campuses either rescinded or amended policies that led to the suits being dropped or being determined moot by the courts.

Last year, writing in the journal *Educational Researcher*, a team from the University of Texas–Austin led by Liliana M. Garces, a lawyer and professor of educational leadership and policy, noted the lawsuits were significant in that each, in some way, dismantled the existing bias response teams. “These law-based pressures are changing postsecondary institutional policy, especially inclusion-focused policy, yet they remain underexamined by education and policy scholars.”

The lawsuits filed by Speech First against the University of Michigan, the University of Texas–Austin, the University of Illinois–Urbana-Champaign, Iowa State University, the University of Central Florida, and Virginia Tech, Garces notes, underscore a need for more research on how external advocacy organizations influence how campuses form policy, and the consequences of those influences on race-centric policies and practices.

“These external organizations are using legal pressure to shape education policy and practice about race on campus in admissions and in areas of inclusion. As institutions respond to these targeted attacks by dismantling bias response teams, they institutionalize these coercive

pressures into organizational policy and practice intended to address racial hostility on campus,” according to the paper, “Legal Challenges to Bias Response Teams on College Campuses.”

Using the concepts of repressive legalism, or coercive legalism, to describe the lawsuits effects on campuses, Garces and co-authors of a 2021 paper published in the *American Educational Research Journal* and entitled “Repressive Legalism: How Postsecondary Administrators’ Responses to On-Campus Hate Speech Undermine a Focus on Inclusion,” offer their own conclusions for policy and practice in avoiding these types of lawsuits:

- Do not censor hate-speech related incidents.

“When repressive legalism is not at play—or when the agency of organizational actors is rescued from the repressive force of the law—a legal approach that emphasizes not censoring hate speech-related incidents can be seen as only one of several answers to what is possible and necessary to promote principles of freedom of expression and inclusion.”

- Actively defend against such lawsuits.

“These efforts may require actively defending against lawsuits with legal strategies that legitimize actions and responses that promote institutional priorities around inclusion. Such responses might require involvement by external actors to wield the influence of litigation based on other legal principles (e.g., the right to equal protection, a compelling interest in the educational benefits of student body diversity).”

- Implement practical, educational responses that support campus community discourse.

“Practical responses, moreover, can include educational efforts that support campus-community discourse around racism, power, and privilege, and enable the campus community to engage in these difficult conversations. Such nonrepressive, or expansive, legally focused approaches empower the voices of marginalized students on campus and can render possible the advancement of principles of open, robust expression and inclusion in the aftermath of hate speech.”

The Foundation for Individual Rights in Education (FIRE) last reported in 2016 there were nearly 250 bias response teams on campuses. Last year, in their article “The Special Problem of ‘Bias Response Teams,’” FIRE co-authors Greg Lukianoff and Adam Goldstein noted that, “Even in those cases where BRTs are organized properly and stay on the lawful side of the fence, creating university offices devoted to investigating expression that may create a ‘hostile learning environment’ will create a substantial chilling effect on the speech subject to investigation. That reinforces an orthodoxy, which undermines the mission of higher education.”

Researchers in 2018 looking to examine disconnects between the theory and practice of bias response teams came away with a series of conclusions related to tensions between theory and practice, the resources provided to the teams, and how they operated. Researchers talk

diversity and student affairs professionals from 19 different institutions on the topic of bias response teams. Ryan Miller, an assistant professor of educational leadership at the University of North Carolina–Charlotte, led the research that was published in *The Review of Higher Education*. It was titled “A Balancing Act: Whose Interests Do Bias Response Teams Serve?”

Framed within the diverse learning environments model, first promoted in the book “Higher Education: Handbook of Theory and Research,” as a theoretical framework, the team did identify a gap between theory and practice with bias response teams in the hope that the research “might allow institutions and administrators to more tangibly enact mission-based commitments to creating welcoming and inclusive environments.”

The work noted that several interviewees “shared that bias response work often did take educational forms, such as restorative justice mediations and diversity education for specific groups,” and some said bias response work “also prompted their institutions to address policy change in several areas.” That did not appear to be the norm, though, as researchers found administrators confronted by limited capacity and limited support from senior leaders.

Administration leaders have the responsibility to address hateful speech directly and specifically, according to Michelle Deutchman, executive director of the National Center for Free Speech and Civic Engagement at the University of California. Speaking to members of the Council on Foreign Relations, Deutchman said universities confronting acts of hate speech can no longer respond with, “We can’t stop this ugly speech because of the First Amendment.”

“Rather, there has to be an acknowledgement that there is a high cost to freedom of speech. We know that hateful, hurtful speech has a disproportionate impact on women and people of color, members of the LGBTQ community, and other marginalized groups,” she said. “While campus leaders may be unable to stop hateful speech, they have the ability—and I would argue, the responsibility—to use their speech rights to respond to ugly speech that unsettles the community and undermines vital institutional values, like inclusion and equity.”

Deutchman offered three ways to act on campus hate speech: Be direct with counter-speech, focus on safety and inclusion, and be prepared.

“Effective counter-speech names the specific hate speech directly to the targeted group and emphasizes how the hateful language doesn’t comport with the institution’s values,” she said. That’s exactly what the University of Wisconsin–Madison did last year after Matt Walsh spoke at the campus. Named by *New Republic* magazine as the 2022 “Transphobe of the Year,” the university cited Walsh by name and responded: “We recognize the impact that speakers and events can have on members of our community, and we seek to provide resources and support to those who may be affected. Our LGBTQ+ students, staff, and faculty are valued and important members of our campus community and we support every individual’s ability to define their gender identity as they choose.”

By focusing on safety and inclusion when responding to hate speech, Deutchman said, campus leaders “let members of the targeted group know they’re safe and a critical part of the campus community.” Being prepared, she added, means pulling a diverse representation of staff, students, and administrators together regularly to discuss challenges, policies, and effort at building dialogues across conflicting constituencies “in preparation for protests and other events.”

If campus spaces are to serve as both safe havens for all students and spaces where free speech can be housed, where nondiscrimination exists alongside non-repression, then having the tools at hand as noted by Garces, Miller, and Deutchman, and others referenced in the accompanying “Recommended Readings and Resources” should serve as aids. And with that, the goal of a healthy campus community would be to distinguish itself apart from the “culture wars” and toward an ideologically diverse debate over curriculum.

Recommended Readings and Resources

ACUI Active Dialogue Resource Page:

Offers institutional programs and initiatives, third-party programs, and other resources. *acui.org/activedialogue* (<https://www.acui.org/activedialogue>)

ACUI Resource:

Expressive Activity on Campus 2022

Access slides and other downloadable materials provided by University of Louisville Assistant Vice President of Student Affairs Tim Moore from his ACUI Annual Conference presentation “Expressive Activity on Campus 2022” (<https://mycommunity.acui.org/viewdocument/2022-acui-conference-expressive-ac>)

Book:

The Mind of the Censor and the Eye of the Beholder, by Robert Corn-Revere. (Oxford University Press, 2021) The book tells the story of expanding American legal protections for expressive rights from the 19th century into the present.

Book & Podcast:

Free Speech: A History from Socrates to Social Media, by Danish lawyer Jacob Mchangama. (Basic Books, 2022). Mchangama is also producer of the award-winning podcast Clear and Present Danger: A History of Free Speech (<https://www.freespeechhistory.com>)

Campus Resource:

Ohio State University Use of Space Rules

(<https://freedomofexpression.osu.edu/documents/university-space-rules.pdf>)

Campus Resource:

University of Mississippi Policy: (<https://union.olemiss.edu/free-inquiry-expression-and-assembly-for-individual-students-and-registered-student-organizations/>)Free Inquiry, Expression, and Assembly for Individual Students and Registered Student Organizations

Campus Resource:

University of Massachusetts–Boston Use of Space Rules

(https://www.umb.edu/event_services/reservation_policies#panel5)

Campus Resource:

University of California National Center for Free Speech and Civic Engagement

(<https://freespeechcenter.universityofcalifornia.edu/programs-and-resources/resource-materials>)

About the Author



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