

The Free Speech-Hate Speech Trade-Off

New York Times, SEPT. 13, 2017



Students protesting a speech by Milo Yiannopoulos at Berkeley in February. Credit Elijah Nouvelage/Getty Images

“Controversies over freedom of speech on college campuses have existed as long as there have been college campuses. But the specific issues vary with each generation.”

That is the first line of Erwin Chemerinsky’s new book, “Free Speech on Campus,” written with Howard Gillman. Mr. Chemerinsky is not only one of the foremost legal scholars on the First Amendment but also a firsthand witness to the free speech debates of today as the new dean of the University of California Berkeley School of Law.

Here he talks with Natalie Shutler, the editor of the [On Campus](#) column, about hate speech, censorship and what campuses can and can’t do. This interview has been edited and condensed.

Natalie Shutler: Hi, Professor! I have spent the past year talking with college students about free speech and, as you know all too well, it’s a contentious topic for them. In this loud internet age, in which provocative opinions are hitting us constantly and from all sides, plenty of students don’t see value in hosting more of the same on their campuses. One thing I appreciate about your new book is that you are thoughtful about these students’ concerns, even if you disagree with their conclusions.

Erwin Chemerinsky: I think we have to be attentive to the fact that many students want to restrict speech because of very laudable instincts. They want to protect other students from hate speech. They want to create an inclusive community for all. But the response to hate speech can't be to prohibit and punish it. It's unconstitutional. We have to find other ways to create inclusive communities.

Natalie: For many students, it's not just about hate speech, but the kind of speech that creates harm. This term is agonizingly broad and open to wildly different interpretations. But students aren't wrong in thinking that speech can be a weapon.

Erwin: Students are quite right. We protect speech *because* of its effects. If speech had no effects, it wouldn't be a fundamental right. Those effects can be positive but they can also be very negative. Speech can cause enormous harm. It can be hurtful, it can cause people to be excluded, and it can interfere with education or employment. Especially in colleges and universities, we have to be attentive to that.

Natalie: But you do take a hard line in your book that even hate speech must be protected.

Erwin: The law under the First Amendment is clear: Hate speech is protected speech. Over 300 colleges and universities adopted hate speech codes in the early 1990s. Every one to be challenged in court was ruled unconstitutional. And there are good reasons for that.

After some really ugly incidents at the University of Michigan in the late 1980s, the school adopted a hate speech code that was undoubtedly well intentioned. But a federal court declared it unconstitutional, in part, because it was so vague. It said that there could not be speech that "demeans or stigmatizes" anyone based on race or gender. But what does that mean? A sociobiology student who challenged the law said, "I want to study whether there are inherent differences between women and men. What if my conclusions are deemed stigmatizing on the basis of gender?" And during the years Michigan's speech code was on the books, more than 20 black students were charged with racist speech by white students. There wasn't a single instance of a white student being punished for racist speech, even though that was what had prompted the drafting of the Michigan speech code in the first place.

That's part of a much bigger historical pattern: As we saw in Michigan, when hate speech codes or laws are adopted, they are most often directed at the very groups they are meant to protect.

Natalie: You make the distinction in your new book that this doesn't mean that the First Amendment is absolute. For example, there is no constitutional protection for a "[true threat](#)" or for harassment. Campuses can protect students against that kind of speech. But before you address unprotected speech, maybe we should talk a bit about the history of free speech, which you lay out in your book.

Erwin: It is hard to imagine social progress anywhere that wasn't dependent on freedom of speech. The civil rights protests of the 1960s — the lunch counter sit-ins, the marches and demonstrations — were essential to federal civil rights acts and the end of Jim Crow laws that segregated every aspect of the South. The anti-Vietnam War protests were crucial for the end of

that war. This has been true throughout American history. The 19th Amendment that gave women the right to vote was the product of demonstrations and speech.

Natalie: Now, as you point out, many students associate free speech with the vitriol of the internet more than they do with the civil rights movement. I feel for them. The internet is terrible. But how do you see things turning around? How do you think students could begin to associate free speech as something for the vulnerable?

Erwin: Some of this is about a lack of education about the history of freedom of speech. I do worry that students today may equate free speech more with cruel or racist posts on Yik Yak than with the civil rights protests of the 1960s. But even when students talk about harm and safety, they need to remember how malleable those terms are. There is no doubt that the civil rights protests deeply offended many Southerners, however objectionable that may sound to us today. An example like that illustrates why offensiveness to an audience can't justify stopping speech.

Natalie: Identity is important to nearly every college student I talk to, regardless of their background or political persuasion. You make the case that free speech is the basis for asserting identities and, in particular, was necessary for the expansion in public of countercultural identities — including, and I'm reading straight from the book here, "forms of expression that challenge traditional religion, prevailing social mores, familiar lifestyle choices, inherited views about sexuality, or historic gender roles." But of course, some identities are much more vulnerable to intimidation than others.

You argue that college administrations need not ignore that. An administration can't bar a campus speaker, but it can engage in its own speech by reaffirming the social standards of the community and reaching out to students who might be offended or hurt. Campuses don't need to stand behind offensive speakers; they just need to allow them the opportunity to speak.

Erwin: I think it's so important for campus officials to respond to and condemn hate speech. Just because the First Amendment protects a right to say something, that doesn't mean it *should* be said.

Campus officials can describe the type of community they want to create and denounce hate speech as inconsistent with it. Many years ago, when I was teaching at the University of Southern California Law School, someone wrote a very offensive homophobic slur on a chalkboard. The dean did not try to find out who did it or threaten punishment. Instead, he wrote a very powerful statement about why what happened was inconsistent with the community we aspired to be. His message had an enormously positive effect.

Also, it is very important that the students themselves respond to offensive speech. They can hold counter-demonstrations, teach-ins and protests. All of that is protected speech. They just can't protest in a way that interferes with the ability of others to speak.

The law is clear that even in places that are open to speech, there can be time, place and manner restrictions, so long as there are adequate places for free speech. There is a right to speak on the

campus, but there is no right to come into my classroom and shout me down. There is a right to use public streets and sidewalks, but a city can prevent trucks with sound amplification equipment from playing music in the middle of the night. Dormitories are also a very special place of repose for students. It's their home, and the Supreme Court has recognized the protection of privacy of people in their homes. So there can be much greater restrictions in dormitories — but it always has to be content neutral. It can't be based on content or message.

Natalie: Right, so you could say that no one is allowed to hang flags from their window, but not that no one is allowed to hang Confederate flags from their window.

Erwin: Exactly.

Natalie: Obviously violence — like what we saw in Charlottesville and could presumably expect near other college towns in the coming year — is not protected by the Constitution. But I have heard from many students that they are frustrated with the idea that people of color and other vulnerable demographic groups are responsible for staying nonviolent and peaceful when aggressive demonstrators march on their colleges. It's not that they want violence, but that they feel that they are being told to respond to aggression with passivity. Could you comment on that? I certainly understand where they are coming from.

Erwin: There is no right to engage in violence. Campuses can take steps to prevent violence — such as preventing weapons at demonstrations, having speakers be in areas where safety can best be assured, and moving counter-demonstrations to another area. Also, if speech is a true threat — causing a person to reasonably fear imminent physical harm — it is not protected by the First Amendment.

Natalie: What about the argument that some inflammatory speakers come to campus with the express aim of creating a hostile environment?

Erwin: It is important to recognize that a public university has no choice but to allow speakers on campus even if their message is regarded as hateful or racist. If the campus tried to exclude such a speaker, it would get sued and the speaker would win and likely would be made a martyr for the First Amendment in the process. Nothing can be gained by exclusion. But the campus must ensure safety for its students, staff and faculty. This might include regulating where the controversial speaker is allowed to be present and, likely, it will include more of a police presence. I am sympathetic to the concerns of students who are wary about more police coming to campus, but not having law enforcement present in the face of a danger to public safety risks even greater harms.

The central principle of the First Amendment — and of academic freedom — is that all ideas and views can be expressed. Sometimes they are ideas and views that we might consider noble, that advance equality. Sometimes they might be ideas that we abhor. But there is no way to empower a government or campus administration to restrict speech without allowing for the possibility that tomorrow, it will be our speech that is restricted.