

# The First Amendment, Freedom of Expression, and Academic Freedom

Presented by Vice President and General Counsel **Tara Evans** and Free Expression, Intellectual Freedom, and Constructive Dialogue Lead **Martha McCaughey**

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# 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

# Protected Speech

Most speech is protected by the First Amendment, with some exceptions

# Unprotected Speech

UW can regulate speech that falls into the below categories:

- Incitement of immediate unlawful action
- True threats
- Fighting words
- Obscenity
- Defamation
- Fraud and perjury
- Speech integral to criminal conduct

# Hate Speech

- Hate speech
  - Is it protected? YES
- Discrimination and harassment
  - Is it protected? NO, if the conduct is severe, pervasive, and objectively offensive

# Public Employee Speech

- The First Amendment does not protect speech by public employees made pursuant to their official duties
- Public employees can still be disciplined for speech made pursuant to their official duties
- However, if the speech was made by a public employee in their capacity as a private citizen, *and* if the speech was on a matter of public concern, then it might be protected by the First Amendment

# Student Speech in the Classroom

- UW may limit student speech in the classroom that would disrupt the classroom and is regarding a subject that is outside the scope of the classroom discussion.
- Classes may examine a controversial political issue; no subject is off-limits. Students are encouraged to engage in academic inquiry in the classroom, not activism.
- Faculty may limit student speech in the classroom if the faculty member's actions are reasonably related to legitimate pedagogical concerns.

# Heckler's Veto

- When a speaker's right is curtailed or restricted by the government to prevent a reacting party's behavior
- The concept has been invoked in situations where hecklers or demonstrators silence a speaker without intervention of the law

Coined by University of Chicago professor of law Harry Kalven

# UW's Freedom of Expression Principles

In accordance with the nation's First Amendment protections and the right to free speech enshrined in the Constitution of the State of Wyoming, UW recognizes and respects the liberty of students, faculty, and staff as private citizens to express their opinions and identities, including concerns they may have about public institutions and the larger society.

At a public university, it is inevitable that the ideas and beliefs of different members of the UW community or visitors to campus will conflict with one another.

UW does not shield individuals from the free expression of ideas and criticism, including that which community members may find uncomfortable, disagreeable, or even deeply offensive.

The expression of criticism must respect the legal right of others to express themselves without serving to obstruct, censor, or otherwise interfere with the rights of others to hear those ideas.

# Free Expression, Institutional Neutrality, and Equal Opportunity

- First Amendment
- Fourteenth Amendment
- Title VI, Title VII, Title IX
- UW Regulations 4-1, 4-2, 4-3
- Equal Opportunity and Prohibited Efforts

**A student says, "Members of racial group X have smaller brains than other racial groups and so shouldn't be allowed to attend medical school" . . .**

- . . . as a comment on social media
- . . . in a conversation at a party
- . . . shouting it repeatedly in the dormitory at 3am
- . . . shouting it repeatedly during a public lecture on cognitive science
- . . . during their workday as a UW new student recruiter
- . . . in a written class assignment
- . . . in a classroom discussion

# Instructor Freedoms in Classroom . . .

- Enjoy full freedom in discussing their subject, including making decisions about how to approach the subject, how to present and explore the material, and which activities and assessments best meet the course learning objectives.
- Discuss controversial topics that are relevant to the course for the educational purpose of academic inquiry.
- Expect students to learn the material, read and discuss texts, etc. -- even if that course material makes the student uncomfortable. (Instructors can *compel speech* that's for an educational purpose.)
- Enforce norms that eliminate disruptions of their instruction, and stop students from expressing themselves when such expression disrupts the instruction or prevents the students from reaching the educational objectives of the course. (The classroom is not a public forum.)

# Student Freedoms in Classroom . . .

- ***Protection of Freedom of Expression***

Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.

- ***Protection against Improper Academic Evaluation***

Students should have protection through orderly procedures against prejudiced or capricious academic evaluation.<sup>4</sup> At the same time, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled.

- ***Protection against Improper Disclosure***

Information about student views, beliefs, and political associations that professors acquire in the course of their work as instructors, advisers, and counselors should be considered confidential. Protection against improper disclosure is a serious professional obligation. Judgments of ability and character may be provided under appropriate circumstances, normally with the knowledge and consent of the student.

*Joint Statement on Rights and Freedoms of Students, 1967*

American Association of University Professors

United States Student Association

American Association of Colleges and Universities

National Association of Student Personnel Administrators

National Association of Women Deans and Counselors

# Freedom to be Incompetent?

- As an ordinary citizen, **yes**  
(democratic and egalitarian ideals means all people can say whatever absurd thing they wish)
- As a professor or a student in a university class, **no**  
(both professors and students are evaluated by scholarly experts)

# Free Expression vs. Academic Freedom

FREE EXPRESSION	ACADEMIC FREEDOM
A constitutional right of ordinary citizens	A professional right of academics
Protects the egalitarian and democratic ideal so that everyone enjoys a political right to an idea or an opinion	Protects the academic mission geared toward advancing knowledge, vetting ideas, and judging competency
Meant to ensure open political discourse free from government censorship  (But if you work for Starbucks, you have no protection from your non-government employer's censorship)	Meant to ensure independent expert scholarly judgment free from political, religious, or administrative interference  Freedom in research, teaching, intramural utterances, and extramural utterances
Right to share political opinions regardless of accuracy or quality—no obligation to be civil, expert, or educational	No right to preach or politicize No right to be published or promoted No right to protection from peer/expert judgment <b>No right to be incompetent</b>
No right to harass, defame, incite violence, invade privacy, violate time/place/manner restrictions, etc.	No right to disrupt learning, be dishonest, deny equal treatment under the law, etc.

# Academic Freedom vs. HB0147 (Prohibition of Institutional Discrimination)

- Teaching the history of women's suffrage and the equal rights movement or sharing data on socioeconomic outcomes based on race are fine (academic freedom right). But telling the class that the men or the white students are to blame for another person's hardships, or grading one racial group differently, is not allowed (institutional discrimination).
- Scholarly inquiry is fine; moralizing is not.
- Scholarly inquiry is fine; political or ideological advocacy is not.
- Scholarly inquiry is fine; discrimination is not.

# OPEN

**O**pen Inquiry

**P**edagogical Purpose

**E**ducational Goals

**N**ever Assume

# WHEN THE DOOR TO FREE INQUIRY IS OPEN

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If the door to advancing knowledge of the subject stays open, the behavior is likely within bounds and complaints about it may lack merit.



# WHEN THE DOOR TO FREE INQUIRY IS CLOSED

If someone is doing or saying something that prevents knowledge of the subject from advancing, they're probably violating expectations, professional norms, and/or the law, and complaints about that may have merit.



# Should I Tweet That?

- Government employees enjoy First Amendment protections for their speech as ordinary citizens (eg, at a Town Hall meeting or over their own personal platform on YouTube), so they *can* Tweet their opinions on political or other matters of public concern.
- Whether and how to exercise that right, however, is a separate question that deserves careful and deliberate reflection.
- Social media can collapse boundaries between professional, personal, and civic roles. Social media can also spread one's message to a global audience and/or pull it out of context.
- Exercising your free speech rights does not insulate you from online dogpiling and doxxing, or from calls to censor, punish, or dismiss you by people who do not understand the scope of those constitutional rights.

Questions?