

**THE FIRST AMENDMENT AND
EXPRESSIVE ACTIVITY:
MANAGING CAMPUS UNREST**

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EDUCATION PRACTICE AT THE OFFICE OF THE ATTORNEY GENERAL

- Education Division

Olympia, Tacoma, Seattle, Spokane

- Regional Services Division

Bellingham, Everett, Port Angeles, Vancouver, Wenatchee, Yakima,
Kennewick

- UW, WSU

TODAY'S PRESENTATION

1. General approach to managing legal risk
2. First Amendment and related concepts
3. Before, during, and after a campus protest event

MANAGING LEGAL RISK

AVOIDING LIABILITY

1. Have good policies.
2. Follow them.

WHAT KIND OF POLICIES ARE WE TALKING ABOUT?

- Student Conduct Code
- Facilities Use Policy
- Bulletin boards/posting
- Tabling
- Chalking
- Social Media
- Website, Listserve
- Clubs
- Classroom conduct

POLICY REVIEW: EARLY AND OFTEN

- Good idea to review policies regularly
- Consider amendments
- Discuss with AAG

PRACTICE YOUR POLICIES

- Ensure familiarity
- Advance planning and discussion
- Tabletop exercises

CONSTITUTIONAL PROTECTION
FOR EXPRESSIVE ACTIVITIES

CONSTITUTIONAL PROTECTIONS

“Congress shall make no law ... abridging the freedom of speech ... or the right of the people to peaceably assemble. ...”

First Amendment to the Constitution of the United States

“FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.”

Declaration of Rights, Constitution of the State of Washington

BUT WE'RE NOT CONGRESS!

- State actors
- Different from private colleges
- *Healy v. James*

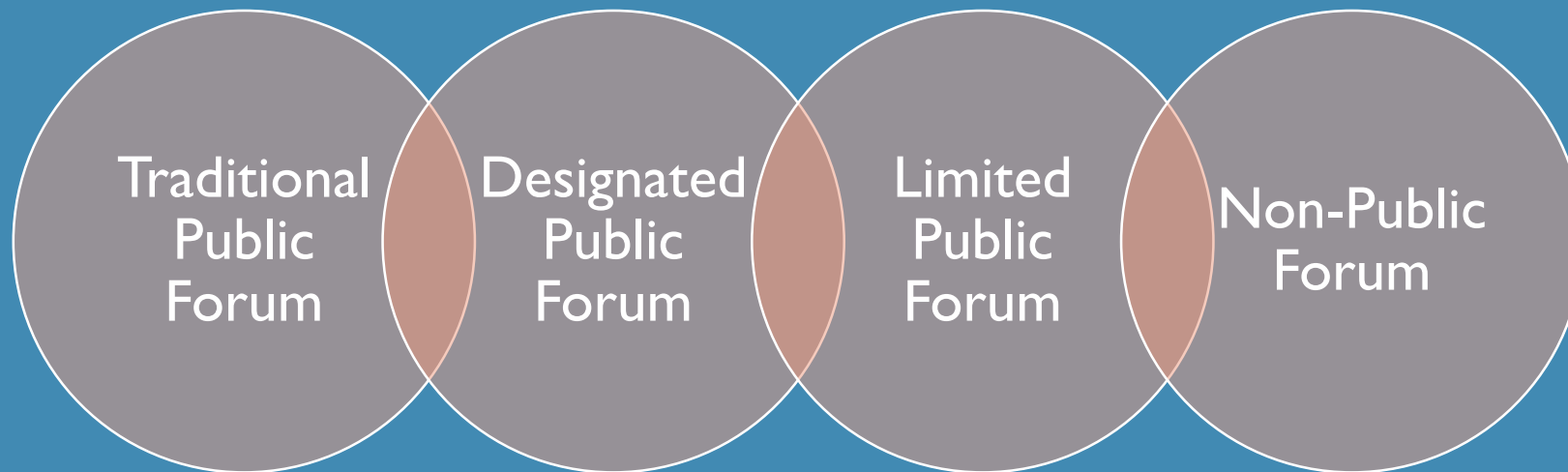
KEY FIRST AMENDMENT CONCEPTS

- Forum analysis
- Allowable restrictions
- Content discrimination
- Viewpoint discrimination
- Heckler's veto
- Time, place, manner regulations
- Speech vs. conduct
- Protected vs. unprotected speech
- Hate speech

CONTENT AND VIEWPOINT DISCRIMINATION

- Content discrimination = excluding speech about certain topics
- Viewpoint discrimination = excluding speech based on speaker's expressed viewpoint about content
- Both are highly disfavored and likely unconstitutional

FORUM ANALYSIS OVERVIEW



FORUM ANALYSIS: TRADITIONAL PUBLIC FORUM

- Public sidewalks, plazas, “Speakers Corner”
- College campus not likely traditional public forum but adjoining or intersecting sidewalks or public areas may be
- Most protection here for expressive activity: restrictions must be narrowly tailored and serve compelling governmental interest



FORUM ANALYSIS: DESIGNATED PUBLIC FORUM

- College designates areas – either expressly or by long-standing practice
- Open area, plaza, mall, fountain
- May be “public use area” if non-students permitted
- Expressive activity by students protected: restrictions must be narrowly tailored and serve compelling governmental interest
- Reasonable, content-neutral time, place, and manner regulations OK



FORUM ANALYSIS: LIMITED PUBLIC FORUM

- College-designated time and space for specific groups or purposes
- Auditorium, playing field, bulletin board
- Also can be non-physical space, such as social media, yearbook
- Can have content-based restrictions (like excluding protest activity from musical performance space and time)
- Restrictions must be consistently applied and viewpoint-neutral (must exclude all non-musical-performance expressive activity, not just disagreeable expression)



FORUM ANALYSIS: NON-PUBLIC FORUM

- Private offices, classrooms, dormitories
- Least protection for expressive activities
- College may exclude or restrict based on speaker identity or subject matter (don't need to allow student protest in staff office)
- Must be reasonable and viewpoint neutral
- Take care not to inadvertently create a public forum through lax practices



STUDENTS VS. NON-STUDENTS

- Answer to forum analysis might be different
- Watch historical practice

CLASSROOMS

A bit of a different animal



CLASSROOM SPEECH

- Is the speech curriculum-related?
- Does the speech substantially interfere with other students' ability to learn or cause actual material disruption?
- Do restrictions serve a legitimate pedagogical interest of the school, such as educating free of irrelevant distractions?

T-SHIRTS AND HATS

- May be in multiple fora as student moves around campus
- Effect on other students (e.g. swastika, sexualized content)
- More restriction may be allowable in classroom
- Any restriction must be narrowly tailored to serve compelling governmental interest
- Even if clothing cannot be excluded, important to address and document impacts

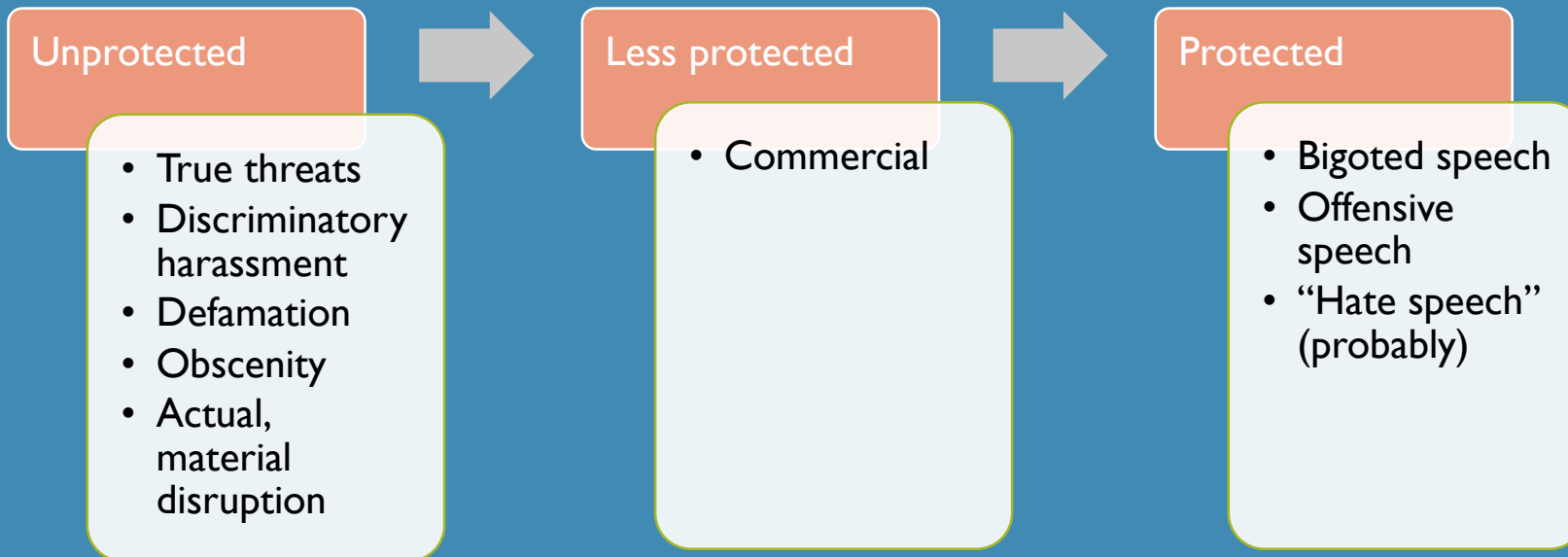
PERMISSIBLE TIME, PLACE & MANNER REGULATIONS

- Certain areas (not too remote)
- No obstruction (don't overdefine obstruction)
- Certain hours (not too compressed)
- Block off exam days, "dead days" (don't overdesignate)
- Safety hazards
- Size, placement of signs
- Advance registration/permit
- Limits on amplified sound
- Clean-up required
- No camping or overnight presence

SPEECH VS. CONDUCT

- Safest regulating conduct rather than speech
- Can be tricky to tell the difference
- Expressive conduct is also protected
- Concentrate on safety and security effects of conduct (such as camping)
- Be cautious of restricting messages out of fear that they may create discomfort

TYPES OF SPEECH



“HATE SPEECH”

- Rarely unprotected
- Does it cause actual material disruption to college operations?
- Is it general or targeting an individual?
- Is it sufficiently severe, pervasive, persistent, and objectively offensive to deny another student the ability to participate in the educational program?

TOOLS TO COMBAT HATE SPEECH

- Counter speech
- Remove material that violates content-neutral posting rules
- Enforce conduct code provisions related to
 - damaging or defacing property
 - obstructing egress and ingress
 - physical assault or abuse
 - discriminatory harassment
- Law enforcement for criminal conduct

HOW TO PROTECT STUDENTS FROM DISCRIMINATORY HARASSMENT

1. Focus on effect, not on intent
2. Focus on conduct

Speech may be incidental to conduct that is sufficiently severe, persistent, or pervasive as to limit or deny another student the ability to participate in, or benefit from, the educational program.

COMMENCEMENT TIME!

How do we handle disruptions to commencement ceremonies?



COMMENCEMENT DISRUPTIONS

- Plan ahead – consider your time, place, manner restrictions
 - Designated areas for expressive activity
 - Prohibition of amplified sound, sign sticks
- Plan ahead – do you need to change location, admission protocols?
 - Encampments?
 - Threats?
- Distinguish true disruption from peaceful protest
 - Turning backs to commencement speaker vs.
 - Bullhorns drowning out speaker or reading of graduate names

EXAMPLE QUESTION

CAN IT BE A VIOLATION OF THE STUDENT CONDUCT CODE FOR A STUDENT TO CARRY A PLACARD CALLING FOR ELIMINATION OF ALL THE WORLD'S JEWS?

EXAMPLE QUESTION

1. Does it cause actual material disruption in college operations?
2. Does it interfere with rights of other students by
 - creating objectively offensive harassment
 - that is sufficiently severe, pervasive, and persistent
 - to deny another student the ability to participate in or to benefit from the educational program?

COLLEGE POLICIES IN ACTION

BEFORE, DURING, AND AFTER CAMPUS
PROTEST EVENTS

BEFORE: PREPARATION

- Encourage advance registration
- Gather valuable information
- Involve organizers in safety planning

BEFORE: PLANNING

- Operations planning with Events or Facilities staff
- Safety planning with affected groups
- Are counter-protests expected?
- Will college engage in its own speech? When and how?

BEFORE: RESOURCES

- Communications Director
- AAG
- Law enforcement
 - local police department, county sheriff
 - WSP
 - FBI Campus Liaison
 - Fusion Center <https://www.wsfc.wa.gov>

BEFORE: RESIST HECKLER'S VETO

- Stifling disfavored speech due to expected backlash and disruption
- Not a legitimate reason to silence protected speech
- College has affirmative obligations to safeguard right to engage in protected expressive activity

DURING: KEEP STUDENT CONDUCT CODE IN MIND

- Obstructive or disruptive conduct
- Failure to comply with directions
- Unauthorized entry
- Weapons
- Harm
- Harassment
- Physical abuse

DURING: CRIMINAL OFFENSES

- Failure to disperse
- Obstructing law enforcement officer
- Disorderly conduct
- Criminal mischief
- Unlawful imprisonment
- Assault
- Trespass

DURING: PRESSURIZED DECISION MAKING

- Really tough to make decisions on the fly
- No matter how much you plan, unexpected things will happen
- Take a minute to think
- Consult with other leaders
- Don't forget your AAG

DURING: PRACTICAL QUESTIONS

- “What do we do with the tents?”
- Follow usual procedures as much as possible (allow students to reclaim property later)
- Trust in policies and training

AFTER: STUDENT CONSEQUENCES

- Possible Student Conduct Code violations
- Possible criminal offenses
- Tread lightly here

AFTER: SUPPORTING STUDENTS

- Do safety planning with affected groups (escorts, separation)
- Offer counseling services to affected students
- Designate single point of administration contact
- Consider college-sponsored counter-speech
- Investigate and resolve complaints, as appropriate
- Implement monitoring measures
- Document impacts: when do scales tip to actual, material disruption or pervasive harassing conduct?

AFTER-ACTION DISCUSSIONS

- What went well?
- What could have gone better?
- What changes to our policies make sense to consider?
- What additional training makes sense?

SUMMING UP

- Pure speech carries a high degree of constitutional protection.
- Courts give some consideration to educational setting and mission.
- Be thoughtful about campus policies around assembly and speech activities. Tailor to your needs and review often.
- Be careful about restricting speech to protect students from harassment.

QUESTION TIME