

Recommendations and discussion of the Academic Freedom Subcommittee of the Senate with regards to the draft document entitled, “Campus Expression: Time, Place, and Manner”

ABOUT THIS DOCUMENT

In responding to the document “Campus Expression: Time, Place, and Manner,” dated 3/2/10.2, the Academic Freedom Subcommittee seeks to accomplish two objectives in the present document:

- (1) to assist the reader in understanding the decision-making behind the AFS recommendations herein; and*
- (2) to underscore that we have offered our recommendations in the spirit of open dialogue and engagement with the University community.*

We hope that this document will assist in furthering our collective understanding of the relevant issues and in developing our capacity to produce a useful policy consistent with the educational mission of the University in a democratic society.

Along these lines, AFS recommends that a public repository be created where this document of recommendations/discussion can become publicly accessible, alongside each and every other public document created on this issue, including the letters to the STAR, op-ed and news pieces in the STAR, prior policy drafts, statements from individual members of the campus community or other campus committees, and so forth.

Title: Constitutionally Protected Speech: Time, Place, and Manner Restrictions

Discussion: *The committee felt that “campus expression” is overly broad; the policy simultaneously serves to educate as well as regulate, and therefore there is a need to be as specific as possible about the purpose of the policy.*

I. Introduction

Universities in a democratic society are by definition places for educating an informed and ethically engaged polity. For this reason, university campuses are traditional venues for political activity and for introducing students to the open expression, debate, critique, and reflection on which democracy depends. It is incumbent upon Sonoma State University, therefore, to cultivate a venue hospitable to, and to protect from proscription, a diversity of expressions, irrespective of how unpopular they may be.

The *right to legally protected speech acts* principally derives from the First Amendment to the U.S. Constitution. First amendment jurisprudence establishes that political and artistic expression is protected under the *doctrine of content-neutrality*: even if some find it offensive or disparaging, such speech is legally protected. Although the University strives to educate its community with respect to any potential harmful effects of such *objectionable speech*, it must nevertheless protect the right to such expression.

Since it may not regulate the content of political and artistic speech acts, the courts have recognized that the university can only restrict the *time, place, and manner* of such expression. This document outlines the Sonoma State University policy regulating the time, place, and manner restrictions on legally protected speech on campus.

Discussion

Paragraph one announces the importance of protecting speech on university campuses in a democratic society. The intention is to concisely stipulate this import as a positive orientation, rather than a negative one: that the university embraces as foundational to its existence as an educational institution the open discussion of viewpoints that may be marginalized elsewhere in society.

Paragraphs two and three then endeavor to introduce the specific purpose of this document within the context announced in paragraph one.

- 1. It introduces legally-specific language consistent with First Amendment jurisprudence: legally protected speech rather than free speech;*
- 2. it defines what kind of protected speech we're talking about—political and artistic—and thus under what area of law we're working;*
- 3. it identifies how an authority (such as a university) may place restrictions on this otherwise legally protected speech: by restricting merely the time/place/manner of the speech act, not its content;*
- 4. the purpose of this document, therefore, is principally, if not solely, to enumerate the time/place/manner restrictions on otherwise legally protected speech.*

II. Authority

This restrictions on legally protected speech enumerated in this document are promulgated under the authority of Title V, California Code of Regulations, subsequent directives, resolutions, standing orders, and Executive Orders of the Board of Trustees and Chancellor of the California State University, and the President of Sonoma State University.

III. Time, Place, and Manner Restrictions

At Sonoma State University, the time, place, and manner of legally protected political and artistic expression is limited solely by the following conditions. The interpretation of the following restrictions must be sufficiently narrow and tailored to accomplish the goal of advancing significant identified campus interests without adversely affecting other forms of protected speech. ***Such activities may not unreasonably or unduly***

1. interfere with University activities, including classes or other scheduled academic, educational, athletics, cultural arts, and career activities or with use of the University library;
2. obstruct the flow of pedestrian or vehicular traffic;
3. interfere with or disrupt the conduct of University business and operations;

Discussion

This section does not document or seek to proscribe or explain what “free expression” is or how it may occur at SSU. In a much more limited fashion, it enumerates the specific and circumscribed ways in which legally protected speech may be regulated on campus: through restrictions on the time/place/manner of speech. This section is the sum total of such restrictions.

No policy preempts the varieties of interpretation that can arise when implementing it. That’s why law is always contestable. Having recognized that ambiguity will necessarily remain, AFS felt that by adding “unreasonably” and “unduly” to bullets 1-3, the standard for objection is raised. Without these modifiers, there is considerably more room for the interpretation of mere incidental interference as unallowable; with these modifiers, the University must show that the alleged violation of the time/place/manner restrictions is substantial, beyond what a “reasonable” person would recognize as interference. The notion of “reasonableness” is a central tenet of legal interpretation; therefore, the matter of how something comes to be defined as “reasonable” or not has a long jurisprudential history. Obviously, it’s still open for interpretation, but at least there are authoritative benchmarks.

That said, AFS urges further discussion about the very question of enforcement: Who gets to decide what’s undue interference or unreasonable obstruction? How will these deliberations take place and on what grounds? What kinds of appeal procedures will be available after a decision has been made?

AFS felt that bullets 4 and 5 were implicit in 1-3 and therefore were extraneous. Similarly, it should not be necessary to reiterate that speech acts cannot violate federal, state, local, or University laws and safety regulations. Moreover, AFS felt that language such as that in bullet 6 could provide the University with justification to use “public safety” or “security” as the basis for preventing or unreasonably burdening otherwise protected activity. For example, bullet 6 could permit the University to prevent a controversial speaker on campus, or to impose costs for security reasons, on the grounds that the speaker’s presence may generate opposition that may take a violent form. Indeed, precisely this situation has occurred (not actual violence, but rather the University using hypothetical violence as just cause for imposing undue costs on a campus event).

The final paragraph of the original Campus Expression policy draft in this section is also unnecessary and irrelevant to the purpose of the document. “Legal free speech” has no jurisprudential meaning; the terms “protected” and “unprotected” should be used instead. Defamation, false advertising, obscenity, making of terrorist threats and incitement of actual violence—all of these things are areas of unprotected speech that are unrelated to the purpose of the policy. Defamation is part of civil tort law; false advertising is part of the jurisprudence of commercial speech, not political or artistic speech; obscenity, although arguably a content matter, remains a contested terrain for Congress and the Supreme Court alike and clearly beyond the purview of campus officials to determine; and terrorist threats and incitement of violence are crimes fully covered in state and federal law.

IV. Protected Speech and Academic Freedom

Academic freedom, inside and outside the classroom, is an essential component of legally protected speech on campus because of its integral role in the University’s educational mission. Although academic freedom exists within the penumbra of legally protected speech, it also entails additional duties and restrictions that are specific to the teaching, learning, and scholarship activities at the University. The University’s policies concerning academic freedom are elaborated in the following senate documents, including information about how to know if your academic freedom has been inappropriately restricted and what to do about it. (<http://www.sonoma.edu/Senate/Documents.html> – See *Academic Freedom Statement and Academic Freedom Complaint Procedures*)

Discussion

AFS believes that, technically speaking, this section does not belong in a University policy on time/place/manner restrictions to legally protected speech. The University has separate documents that deal with the rights and responsibilities that the doctrine of academic freedom implicates. Moreover, AFS feels that the original Campus Expression draft statement on academic freedom further muddies an issue that is already in need of clarification. For instance, faculty and students do not enjoy academic freedom in the same ways in the classroom. A faculty person may require a student to adopt a specific perspective as part of a particular pedagogical design; the student cannot object to this assignment, and thus to the course content, on academic freedom grounds. The CSU General Counsel’s Handbook on Free Speech Issues includes a brief section on this issue, and the American Association of University Professors (AAUP) website is a leading resource.

However, despite recognizing that this section ought not properly belong in this policy, AFS feels that because academic freedom doctrine is grounded in First Amendment rights (among other things), that the time, place, and manner of the exercise of such rights does indeed involve academic freedom issues. More to the concern of AFS, however, is that a restated paragraph on academic freedom within this policy could positively inform the campus community of the set of separate but related issues, and importantly, where to find out more about them.

The proposed language for this section, then, aims to concisely state the connection between academic freedom and legally protected speech, but to also note that there are differences between the two that are elaborated elsewhere. Specific websites, document titles, and senate committees (AFS) should be identified for further reference.

V. Designated Public Forums

Except for the conditions enumerated in Section III above, the entire campus is designated a public forum for legally protected political and artistic expression. In this way, the *place* for legally protected speech is interpreted as broadly as possible in order to foster, rather than limit, campus expression.

Discussion

The position of AFS is that free speech zones are untenable legally and undesirable in terms of the purpose of the University. The University's mission, as stated in the Introduction, is to foster expression, not limit it. The CSU General Counsel's Handbook on Free Speech Issues notes that the courts have clearly acknowledged that the "location of speech, like other aspects of presentation" is significant to the message, and therefore having exclusive "free speech zones" will not withstand legal scrutiny. We have certainly seen this to be true over time at SSU: organized speech acts have occurred at numerous places on campus, depending on the message being communicated. The CSU General Counsel recommends that "it can be effective to designate an entire campus open to free speech..." AFS concurs with this recommendation of the CSU General Counsel.

The language in the original Campus Expression draft that "free speech activities in these designated forums may not unduly limit pedestrian traffic in the area" is purposely omitted in the AFS recommendations not simply because the notion of a finite number of "designated forums" is inherently problematic, as explained above. In addition, not unduly limiting pedestrian traffic in the area contradicts the point of a public forum. For instance, when students at UC Berkeley blocked the entrance to campus on the National Day of Action to Defend Education (March 4th of this year), the whole point of the public forum that they created was to limit access to campus in order to raise the issue that business-as-usual must cease. The action was symbolic: there was no actual blockade, but pedestrian traffic was indeed limited.

VI. Public Events

Members of the University community and non-University community may use campus buildings and grounds for public events in accordance with the time, place, and manner restrictions enumerated in Section III above. Although facilities and equipment fees may apply in certain circumstances, there will be no such security fees applied to legally protected political and artistic events: the provision of police services for events that are non-commercial is part of the function of a department of public safety at a public university that encourages political dialogue, even if such expression requires security.

In general, the courts have stated that requirements that call for advance notice, registration, or permits before speech activity can occur are presumed to be unreasonable. As with Section IV above, the *time* for legally protected speech is interpreted as broadly as possible in order to cultivate an environment conducive to, rather than limiting of, campus expression. Requests for use of University buildings, however, are limited by availability and the standard room reservation procedures.

Discussion

The rationale behind the AFS recommendations for this section is contained in the section itself. We encourage review of the CSU General Counsel Handbook on Free Speech Issues, as the case law cited by the General Counsel served as a guide for the AFS recommendations:

http://www.calstate.edu/Gc/Docs/Free_Speech_Handbook.doc.

VII. Sound Amplification

Political speech often involves the use of amplified sound and as such any restrictions on amplification must be narrowly proscribed in accordance with Section III above in order to avoid an undue burden on legally protected speech. In the event of a conflict between a legally protected speech act and campus sound amplification regulations, the proper authority for deciding...[not simply the staff of Conferences and Event Services, but who else in addition? faculty representation? a senate body? AFS!]

Discussion

The original Campus Expression draft began with two sentences that are redundant because they're covered elsewhere in the policy document. The main proposal that sound amplification be permitted only between 12-1pm is objectionable to AFS because

1. as stated in the AFS recommendations, virtually all political expression involves the use of amplified sound, and therefore the one hour time slot is an unreasonable restriction;
2. just about any space on campus is potentially adjacent to buildings where scheduling occurs;
3. restrictions on sound should be narrowly defined in accordance with the restrictions enumerated in Section III;
4. and if conflict arises between the campus sound amplification policies and legally protected speech, there must be a more representative voice to deliberate than simply the staff of Conferences and Event Services.

VIII. Distribution of Published Materials

[same as in initial draft policy 3/2/10.2—no proposed changes—this section is consistent with Trustee policy as outlined in CSU General Counsel's Handbook on Free Speech Issues] (www.calstate.edu/gc/Docs/Free_Speech_Handbook.doc)

IX. Bulletin Boards and Posting

The posting of printed material is an important means of communication for the campus community and an integral part of the University's mission to educate and generate diversity of expression. To the extent that such material refers to legally protected forms of speech, it is accorded the same protected status and cannot be prohibited or restricted based upon interpretations of the offensiveness or fraudulence of the messages or information conveyed in the material.

All materials must be:

[same as in initial draft policy 3/2/10.2—no proposed changes to SSU signage policies—except for subsection on Pole Banners which should be removed as it is unrelated to the time/place/manner restrictions on legally protected speech which this policy is meant to enumerate] (<http://www.sonoma.edu/UAffairs/policies/signagepolicy.htm>)