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Universities Inadvertently Permit "Toxic" Environments: Free Speech and Private Institutions

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INTRODUCTION

The most important amendment that protects democracy is the First Amendment.[1] The First Amendment provides that "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."[2] Pure speech (speaking and writings) and symbolic speech (nonverbal expression intended to communicate ideas) are forms of expression protected under the First Amendment.[3] The Constitution protects "coarse expression as well as refined, and vulgarity no less than elegance" because "a society can be truly strong only when it is truly free."[4] Without the protection the Constitution provides, society would lack confidence in itself.[5] The First Amendment is often used to push or oppose political and social change.[6] In academic settings, the First Amendment is also used to protect professors' rights under academic freedom. However, the jurisprudence of where these protected rights begin and end are blurred.[7]

Across the nation, there has been media coverage of faculty, students, and seasoned professionals sharing offensive, racist, and sexist comments. Some institutions have taken disciplinary action once they were made aware of the situation, or have taken action when they were pressured by members of the community.[8] When made aware of offensive speech or expressions at an institution, some institutions simply made a statement that they were aware of

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[1] Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968).

[2] U.S. CONST. amend. I.

[3] *See, e.g.*, Spence v. Washington, 418 U.S. 405, 415 (1974); Cohen v. California, 403 U.S. 15, 91 (1971); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969); Brown v. Louisiana, 383 U.S. 131, 146 (1965); Cox
v. Louisiana 379 U.S. 559, 574 (1965).

[4] Ginzburg v. United States, 383 U.S. 463, 498 (1966) (Stewart, J., dissenting.)

[5] *Id.*

[6] Roth v. U. S., 354 U.S. 476, 484 (1957).

[7] Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 278 (1991) (discussing how the First Amendment is neither clear or logical).

[8] *See id.*

the situation and no disciplinary action followed.[9] In most cases, the institutions that have not followed up with some form of disciplinary action, determined that the actor's speech or expressions were protected by the First Amendment. Though these expressions may be protected under the First Amendment, it does not mean those professors were not immune from the consequences of their actions.[10] Within the last five years, there have been several instances where derogatory terms or slurs were used by professors in an academic setting. This perspective will explore why administration in private institutions decide that no disciplinary action was necessary when such terms are used in an academic setting.

I. IDENTITY OF ACTOR'S AND INSTITUTION

When applying the First Amendment to speech, we must consider the actors seeking protection under the First Amendment .[11] Unlike government actors, private institutions do not face the same constraints when regulating the speech and expression of their members.[12] An educational institution is classified as private if it is controlled and managed by a non-governmental organization.[13] Limited Constitutional constraints of speech and expression at private institutions are vindicated because private institutions do not have the same coercive power that a government actor does nor do private institutions limit the functionality of the democratic political process.[14] The difference between consequences at a public institution is that a derogatory or offensive term may result in legal action, and at a private institution a derogatory term consequence relies on the institution's code of conduct, moral commitment, understanding, and setting it wishes to portray.[15]

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[9] *See id.*

[10] Lisa M. Woodward, Collision in the Classroom: Is Academic Freedom a License for Sexual Harassment?, 27
CAP. U. LAW REV. 667, 668 (1999).

[11] *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

[12] *See generally* Jackson v. Metro, *supra* note 11 (distinguishing regulation between private and state actions).

[13] OECD & UNESCO INSTITUTE FOR STATISTICS, DATA COLLECTION ON EDUCATION SYSTEMS: DEFINITIONS, EXPLANATIONS, AND INSTRUCTIONS, 49, (2002). (Available here: https://www.oecd.org/education/1841883.pdf)

[14] *First Amendment on Private Campuses*, HARV. C.R.-C.L. L. REV. (Dec. 1, 2015) (Available here: https://harvardcrcl.org/first-amendment-on-private-campuses).

[15] *See id.*

II. IDEAS, EXPRESSION, AND ACADEMIC FREEDOM

Like Justice Frankfurter, I agree that all views and ideas (even radical and controversial ones) should be shared in a classroom setting. [16] Not only does the First Amendment protect the institution's interest for maintaining the necessary academic freedom, but provides the members of the institution the ability to speculate and experiment with thoughts and ideas within the academic realm.[17] Academic freedom is "the right to speak freely about political or ideological issues without fear of loss of position or other reprisal."[18] Our Nation is committed to upholding academic freedom, which is valuable not only to teachers, but to all citizens.[19] The First Amendment places a special emphasis on academic freedom, which does not "tolerate laws that cast a pall of orthodoxy over the classroom".[20] The Nation's future depends upon the leaders trained through wide exposure to that robust exchange of ideas which, discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." [21] Imposing restrictions on professors in educational institutions will imperil the future of our Nation.[22] Professors of higher education exercise their First Amendment academic freedom rights by determining for themselves, without the input of the university (and perhaps even contrary to the university's desires), the subjects of their research, writing, and teaching.[23] The exchange of ideas by professors "are presumptively immune from inquisition by political authority."[24]

Private institutions have adopted open expression policies that further the university's mission to have diverse forms of open expression – including freedom of thought, inquiry, speech, activism, and assembly.[25] For instance, Emory's policy does not ban the use of certain words or phrases when they serve a pedagogical purpose.[26] Between private institutions open policies and the

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[16] *See* Sweezy v. N. H., 354 U.S. 234, 250 (1957).

[17] Sweezy v. N. H., 354 U.S. 234, 250 (1957).

[18] Academic Freedom, Black's Law Dictionary (11th ed. 2019).

[19] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[20] *Id*.

[21] U.S. v. AP, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

[22] Sweezy v. N. H., 354 U.S. 234, 250 (1957).

[23] Urofsky v. Gilmore, 216 F.3d 401, 409-10 (4th Cir. 2000).

[24] Sweezy v. N. H., 354 U.S. 234, 266 (1957) (Frankfurter, J., concurring).

[25] *Respect for Open Expression*, EMORY UNIVERSITY, (last visited Nov. 11, 2022). https://campuslife.emory.edu/about/initiatives/open-expression/index.html.

[26] *Respect for Open Expression Policy (8.14*), EMORY UNIVERSITY, (Nov. 11, 2022), https://emory.ellucid.com/documents/view/19648?security=c6f36f9de43a2cd25fc99614d09384f649a313cf; *See A Message to Students*, EMORY LAW NEWS CENTER (Sep. 21, 2021), *https://law.emory.edu/news-and-events/releases/2021/09/a-message-to-the-students.html*.

doctrine of academic freedom professors may be permitted to say the "n" word and fa* in the classroom.

For instance, a professor argued that saying the actual "n" word was necessary in a discussion about systemic racism and argued that their use of that slur was protected under the umbrella of academic freedom and did not violate any of Emory's policies.[27] Further, a professor who used a homophobic slur argued that using the word in a classroom setting helps prepare law students for when they encounter slurs in their legal careers. [28] Supporting their argument, the professor shared that "we should teach our students to discuss the use of the word with clinical detachment, because we need to socialize our students into the norms of the profession."[29]

Following those situations, there has been other instances where derogatory terms and slurs were used at the aforementioned institution. Professors and students who use these terms are not ignorant, but show a lack of respect for those affected by the use of certain words. This repetitive behavior suggests that offensive and derogatory speech in private institutions is rarely an implication of free speech, but rather a moral and philosophical issue for those affected.

When applied in light of special characteristics in educational settings, First Amendment rights are available to teachers and students.[30] While students obtain the benefits of academic freedom through the freedom of their professors to teach, research, and publish academic freedom does not extend to students with the same protection as professors. [31] Students play a different role in the academic setting as they are not trained to lead in a formal academic setting.[32] The Supreme Court has not yet engaged in specific discussion of student academic freedom.[33] Students have no recognized student rights of free speech that are properly part of constitutional academic freedom, because the expressions of students does not have anything to do with scholarship or

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[27] Alex Morey, *Emory Prof's Reinstatement a Bittersweet Victory After Year-Long 'N-Word' Investigation*, FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION (Mar. 11, 2020), https://www.thefire.org/news/emory-profs-reinstatement-bittersweet-victory-after-year-long-n-word-investigation.

[28] Matthew Chupack, *A Classroom Divided: How the Debate of Slurs and Academic Freedom Splintered the Law School, The Emory Wheel (Dec. 1, 2021),* https://emorywheel.com/a-classroom-divided-how-the-debate-of-slurs-and-academic-freedom-splintered-the-law-school/.

[29] *Id.*

[30] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[31] *First Amendment on Private Campuses*, HARV. C.R.-C.L. L. REV. (Dec. 1, 2015) https://harvardcrcl.org/first-amendment-on-private-campuses.

[32] Peter Byrne, *A "Special Concern of the First Amendment "*, 99 Yale L. J. 251, 262 (1989).

[33] LOUIS M. BENEDICT, THE FIRST AMENDMENT AND ACADEMIC FREEDOM: FACULTY AS EMPLOYEES AND CITIZENS, (Aug. 2008).

systematic learning.[34] Hence, the same slurs used by professors in the same setting may not have the same disciplinary action if said by students because it does not fall under the umbrella of First Amendment -based academic freedom.[35]

III. STUDENTS AS MEMBERS OF THE COMMUNITY

The relationship between a private institution and its students is a voluntary contractual relationship.[36] Students at these institutions are members of a captive audience.[37] Students have to listen and engage in the classroom setting to get the information they need to succeed. Law schools cannot be effective in isolation from the individuals and institutions with which the law interacts.[38] The interactions of the individual members of the educational community are directed and influenced by the institutions' educational policies and educational goals.[39] It is unlikely that students and lawyers would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.[40] With that being said, students cannot afford to skip class because of the anticipation of uncomfortable topics or conversations in class. As future lawyers, law students are being exposed to racist, sexist, or offensive speech in everyday life and do not need to hear or engage in offensive speech in academic settings. When students are offended by slurs or offensive speech, they often reach out to affinity groups or to administration, but are often dissatisfied with the results. If the administration of private institutions fail to revise and amend their open expression policies, the environment of the institutions will continue to become more toxic for the members of the community.

CONCLUSION

The protection of constitutional freedoms, such as the First Amendment , is nowhere more vital than in the community of American schools.[41] The Supreme Court believes that "Scholarship cannot flourish in an atmosphere of suspicion

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34 Peter Byrne, *supra* note 32.
35 *Id.*
36 Gorman v. St. Raphael Acad., 853 A.2d 28, 38 (R.I. 2004).
37 Sweezy v. N. H., 354 U.S. 234, 266 (1957).
38 Sweatt v. Painter, 339 U.S. 629, 634 (1950).
39 *Id.*
40 *Id.*
41 Shelton v. Tucker, 364 U.S. 479, 487 (1960).

and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[42]

Although, the First Amendment extends protection to offensive speech in professional settings such as academic institutions, administration should consider the impact of how students feel and the environment they are creating by permitting such behavior. As a professor, before you share or express your view on a matter, the question should not be "can I say it?", but "should I say it?". Although your expressions may be protected and you may be permitted to say derogatory and offensive terms under an institution's policy and or academic freedom, professors should consider non offensive ways to convey the same message.

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[42] *Id.*