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Dear Members of the Committee:

Many thanks for inviting me to testify about the Anti-Free-Speech Movement on college campuses. This assault is a serious threat to American liberty and democracy, as well as to excellence in education and research.

Let me begin with two incidents that help illustrate the problem; move on to why calls to restrict supposed “hate speech” on campus are unconstitutional and misguided; and then talk about how the problem goes beyond the First Amendment as such, and reflects a failure of education and not just failure to comply with the law.

I. Two incidents

A. *The University of Minnesota*

In January 2015, some University of Minnesota professors put together a panel on the then-recent *Charlie Hebdo* murders. The panel was promoted with a flyer depicting the iconic post-murder issue of *Charlie Hebdo*, which showed a cartoon that was meant to depict a crying Mohammed holding a sign saying “I am Charlie,” with the French words “all is forgiven” above him.

The panel was a serious, academic attempt to deal with “Satire and Free Speech After Charlie,” with faculty members from three University of Minnesota departments (anthropology, journalism, and French and Italian), a law professor from a cross-town school, and the Minneapolis Star Tribune’s editorial cartoonist. These were not scholars, not professional provocateurs; professional provocateurs should of course be allowed to speak on campus, but we should expect the bulk of university discussion to be driven by academics, and here it was. And the event was, by all accounts, quite successful.

Can One Laugh At Everything? Satire and Free Speech After Charlie



January 29, 2015
4pm

Anderson Hall 230
West Bank
University of Minnesota

Free Speech Laws: A Comparative Study

Anthony S. Winer

Professor of Law, William Mitchell College of Law

Figurative Representation in the Islamic Tradition

William Beeman

Professor and Chair of Anthropology, University of Minnesota

"As Welcome as a Bee Sting": Why We Must Protect "Outrageous" Speech

Jane E. Kirtley

Silha Professor of Media Ethics and Law | School of Journalism and Mass Communication

Director, Silha Center for the Study of Media Ethics and Law, University of Minnesota

Antisemitism and Islamophobia: A Double Standard?

Bruno Chauat

Professor and Chair, French and Italian, University of Minnesota

Brief Reflections on Editorial Cartoons

Steven Sack

Editorial Cartoonist, Minneapolis Star Tribune

Now of course the petitioners have their own free speech rights, and were perfectly entitled to criticize the flyers (though I disagree with their criticism). But the university's Office of Equal Opportunity and Affirmative Action did not react well. It reportedly ordered staff to take down copies of the flyers, both from bulletin boards and from any university Web sites, though fortunately the dean of the College of Liberal Arts, John Coleman,

promptly reversed that order.¹ And the Office launched a formal investigation into whether the posters constituted religious “harassment”:

Kimberly Hewitt, the director [of the Office], said her office had no choice but to investigate. “There are limits on free speech, and that would be where you have harassment of an individual based on their identity,” she said. “We got complaints from eight individuals and a petition from 300 people saying that they felt that this was insulting, disparaging to their faith.”²

Months later, the investigation concluded that the flier didn’t “rise to the level of discriminatory harassment that would violate University policy,” but found that, because many people found the poster “personally offensive and hurtful,” the poster had contributed to an “atmosphere of disrespect towards Muslims at the University.” And Hewitt asked Dean Coleman to “communicate” that the College of Liberal Arts “does not support the flier’s image of the Charlie Hebdo depiction of Muhammad.”³ The message was likely pretty clear to many students, lecturers, untenured faculty members, and likely even some faculty members: If you say things that some people may perceive as blasphemous towards Islam, you will risk getting into trouble with the university administration.

But of course, whatever limits on “harassment of an individual based on their identity” might be (a complicated question, partly because “harassment” is so ill-defined), here there was no harassment *of an individual*. The flyer didn’t call people’s homes to leave offensive messages. The flyer didn’t follow anyone, calling them names. The flyer didn’t even mention any faculty, staff member or student whom it was criticizing by name (though most such criticism would indeed be protected free speech).

Rather, the flyer contained an image that some individuals find offensive because of their religion. When *that* is enough to trigger an investigation—on the theory that any speech offensive to individuals of certain religious groups may be “harassment of an individual based on their identity”—then something is very badly wrong at America’s universities

Indeed, even speech that intentionally “disparag[es]” “faith[s]” is exactly the sort of thing that universities should host, alongside speech that defends people’s faiths, or that disparages or defends political, moral or scientific beliefs. (The Establishment Clause has been read as prohibiting governments, including public universities, from taking official stances on theology or on the merits of various religions. But it most certainly does not

¹ Maura Lerner, *Poster for free-speech forum sets off debate at University of Minnesota*, Minn. Star-Trib., May 5, 2015, <http://m.startribune.com/poster-for-free-speech-forum-sets-off-debate-at-university-of-minnesota/302689691/>.

² *Id.*

³ *Id.*

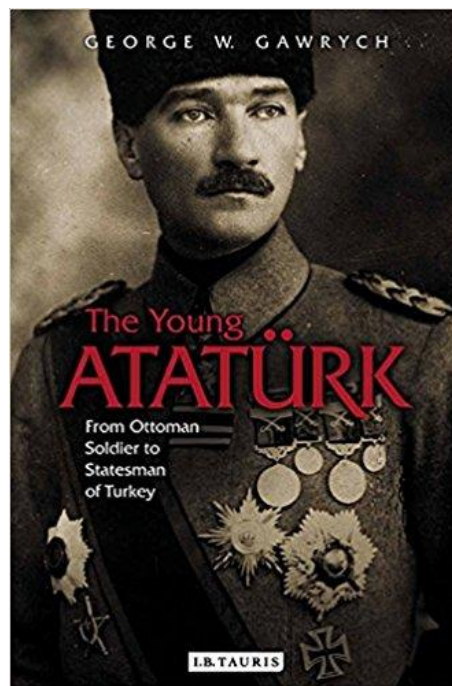
prohibit panels on religious topics, or panels that discuss controversies or current events that involve religious belief, including in ways that disparage or praise certain beliefs.) Islam, Christianity, Judaism, Buddhism, atheism, feminism, socialism, capitalism, nihilism, existentialism—all of these, and much more, are proper subjects for academic discussion and critique, no matter who might find it “personally offensive and hurtful.”

It is true that even quoted blasphemy, as in the event flyer, is “disrespect[ful],” in the following way: It communicates to members of a certain religion, “We do not feel ourselves bound to respect your demands about what we should or should not say.” And “respect” here means both “feel obligated to follow” and “express respect for.”

But this particular kind of disrespect is the very essence of academic freedom—the judgment that no religious group can set the terms for what can or cannot be said or shown. Fortunately, it looks like the academics at the University of Minnesota, including the dean, accept that judgment. Unfortunately, it looks like some University administrators do not.

B. California State University, Northridge

George Gawrych, Professor of History at Baylor University, has written extensively about the Balkans and the Middle East. His book about Kemal Ataturk, the founder of modern Turkey (*The Young Ataturk: From Ottoman Soldier to Statesman of Turkey*) got the 2014 Society for Military History Distinguished Book Award.



Gawrych was therefore invited by a faculty member to give a lecture for the Middle Eastern and Islamic Studies program at California State University, Northridge (in Los Angeles).

But various activists, including apparently some students, wouldn't allow that to happen. The Armenian Youth Federation proudly described the incident, with video included:

Armenian students at California State University Northridge (CSUN) shut down a planned lecture about Mustafa Kemal Atatürk, citing historical evidence Atatürk continued Turkey's genocidal policies and the event's purpose to distract from the crisis in Turkey today....

Our presence at these events will send a clear message to the Turkish community that college and university campuses are not incubators for denialists. Treating college campuses as breeding grounds for Turkish nationalist ideology is offensive for the number of Armenian students who attend these colleges.⁴

The university's student newspaper elaborated:

Scholar George Gawrych got through no more than five sentences during his presentation on his book about Turkish army officer Mustafa Kemal Atatürk before students raised their voices in protest Thursday at the Aronstam Library in Manzanita Hall.

Over 20 protesters stood up from their seats, turned their backs on Gawrych and repeatedly chanted "Turkey guilty of genocide" and "genocide denialist."

Gawrych waited briefly as other attendees voiced their opinions to let him speak, until he began walking up and down the aisle trying to get the protestors to face him.

Two police officers who guarded the entrance escorted Gawrych, a Baylor University Boal Ewing chair of military history, out of the library to sounds of chanting protesters.

As best I could tell (and I asked about this), there was no attempt by Cal State Northridge to eject the shouters and allow the speech to go on, or to punish them after the fact.

Again, this was exactly the sort of lecture one would expect at a university, on a subject (the life of Kemal Atatürk) that is of obvious importance to anyone interested in recent Middle Eastern history. If some people think the author was going to be too soft on Atatürk's involvement in attacks on Armenians, and the denial of such attacks, they were certainly entirely free to ask these questions after the lecture, or to hand out leaflets outside the building before and after the lecture. If they were displeased with the author's own past statements about the genocide (apparently he had said that he prefers to describe it as "massacres," and suggests that it may have been less coordinated than some claim⁵),

⁴ Citations available in Eugene Volokh, *Student group at Cal State Northridge boasts of 'shutting down' speech by award-winning scholar*, Volokh Conspiracy, Wash. Post, Nov. 15, 2016, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/15/student-group-at-cal-state-northridge-boasts-of-shutting-down-speech-by-award-winning-scholar/>.

⁵ See Terri Jo Ryan, *Family tree tied to forgotten genocide*, Waco Trib.-Herald, https://www.aarweb.org/sites/default/files/pdfs/Programs_Services/Journalism_Award_Winners/2006Ryan.pdf: "He struggles with the term 'genocide' (race-murder) to describe what happened to the

they could have questioned him about that, though this wasn't the subject of his lecture or his book. But when universities allow lecturers to be just shouted down—and thus shut down—with impunity, something is very badly wrong in American higher education.

II. There is no “hate speech” exception to the First Amendment—and there shouldn't be

These incidents illustrate the wisdom of the modern Supreme Court's refusal to recognize any “hate speech” exception to the First Amendment. It's often tempting to try to carve out limited exceptions for views that we think are just so evil and so offensive, whether they are advocacy of Communism or Nazism or jihadism or whatever else. But since the 1960s, the Supreme Court has rightly resisted this temptation, following Justice Black's admonition: “the freedoms . . . guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.”⁶

Imagine that, say, in 2002, Rush Limbaugh had predicted, “if campuses are allowed to restrict supposed racist harassment, then soon people will be demanding that university professors be stopped from displaying images of Mohammed.” Or, “if students are taught that campuses should have ‘zero tolerance’ for ‘hatred,’ soon they'll be shouting down leading academics who are seen as too sympathetic to, say, Kemal Ataturk.”⁷ People would have said, “oh, that's ridiculous fearmongering, pointless strawmen in a fanciful parade of horrors.”

But what we have seen in recent years is the Parade of the Living Strawmen: The worries about the slippery slope have proven entirely prescient. Calls for suppressing supposedly extremist provocateurs (such as Milo Yiannopoulos) have led to the shouting down of

Armenians. He said he prefers ‘massacre,’ which he considers a more powerful term, to describe the conditions that allowed for violence without repercussions. ‘We need better terms,’ Gawrych said. ‘With ‘ethnic cleansing,’ you don't feel the human agony, do you?’ The Ottomans were fighting the growth of nationalistic fervor among its peoples, not just the Armenians, said Gawrych. An Armenian guerilla movement was fighting for statehood, and massacres happened on both sides: Armenian insurgents killing soldiers and wiping out Muslim villages, and soldiers killing Armenians and wiping out their villages. Gawrych said it was hard to sift through the carnage. But was an extermination of Armenians ordered? Gawrych said the official Ottoman position was that no such order existed, and that the bloodshed was just a series of unfortunate massacres in reaction to nationalistic fervor and ethnic tensions. ‘But too many women and children died. Too many old people. There was some government involvement,’ he said, at least in creating the atmosphere of lawlessness that allowed the worst to happen.”

⁶ *Healy v. James*, 408 U.S. 169, 188 (1972) (quoting Justice Black's statement, specifically in a case about speech at a university).

⁷ A supporter of the Northridge suppression of Prof. Gawrych specifically pointed to Cal State Northridge being “a large proponent of the inclusion and respect of all individuals, regardless of gender, race, and ethnicity, with a zero tolerance policy regarding hatred” as a justification for keeping Gawrych from speaking. See Volokh, *supra* note 4.

serious scholars, and even to physical assaults (as in the Charles Murray Middlebury speech). Calls for suppressing racist insults have led to attempts to shut down display of the Mohammed cartoons (not just at the University of Minnesota but also elsewhere),⁸ punishments for reading or displaying supposedly offensive books,⁹ and much more.

Fortunately, courts have reaffirmed that the First Amendment protects ideas about religion, sexual orientation, race, and the like—including ideas that may be wrong or offensive—as well as ideas about other topics. Indeed, in *Christian Legal Society v. Martinez*, the Supreme Court gave students’ freedom to “express any viewpoint they wish—including a discriminatory one” as an example of “this Court’s tradition of protect[ing] the freedom to express the thought that we hate.”¹⁰ And lower courts have repeatedly struck down campus speech codes aimed at supposedly bigoted speech.¹¹

Not everyone, to be sure, seems aware of that. Gov. Howard Dean recently claimed that “hate speech” is constitutionally unprotected.¹² So did Portland Mayor Ted Wheeler.¹³

⁸ See Foundation for Individual Rights in Education, *Mohammed Cartoon Controversy: FIRE Response to Intimidation and Newspaper Disputes*, <https://www.thefire.org/cases/mohammed-cartoon-controversy-fire-response-to-intimidation-and-newspaper-disputes/>.

⁹ See Foundation for Individual Rights in Education, *Indiana University–Purdue University Indianapolis: Student Employee Found Guilty of ‘Racial Harassment’ for Reading a Book*, <https://www.thefire.org/cases/indiana-university-purdue-university-indianapolis-student-employee-found-guilty-of-racial-harassment-for-reading-a-book/>; Eugene Volokh, *No ‘inflammatory’ books allowed—we’re a university, after all ...*, Volokh Conspiracy, Wash. Post, Mar. 1, 2017, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/01/no-inflammatory-books-allowed-were-a-university-after-all/>.

¹⁰ 561 U.S. 661 (2010) (internal quotation marks omitted). The court split 5-4 on whether student groups were entitled to have access to various university programs while engaging in discriminatory *conduct*, such as selecting members or leaders based on sexual orientation or religion. But the Justices agreed that student groups were entitled to have access to such programs regardless of the viewpoint of their *speech*, even if that viewpoint supported certain forms of discrimination.

¹¹ See, e.g., *Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1184-85 (6th Cir. 1995); *DeJohn v. Temple Univ.*, 537 F.3d 301, 316-17, 320 (3d Cir. 2008); *McCauley v. Univ. of V.I.*, 618 F.3d 232, 237-38, 250 (3d Cir. 2010); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.3d 386, 388-89, 391, 393 (4th Cir. 1993); *College Republicans v. Reed*, 523 F. Supp. 2d 1005, 1010-11, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 870-72 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 373 (M.D. Pa. 2003); *Booher v. Bd. of Regents of N. Ky. Univ.*, 1998 U.S. Dist. LEXIS 11404, *28-*31 (E.D. Ky. 1998); *UWM Post, Inc. v. Regents*, 774 F. Supp. 1163, 1165-66, 1173, 1177 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856, 864-66 (E.D. Mich. 1989).

¹² See Eugene Volokh, *No, Gov. Dean, there is no ‘hate speech’ exception to the First Amendment*, Volokh Conspiracy, Wash. Post, Apr. 21, 2017, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/21/no-gov-dean-there-is-no-hate-speech-exception-to-the-first-amendment/>.

¹³ See Eugene Volokh, *Portland mayor urges federal government to revoke permit for ‘alt-right’ demonstration, on the theory that ‘hate speech is not protected’*, Volokh Conspiracy, Wash. Post, May 29, 2017,

Even the Washington Post editorial board has demanded that university administrators “make crystal clear that racist . . . speech” is “off-limits” on campus—without any acknowledgment that perhaps university administrators may not declare viewpoints “off-limits,”¹⁴ and without any recognition of just how much speech is casually labeled “racist” or similarly ethnically prejudiced (*e.g.*, criticisms of Islam, calls to deport illegal aliens, harsh condemnation of Israel, and more). But the courts have been clear on the First Amendment rules here even if politicians and newspaper editors, who themselves profit greatly from broad First Amendment protections, are not.

III. Freedom of speech and freedom of academic discourse: The First Amendment and beyond

Finally while First Amendment protection is important, free speech and free academic discourse require more than just the First Amendment minimums. For instance, courts have rightly concluded that the First and Fourteenth Amendments (which by their terms apply only to the federal and state governments) don’t bind private universities. But if leading private universities suppress dissenting viewpoints, that too is bad for the marketplace of ideas, and inconsistent with the claims about freedom and diversity that most private universities routinely make to students, donors, and others.

Likewise, the First Amendment doesn’t require public universities to protect speakers from being shouted down or even attacked. It does bar public universities from protecting some speakers based on viewpoint but denying such protection to others; but when a university wants to let hecklers and thugs generally control what is said on campus, that is not itself a First Amendment violation. Yet it is an abdication of the universities’ responsibility to foster free discussion.

More broadly, it is an abdication of the universities’ responsibility to *educate*—to teach their students about the importance of responding to speech with arguments and not with suppression.

A. To begin with, a core principle of modern science and history is that we can be confident of a view only if we know that this view is constantly withstanding challenges. Were the deaths of Armenians in the Ottoman Empire during World War I a deliberate genocide? Few of us are likely to personally examine all the evidence ourselves. Instead, we generally (and reasonably) rely on the consensus of scholars in the field.

<https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/29/portland-mayor-urges-federal-government-to-revoke-permit-for-alt-right-demonstration-on-the-theory-that-hate-speech-is-not-protected/> .

¹⁴ See Eugene Volokh, *Washington Post editorial calls for universities to ‘make crystal clear that racist ... speech [is] off-limits’*, Volokh Conspiracy, Wash. Post, May 11, 2017, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/11/washington-post-editorial-calls-for-universities-to-make-crystal-clear-that-racist-speech-is-off-limits/> .

But that consensus is trustworthy only if we know that rival views can be aired, and have been rejected on the merits. (Prof. Gawrych’s talk was not itself about the Armenian genocide, but if speech like his can be suppressed, then surely speech that is skeptical about the genocide would be even more likely to be suppressed.) Once expressing a dissenting view, whether about the Armenian genocide, global warming, or race, sex, or sexual orientation, is forbidden, we can no longer have confidence about the dominant view: We would know that the domination no longer necessarily stems from rival views being logically rebutted, but rather from rival views simply being suppressed.

This is a basic idea, familiar to scientists and historians. Indeed, it is a foundation of academic freedom. But it is not obvious; it has to be taught. Many universities are missing the opportunity to teach it.

B. Beyond this, how can students become effective advocates even for good and correct ideas if they are shielded from contrary views? At some point, “shut up!” and “you’re a racist!” stops being effective arguments. They may work to stop people from spreading ideas—but they won’t work to stop them from believing those ideas.

And outside the university, when you’re trying to persuade voters whom you can’t threaten with expulsion or firing, you need to know how to listen and rebut even views that you find wrong—even disgusting. That takes practice; and what better place for that practice than a university, an institution that is supposed to be all about ideas, debate, reasoning, and arguments?

In the words of John Stuart Mill, “He who knows only his own side of the case knows little of that.”¹⁵ How can such a person, insulated from rival views, hope to persuade anyone?

C. Finally, how can honest people be sure that they are themselves right, even about their most cherished beliefs, if they are insulated from possible counterarguments? Oliver Cromwell exhorted his adversaries, “I beseech you, in the bowels of Christ, think it possible you may be mistaken.”¹⁶ That is good advice in science, history, and moral thinking, as well as in religion and politics. And it is an animating principle of modern First Amendment law; in Justice Holmes’ words, the marketplace of ideas is so important because we realize “that time has upset many fighting faiths,” and that only “free trade in ideas” has any hope for helping show us which of today’s faiths are false as well.¹⁷

Indeed, most of what people today know—or, to be precise, of what they think they know—about race, sex, religion, sexual orientation, gender identity, and a vast range of

¹⁵ John Stuart Mill, *On Liberty*.

¹⁶ Thomas Carlyle, 1 *Oliver Cromwell’s Letters and Speeches* 168-69 (1888).

¹⁷ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

other topics has come about through rejecting many former “fighting faiths.” Free speech has been a major tool for change in all these areas. Yet why should we assume that we have finally reached the correct answers? We talk a lot about teaching students “critical thinking”; but one of the most important forms of critical thinking is self-critical thinking, thinking that is open to the possibility that one’s own deeply held beliefs are mistaken. That habit is likewise something that universities must be constantly teaching.

* * *

I am very glad that this Committee is looking into this subject, which goes to the heart of who we as Americans are, and who we ought to be. Many people at universities (such as the faculties that have promulgated and adopted the University of Chicago Statement on Principles of Free Expression¹⁸) are taking this problem seriously, and trying to combat it; but too many people in the academy are not focusing on it, or are coming down on the wrong side. I hope that hearings such as this can help shed more light on the matter.

Sincerely Yours,

A handwritten signature in cursive script that reads "Eugene Volokh".

Eugene Volokh

¹⁸ <https://freeexpression.uchicago.edu/page/statement-principles-free-expression> .