

## There Is No Campus Speech Crisis

By Steve Kolowich September 02, 2018 Premium

Noah Berger

Erwin Chemerinsky



In 2016, Erwin Chemerinsky, then law dean at the University of California at Irvine, asked students in a free-speech seminar if they thought the University of Oklahoma

might have violated the rights of two fraternity brothers expelled for instigating a racist chant with a reference to lynching. All 15 students said no.

It was a revealing moment for Chemerinsky, a First Amendment scholar who had witnessed the stifling of Vietnam War protesters and come away with a gimlet-eyed view of what speech should be censored in the name of protecting community values. "This is the first generation of students educated, from a young age, not to bully," Chemerinsky and Howard Gillman, now chancellor at Irvine, write in their book [\*Free Speech on Campus\*](#) (Yale 2017). "They are deeply sensitized to the psychological harm associated with hateful or intolerant speech." Growing up with the internet, they write, today's students have seen free speech invoked less by protesters against injustices than by trolls starting flame wars online.

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Now dean of Berkeley Law, Chemerinsky says he wants to teach "both sides" that the battle over campus speech isn't winner-take-all. While theorizing about protecting both free speech and subjects of harassment or threats, he is defending a group of women who sued the University of Mary Washington for deliberate indifference to cyberbullying on Yik Yak.

He spoke with *The Chronicle* about speech and safety on the modern campus, and how to talk about those things without hyperventilating.

**First things first. Is there a free-speech crisis on college campuses?**

No.

**Why do I keep hearing about one then?**

Every day as I walk across campus, I see student groups engaged in various free-speech activities. They're gathering signatures on petitions, handing out leaflets, holding demonstrations. And it goes on without incident day after day. Berkeley is

not unique. Free-speech activities occur all the time. But they don't gather media attention.

There are certainly high-profile instances that pose difficult questions, like Richard Spencer wanting to speak on campuses. There are issues like, How much do campuses have to spend for controversial speakers to be there? But that's very different than saying there's a crisis.

**How healthy do you think today's campus environment is for speech compared to previous eras?**

During the McCarthy era, you had faculty being fired for just being suspected of Communist leanings. In the 1960s, you had a lot of demonstrations, but you also had instances of campuses trying to crack down on the demonstrators. In the 1990s, you had 350 colleges adopting hate-speech codes. Generally this is a time when freedom of speech is protected. But there are strong pressures on campuses to try to regulate hate speech, and more students today than we've seen in a while who would rather see greater restrictions on speech.

**In your book you talk about the increase in diversity among students. You write, "There are more people on campus who can testify to the very real harms associated with hateful or intolerant speech." But because the wounds of speech can't be evaluated as easily as, say, a broken jaw, there's no broad consensus on how real the harm is.**

There will never be a consensus on how campuses should handle hate speech. I don't think there will be a consensus in society. On the one hand, there is an understandable desire to restrict hate speech. It's offensive, it's hurtful, it inflicts injury. On the other hand, we've never found a way of defining hate speech with any precision, and the courts are clear that hate speech is protected under the First Amendment.

Campuses have a duty to ensure a safe learning environment for all students. They need to do so in ways that aren't restrictive of speech. So it's important that

colleges express the type of place they want the campus to be. It's important for campus officials to speak out against hateful incidents using their own power of speech. They can help students come up with counter-speech to express themselves. They can hold teach-ins and provide for programs that deal with issues of hateful expression. They can make available counseling for students who have been subjected to hate speech. Protecting students who are victims of harassment is not the same as saying, We're going to punish all hate speech.

**It's way less effective.**

Or way *more* effective!

**Explain what you mean.**

Often it's the very groups we're trying to protect that end up getting disciplined. When the University of Michigan had a hate-speech code, many of the enforcement actions under it were against African-American or Latino students.

I also worry that punishing hate speech has the effect of creating martyrs. Last fall, in anticipation of a so-called free-speech week at Berkeley, the chancellor, Carol Christ, convened a campus-wide gathering. I was on a panel. Another faculty member on the panel began by saying that the greatest problem in our society is white supremacy, and that the campus should exclude racist speakers. He got resounding applause. In the question-and-answer period, one of the students spoke quite eloquently and said that she feels threatened when there are hateful speakers on campus. She wanted the chancellor to exclude them. She got resounding applause.

I then spoke up and said, Let's be clear. If the chancellor were to exclude speakers because they're offensive, they would sue, and they would win. The campus would be liable for their attorneys' fees. In fact, the chancellor might be liable for damages, because the laws are so clear. The excluded speakers would make themselves out to be martyrs, and they'd get to speak anyway. Nothing would be gained. No one applauded when I said that.

## **Why not?**

Often the value of free speech is seen as too abstract, and the harms of hateful speech more real.

**You make no secret of your own position that campuses should never censor or punish the expression of ideas. Is there a bar for what qualifies as an idea? White frat boys at the University of Oklahoma chanting a racial slur or Milo Yiannopolous saying all feminists are fat?**

No. There's no line under the First Amendment to separate an idea from a provocation. It's too easy, if we were to draw that line, to take speech we don't like and call it a "provocation" and say the speech we do like is an "idea."

The United States Supreme Court has said that so-called "true threats" are not protected by the First Amendment. The courts are split on how you determine what's a true threat. Is it from the perspective of a reasonable observer, or do you need to prove that the speaker actually desired to threaten others? I would define as a "true threat" speech that causes a reasonable person to imminently fear physical harm.

**You write about the dangers of deferring to an "especially sensitive or fearful person" when making that call. So how does a college decide who is being reasonable and who is being a snowflake?**

I've heard people say that merely allowing Milo Yiannopolous or Ann Coulter on campus would cause them to feel threatened. That's not enough. For a true threat, you really have to reasonably fear imminent harm to one's physical safety. That's contextual and involves line-drawing, but the law always does that.

## **What is the biggest threat to campus speech?**

The ability of campuses to protect students and faculty from harassment over the internet raises enormously difficult issues. And how much do campuses have to pay

in order to facilitate speech and ensure safety? Berkeley last September spent \$3.9 million for security. What if it was \$

39 million?

In a particular context where a campus has already spent a great deal of money, it is justified in saying, Given our budget, we can't go any higher than this. But that line has to be very high. Campuses have an obligation to spend a great deal of resources protecting free speech.

**Was \$3.9 million in one month too much?**

No, not in a budget as large as Berkeley's. For a much smaller school, \$3.9 million would be difficult. If a campus came forward and said, Look, this year we've already spent X amount, and it's an unreasonable burden, there's a point at which that campus would win in front of a judge. I don't know what that point is, though. Nobody does.

*This interview has been edited for length and clarity.*