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Reflections on Free Speech: An Open Letter to the Harvard Community

During the past year or two, we have had several incidents on campus that provoked concern about freedom of speech. Last October, Secretary of Defense Caspar Weinberger was heckled and interrupted in Sanders Theatre and could finish his speech only with difficulty. In 1983, members of the audience interfered with another speech by alternately booing and cheering a representative of the Palestine Liberation Organization who had been invited to speak by the Black Law Student Association (BLSA). Last April, the moderator at a panel arranged by the BLSA did not recognize Jewish law students who wished to question a speaker representing the PLO. In universities, elsewhere, several controversial figures have been severely heckled; others have actually been prevented from speaking; still others have had to withdraw from speaking after vigorous protests or threats of disturbance by students.

Against the background of these events, I have decided to write an open letter on the subject of free speech and its application to a university community.* Some readers may question the need for such a letter. After all, almost everyone understands the importance of free speech under our Bill of Rights, and the few who deny its importance will not be persuaded by anything that I might write.

There are several reasons for discussing this subject openly and carefully. To begin with, commentators have pointed out for years that Americans give overwhelming support to free speech as an abstract proposition but quickly change their minds when they encounter concrete cases involving the expression of unpopular ideas. Not so long ago, for example, a national poll revealed that 68 percent of people 25 to 35

* The views and arguments set forth in this letter are not presented as authoritative or binding on the University. In my opinion, they are in keeping with the main lines of Constitutional thought that have developed over the years concerning the principles of free speech. I also believe that they represent sensible adaptations of these principles to the circumstances of a university community. But I present them only as my personal views in the hope that they will help to clarify some of the confusion that can develop in considering what free speech means in concrete situations. If an occasion arises for applying principles of free speech in an official disciplinary proceeding, that task must be left to the bodies properly designated to hear and decide such cases.

years old and 78 percent of all 17-year-olds favored a ban on any statements on radio or television indicating that "Russia is better than the United States" or "Some races of people are better than others" or "It is not necessary to believe in God."

Even if such polls do not reflect the prevailing sentiments in this community, the principle of free speech is not always easy to apply in specific cases. When is heckling an interference with free speech and when is it simply a means by which an audience communicates its disapproval? Does one promote free speech or infringe on it by requiring a speaker to submit to open debate as a condition of appearing on campus? Does a student organization interfere with free speech if it excludes nonmembers from attending and listening to a speaker on a subject of great interest to them? Having read the correspondence and published commentary resulting from the recent incidents at Harvard, I realize that much confusion exists over issues of this kind.

Some of the disagreement arises from dispute and uncertainty over the reasons for protecting free speech. It is not enough to say that the principle is written into our Constitution or is a basic part of our way of life. Such statements do not help us resolve hard cases. Freedom of speech exists to further more specific ends. Writers who have thought carefully about the subject tend to emphasize the following purposes:

—To protect the opportunity of speakers to express themselves freely, recognizing that personal development is a basic value in our society and that freedom to express one's views and discuss them with others is a vital part of personal development.

—To protect the opportunity of listeners to hear and consider ideas, recognizing again that the chance to receive communications of all kinds and the right to decide for one's self which ideas to accept are important aspects of personal autonomy and growth.

—To promote the discovery of truth through an open marketplace of ideas. Of course, no serious person would insist that truth always emerges from free discussion or that the "marketplace of ideas" works perfectly in a world where some people have far greater access than others to the most

effective means of communication. What the rationale does rest on is a conviction that truth will emerge more often from a process of free discussion and debate than it will if the government or any other group undertakes to decide which ideas will be heard and which will be suppressed.

Universities have a special interest in upholding free speech. Educational institutions exist to further the search for truth and understanding and to encourage the personal development of all who study and work within their walls. Because the right to speak freely and the opportunity to enjoy an open forum for debate are so closely related to these central purposes, the university has a stake in free speech that goes beyond the interests of its members. Its integrity as an institution is bound up in the maintenance of this freedom, and each denial of the right to speak diminishes the university itself in some measure.

Those who have come recently to Harvard may not realize how often universities had to struggle in earlier years to establish the right to free expression. In 1915, after faculty members had demanded an explanation for the firing of the radical Scott Nearing from the University of Pennsylvania, the president of the board of trustees aptly reflected the spirit of the times when he replied: "If I am dissatisfied with my secretary, I would suppose that I would be within my rights in terminating his employment." As late as 15 to 20 years ago, a few state legislatures enforced laws banning from campuses speakers who pleaded the Fifth Amendment, or refused to sign non-Communist affidavits, or threatened to "do violence to the academic atmosphere." Mississippi officials used such a statute in the late 1960s to keep Charles Evers and Aaron Henry, president of the NAACP, from giving speeches at state universities. These examples should remind us that educational institutions can never take free speech for granted and that its enemies come from many directions carrying the banner of many different ideologies and dogmas.

As I have pointed out, the principle of free speech is not always easy to apply. Despite its place in the Constitution, the right to speak freely is not absolute. No private individual has a constitutional right to defame another maliciously or to communicate so loudly or intrusively as to invade another's privacy without justification. No one is free to speak in such a way as to create a "clear and present danger" of inflicting immediate harm on others, a principle illustrated by Justice Holmes's famous example of causing needless panic by falsely shouting "fire" in a crowded theater. In rare situations where choices must be made among competing applicants—as when two groups seek to use the same forum at the same time—officials must choose between them on some reasonable basis even though the effect may be to favor the opportunities for communication of one group and inhibit them for another.

These examples show that free speech, though extremely important, must still be fitted together with other rights and legitimate interests. The same is true on the campuses of universities, which accord free speech such great importance. Even the right of professors to academic freedom does not mean that they can teach courses outside their field of competence, or abuse their students verbally in an unjustified manner, or use coercive power to force their ideas on unwilling classes. (At the same time, students must give professors the freedom to present their views without fear of disruption or harassment.)

With this background, I will comment on several issues of varying degrees of difficulty. In doing so, I will not pretend to answer all the questions and problems that could arise involving free speech. So much turns on the particular facts of each situation and the situations are so numerous and hard to predict that no one could aspire to present a comprehensive treatment of the subject. Instead, I have tried to choose a sample of questions growing out of the recent incidents at Harvard and other campuses in the hope of clearing up some of the confusion that can arise over the application of this important principle.

1. *Must we really extend the principle of free speech to blatantly racist or sexist communications that are so offensive to others, so inflammatory, so devoid of intellectual content that they could not conceivably contribute to the pursuit of truth and understanding?*

A local example of such communications was the letter sent last year by members of the Harvard Pi Eta Club, which referred to women in terms that can be fairly described as lewd, insulting, and grossly demeaning. The same issue can arise in the case of speeches or communications that are patently anti-Semitic or vulgarly abusive toward people because of their sexual orientation. Although such statements are deplorable, they are presumed to be protected under the Constitution and should be equally so on the campus as well. Why? The critical question is: Whom will we trust to censor communications and decide which ones are "too offensive" or "too inflammatory" or "too devoid of intellectual content?" Past experience suggests that the task of censorship often falls into the hands of people who eventually begin to suppress communications that others consider worthwhile. Besides, should we not trust the members of our community to decide for themselves whether ideas are good or bad instead of allowing someone else to shield them from pernicious thoughts? As a former president of the University of California once said: "The University is not engaged in making ideas safe for students. It is engaged in making students safe for ideas." Finally, the most reasonable people will often have a hard time deciding which communications are worth hearing. For example, even a statement as offensive as the Pi Eta letter may have done more than any learned tract to awaken some readers to the attitudes and

prejudices that can underlie what might otherwise seem to be merely "innocent humor." Such insights into one's own inner feelings, even by only a single individual, can represent a gain of considerable value.

2. If free speech is so important, why did you and other Harvard officials issue such strong public denunciations of the Pi Eta letter?

The wording of the letter was so extreme and derogatory to women that I wanted to communicate my disapproval publicly, if only to make sure that no one could gain the false impression that the Harvard administration harbored any sympathy or complacency toward the tone and substance of the letter. Such action does not infringe on free speech. Indeed, statements of disagreement are part and parcel of the open debate that freedom of speech is meant to encourage; the right to condemn a point of view is as protected as the right to express it. Of course, I recognize that even verbal disapproval by persons in positions of authority may have inhibiting effects on students. Nevertheless, this possibility is not sufficient to outweigh the need for officials to speak out on matters of significance to the community—provided, of course, that they take no action to penalize the speech of others. No such action was taken against members of the Pi Eta Club for having written the letter, and no such action should have been taken.

3. Doesn't an invitation to someone like Secretary Weinberger to speak at Harvard constitute an implicit endorsement of his policies and thus justify efforts to disrupt the speech by those who deeply disagree with those policies?

Since Secretary Weinberger was invited by a student organization, there could be no implication that the University endorsed his views. But even when the University itself asks individuals to speak, such invitations definitely do *not* constitute implicit endorsements of the speakers or their policies and ideas. If a university could only invite speakers holding views it officially endorsed, it would have to impose a form of orthodoxy on the campus that would prevent us all from listening to many kinds of unconventional, often disagreeable, but potentially stimulating and worthwhile ideas. Once again, we must ask who would decide which opinions and policies to endorse and whether we would really want to trust any group with such power. History is full of examples of censoring bodies that condemned ideas that later turned out to be correct. A university should be the last place to follow that example.

4. Aren't there some speakers, such as Prime Minister Botha of South Africa, who have done such terrible things that they have forfeited their right to talk at an American university?

Different people have sharply different views on which public figures are particularly reprehensible. Once again, therefore, we have to ask who will judge which individuals are culpable enough to lose their right to speak. But most

important, we must remember that free speech is more than a personal privilege of the speaker to be forfeited for bad behavior. Society, universities, and listeners also have legitimate interests in the free and open communication of ideas. No one has the right to decide for others which speakers are fit to be heard or which public discussions deserve to take place. If members of this community consider a speaker to be reprehensible, they can refuse to listen or express their disapproval in other ways that do not interfere with the rights of others—for example, by engaging in a peaceful demonstration, by participating in discussion taking place after the speech, or by expressing contrary views in the local media. Such means of disagreement offer appropriate ways of seeking to counterbalance the speaker's access to a public forum.

5. Since Secretary Weinberger wasn't saying anything new that hadn't been reported in newspapers and speeches elsewhere, how can he be said to be contributing to the "marketplace of ideas" and why would it matter whether he could be heard?

Obviously, many people in the audience did not believe that the situation was as simple as this question implies, or they would not have paid three dollars and taken the trouble to attend the speech. Whether or not Secretary Weinberger was contributing anything new to the public debate—and protestors could hardly know this in advance—they have no right to interfere with the opportunity of other listeners to hear the speech, ask questions afterward, and ultimately decide for themselves whether something interesting or worthwhile was said.

6. When does heckling amount to an interference with the right of free speech?

Custom suggests that the latitude given to expressions of audience disapproval usually varies from one setting to another—less latitude is given in a religious service than in the classroom and less latitude in the classroom than in a public speech or open meeting. Regardless of the setting, however, sponsors of a meeting have discretion to enforce reasonable rules designed to make it easier for the speakers to speak and the audience to listen, provided the audience is warned in advance. Even if the sponsors have imposed no rules, expressions of disapproval begin to infringe on free speech when they have the effect either of preventing the speakers from communicating their ideas effectively or of keeping the audience from hearing what is being said. Drawing these lines in practice may be difficult. In general, however, temporary booing or cheering at a public speech is not considered an infringement of free speech. Sustained noise does represent an interference if it lasts long enough or is repeated often enough to interfere with the orderly expression of ideas or to prevent a significant segment of the audience from hearing the speaker.

7. Isn't the act of shouting to interfere with Weinberger's speech itself a form of communication deserving protection?

It is true that those who protest at a speech are often communicating a message. Such communication is entitled to protection but only so long as it does not infringe unjustifiably on the rights of others. That point arises when the heckling and protests interfere with a speaker's ability to communicate and the rights of other members of the audience to listen. This is simply another application of the principle that gave rise to the celebrated maxim: "Your freedom to swing your fist stops at the point of my nose." This principle does not deprive anyone of the right to communicate. If persons opposed to a speaker's policies wish to publicize that fact, they can do so in various ways that will not interfere with the rights of the speaker and the audience—by peaceful picketing, leafletting, petitions, and the like.

8. *As a change of pace, how is it that Dean Archie Epps can tell the band that some kinds of material are in such bad taste that they can't be included during halftime shows at football games? Isn't this a kind of censorship?*

If Dean Epps tried to tell the band members what material they could present at an event where they were playing in a private capacity, he would be skating on exceedingly thin ice (unless the band were disturbing people's sleep or otherwise invading their privacy). But when the band appears during halftime, it is officially representing the University. It is also appearing before a public audience that is somewhat "captive," since most people will have come to the stadium (dare I finish the sentence) primarily to see the football game rather than hear the band. In these circumstances, the University has a legitimate interest in seeing to it that the band observes *some* limits on the material it uses, and the audience has an interest in not having to listen—or have their children listen—to material that seems, by generally prevailing standards, offensive, lewd, or in grossly bad taste. It is Dean Epps's unenviable task to see to it that these legitimate interests are protected while giving as much latitude as possible to the creative impulses of the band.

9. *Would students be justified in disrupting a commencement speech on the ground that they should not have to choose between their own graduation and listening to a speaker whose views they abhor?*

This precise question does not arise at Harvard, since the public address takes place not at graduation but during the alumni exercises in the afternoon. If such a question did arise, however, students could justifiably expect the administration to exercise care not to invite a speaker who would be seriously offensive to large portions of the audience. If such a speaker were selected and the decision was announced, students might understandably ask the administration to rescind the invitation, provided that their intent was not to deny anyone the right to speak on campus but simply to avoid a situation that would make them choose between attending their own graduation and listening to a highly objectionable speaker. If the administration refused to rescind the invita-

tion, students would be within their rights to express their disapproval publicly, even if the resulting publicity led to the speaker's refusing to appear. If such a speaker did come, however, students would *not* have a right to try to prevent the address from being heard, although they might express their disapproval in other, nonobstructive ways. Even if the administration showed poor judgment in its choice of speaker or in refusing to rescind the invitation, the importance of free speech to the university—an interest that exists apart from any particular administration—is too critical and the interests of those who might wish to hear the address are too important to justify such interference. In light of these interests, it is not too much to ask of disapproving students that they close their ears, wear armbands, picket peacefully, or simply suffer through a disagreeable speech rather than prevent others from hearing it.

10. *Can a university or a student group insist that particular speakers be barred from campus appearances unless they agree to submit to open debate?*

A sponsoring organization, be it the university or a student group, should be free to select the format in which its invited speaker will appear by indicating how long the speech should last, whether there will be a question period, whether other speakers will sit as a panel, etc. Invited speakers are naturally free to refuse if they do not feel comfortable with the format proposed.

The question naturally arises whether the University should insist that every campus organization require that all of its invited speakers subject themselves to questioning and debate. This is not a simple issue to resolve. Some thoughtful people would favor such a rule because the special mission of a university suggests that it should make special efforts to promote open discussion and debate whenever possible. Nevertheless, a university requirement that all speakers agree to debate might inhibit more speech than it promoted. Some speakers might refuse to come under these circumstances. Some organizations might decide to invite speakers to private members-only meetings rather than have a contentious public debate. Moreover, such a rule could prove difficult to administer. It would surely be unreasonable to require *all* invited speakers to submit to questioning and debate; commencement speakers and guest preachers illustrate the point. Hence, the University would have to engage in a difficult process of drawing lines to determine when a student organization or other campus group had to conform to the requirement.

In view of these problems, I do not believe that it would be wise to insist that campus organizations require all speakers to submit to questions and discussion. It follows that no group should have the right to insist that speakers invited by others must subject themselves to debate. That is an issue for the sponsoring organization to decide. As a matter of good judgment, a sponsor would be well-advised at least to ask a speaker to engage in debate or answer questions whenever the subject is one that would naturally provoke interest in

having such discussion. But a sponsoring organization has the right not to insist on this point, especially if the speaker is likely to refuse to come under such conditions. If some speakers will only appear without a question period and an audience wishes to hear them on this basis, others have no right to insist that the speech take place on their terms or not at all. Should members of this community regard a particular speaker as biased, untruthful, or otherwise irresponsible, they have alternative ways by which to publicize their views and make their disagreements known.

11. *Is a student organization that has invited a controversial speaker to address its members obligated to advertise the occasion and open a private meeting to nonmembers who wish to attend and question the speaker?*

Organizations at Harvard should have broad latitude to conduct private meetings for their members in the manner they think best. It may be good judgment for an organization to invite others with a particular interest in an outside speaker to attend even if they have sharply opposing views. But the University should not *insist* that an organization invite nonmembers to hear a speaker whenever there is reason to believe that they might wish to come. For example, the Republican Club should be able to invite political figures to speak at private meetings without having to allow members of the Democratic Club to attend and participate in the discussion. All manner of groups in the University have traditionally invited people to address them without being under any compulsion to advertise the occasion or open their meeting to outsiders. No one has supposed that these groups have thereby violated any right of those who might have wished to attend. A contrary rule would sacrifice the interests of the members unduly in order to satisfy the desires of nonmembers. It might also discourage some outside speakers from coming at all. Moreover, such a rule would raise all manner of practical problems. When should a group be expected to realize that outsiders might wish to come? How widely should a group publicize its meetings and how far in advance? Who should cover the costs of the publicity or of procuring a larger auditorium? Should members at least be entitled to preferred seating? Such questions may not be impossible to answer, but they indicate the type of regulatory morass that the University would enter if it undertook to fix detailed rules to govern exactly how each student group should conduct its meetings.

12. *If a controversial speaker addresses a public meeting and questions are permitted, can the sponsoring organiza-*

tion deny admission to or refuse to take questions from individuals of a different political persuasion (or a different ethnic, religious, or national group)?

Once again, the University will accord great latitude to student organizations in determining how to conduct their meetings. Since organizations may restrict private meetings to their own members, they may invite particular guests to an otherwise closed meeting on the explicit, prior understanding that only members will be allowed to participate in discussion. Once an organization opens its meeting to the public, however, it must not then discriminate on grounds such as race, religion, or political persuasion in deciding who shall be allowed to enter the meeting hall or who shall be given the opportunity to ask questions. A moderator may limit the question period for the benefit of the speaker or audience, call on members of the audience in any reasonable order, or take prudent steps to prevent members of the audience from being abusive, giving speeches, or otherwise interfering improperly with the proceedings. But a moderator may not use such authority in a public meeting as a device for limiting participation according to criteria that are arbitrary and suspect, such as race, religion, or political persuasion.

In closing, I would emphasize how much the principles of free speech require the understanding and support of all segments of the university community. The administration is primarily responsible for maintaining an environment in which free expression and debate can flourish. But even with the most vigorous efforts on the part of campus officials, free speech will not survive an environment in which many people are indifferent to its existence or hostile to the expression of unpopular thoughts. Only in a community that actively values the open exchange of ideas and strongly disapproves of all forms of censorship can the right to speak remain unimpaired. The effort to respect this freedom can require great strength and self-restraint in the face of trying provocations. And yet, the more controversial ideas this community can tolerate and the more unpopular speakers we can hear without disruption, the closer we will come to the highest ideal of a university. I hope that we will all be equal to this challenge.



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