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Campus Free Speech: The First Amendment and the Case of 2017 Assembly Bill 299

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On November 16, 2016, conservative speaker Ben Shapiro prepared to deliver a speech at the University of Wisconsin–Madison called "Dismantling Safe Spaces: Facts Don't Care About Your Feelings." A registered student organization, the UW–Madison chapter of Young Americans for Freedom, had invited Shapiro to speak. After he began to speak, "protesters lined up in front of the stage, their shouts about feeling at risk on campus drowned out by retorts from the audience. After some 10 minutes of chaos, the protesters filed out of the room, reportedly after being threatened with arrest by UW Police officers."[1] In February 2017, the University of California–Berkeley cancelled a speech by Milo Yiannopoulos, who had been invited to speak by the Berkeley College Republicans, after masked agitators interrupted an otherwise nonviolent protest and instigated a violent riot.[2] On March 2, 2017, protesters disrupted a speech at Middlebury College in Vermont by controversial author, Charles Murray, who had been invited to speak by a student chapter of The American Enterprise Institute. After the speech, the protest turned violent and a faculty member was treated for a concussion and other injuries.[3]

With the above incidents in the background, Wisconsin Assembly Republicans introduced 2017 Assembly Bill 299 on May 5, 2017, which would have created a statute applicable to institutions of the UW System called the Campus Free Speech Act.[4] The bill's language was based on model legislation prepared by the Goldwater Institute, which describes itself as "a leading free-market public policy research and litigation organization" that advances "principles of limited government, economic freedom, and individual liberty," with a focus on education, free speech, and other issues.[5] The Goldwater Institute believed that legislation was necessary "to protect the increasingly imperiled principle and practice of campus free speech" and to "ensure free expression at America's public university systems."[6]

Testifying at a public hearing shortly after the bill's introduction, Speaker Robin Vos, who had originally requested the bill, cited the above incidents as part of "the trend of suppression of ideas."[7] Before the public hearing, Representative Jesse Kremer, who became the bill's lead author, said that the bill was not a response to any one incident, but had the purpose of ensuring a "marketplace of ideas" on college campuses.[8]

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1. Pat Schneider, "Fighting words: The campus free speech battle at UW often focuses on guest speakers," *The Capital Times*, April 5, 2017, https://madison.com/.

2. Public Affairs, UC Berkeley, "Milo Yiannopoulos event canceled after violence erupts," *Berkeley News*, February 1, 2017, http://news.berkeley.edu/.

3. Christina E. Wells, "Free Speech Hypocrisy: Campus Free Speech Conflicts and the Sub-Legal First Amendment," 89 U. Colo. L. Rev. 546–48 (2018); Taylor Gee, "How the Middlebury Riot Really Went Down," *Politico Magazine*, May 28, 2017, https://www.politico.com/.

4. 2017 Assembly Bill 299, https://docs.legis.wisconsin.gov/.

5. Goldwater Institute, "About," accessed October 4, 2018, https://goldwaterinstitute.org/.

6. Stanley Kurtz, James Manley, & Jonathan Butcher, "Campus Free Speech: A Legislative Proposal," *Goldwater Institute*, January 30, 2017, https://goldwaterinstitute.org/.

7. *Hearing on 2017 AB 299 before the Assemb. Comm. On Colleges and Universities*, May 11, 2017 (testimony of Robin J. Vos, Assembly Speaker). Speaker Vos's testimony and other statements made at the public hearing can be found on the legislature's Internet website at https://docs.legis.wisconsin.gov/.

8. Gretchen Brown, "Lawmaker: Proposed Anti-Heckler Bill Could Pass With Bipartisan Support," *Wisconsin Public Radio*,

The bill codified many principles of First Amendment jurisprudence, as well as required the mandatory suspension or expulsion of students who repeatedly interfered with the free expression rights of others. The bill passed the Assembly with one amendment (AA2) along a mostly party-line vote in which one Republican joined Democrats in opposing the bill. The bill subsequently died in the Senate, which did not take any action on the bill before the end of the legislature's regular session floor period on March 28, 2018. However, the UW Board of Regents ultimately adopted a policy incorporating some of the bill's main components, including its requirements for mandatory discipline.

This report describes 2017 Assembly Bill 299, legislative action in other states on similar bills, and the UW Board of Regents' responses to 2017 Assembly Bill 299. First, however, the report summarizes some of the legal principles courts use to interpret the First Amendment.

First amendment principles

The First Amendment to the U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech." Although the language is limited to Congress, since 1925, the U.S. Supreme Court has held that the First Amendment also prohibits states from abridging freedom of speech.[9] In addition, like other individual liberties protected by the U.S. Constitution, the First Amendment applies to both state and local governments and their officials.[10] As a result, the First Amendment applies to public schools. In its 1969 decision involving the protest rights of junior high and high school students, *Tinker v. Des Moines Independent Community School District*, the U.S. Supreme Court made the oft-quoted statement: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[11] As for post-secondary schools, the U.S. Supreme Court quoted that statement three years later in *Healy v. James* and said that "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[12]

May 1, 2017, https://www.wpr.org/.

9. Gitlow v. New York, 268 U.S. 652 (1925). The First Amendment is part of the Bill of Rights, which are the first 10 amendments to the U.S. Constitution. In addition to freedom of speech, the Bill of Rights protects various other individual rights against government interference, including freedom of the press, freedom of religion, and certain rights in criminal proceedings. Before ratification of the Fourteenth Amendment, the U.S. Supreme Court held that the Bill of Rights applied only to the federal government. However, the Due Process Clause of the Fourteenth Amendment prohibits states from depriving any person of life, liberty, or property without due process of law. Over time, the U.S. Supreme Court has found that the clause incorporates various protections of the Bill of Rights. Upon incorporation, the protection applies against states as well as the federal government. In *Gitlow*, the U.S. Supreme Court found that freedom of speech is "among the fundamental personal rights and 'liberties' protected by the Due Process Clause of the Fourteenth Amendment from impairment by the State." 286 U.S. at 666. For a discussion of how that clause incorporates other protections under the Bill of Rights, see Erwin Chemerinsky, *Constitutional Law, Principles and Policies*, 5th ed. (Wolters Kluwer Law & Business, 2015), s. 6.3.3. at 528–31.

10.Chemerinsky, *Constitutional Law*, s. 6.4.1 at 533.

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

12. Healy v. James, 408 U.S. 169, 180 (1972).

The U.S. Supreme Court's First Amendment decisions have been described as a "labyrinth"[13] and as "notoriously complex and contradictory."[14] Nevertheless, the following principles can be drawn from those decisions for determining the extent to which states may regulate free speech without abridging that freedom.

Expressive conduct. The U.S. Supreme Court has explained that, although the First Amendment "literally forbids the abridgment only of 'speech,'" the Court has "long recognized that its protection does not end at the spoken or written word" and has "acknowledged that conduct may be 'sufficiently imbued with elements of communication'" to be protected by the First Amendment.[15] For example, in *Tinker*, school principals suspended students who violated school policy by refusing to remove black armbands worn in protest of the Vietnam War. The U.S. Supreme Court agreed with a lower court that "the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment."[16] Flag and cross burnings are other examples of expressive conduct the U.S. Supreme Court has found to be protected by the First Amendment.[17]

Unprotected speech. The U.S. Supreme Court has established that certain categories of speech are not protected by the First Amendment, including true threats, speech that incites illegal activity, fighting words, and, with certain exceptions, defamation and invasions of privacy or confidentiality.[18] Speech in any of these categories is referred to as unprotected speech; any other type of speech is referred to as protected speech. The foregoing categories of unprotected speech are described below.

First, however, it is worth noting that there is no unprotected category for offensive speech. To the contrary, the U.S. Supreme Court has stated that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[19] As a result, offensive speech is protected speech. If no other principles justify regulation, a state may not regulate speech based merely on its offensiveness. Does the foregoing principle apply to racist and other forms of hate speech?[20] Proponents for restricting racist and other hate speech have argued the answer should be no: the First

13. Kevin Francis O'Neill, "A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework," 29 Sw. U. L. Rev. 223 (2000).

14. John D. Moore, "The Closed and Shrinking Frontier of Unprotected Speech," 36 Whittier L. Rev. 1 (2014).

15. Texas v. Johnson, 491 U.S. 397, 404 (1989), *quoting* Spence v. Washington, 418 U.S. 405, 409 (1974).

16. *Tinker*, 393 U.S. at 505.

17. *Texas*, 491 U.S. at 406 (flags); Virginia v. Black, 538 U.S. 343, 366 (2003) (crosses).

18. Other unprotected categories are obscenity and child pornography. See Roth v. United States, 354 U.S. 476, 485 (1957) (obscenity) and New York v. Ferber, 458 U.S. 747, 764–65 (1982) (child pornography).

19. *Texas*, 491 U.S. at 414, *quoting* Hustler Magazine v. Falwell, 485 U.S. 46, 55–56 (1988).

20. Examples of hate speech include epithets based on race, sex, religion, or sexual orientation. Erwin Chemerinsky and Howard Gillman, *Free Speech on Campus* (Yale University Press, 2017), 82.

Amendment should not protect such speech.[21] Based on these arguments, many state universities, including the UW System, adopted speech codes in the 1990s for disciplining students who use racist and other hate speech. However, every time a code has been challenged, a court has found the code to violate the First Amendment.[22]

True threats. Threatening speech is unprotected if it constitutes a true threat. In *Virginia v. Black*, the U.S. Supreme Court defined "true threat" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat."[23] In *State v. Perkins*, the Wisconsin supreme court provided a more detailed definition: "A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered."[24]

Speech-inciting illegal activity. In *Brandenburg v. Ohio*, the U.S. Supreme Court held that, although the First Amendment protects speech that merely advocates illegal activity, the First Amendment does not protect speech directed to a specific group or individual that is intended to incite imminent illegal activity and is likely to bring about that activity.[25] This principle is the current formulation of the "clear and present danger" doctrine.[26] For example, in *Hess v. Indiana*, after the police ordered anti–Vietnam War protesters to clear a street, one protester said either "we'll take the fucking street later" or "we'll take the fucking street again."[27] On the basis of that speech, the protester was convicted of disorderly conduct. However, the U.S. Supreme Court reversed the conviction because the speech was not directed at any person or group of persons and was not intended or likely to produce imminent disorder.[28]

Fighting words. The U.S. Supreme Court originally defined "fighting words" as those that "by their very utterance" either "inflict injury or tend to incite an immediate

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21. See, e.g., Mari J. Matsuda, "Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story," 87 Mich. L. Rev. 2320 (1989); Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," 17 Harv. Civil Rights-Civil Liberties L. Rev. 133 (1982). See also David Rosenberg, "Racist Speech, the First Amendment, and Public Universities: Taking a Stand on Neutrality," 76 Cornell L. Rev. 569–75 (1991) (note, summarizing arguments).

22. Chemerinsky and Gillman, *Free Speech on Campus*, 82 n.2, citing PEN America, "And Campus for All: Diversity, Inclusion and Freedom of Speech at U.S. Universities," 10 (2016).

23. Virginia v. Black, 538 U.S. 343, 359–60 (citations omitted).

24. State v. Perkins, 626 N.W.2d 762, 770.

25. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

26. Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law, Substance and Procedure* 5th ed. (Thomson-Reuters-West, 2013), 106, 108.

27. Hess v. Indiana, 414 U.S. 105, 106–07 (1973).

28. *Id.* at 108–09.

breach of the peace."[29] However, in *Cohen v. California*, the U.S. Supreme Court limited the definition to speech directed to a specific person that is likely to provoke a violent response.[30] In theory, states may regulate speech that qualifies as fighting words, but, in practice, courts have consistently invalidated such regulation on the basis of other First Amendment principles.[31]

Defamation. Defamation is the "malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person."[32] Defamation is called libel when it is expressed in a fixed medium, such as writing, pictures, signs, or electronic broadcast, and is called slander when it is spoken or expressed in another transitory form.[33] Defamation is not a crime, but a type of civil wrong called a tort that is usually governed by a state's court decisions.[34] Because a state's tort law allows a defamed person to bring a civil action for damages, defamation can be characterized as unprotected speech. However, in *New York Times Co. v. Sullivan*, the U.S. Supreme Court held that the First Amendment limits the authority of state courts to impose tort liability for defamation.[35] As a result, some expression that otherwise qualifies as defamation is protected speech. The U.S. Supreme Court has developed "a complex series of rules" for determining when defamation is protected that depend on whether the defamed person is a public official, candidate for public office, or public or private figure and whether the defamation is a matter of public or private concern.[36]

Invasions of privacy and breaches of confidentiality. Most state courts recognize torts that allow an individual whose privacy is invaded by another to bring civil actions for damages.[37] There are different torts for the following: (1) appropriation of an individual's name or likeness for another person's advantage; (2) intrusion upon an individual's seclusion or solitude or into private affairs; (3) public disclosure of private facts; and (4) publicity that places an individual in a false light in the public eye.[38] In Wisconsin, such actions were not allowed until 1977 when the legislature passed a statutory right to pri-

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29. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

30. Cohen v. Cal., 403 U.S. 15, 20 (1971).

31. Chemerinsky, *Constitutional Law*, s. 11.3.3.2 at 1053–54. For example, as discussed below, the UW System's speech code was found to be unconstitutionally overbroad and vague.

32. *Black's Law Dictionary* 10th ed., 506.

33. *Id.* at 1055, 1600.

34. Under Wisconsin law, a defamation claim consists of the following elements: "(1) a false statement, (2) communicated by speech, conduct, or in writing to a person other than the person defamed, and (3) the communication is unprivileged and is defamatory, that is, tends to harm one's reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her." Hart v. Bennet, 267 Wis. 2d 919, 941 (Ct. App. 2003).

35. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

36. Chemerinsky, *Constitutional Law*, s. 11.3.5.2 at 1097–98.

37. Robert M. O'Neil, *The First Amendment and Civil Liability* (Indiana University Press, 2001), 77 (noting that only North Dakota and Wyoming do not recognize invasion of privacy torts).

38. William L. Prosser, "Privacy," 48 Calif. L. Rev. 383, 389 (1960), *cited* by Zinda v. Louisiana Pacific Corp., 149 Wis. 2d 913, 928.

vacy.[39] The statute created causes of action that correspond, "to a limited degree," to the first three torts described above but not for the fourth tort regarding false light.[40] In addition, some states have recognized a tort action for breaching confidentiality in certain circumstances.[41]

If a court in a tort action finds that speech invades privacy or breaches confidentiality, the speech—like defamation—is not protected by the First Amendment. However, courts have dismissed actions brought by newsworthy plaintiffs that involved matters of public concern.[42] In addition, in *Snyder v. Phelps*, the U.S. Supreme Court emphasized that speech "on a matter of public concern" is "entitled to 'special protection' under the First Amendment" and overturned a jury verdict against protesters at a soldier's funeral for the tort of intentional infliction of emotional distress.[43] Special protection for matters of public concern might also apply to torts for invasion of privacy and breach of confidentiality.

Content-based regulation. Courts distinguish between the regulation of speech based on the content of its message (content-based regulation) and regulation regardless of content (content-neutral regulation). Except as noted below, this distinction usually does not apply to unprotected speech in the categories described above, as the categories themselves are based on content.

For protected speech, content-based regulation is presumptively invalid.[44] Why? The U.S. Supreme Court has explained: "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions 'raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'"[45]

Courts use strict scrutiny in evaluating content-based regulation of protected speech.[46] Under that standard of review, a state must show that its regulation "is necessary to serve

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39. See Wis. Stat. § 995.50. Prior to enactment of the statute, the Wisconsin supreme court declined to recognize a right to privacy in the absence of legislative authorization. See Yoeckel v. Samonig, 272 Wis. 430, 434–35.

40. *Zinda*, 149 Wis. 2d at 928–29.

41. See Neil M. Richards & Daniel J. Solove, "Privacy's Other Path: Recovering the Law of Confidentiality," 96 Geo. L. J. 124, 157–58 (2007) (citing cases).

42. See, e.g., Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940), *cited* in Peter B. Edelman, "Free Press v. Privacy: Haunted by the Ghost of Justice Black," 68 Tex. L. Rev. 1218–19 (1990).

43. Snyder v. Phelps, 562 U.S. 443, 458 (2011).

44. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

45. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (citations omitted).

46. *Id.* at 642.

a compelling state interest and that it is narrowly drawn to achieve that end."[47] If there is a less restrictive alternative to the regulation, the regulation survives strict scrutiny only if the state shows that the alternative does not effectively achieve its compelling interest.[48] For example, in *Widmar v. Vincent*,[49] a state university allowed registered student groups to conduct meetings in university facilities, but excluded a religious group from doing so. The prohibition was based on a university policy prohibiting using its facilities for religious worship or teaching. Thus, the university excluded the student group based on the religious content of its speech. Using strict scrutiny, the U.S. Supreme Court found that the policy violated the First Amendment because the university did not have a sufficiently compelling interest to justify its content-based exclusion.[50]

As for unprotected speech, courts may use strict scrutiny when a state makes a distinction on the basis of content within a particular category of unprotected speech. The U.S. Supreme Court took this approach in *R.A.V. v. City of St. Paul*.[51] In that case, the defendants were convicted of violating a city ordinance prohibiting a person from, among other things, burning a cross on public or private property if the person knew or should have known that it would arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[52] The Minnesota supreme court narrowly interpreted the ordinance to apply only to unprotected speech under the "fighting words" category and therefore found that the defendants' conduct was not protected by the First Amendment. The U.S. Supreme Court disagreed. The ordinance made distinctions on the basis of content, as it prohibited fighting words based on race, color, creed, religion, and gender, but did not prohibit fighting words on the basis of other things, such as political affiliation, union membership, or homosexuality. According to the U.S. Supreme Court, that distinction was not allowed: "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[53]

Content-neutral time, place, and manner regulation. The First Amendment "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired" but allows states to impose "reasonable time, place, and manner restrictions" that are "justified without reference to the content of the regulated speech."[54] In evaluating content-neutral time, place, and manner regulations, courts use a standard of review called intermediate scrutiny.[55] Under that standard, regulations are constitu-

47. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

48. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000).

49. Widmar v. Vincent, 454 U.S. 263 (1981).

50. *Id.* at 276.

51. *R.A.V.*, 505 U.S. 377.

52. *Id.* at 380.

53. *Id.* at 391.

54 Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 647–48 (1981) (quotation omitted).

55. Ashutosh Bhagwat, "The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence," 2007

tional if they are "narrowly tailored to serve a significant governmental interest" and they "leave open ample alternative channels for communication of the information."[56] For a regulation to pass the "narrowly tailored" part of the test, it need not be the least restrictive means to serve the government's interest, but it must not be "substantially broader than necessary" to achieve that interest.[57] Thus, intermediate scrutiny is a lower standard than strict scrutiny, as the government interest must be significant, rather than compelling, and less restrictive alternatives do not doom the regulation.

Forum analysis for public property. A state's authority to regulate speech on public property depends on whether the property is characterized as (1) a public forum (also called a traditional public forum); (2) a limited public forum (also called a designated public forum); or (3) a nonpublic forum. In the leading decision on this principle, *Perry Education Association v. Perry Local Educators' Association*, the U.S. Supreme Court described the first type of forum (public forum) as "places which by long tradition or by government fiat have been devoted to assembly and debate," such as streets and parks.[58] For a university campus, a federal district court has held that the "park areas, sidewalks, streets, or other similar common areas" are public forums, "at least for the University's students."[59] A public forum is subject to the principles regarding content-based and content-neutral regulation described above.[60]

Those same principles also apply to the second category, limited public forum, which is "public property which the State has opened for use by the public as a place for expressive activity."[61] Courts consider the following factors to determine whether a state has opened a facility for such use: (1) the state's intent, which may be shown by its policies and practices; (2) the extent of the use granted; and (3) the state's consistency in granting or denying access.[62] In *Perry Education Association*, the U.S. Supreme Court cited as an example the university facilities used for student group meetings that were at issue in *Widmar*.[63] A state is not required to designate a facility as a limited public forum, but once it does so, the principles apply for as long as the state maintains the "open character" of the facility.[64]

Different principles apply to the third category, nonpublic forum, which is public

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Univ. of Ill. L. Rev. 783, 784 (2007).

56. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), *quoting* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

57. *Id.* at 800.

58. *Perry Educ. Ass'n*, 460 U.S. at 45.

59. Roberts v. Haragan, 346 F. Supp. 2d 853, 861 (N.D. Tex. 2004). The court noted that the areas might qualify instead under the second category, but the distinction did not matter as the same standards apply to both categories. *Id.* n. 8.

60. *Perry Educ. Ass'n*, 460 U.S. at 45.

61. *Id.*

62. Gregoire v. Centennial School Dist., 907 F.2d 1366, 1371 (3rd Cir. 1990) (citations omitted).

63. 460 U.S. at 45.

64. *Id.*

property that "is not by tradition or designation a forum for public communication."[65] Examples of nonpublic forums include airport terminals, military bases, jailhouse grounds,[66] and public high school classrooms.[67] For a nonpublic forum, the U.S. Supreme Court in *Perry Education Association* stated that a state "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[68] In a subsequent decision, the U.S. Supreme Court elaborated that "control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."[69]

In *Perry Education Association*, a school district allowed access to an internal mail system to a union that was elected as the exclusive collective bargaining representative for teachers, but denied access to a rival union that did not have that status. The U.S. Supreme Court held that the mail system was a nonpublic forum and rejected the rival union's argument that the school district's access policy favored the viewpoint of the collective bargaining representative. Instead, the Court stated that "it is more accurate to characterize the access policy as based on the status of the respective unions rather than their views."[70] The Court found that the access policy was reasonable, as "exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools."[71]

Overbroad or vague regulation. The overbreadth doctrine allows courts to invalidate overbroad state laws that regulate substantially more speech than allowed under the First Amendment.[72] In addition, the doctrine allows an individual whose speech might be punished under a narrower law to "argue that the law is unconstitutional because of how it might be applied to third parties not before the Court."[73] Usually, a litigant is not allowed to argue about the rights of those third parties. Why is there an exception for the First Amendment? "The overriding reason lies in the judicial concern that protected freedom of expression not be chilled by the overbroad law."[74] For a court to invalidate a

65. *Id.* at 46.

66. Hotel Emps. & Rest. Emps. Union, Local 100 v. City of N.Y. Dep't of Parks & Rec., 311 F.3d 534, 546 (1st Cir. 2002) (citing cases).

67. Murray v. Pittsburgh Bd. of Pub. Educ., 919 F. Supp. 838, 844 (W.D. Penn. 1996), *aff'd*, 107 F.3d 862 (1997).

68. *Perry Educ. Ass'n*, 460 U.S. at 46.

69. Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985).

70. 460 U.S. at 49 (emphasis in original). In his dissent, Justice Brennan disagreed and found the access policy amounted to impermissible viewpoint discrimination. 460 U.S. at 56.

71. *Id.* at 52.

72. Chemerinsky, *Constitutional Law*, s. 11.2.2 at 989.

73. *Id*. at 990.

74. Jerome Barron and C. Dienes, *First Amendment Law in a Nutshell* 4th ed. (West, 2008), 46.

law under the doctrine, the overbreadth must be substantial;[75] "there must be a realistic danger that the [law] itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on over breadth grounds."[76]

The vagueness doctrine allows a court to find that a state law is unconstitutionally vague. The doctrine is based on the due process clause of the Fourteenth Amendment and applies to all laws, not just those regulating speech. As explained by the U.S. Supreme Court: "Vague laws offend several important values. First, . . . laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."[77] In addition, for laws regulating speech, vagueness, like overbreadth, may have a chilling effect that inhibits the exercise of First Amendment freedoms.[78]

A federal court of appeals applied the vagueness doctrine in *Soglin v. Kauffman*.[79] In that case, UW–Madison students protested Dow Chemical's on-campus recruitment by physically obstructing the doorways and corridors of a university building. The university suspended the students for committing misconduct in violation of its code of conduct. However, the court found that the use of misconduct as a disciplinary standard was unconstitutionally vague. The court explained: "We do not require university codes of conduct to satisfy the same rigorous standards as criminal statutes. We only hold that expulsion and prolonged suspension may not be imposed on students by a university simply on the basis of allegations of 'misconduct' without reference to any preexisting rule which supplies an adequate guide."[80]

Federal courts have found that campus speech codes violate the First Amendment under both the overbreadth and vagueness doctrines.[81] For example, in *The UWM Post, Inc. v. Board of Regents*, the UW Board of Regents adopted a rule allowing a university to discipline a student for expressive behavior that (1) was racist or discriminatory; (2) was directed at an individual; (3) demeaned the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age of the individual addressed; and (4) created an intimidating, hostile, or demeaning environment for education, university-re-

75. Broadrick v. Okla., 413 U.S. 601, 615 (1973).

76. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984).

77. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (citations omitted).

78. *Id.* at 109.

79. Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969).

80. *Id.* at 168 (citation omitted).

81. See, e.g., Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); Bair v. Shippensburg Univ., 280 F. Supp. 2d 357, 372 (M.Dist. Penn. 2003) (granting preliminary injunction based on likelihood that speech code was overbroad).

lated work, or other university-authorized activity.[82] The UW Board of Regents argued that the regulated speech fell under the unprotected category of fighting words; however, fighting words are those that are likely to provoke a violent response. Because the disciplinary rule applied to expressive behavior whether or not it was likely to provoke that response, the federal district court held that the rule was unconstitutionally overbroad.[83] As for vagueness, the court noted that the rule was ambiguous, as it could be interpreted to require either that a student's expressive behavior must actually demean the individual addressed or that the student must merely intend to demean. That ambiguity made the rule unduly vague.[84]

Interference and disruption in public schools. In two leading decisions, the U.S. Supreme Court has stated that public schools may regulate the expressive conduct of students that materially and substantially interferes with or disrupts the school or the rights of other students.

In *Tinker*, the U.S. Supreme Court considered a ban on junior high and high school students wearing black armbands to protest the Vietnam War. A lower court agreed with the schools that the ban "was reasonable because it was based upon the fear or apprehension of disturbance from the wearing of the armbands."[85] However, the U.S. Supreme Court stated that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[86] To justify the ban, the schools had to show that the ban "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[87] Instead, the schools had to show that "the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"[88] The U.S. Supreme Court found no evidence that wearing the armbands "would substantially interfere with the work of the school or impinge upon the rights of other students" and held that the ban violated the First Amendment.[89] The Court also stated that, although the First Amendment allows students to express opinions on controversial subjects, such as the Vietnam War, the First Amendment does not protect student conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[90]

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82. The UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163, 1166 (E.D. Wis. 1991).

83. *Id.* at 1173.

84. *Id.* at 1180. The court could have resolved the ambiguity by adopting one of the interpretations. However, it declined to do so because neither interpretation "saves the rule from its overbreadth difficulties." *Id.* at 1181.

85. *Tinker*, 393 U.S. at 508.

86. *Id.*

87. *Id.* at 509.

88. *Id.* 509, *quoting* Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966) (invalidating a prohibition on high school students wearing buttons containing the words "One Man One Vote" and identifying a civil rights organization).

89. 393 U.S. at 509.

90. *Id.* at 513.

Three years later, in *Healy v. James*, the U.S. Supreme Court relied on *Tinker* when it considered the denial of a college president to officially recognize a chapter of Students for a Democratic Society (SDS) as a student group.[91] The denial meant, among other things, that the SDS chapter could not use the college's facilities for meetings. The college president based the denial on the fear that the SDS chapter would be a disruptive influence on campus. Quoting *Tinker*, the U.S. Supreme Court noted that the college could prohibit actions that "materially and substantially disrupt the work and discipline of the school."[92] However, again quoting *Tinker*, the Court found that the college president's fear "constituted little more than the sort of 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right of free expression.'"[93]

Lower federal courts have upheld school discipline based on interference and disruption. For example, in *Esteban v. Central Missouri State College*, a federal court of appeals upheld the suspension of students who participated in mass demonstration because the students were suspended "not for expressing their opinions on a matter of substance, but for violent and destructive interference with the rights of others."[94] In *Speake v. Grantham*,[95] university students were suspended for possessing leaflets falsely claiming that classes would be cancelled. The students argued that possession of the leaflets was protected by the First Amendment and could not be punished. The district court found that the students were not punished for exercising First Amendment rights but because their possession of the leaflets "posed the potential threat of disruption of normal educational activities at the University and all other students attending it."[96] In *Adibi-Sadeh v. Bee County College*,[97] a college expelled students who participated in a sit-in that forced the college to cancel classes. The students argued the discipline violated their First Amendment rights. Citing *Tinker*, the district court found that the students had created "a substantial and material interference" with the operations of the college, which was not protected by the First Amendment.[98]

Conflict between speaker and protester rights. Courts have had to resolve conflicts between an individual's right to make a speech and an audience member's right to protest the speech. As noted by the California supreme court in *In re Kay*, the First Amend-

91. *Healy*, 408 U.S. 169. The SDS chapter argued that the denial violated its freedom of association, rather than its freedom of speech. The First Amendment does not mention freedom of association, but the U.S. Supreme Court has found that it is implicit in the freedoms of speech, assembly, and press that are explicitly stated in the First Amendment. *Id.* at 181 (citing decisions).

92. *Id.* at 189, *quoting Tinker*, 393 U.S. at 513.

93. *Id.* at 191, *quoting* 393 U.S. at 508.

94. Esteban v. Central Missouri State College, 415 F.2d 1077, 1087 (8th Cir. 1969) (quotation omitted), *cert. denied*, 398 U.S. 965 (1970).

95. Speake v. Grantham, 317 F. Supp. 1253 (S.D. Miss. 1970), *aff'd*, 440 F.2d 1351 (5th Cir. 1971).

96. *Id.* at 1278.

97. Adibi-Sadeh v. Bee County College, 454 F. Supp. 552 (S.D. Tex. 1978).

98. *Id.* at 557.

ment "affords some measure of protection to the free expression of all of those present at a meeting—speakers, officials, and audience."[99] Conflicts occur because, on one hand, speakers "must run the risk of attracting opposition; they cannot expect their opponents to be silenced while they continue to speak freely."[100] On the other hand, the state has a legitimate interest in ensuring that a protester's "unruly assertion" of his or her rights does not interfere with the rights of others.[101]

In cases involving unlawful disturbances, some courts have resolved the conflict between speakers and protesters by allowing states to penalize protesters when their conduct substantially obstructs or interferes with a speech. For example, in *In re Kay*, protesters who supported a consumer boycott of non-union table grapes shouted and clapped during a speech by a congressman who had declined to support the boycott. The protesters were convicted of violating a state law that prohibited willfully disturbing or breaking up an assembly or meeting. The law's prohibition against "disturbing a meeting" could have been interpreted as unconstitutionally overbroad or vague. To avoid that result, the California supreme court interpreted the law to prohibit activity that "substantially impairs the effective conduct of a meeting."[102] The court concluded that the protest did not substantially impair the meeting and overturned the convictions because the protest lasted between five and ten minutes, the congressman was able to complete the speech, and the protest did not prevent a large part of the audience from hearing the speech.[103]

In contrast, in *State v. Brand*,[104] an Ohio appellate court upheld the conviction of a protester for violating a state law that prohibited obstructing or interfering with the conduct of a lawful meeting or gathering. During a speech by First Lady Rosalyn Carter, the protester shouted his support for the Iranian revolution and condemned the Carter administration's policies toward Iran. The protest lasted approximately one minute and prevented the First Lady from speaking for forty-five seconds at the most. The law prohibited obstruction without requiring the obstruction to be substantial. However, as in *In re Kay*, the court interpreted the law to prohibit substantial obstruction in order to avoid interpreting the law to be unconstitutionally overbroad. Although the duration of the protest was less than the protest in *In re Kay*, the court found there was sufficient evidence that the protester had substantially obstructed the First Lady's speech.[105]

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99. In re Kay, 1 Cal. 3d 930, 941 (1970).

100. *Id.* at 940 (quotation omitted).

101. *Id.* at 941.

102. *Id.* at 942. The court also provided a more detailed interpretation, stating that, to establish a violation of the law, it had to be shown "that the defendant substantially impaired the conduct of the meeting by intentionally committing acts in violation of implicit customs or usages or of explicit rules for governance of the meeting, of which he knew, or as a reasonable man should have known." *Id.* at 943.

103. *Id.* 944–45.

104. State v. Brand, 2 Ohio App. 3d 460 (1981).

105. *Id.*

2017 AB 299: The Campus Free Speech Act

This section discusses the major components of 2017 Assembly Bill 299. Except as noted, the proposed statutory language that is cited can be found in the engrossed version of 2017 Assembly Bill 299, which incorporated the changes made by Assembly Amendment 2.

Affirmation of free expression. The bill required the UW Board of Regents to adopt a policy that, according to the Goldwater Institute, strongly affirms the importance of free expression.[106] The policy had to set forth specified statements, including that "the primary function of an institution is the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate" and that to fulfill that function "an institution must strive to ensure the fullest degree of intellectual freedom and free expression."[107] In addition, the bill required the policy to state that "it is not the proper role of an institution to shield individuals from speech protected by the First Amendment of the U.S. Constitution, including ideas and opinions they find unwelcome, disagreeable, or even deeply offensive."[108] According to the Goldwater Institute, one purpose of the foregoing statements was to nullify any existing restrictive free speech codes.[109]

Codification of First Amendment principles. The bill codified many of the First Amendment principles described above, include those regarding content-neutrality, public forums, and regulation based on interference or disruption. Specifically, the bill required the UW Board of Regents' free expression policy to include the following statements:

1. "That students and faculty have the freedom to discuss any problem that presents itself, as the First Amendment of the U.S. Constitution permits and within the limits of reasonable viewpoint-neutral and content-neutral restrictions on time, place, and manner of expression . . . that are necessary to achieve a significant institutional interest, provided that these restrictions are clear, published, and provide ample alternative means of expression."[110]
2. That students and faculty are allowed "to assemble and engage in spontaneous expressive activity as long as such activity is not unlawful and does not materially and substantially disrupt the functioning of an institution."[111]
3. "That the campuses of the institution are open to any speaker whom students, student groups, or members of the faculty have invited."[112]

106. Kurtz, Manley, & Butcher, *supra* note 6, at 5.

107. Proposed Wis. Stat. § 36.02 (4) (a) 1.

108. Proposed Wis. Stat. § 36.02 (4) (a) 2.

109. Kurtz, Manley, & Butcher at 5.

110. Proposed Wis. Stat. § 36.02 (4) (a) 3.

111. *Id.*

112. Proposed Wis. Stat. § 36.02 (a) 5.

4. "That the public areas of institutions are public forums and open on the same terms to any speaker."[113]

Regarding item 4, the Goldwater Institute noted it was intended to counteract "restrictive speech codes that attempt to cabin the exercise of free speech to certain narrow and approved 'zones' of the campus."[114] Although some universities in other states have attempted to establish "free speech zones" on campus,[115] it does not appear that such zones have been established in the UW System.[116]

Unprotected speech. The bill also codified First Amendment principles regarding unprotected speech, as it required the UW Board of Regents' free expression policy to allow institutions to restrict student expression only for unprotected expressive activity. The bill included the following examples of unprotected speech, which correspond to categories discussed earlier: "expression that a court has deemed unprotected defamation"; true threats, as defined by the Wisconsin supreme court in *State v. Perkin*s; and "an unjustifiable invasion of privacy or confidentiality not involving a matter of public concern."[117] The bill also added the following examples: violations of state or federal law; actions that unlawfully disrupt the function of an institution; and violations of a reasonable time, place, and manner restriction on expressive activities.[118]

In addition, the bill allowed institutions to restrict expressive conduct that qualifies as "peer-on-peer harassment" or "quid pro quo sexual harassment."[119] The bill defined "quid pro quo sexual harassment" as "explicitly or implicitly conditioning a student's participation in an education program or activity or basing an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature."[120] The bill defined "peer-on-peer harassment" as "conduct directed by one student towards another individual student, on the basis of that other student's race, color, creed, religion, political views, sex,

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113. Proposed Wis. Stat. § 36.02 (a) 6. 2017 AB 299 omitted a section of the model legislation that allows an institution to restrict expressive conduct in the campus public areas only if the restriction satisfies specified criteria. See Section 5 (A) of the model legislation at Kurtz, Manley, & Butcher at 22.

114. Kurtz, Manley, & Butcher at 6.

115. See, e.g., *Haragan*, 346 F. Supp. 2d at 869–70 (finding a portion of university's free speech zone rules unconstitutional). *See also* Thomas Davis, "Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine," 79 Ind. L. J. 267 (2004).

116. In a 2017 national survey of university speech codes, Foundation for Individual Rights in Education (FIRE) found that the following UW institutions included in the survey had not established free speech zones: UW-Eau Claire, UW-Green Bay, UW-La Crosse, UW-Madison, UW-Oshkosh, and UW-Stout. See Appendix D, "Spotlight on Speech Codes 2017," *FIRE*, https://www.thefire.org/. In January 2002, the UW-Whitewater added a policy to its student handbook that prohibited posting political material outside "free-speech areas," but rescinded the policy a month later. See FIRE, "West Virginia University Quarantines Free Speech," March 18, 2002 (discussing free speech zones at several universities), https://www.thefire.org/.

117. Proposed Wis. Stats. § 36.02 (9) (b), (e), and (f). The definition of "true threat" is set forth at proposed Wis. Stat. § 36.02 (3) (d).

118. Proposed Wis. Stats. § 36.02 (9) (a), (g), and (h).

119. Proposed Wis. Stats. § 36.02 (9) (c) and (d).

120. Proposed Wis. Stat. § 36.02 (3) (c).

national origin, disability, ancestry, age, sexual orientation, gender identity, pregnancy, marital status, parental status, or military status, that is so severe, pervasive, and objectively offensive that it effectively deprives the victim of access to the educational opportunities or benefits provided by an institution."[121] According to the Goldwater Institute, the definition of "peer-on-peer harassment" is based on the U.S. Supreme Court's decision in *Davis v. Monroe County Board of Education*, which limited a school's liability under federal law for student-on-student sexual harassment to harassment "that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[122]

Basis for discipline. The bill required the UW Board of Regents' free expression policy to contain a general statement that "protests and demonstrations that interfere with the rights of others to engage in or listen to expressive activity" should be "subject to sanction."[123] The bill also contained more specific requirements for discipline. Before its amendment by Assembly Amendment 2, the bill required the policy to include "a range of disciplinary sanctions for anyone under the jurisdiction of [an] institution who engages in violent, abusive, indecent, profane, boisterous, obscene, unreasonably loud, or other disorderly conduct that interferes with the free expression of others."[124] That language is different from the Goldwater Institute's model legislation, which requires instead that the range of disciplinary sanctions should apply to anyone who "interferes with the free expression of others."[125] The bill's language is borrowed from Wisconsin's disorderly conduct statute,[126] and similar language can be found in the UW Board of Regents' administrative rules for conduct on the UW System's lands.[127]

The bill's disorderly conduct language provoked criticism. Some participants at the bill's public hearing expressed concerns that the language was vague and ambiguous.[128] The Wisconsin Institute for Law & Liberty (WILL) recommended modifying the language. In its analysis of the bill, WILL stated: "It is important that permissible regulation of speech be scrupulously clear and narrow. Protests that are 'indecent,' 'profane,' or 'boisterous' may well be protected by the First Amendment. Terms like 'abusive,' 'unrea-

121. Proposed Wis. Stat. § 36.02 (3) (b).

122. Kurtz, Manley, & Butcher at 11, *citing* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999).

123. Proposed Wis. Stat. § 36.02 (4) (a) 4.

124. Proposed Wis. Stat. § 36.02 (4) (b) 1. (2017 AB 299 as introduced).

125. Kurtz, Manley, & Butcher at 20 (Section 1 (7) of model legislation).

126. See 2017 AB 299 Drafting File, electronic mail from Alicia Schweitzer to Mark Kunkel, March 29, 2017. The disorderly conduct statute provides: "Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor." Wis. Stat. § 947.01 (1).

127. Wis. Admin. Code § UWS 18.11 (2) provides: "No person may engage in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance, in university buildings or on university lands."

128. See *Hearing on 2017 AB 299 before the Assemb. Comm. On Colleges and Universities*, May 11, 2017 (statements and testimony by David J. Vanness, PhD; Matt Rothschild, Executive Director, Wisconsin Democracy Campaign; and Jordan Ellenberg, John D. MacArthur Professor of Mathematics at UW–Madison), available at https://docs.legis.wisconsin.gov/.

sonably loud,' and 'disorderly' are vague."[129] WILL recommended that discipline should apply to anyone who "engages in conduct that substantially and materially interferes with the free expression of others."[130] Likewise, the Foundation for Individual Rights in Education (FIRE) stated: "Most of what people would consider to be 'indecent, profane, [or] boisterous . . . conduct' is actually just a form of speech or expression, and is therefore likely to be protected under the First Amendment."[131] Like WILL, FIRE recommended modifying the language to apply to substantial and material interference with the expressive rights of others.[132] Before the bill's public hearing, Representative Kremer expressed confidence that, with "some tightening of the language," the bill could gain bipartisan support.[133]

In response to the criticism, Assembly Amendment 2 revised the disorderly conduct language. As amended, the bill required the UW Board of Regents' free expression policy to include "a range of disciplinary sanctions for anyone under the jurisdiction of [an] institution who engages in violent or other disorderly conduct that materially and substantially disrupts the free expression of others."[134] In response to the change made by Assembly Amendment 2, FIRE stated that it would "watch closely" to ensure that the "material and substantial disruption standard" is applied properly: "The provision must only be construed to reach conduct that intends to or succeeds in preventing people from speaking, hearing a speaker, or attending an event. Walking out of a speech, holding a sign outside an event, chanting outdoors, brief heckling—none of these types of expressive activity should be found to constitute material and substantial disruption."[135]

Mandatory discipline. 2017 Assembly Bill 299 required mandatory discipline in certain cases. Before its amendment by Assembly Amendment 2, the bill required the UW Board of Regents' free expression policy to "require suspension for a minimum of one semester or expulsion of any student who has twice been found responsible for interfering with the expressive rights of others."[136] In contrast, the Goldwater Institute's model legislation requires minimum suspension for one year, instead of one semester, for a second violation.[137] Like the disorderly conduct language, the bill's mandatory discipline was criticized at the bill's public hearing, with some participants calling it overly prescriptive, too harsh,

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129. Richard M. Esenberg & Clyde Taylor, "On Freedom of Expression in the University of Wisconsin System: Analysis and Recommendations of the Legislative Proposals," *Wisconsin Institute for Law & Liberty*, (May 15, 2017) 9–10, https://www.will-law.org/.

130. Esenberg & Taylor at 10.

131. Joe Cohn, "Wisconsin's 'Campus Free Speech Act' gets lots right, has room for improvement," *Foundation for Individual Rights in Education*, May 1, 2017, https://www.thefire.org/.

132. *Id.*

133. Gretchen Brown, *supra* note 8.

134. Proposed Wis. Stat. § 36.02 (4) (b) 1.

135. Joe Cohn, "New Wisconsin Regents policy has problems and promise," *FIRE*, Oct. 10, 2017, https://www.thefire.org/.

136. Proposed Wis. Stat. § 36.02 (4) (b) 3. (2017 AB 299 as introduced).

137. Kurtz, Manley, & Butcher at 20 (Section 1 (9) of model legislation).

and inflexible.[138] In its analysis of the bill, WILL stated that the language was "well-intentioned and designed to prevent administrators from ignoring anti-speech activities," but argued that "the specific punishment in any given incident should be left to the educational institution."[139] Likewise, FIRE argued against the language because "not all disruptions are equal in their severity, and sanctions should be proportional to the offense."[140]

Despite the criticism, Assembly Amendment 2 revised the language instead of eliminating it. As amended, the UW Board of Regents' free expression policy had to require suspension for a minimum of one semester, but not expulsion, if a student was twice found responsible for interfering with the expressive rights of others. Assembly Amendment 2 also clarified that the requirement applied to interference that occurred at any time during the student's enrollment.[141] Upon a third finding against a student, Assembly Amendment 2 required the institution to expel the student.[142] In response to Assembly Amendment 2, FIRE stated its concern "that mandatory minimum punishments will lead to unduly harsh punishments that don't always account for the degree of a student's culpability" and argued that "institutions should have broader latitude to impose sanctions that make sense in the specific context of each case."[143]

Assembly Amendment 2 also allowed any person to make a report that another person violated the UW Board of Regents' free expression policy.[144] In addition, Assembly Amendment 2 required a formal investigation and disciplinary hearing the second time a student was alleged to have interfered with expressive rights of others.[145] FIRE responded by expressing its concern over the potential for frivolous complaints: "Students will now have the ability to trigger investigations into their political adversaries simply by lodging multiple complaints."[146]

Disciplinary procedures. The bill required disciplinary cases involving expressive conduct to satisfy specified procedural requirements, including requirements for notice, reviewing evidence, confronting witnesses, appeals, and active assistance of counsel.[147] Assembly Amendment 2 made minor changes to those requirements. As originally introduced, the bill limited active assistance of counsel to those cases involving potential expulsion or suspension for more than nine days.[148] Assembly Amendment 2 removed

138. See *Hearing on 2017 AB 299 before the Assemb. Comm. On Colleges and Universities*, May 11, 2017 (testimony of Ray Cross, UW System President, and statement by Matt Rothschild).

139. Esenberg & Taylor at 10.

140. Joe Cohn, *supra* note 131.

141. Proposed Wis. Stat. § 36.02 (4) (b) 4.

142. Proposed Wis. Stat. § 36.02 (4) (b) 5.

143. Joe Cohn, *supra* note 135.

144. Proposed Wis. Stat. § 36.02 (4) (bm).

145. Proposed Wis. Stat. § 36.02 (4) (b) 3.

146. Joe Cohn, *supra* note 135.

147. Proposed Wis. Stat. § 36.02 (4) (b) 2.

148. Proposed Wis. Stat. § 36.02 (4) (b) 2. h. (2017 AB 299 as introduced).

that limitation. In addition, Assembly Amendment 2 required students to be informed of the right to record disciplinary hearings.[149]

Institutional neutrality. The bill required the UW Board of Regents' free expression policy to state that each institution must "strive to remain neutral, as an institution, on the public policy controversies of the day."[150] In addition, the policy had to prohibit an institution from taking action, "as an institution, on the public policy controversies of the day in such a way as to require students or faculty to publicly express a given view of social policy."[151] This requirement generated some criticism. For example, at the public hearing on the bill, one professor stated that the requirement was too broad: "The University must be allowed to advocate, as an institution, for funding of scientific research and humanistic scholarship, for free speech on campus, and for support of our students. All of these are controversial matters of public policy in which the University has a direct stake."[152] WILL suggested either removing the requirement or revising it to affirm the right of faculty and students to take positions on public controversies.[153] FIRE suggested changing the requirement to allow institutions to take positions, as long as they do not compel others to agree.[154] Despite the criticism and suggestions, Assembly Amendment 2 made no changes to the requirement.

Other requirements. As originally introduced, the bill required the UW Board of Regents to create a council on free expression, which was required to make annual reports on discipline and other matters. Assembly Amendment 2 eliminated the council and required the UW Board of Regents to make the reports.[155] Also, as originally introduced, the bill required institutions to describe free expression policies and rules as part of freshman orientation. Assembly Amendment 2 expanded that requirement to apply to transfer students and required institutions to provide training on the policies and rules to employees when they were hired, as well as to instructors on an annual basis.[156] Finally, the bill provided for private enforcement. As originally introduced, the bill allowed a person to sue for an injunction or damages if his or her expressive rights were violated by a violation of the UW Board of Regents' free expression policy. Assembly Amendment 2 made only one change by adding language allowing defendants to recover attorney fees in lawsuits found to be frivolous or brought in bad faith.[157]

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149. Proposed Wis. Stat. § 36.02 (4) (b) 2m.

150. Proposed Wis. Stat. § 36.02 (4) (a) 7.

151. *Id.*

152. *Hearing on 2017 AB 299* (statement of Jordan Ellenberg).

153. Esenberg & Taylor at 11.

154. Joe Cohn, *supra* note 131.

155. Proposed Wis. Stat. § 36.02 (5).

156. Proposed Wis. Stat. § 36.02 (6).

157. Proposed Wis. Stat. § 36.02 (10).

Other states

Other states have enacted laws based on the Goldwater Institute's model legislation, but, like 2017 Assembly Bill 299, with modifications. For example, regarding the basis for discipline, North Carolina enacted a law in 2017 that requires institutions to implement a range of sanctions for substantially disrupting the functioning of an institution or substantially interfering with the free expression rights of others.[158] In contrast, the Goldwater Institute's model legislation refers to interference, not substantial interference. In addition, the North Carolina law omits mandatory discipline. Enacted in 2018, Georgia's and Louisiana's laws also omit mandatory discipline.[159]

Unlike the Goldwater Institute's model legislation, the North Carolina law does not state that public areas of institutions are public forums and open on the same terms to all speakers. Instead, the North Carolina law refers to different forums: "Access to campus for purposes of free speech and expression shall be consistent with First Amendment jurisprudence regarding traditional public forums, designated public forums, and nonpublic forums, subject to reasonable time, place, and manner restrictions."[160] Regarding institutional neutrality, North Carolina's law prohibits institutions from taking action, as an institution, on public controversies in a way that requires students, faculty, or administrators to publicly express a given view of social policy.[161] However, the law omits the Goldwater Institute's requirement that institutions strive to remain neutral on public controversies.

Arizona's version of the model legislation makes extensive changes to the basis for discipline. Enacted in 2018, the Arizona law requires a range of disciplinary sanctions for a student who engages in "individual conduct that materially and substantially infringes on the rights of other persons to engage or listen to expressive activity,"[162] which is defined to mean "conduct by a person who, with the intent to or the knowledge of doing so, materially and substantially prevents the communication of a message or prevents the transaction of the business of a lawful meeting, gathering or procession by doing" specified activities.[163] The activities specified are "engaging in fighting or violent or other unlawful behavior"; "physically blocking or using threats of violence to prevent another person from attending, listening to, viewing or otherwise participating in an expressive activity"; and "preventing another person from attending, listening to, viewing or otherwise participating in an expressive activity that is held at a location that is not a public

158. N.C. Gen. Stat. § 116-300 (7), enacted by 2017 N.C. Sess. Laws 196.

159. Ga. Code Ann. § 20-3-48 (b) (2018), enacted by 2018 Ga. Laws 557; La. Rev. Stat. Ann. §§. 17:3399.31 to 17.3399.37, enacted by 2018 La. Acts 666.

160. N.C. Gen. Stat. § 116-300 (5).

161. N.C. Gen. Stat. § 116-300 (3).

162. Ariz. Rev. Stat. Ann. § 15-1866 (A) 4., enacted by 2018 Ariz. Sess. Laws 267.

163. Ariz. Rev. Stat. Ann. § 15-1861 (2).

forum, such as an auditorium or lecture hall."[164] In addition, instead of mandatory discipline, the Arizona law states that "it is the sense of the legislature" that suspension or expulsion "may be appropriate" for students who repeatedly engage in such conduct.[165] Regarding institutional neutrality, the Arizona law encourages institutions to attempt to remain neutral "unless the administrative decisions on such issues are essential to the day-to-day functioning" of the institution.[166]

As of the publication of this report, bills based on the model language have been introduced in California,[167] Illinois,[168] Michigan,[169] Nebraska,[170] and Wyoming.[171]

UW Board of Regents actions

Before 2017 Assembly Bill 299 died in the Senate, the UW Board of Regents adopted a policy that implemented some of the bill's components, including mandatory discipline. However, before adopting that policy, the UW Board of Regents adopted two resolutions that affirmed its support of free expression without making changes to its policies or administrative rules.

Resolutions. About a year and half before 2017 Assembly Bill 299 was introduced, the UW Board of Regents adopted the first resolution, which stated that institutions could "restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the university."[172] In addition, the resolution stated that institutions could "reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt ordinary activities."[173] However, the resolution emphasized that those restrictions and regulations were "narrow exceptions to the general principle of freedom of expression," which should "never be used in a manner that is inconsistent with each institution's commitment to a completely free and open discussion of ideas."[174] The resolution also stated: "Although members of the university community . . . are free to criticize and contest the views expressed on campus, they may not obstruct or otherwise interfere with the

164. *Id.*

165. Ariz. Rev. Stat. Ann. § 15-1866 (A) 6.

166. Ariz. Rev. Stat. Ann. § 15-1864 (G).

167. 2017 Bill Text CA A.C.A.14 (proposed constitutional amendment), introduced May 1, 2017.

168. Ill. 100th General Assembly HB 2939, introduced Feb. 9, 2017.

169. Mich. 2017 Senate Bill 350, introduced May 2, 2017.

170. Neb. 2018 Legislative Bill 718, introduced Jan. 3, 2018.

171. Wyo. 2018 House Bill No. HB0137, introduced Feb. 12, 2018.

172. Resolution 10600 (UW System Board of Regents' 2015 Statement Reiterating the Board's Commitment to Academic Freedom and Affirming its Commitment to Freedom of Expression) Dec. 11, 2015. See Minutes of the Regular Meeting of the Board of Regents of the UW System at 22, https://www.wisconsin.edu/regents/.

173. *Id.*

174. *Id.*

freedom of others, including speakers who are invited to campus, to express views they reject or even loathe."[175]

Shortly after 2017 Assembly Bill 299 passed the Assembly, the UW Board of Regents adopted a second resolution, which noted that the prior resolution demonstrated the UW Board of Regents' "strong support for freedom of expression" and mentioned that the UW System was reviewing its policies "to ensure each of our campuses supports and maintains an environment where civil discussions can occur as students learn, study, and prepare for their futures."[176] A board member explained that the prior resolution was adopted in response to student and faculty concerns about the stifling viewpoints on campus.[177] The board member described the second resolution as "concise and direct, but not prescriptive or punitive in scope."[178] Regarding the second resolution, Speaker Robin Vos commented that, while he appreciated the UW Board of Regents' efforts, "having no penalties won't deter bad actors."[179]

Policy change. Three months after adopting the second resolution, the UW Board of Regents adopted a new policy adopting some of the components of 2017 Assembly Bill 299, including mandatory discipline.[180] Like 2017 Assembly Bill 299, the policy states: "Any student who has twice been found responsible for misconduct that materially and substantially disrupted the free expression of others at any time during the student's enrollment shall be suspended for a minimum of one semester. Any student who has thrice been found responsible for misconduct that materially and substantially disrupted the free expression of others at any time during the student's enrollment shall be expelled."[181] In addition, like 2017 Assembly Bill 299, the policy requires a formal investigation and disciplinary hearing "the second time a formal complaint alleges a student has engaged in violent or other disorderly misconduct that materially and substantially disrupted the free expression of others."[182]

The policy incorporates other components of 2017 Assembly Bill 299. Regarding unprotected speech, the policy states that institutions "may restrict expressive activity not protected by the First Amendment," including state and federal law violations, discriminatory harassment, sexual harassment, true threats, unjustifiable invasions of privacy or confidentiality, actions that materially and substantially disrupt the function of an insti-

175. *Id.*

176. Resolution 10906 (Affirming the Board of Regents' Commitment to Freedom of Expression), July 7, 2017. See Minutes of the Regular Meeting of the Board of Regents of the UW System at 7, https://www.wisconsin.edu/regents/.

177. *Id.* at 6.

178. *Id.* at 7.

179. Karen Herzog, "UW Regents set 'guidepost' for campus free speech with no mention of penalties GOP lawmakers want," *Milwaukee Journal Sentinel*, July 7, 2017, https://www.jsonline.com/.

180. Regent Policy Document 4–21, Commitment to Academic Freedom and Freedom of Expression, Oct. 6, 2017.

181. Regent Policy Document 4–21, s. 2 (Conduct on University Lands; Student and Employee Discipline).

182. *Id.*

tution, and violations of reasonable time, place, and manner restrictions on expressive activities.[183] Those restrictions are similar to those allowed under 2017 Assembly Bill 299, except that the policy does not refer to defamation or define true threats, discriminatory harassment, or sexual harassment. Regarding institutional neutrality, the policy states: "Each UW institution shall not take action, as an institution, in such a way as to require students or employees to express a particular view on a public policy issue."[184] Finally, the policy requires the UW System to make annual reports to the UW Board of Regents,[185] requires institutions to include information about freedom of expression under the policy in orientation for freshman and transfer students,[186] and requires institutions to provide annual notice about the policy to students and employees.[187]

Rule making. In the above policy, the UW Board of Regents notes that it must amend its administrative rules in order to implement the requirements regarding mandatory discipline. As of the publication of this report, the UW Board of Regents completed the first step of the rule-making process when the governor approved the board's statement of scope for amended rules on June 14, 2018.[188] In subsequent steps, the UW Board of Regents will draft amended rules and submit them to the governor and the legislature for approval.

Conclusion

This report has limited its story to 2017 Assembly Bill 299, similar laws and bills in other states, and the UW Board of Regents' responses to 2017 Assembly Bill 299. That story raises many issues regarding the First Amendment, such as the extent to which public universities may discipline students who interfere with the expressive rights of others. There are many other issues regarding the First Amendment's impact on institutions of higher education that this report has not addressed, including those involving prior approval of protests,[189] discipline for off-campus student speech,[190] and mandatory activity fees that support student organizations with which students may disagree.[191]

There is not yet an end to the story told in this report. Other states have only recently enacted laws based on the Goldwater Institute's model legislation. The UW Board of

183. *Id.*, s. 4 (Restrictions of Expression).

184. *Id.*, s. 6 (Neutrality).

185. *Id.*, s. 5 (Accountability).

186. *Id.*, s. 7 (New Student Orientation).

187. *Id.*, s. 8 (Notice).

188. See Scope Statement SS 071-18, https://docs.legis.wisconsin.gov/.

189. Khademi v. S. Orange County Cmty. College Dist.,194 F. Supp. 2d 1011 (2002) (finding that approval cannot be left to the sole discretion of a college president).

190. Keefe v. Adams, 840 F.3d 523 (8th Cir. 2016) (upholding removal of student from college nursing program based on student's social media posts that violated student code of conduct).

191. Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (upholding fees that are distributed in a viewpoint-neutral manner).

Regents has just begun the process of promulgating rules for implementing its policy. We do not yet know the rules' details and can only imagine the individual cases in which they will be enforced. However, we do know that courts will likely be asked to interpret the rules and question their enforcement. As noted above, FIRE intends to "watch closely" to ensure that standards for discipline are properly applied. In addition, the American Civil Liberties Union of Wisconsin has announced that it "stands ready" to defend students from the UW Board of Regents' policy.[192] And so the story told in this report will continue. Stay tuned. ■

192. ACLU Wisconsin, "ACLU of Wisconsin Condemns University of Wisconsin Policy Allowing Expulsion of Student Protesters," *ACLU Wisconsin*, October 10, 2017, https://www.aclu-wi.org/.