HOW TO KEEP VIOLENT SPEECH OFF CAMPUS, LEGALLY

by Carlin Romano
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Fresno State adjunct lecturer Lars Maischak posts, "Trump must hang," and finds himself a non-renewed adjunct lecturer. John Jay College economist Michael Isaacson tweets "Off the pigs" and "Dead cops are good," and the college suspends , then terminates him . Virginia Tech's Steven Salaita declares, "I wish all the West Bank settlers would go missing" and sees a tenured position at the University of Illinois at Urbana-Champaign go poof instead—he did pick up a $600,000 settlement for his troubles.

Free speech controversies on campus involve a host of issues and buzz phrases, among them safe spaces, micro-aggressions, "snowflakes" and the heckler's veto. But one phenomenon cuts across all of them: Acceptable speech at some point shifts into unacceptable speech, and someone must pay the price. When the "unacceptabililty" relates to violence, the price can come as fast as a supermarket cashier zapping a bar code.

Contemplating what I'd call the top-of-the-charts cases of unacceptable speech—academics who express a blunt wish for violence, who fantasize about violence, who float the idea of violence—it occurred to me that a big fat concept in academic life, at the core of our volatile area of sexual harassment and assault, has gone missing-in-action in the free-speech fracas. But it should be at the heart of responding to academic speech that vaunts violence.

Honorable colleagues, I speak of *consent*.

First, the proposal. Then the argument for why we need it.

Every student, administrator, faculty member and staffer must sign an agreement, on becoming a member of the campus community, that he or she will not commit violence or threaten violence against person or property ("property" is worth adding), or float the idea of disproportionate violence against others, on pain of immediate termination from the institution. This obligation to foreswear physical and verbal violence overrides all other rights (e.g., tenure rights).

In the case of students, this would come at the beginning of a required full-semester course on "Free Speech, Campus Life, and the First Amendment." In the case of faculty and staff, it would come at the beginning of a mandatory free-speech training course, analogous to the Title IX courses many institutions now require.

The entrant to academe thus *consents* to non-violence on Day One. The institution gains a powerful contractual right to eliminate violators without instant litigation (or with much less of it, since breaches of contract remain subject to legal challenge). The college's ability to channel newcomers into steering clear of unacceptable violent language shoots up enormously. Those students and staff and faculty members who decide after their course or training that they wish to retract their consent can do so and withdraw from the institution.

Goodbye troublemaker.

This proposal packs the welcome appeal of drawing on elements already deeply rooted in academic life. While consent doesn't provide a cure-all in practice—subtle coercion, murkiness of verbal and body language, and a slew of other factors foil ideal solutions—when the concept operates with clarity and precision, free of complications, it solves both moral and legal problems.

Moreover, because of the long history of imposing contractual obligations on campus personnel, universities and colleges shouldn't fear imposing these new ones. Consider three common precedents. The May 1st deadline for accepted applicants to inform institutions of their intention to enroll stands as a contractual obligation that entails possible loss for breach of contract (e.g., one's deposit). Honor codes obligate students to follow specific behaviors, as do non-plagiarism pledges. And employment contacts for staff and faculty members also dictate specific behaviors. Some colleges even require that they be re-signed every year despite broader multi-year contracts plainly in force.

Now, you may ask—do we really need a *legal* solution to the "speech that encourages violence" problem? The answer is that we do, because the law—that is, First Amendment jurisprudence—hasn't given us a legal solution.

Several reasons explain that. All sides to campus free-speech controversies recognize that First-Amendment law controls the subject in some respects, but not others. Public universities and colleges must obey First-Amendment law. Private institutions, though they often adopt First-Amendment thinking in their mission statements and policies, need not.

All sides equally recognize that First-Amendment law, like all American law and the Constitution itself, arises out of philosophical and moral thinking. In analyzing when acceptable speech flips into unacceptable speech, both philosophical and legal perspectives necessarily come into play. That means the nexus between free speech and the peculiar mission of colleges—to educate students, seek truth, advance knowledge, and deliver that knowledge to the world—must remain at the forefront of analysis.

A brief look at the key First Amendment jurisprudence in this area—the so-called "fighting words" doctrine, involving direct threats, orders to harm others, or language supposedly sure to trigger violence—shows why it pushes us back to philosophy, policy and common sense.

The "fighting words" doctrine originated in *Chaplinsky v. New Hampshire*, a 1942 Supreme Court case. Walter Chaplinsky, a Jehovah's Witness, passed out church literature on a public street in Rochester, N.H. In his interactions with those on the scene, he called the police "damned Fascists" and stated that "the whole government of Rochester are Fascists or agents of Fascists." Note that the Court's decision came at the height of World War II.

In upholding Chaplinsky's conviction, the Court first stated its ritual observation that "the right of free speech is not absolute." It then listed among "certain well-defined and narrowly limited classes of speech" that do not "raise any Constitutional problem" a category of "insulting or `fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

According to the Court, "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. `Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.'"

Today, however, the Court is widely seen to have stepped back from *Chaplinsky* despite never expressly overruling it. Erwin Chemerinsky and Howard Gillman, in *Free Speech on Campus* (Yale University Press, 2017), provide a precis of the Court's backpedaling over the roughly 75 years it has gone without affirming any other "fighting words" conviction.

In both *Cohen v. California* (1971) and Texas v. Johnson (1989), Chemerinsky and Gillman observe, "the Court narrowed the scope of the fighting words doctrine by ruling that it applies only to speech directed at another person that is likely to produce a violent response." In four cases decided in 1972, the Court "found laws prohibiting fighting words to be unconstitutionally vague or overbroad."

Yet in a vise-like maneuver on "fighting words," the Court applied its standard opposition to laws that ban language based on the language's content, since content neutrality on the part of courts in regard to ideas and ideology is a pillar of First Amendment jurisprudence. In *R.A.V. v. City of St. Paul* (1992), weighing a Minnesota ordinance that specifically suppressed symbolic speech because of fear of violence, the justices unanimously overturned the conviction of a man who had burned a cross on the lawn of a black family because the St. Paul ordinance in question, which banned exhibition of certain symbolic provocations, specifically outlawed "a burning cross or Nazi swastika." Chemerinsky and Gillman write that by adding the impermissibility of passing "laws prohibiting some fighting words but not others" to its earlier strictures on the concept, the Court created a "Catch-22" that "makes it virtually impossible for public colleges and universities to regulate hate speech on these grounds." Only a "true threat" of violence against identifiable individuals, the Court would later clarify in *Virginia v. Black* (2003), could remove cross-burning from First-Amendment protection.

That leaves the issue of campus speech that threatens violence undetermined by First Amendment law, even as a model, and punts it back toward common-sense considerations.

Thus my proposal.

In putting it forth, I take certain truths to be self-evident. Violent behavior, as confirmed by daily newspapers in general and school shootings in particular, is unpredictable except when a speaker's speech itself promises or predicts violent action by that speaker. Some people shoot to kill after being dissed, or outraced to a parking spot, or suspecting that someone else is pulling a gun on them. Others remain non-violent under the most severe provocation.

A college should operate in agreement with what virtually all sensible observers think about free-speech issues that relate to violence. Threats and encouragement to do physical harm to others on campus should immediately be responded to by security forces. The speaker who declares, "We should just go back to our rooms, get our baseball bats and guns, and get rid of all the—on campus" certainly *communicates*, and law enforcement should move fast.

Those who, like Salaita, simply float possibilities of disproportionate violence, without overtly threatening or ordering it, should be subjected to exacting scrutiny, with special attention to the seriousness with which they float the idea. (Most of us have on occasion said something like, "I'll kill you if you show up late again.")

At the same time, those who, like Texas A & M philosopher Tommy Curry, are falsely accused of advocating unprovoked violence, must be protected as a matter of academic freedom. Conservative bloggers distorted Curry's words into a supposed call for blacks to attack whites—a tale reported in detail by the *Chronicle*. Curry's experience demonstrates the radioactivity of any comments by an academic that others can construe as advocacy of violence. No serious figure in academe wants to shut down scholarly discussion of violence as a historical or contemporary phenomenon.

Some might argue that the way things work now—Mr. or Ms. Academic floats violence, a firestorm of criticism ensues, college punishes perpetrator—remains a perfectly fine way to handle the problem. Those slapdowns, however, amount to emergency medicine. Colleges should practice preventive medicine. A guiding principle should be that "unacceptable" means—it will *not be accepted*. As Keith Whittington puts it in another of the recent studies of free speech on campus, *Speaking Freely* (Princeton University Press), "in throwing the gate of the university open to all those who wish to enter and learn, the university must demand that those entering the campus accept that invitation in the spirit in which it was given."

Those instituting this policy must respect an academic institution's multiple missions, which means placing the least constraint on speech possible while shutting down the "Everybody plays games" attitude when it comes to violence. That means universities and colleges must resist the *metaphorization* of violence. They must reject, as the Court has allowed them to, the perspective of those, such as legal theorist Mari Matsuda, who believe in "discursive violence." They must focus on the discursive only when it calls for, in some way, physical violence. Whittington makes a crucial point here too: "If we elide the real distinctions between speech and actual physical violence... we open the door not only to widespread censorship of disfavored ideas but to the use of actual violence against unpopular speakers in the name of `self-defense.'"

Indeed, in yet a third new book in this area, *Hate* (Oxford University Press), former American Civil Liberties Union President Nadine Strossen points out that federal courts during the civil rights era "refused to halt speeches and demonstrations by civil rights advocates because of threatened and even actual violence by opponents of their cause."

In suggesting contractual consent as an antidote to reckless, "unacceptable" campus speech that might trigger violence, I appeal to one more common-sense notion incorporated widely in American law—the standard of the reasonable person. Almost everyone views violence as the physical assault by some on others, or on property. It requires action taken against another's body or property—by fist, by bullet, by Molotov cocktail. Only in selected climes of activist academe do "only words" become violent in themselves. Philosopher Charles Sanders Peirce memorably declared that that we should not "pretend to doubt in philosophy what we do not doubt in our hearts." I say we should not pretend to accept

metaphorized “discursive violence” on campus that we reject everywhere else.

Using contractual consent, along with required courses and training sessions, to deter rogue speech that threatens or flirts with violence is a fresh approach to the problem. Anyone want to consent?

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