

Does Disruption Violate Free Speech?

By Howard Gillman and Erwin Chemerinsky | OCTOBER 17, 2017



Mark Shaver for The Chronicle

When student protesters prevented President Michael H. Schill of the University of Oregon from delivering his State of the University speech this month, the group explained, "Free speech is the right of individuals and communities to express themselves without repression from the state. The students are not the state nor the repressors. Taking to the stage and using this platform was an act of free speech — not a violation of it."

It's not a new argument. When a group of students tried to prevent Michael Oren, the Israeli ambassador at the time, from delivering a speech at the University of California at Irvine in 2010, one of them explained that "rights can only be trampled upon and censored by the government, not by individuals," and "acts of protest must be judged by

their ability to empower marginalized voices to speak out and demand their basic human rights."

Similar sentiments have led to disruptive protests this year at the College of William & Mary, Evergreen State, Middlebury, and Claremont McKenna Colleges — all of which were motivated by an intent to prevent speakers and their sponsors from exercising their rights of free speech. And very controversial speakers on campuses, like Richard Spencer at the University of Florida this week, especially raise the possibility of disruption by students.

Contrary to the view of these protesters, individuals do not have a right to prevent others from speaking. It has long been recognized in constitutional law that the "heckler's veto" — defined as the suppression of speech in order to appease disruptive, hostile, or threatening members of the audience — can be as much a threat to rights of free expression as government censorship.

If audience members had a general right to engage in disruptive or threatening behavior by using loud, boisterous, or inciting speech, it would give any determined individual or group veto power over the expression of any idea they opposed. Only the most benign or inoffensive ideas would be expressible. It would empower people to believe, "If we can't get the government to censor the speech, then we'll do it ourselves."

The only protections against the heckler's veto are to require officials to make every effort to control the disrupters or to deter their efforts by treating the disruption as a punishable breach of the peace. Of course, it is possible that, despite best efforts, safety or public order cannot be maintained without calling an end to a controversial event. But this should be a last resort, only after exhausting all efforts to control those who are creating the threats against the lawful expression of speech.

The idea that private individuals cannot censor what the government is required to protect played a vitally important role during the civil-rights movement, when courts prevented officials in the South from stopping speeches and marches based on the threat of hostile audiences.

One cannot walk into a courtroom of a controversial judge and shout criticisms in a way that disrupts scheduled judicial proceedings. Likewise, most colleges have student-conduct policies that prohibit the disruption of regular business or authorized campus activities, including classroom teaching, research activities, and ordinary administrative functions.

Importantly, however, prohibitions against disruptions also have their limits.

For example, protecting a controversial speaker assumes that the speaker has a preferred right to speak in a particular location at a particular time. When that is not the case — for example, in a true, open public forum on campus grounds, where anyone is allowed to be and to talk — no one speaker has any more rights to express a point of view than any other. If a Christian fundamentalist preacher were to use an open

public space on a campus to preach against nonheterosexual activity, there is no reason why members of the campus community could not surround the preacher and enter into a boisterous back-and-forth.

Everyone in such a group has a right to be protected against violence or threats of violence. But there is no right in an open campus square, or in an open city park, to speak uninterrupted. If police officers witnessed the preacher speaking and the challengers responding, the officers would have no basis for preferring the free-speech rights of one over the other.

The reason recent campus controversies are different is that, in those cases, the campus has created a process whereby particular people (for example, student sponsors and their invited guests) are given a preferred right to have access to specific campus venues through a reservation process. Once the campus has followed its policies and assigned rooms for particular activities, then those who have secured the reservations have recognized claims to that space at those times.

In such a limited public forum, and in other places on campus where certain activities are assigned and recognized, those who have been given access to the space for certain purposes have the right not to be disrupted in that activity.

That is what justifies Claremont McKenna's decision to punish seven students for their role in blocking an audience from hearing a speech by Heather Mac Donald, a fellow at the Manhattan Institute and critic of the Black Lives Matter movement, and that would justify a decision by William & Mary to take action against those that prevented the ACLU's Claire Guthrie Gastañaga from speaking because of the group's legal defense of white supremacists in free-speech cases.

Also, while opponents cannot disrupt a talk by an authorized controversial speaker, it is true that the speaker has no right to a cooperative or supportive audience.

Those who disagree are allowed to express their disagreement in ways that nevertheless allow the speakers to have their say. In the easiest case this includes the right to hold counterprotests or competing events, or distribute critical leaflets to audience members. But it also includes expressing disapproval as a member of the audience, as long as that disapproval does not undermine the rights of the speakers and their sponsors.

There are always judgment calls in cases of disruptive protests. We favor a more accommodating approach when protesters focus on administrators, for practical reasons rather than because of the First Amendment. Campus leaders have many avenues to express their views, and so an occasional tactical decision to shrug off the disruption is understandable.

But accommodation is much less appropriate when some members of the campus are attempting to prevent others from exercising their rights. In such cases, heckler's veto principles argue in favor of strong campus rebuffs of the claims of the disrupters. Otherwise, vulnerable or controversial opinions will never be expressible on a campus. And that would represent an abandonment of foundational principles of modern American higher education.

Simply put, the right to speak does not include a right to use speech to keep others from speaking.

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