Rhetoric, Chalking, and the First Amendment at the University of Wisconsin La Crosse

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ABSTRACT

The First Amendment of the United States Constitution provides that: "Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Supreme Court of the United States has often addressed issues pertaining to the First Amendment right to free expression using the "marketplace of ideas" metaphor. This metaphor is used to highlight the similarities between the legal doctrine of free speech and a free market economy. In essence, this comparison stems from the belief that through public discourse, certain ideologies and beliefs will compete with one another for widespread acceptance within the public domain.

INTRODUCTION

The marketplace of ideas metaphor has been used by the Supreme Court to condemn the use of government censorship for types of speech that do not surpass the protections of the First Amendment, assuming that the rational population will not support speech that is obviously detrimental to society. The protection provided by the "marketplace of ideas" metaphor from censorship is paramount, as it allows underrepresented communities to voice their opinions equally within public discourse without fear of being silenced. The importance of Free Speech on any college campus is abundantly clear because of these reasons, and in order to fully exercise their rights, students should be aware of what and when certain kinds of speech are protected. Recent events on the University of Wisconsin-La Crosse (UWL) campus, and the administrative responses to them, however, have not necessarily aligned with this metaphor and the First Amendment jurisprudence that invokes its usage.

METHODS

This research seeks to investigate the relationship between rhetoric and the First Amendment at the University of Wisconsin-La Crosse (UWL). To synthesize and explore this relationship further, this research project asks: "How is rhetoric used to justify approaches to and interpretations of the First Amendment at UWL?"

In answering this question, this project will first investigate what First Amendment jurisprudence provides concerning unprotected speech, speech restrictions, and hate speech. Next, through the use of archival research, it will summarize and analyze two specific case studies localized to the University of Wisconsin-La Crosse (UWL) which concern the First Amendment and sidewalk chalking on campus. More specifically, this project will examine certain administrative communications sent to students and faculty regarding these two case studies, inspect their rhetorical and legal implications, and explore reactions to these communications from members of the UWL campus community. This research will then demonstrate the relevance of these two case studies to the broader discussion of discourse and the First Amendment.

Subsequently, this project will analyze some particular data points from the recent University of Wisconsin (UW) System Free Speech Survey and evaluate their pertinence to the discussion at hand. It will also discuss the more recent UWL Free Speech and Campus Discourse Panel, an interview with a member of the Student Senate, and the UWL Chalking Policy.

This project will conclude by returning to its initial research question to discuss the effect that rhetoric has on discussions of the First Amendment as evinced by this study. Additionally, It articulates the dangers of censorship in a free democracy and addresses where the burden of truth under the law should lie. Lastly, this paper will provide potentially interested future researchers with some compelling components of this study that were unfortunately left out of the final product.

FREE SPEECH AND THE UNIVERSITY OF WISCONSIN-LA CROSSE

The University of Wisconsin-La Crosse (UWL) is a public university within the University of Wisconsin (UW) system. As a member of this system, UWL students, employees, and visitors are bound by the policies of the UW Board of Regents. Regent policy document 4-21 titled "Commitment to Academic Freedom and Freedom of Expression" outlines the Board of Regent's dedication to fostering such freedoms in UW universities. Sections 3 and 4 of this document outline policy expectations relating to the freedom of expression and its limits in particular circumstances. Section 3 of the document provides, in part, that:

> "Students and employees have the freedom to discuss any problem that presents itself, as the First Amendment of the U.S. Constitution and Article I of the Wisconsin Constitution permit. Students and employees shall be permitted to assemble and engage in spontaneous expressive activity as long as such activity does not materially and substantially disrupt the functioning of an institution … Access to UW institutions for purposes of free speech and expression shall occur within the limits of reasonable viewpoint-neutral and content-neutral restrictions on time, place, and manner of expression and the provisions of Chapter UWS 21 (Use of University Facilities) of the Wisconsin Administrative Code."[1]

The policy also outlines expressive activities that may be subject to restriction or sanction in section 4, including:

> "Violations of state or federal law … [d]iscriminatory harassment … [s]exual harassment … [t]rue threats, [a]n unjustifiable invasion of privacy or confidentiality … [a]n action that materially and substantially disrupts the function of an institution … [and a] violation of a reasonable time, place, and manner restriction on expressive activities."[2]

These policies act as a baseline for institutions within the UW system to abide by, providing them with guidelines for the creation of more individualized institutional policies.

As an institution, UWL is overtly passionate in its mission to offer students and faculty alike full First Amendment protections. In pursuit of UWL's mission as a university, it promises to provide students with:

> "[A] challenging, dynamic, and diverse learning environment in which the entire university is fully engaged in supporting student success … [they encourage] and [protect] diverse perspectives, the free flow of ideas, and open discussion among students, faculty, staff, and other members of the campus community."[3]

UWL's Chancellor, Joe Gow, is a vocal proponent of the right to free speech and civil discourse at UWL, having founded the UWL Joint Committee on Free Speech Promotion (JCFSP), and regularly hosting and/or advertising on-campus events that pertain to the First Amendment.

UNPROTECTED SPEECH

Free speech protections are by no means limitless on college campuses. Since the inception of the First Amendment there have been numerous legal decisions that have incrementally determined where the limits to free speech lie. Put simply, there are five categories of unprotected speech relevant to the discussion of the First Amendment on campus: incitement/fighting words, true threats, obscenity, defamation, and discriminatory harassment.

Incitement is speech that orders imminent illegal action. The Supreme court determined in *Brandenburg v. Ohio* (a case where a KKK klansman was arrested under Ohio's criminal syndicalism law after making a speech at a Klan rally) that speech is unprotected if it is (1) "directed at inciting or producing imminent lawless action" and is (2) "likely to incite or produce such action."[4] The Ohio criminal syndicalism law was held to be unconstitutional for overbreadth, and the Brandenburg test became the new standard for determining if speech incites. *Brandenburg* was later cited in *Hess v. Indiana*, where an Indiana University protester proclaimed "[w]e'll take the f*cking street later …."[5] The court determined that Hess' speech "amounted to nothing more than advocacy of illegal action at some indefinite future time," and thus did not provide evidence nor rational indication that "his words were intended to

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1 UW Board of Regents. "Commitment to Academic Freedom and Freedom of Expression," October 11, 2017. https://www.wisconsin.edu/regents/policies/commitment-to-academic-freedom-and-freedom-of-expression/.
2 UW Board of Regents. "Commitment to Academic Freedom and Freedom of Expression," October 11, 2017. https://www.wisconsin.edu/regents/policies/commitment-to-academic-freedom-and-freedom-of-expression/.
3 UW-La Crosse. "Civil Discourse and Free Speech - Chancellor | UW-La Crosse," n.d. https://www.uwlax.edu/chancellor/civil-discourse-and-free-speech/#:~:text=The%20First%20Amendment%20and%20UWL,%2C%20peaceful%20counter%20protests%2C%20etc.%20Accessed%209%20May%202023
4 "Brandenburg v. Ohio." Oyez, www.oyez.org/cases/1968/492.
5 LII / Legal Information Institute. "Brandenburg Test," n.d. https://www.law.cornell.edu/wex/brandenburg_test.

produce, and likely to produce, imminent disorder."[6] Incitement, therefore, does not encompass words that simply have a "tendency to lead to violence."[7]

Fighting words, unlike incitement, do not have a pronounced legal basis founded in judicial precedent. The most recent Supreme Court case upholding the fighting words doctrine dates back to the 1942 *Chaplinsky v. New Hampshire* decision, where Chaplinsky, a Jehovah's Witness, made a religiously charged speech where he called a city marshal a "God damned racketeer," further proclaiming that "the whole government of Rochester are fascists or agents of fascists'."[8] Despite the court labeling Chaplinsky's speech as undeserving of First Amendment protection, decades of new precedent would diminish *Chaplinsky*'s merit within free speech jurisprudence. *Gooding v. Wilson*, *Rosenfield v. New Jersey*, *Lewis v. City of New Orleans*, and *Brown v. Oklahoma* all involved the use of charged profanity likely to provoke the speaker's audience, yet in each case the speaker's conviction was overturned. Additionally, *Texas v. Johnson*, the landmark Supreme Court case involving flag-burning as an expressive act, rejected the argument that such an action was an "invitation to exchange fisticuffs."[9] Newer precedent has created a lose-lose situation for institutions looking to enforce prohibitions on fighting words under *Chaplinsky*. The Supreme Court has held that laws punishing fighting words in general are constitutionally unenforceable due to overbreadth and vagueness; yet has also held that narrower laws targeting specific fighting words (such as those rooted in antisemitism) are illegitimate instances of a content-based speech restriction. While *Chaplinsky* has yet to be overturned, the fighting words doctrine is virtually unenforceable in a manner consistent with First Amendment jurisprudence.

A true threat is a statement or expressive act that is meant to intimidate an individual or group of individuals into believing that they will be seriously harmed by actions of the speaker. The Supreme Court's 2003 decision *Virginia v. Black* provides a comprehensive true threat analysis, outlining the distinctions between expressive activity and a true threat. In *Black*,
the Court sought to determine the constitutionality of a Virginia state statute criminalizing the act of burning a cross with the intent to intimidate. The statute provided that burning a cross is itself *prima facie* (on first impression of) evidence of an intent to intimidate. The case considered two instances of cross burnings: one at a KKK rally on private property, and another in front of the home of an African American man. The Court summarized the history of cross burning and offered a definition for true threats in this context. Justice O'Connor provides that:

> "True threats' encompass 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. See *Watts v. United States* ('political hyperbole' is not a true threat). The speaker need not actually intend to carry out the threat."[10]

The Court determined that the ban did not violate the First Amendment so long as the provision clearly burdened prosecutors with proving that an act of cross-burning was intended as a threat. But Virginia's *prima facie* provision made no effort to distinguish between expressive cross burnings and cross burnings that were intimidatory; offering no distinction between the act of burning a cross at a public rally - protected political speech - and burning a cross on a neighbor's lawn - an unprotected true threat. This case demonstrated that even the act of cross-burning, an egregious and hateful act rooted in a history of discrimination, must still be contextually evaluated. Applying this precedent to the university setting, speech can be unprotected and punishable if it causes a reasonable person (or in this case, reasonable *student*) to fear for their safety. The reasonable person standard, though often difficult to apply, prevents speech from being censored or punished simply because an "especially sensitive or fearful person claims to feel threatened by the expression of ideas [they do] not like."[11] In other words, this standard prevents a heckler's veto to speech that could subjectively be labeled threatening by a vocal minority.

The identification of obscene speech has been a difficult standard to uniformly classify. Despite its somewhat vague nature, the *Miller v. California* Supreme Court decision developed a set of guidelines to better

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6 LII / Legal Information Institute. "Brandenburg Test," n.d. https://www.law.cornell.edu/wex/brandenburg_test.
7 LII / Legal Information Institute. "Brandenburg Test," n.d. https://www.law.cornell.edu/wex/brandenburg_test.
8 Chemerinsky, Erwin, and Howard Gillman. Free Speech on Campus,
2018. https://lawcat.berkeley.edu/record/1128238.
9 Chemerinsky, Erwin, and Howard Gillman. Free Speech on Campus,
2018. https://lawcat.berkeley.edu/record/1128238.
10 "Virginia v. Black, 538 US 343 - Supreme Court 2003 - Google Scholar,"
n.d. https://scholar.google.com/scholar_case?case=2729037874515332053&q=virginia+v+black&hl=en&as_sdt=4,
60.
11 Chemerinsky, Erwin, and Howard Gillman. Free Speech on Campus,
2018. https://lawcat.berkeley.edu/record/1128238.

define what is legally obscene, and thus unprotected. In *Miller*, Californian publisher Marvin Miller was convicted of violating a state statute prohibiting the distribution of obscene material after running a mass mailing campaign to advertise adult content. Miller's campaign involved brochures containing graphic images from books and film that graphically depicted sexual activity between men and women. The Court found that obscene speech and/or expression is indeed unprotected but recognized that there are "inherent dangers [in] … regulat[ing] any form of expression."[12] To avoid the repercussions of providing state statutes with the ability to censor speech they could subjectively label obscene, the Court devised a strict test that must be satisfied for speech to be subject to state regulation as obscenity. The test asks: (1) "whether the average person, applying contemporary 'community standards,' would find that the work, taken as a whole, appeals to the prurient interest;" (2) "whether the work depicts or describes, in an offensive way, sexual conduct or excretory functions, as specifically defined by applicable state law;" and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[13]

Cohen v. California provides further insight into the distinction between obscenity and profanity. In *Cohen*, appellant Robert Cohen wore a jacket containing the words "F*ck the Draft" into a Los Angeles courthouse. Cohen was subsequently arrested and charged with a violation of the state breach-of-peace law prohibiting "offensive conduct," defined as "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace."[14] The Supreme Court's majority opinion written by Justice Harlan and joined by four concurring Justices reversed Cohen's conviction. Harlan reasoned that Cohen's profane expression could not be labeled obscene because it was not erotic and could not be considered fighting words because it was not directed explicitly at any particular individual. Harlan further noted that unwilling viewers such as women and children "could effectively avoid further bombardment of their sensibilities by averting their eyes."[15] Harlan concluded by stating that "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."[16] Profanity, in summation, does not meet the burdensome standard required for classifying speech or expression as obscene under the law.

Defamation is a tort (a wrongful act or infringement of a right leading to potential civil liability) defined as "false statements of fact that harm another's reputation."[17] Generally, defamation falls into two categories: libel and slander, where libel is written, and slander is spoken. Defamation lawsuits have an interesting relationship with the First Amendment in that the fear of a defamation suit can chill speech that would otherwise be constitutionally protected. Despite this, defamation cases are among the most failed suits brought to court due to the difficult burden that must be met by the plaintiff. The standard for defamation requires a plaintiff to show four things:

> "1) [A] false statement purporting to be fact [which cannot encompass an opinion]; 2) publication or communication of that statement to a third person; 3) fault amounting to at least negligence; and 4) damages, or some harm caused to the reputation of the person or entity who is the subject of the statement."[18]

There is also an important distinction between public and private figures in defamation lawsuits. In the landmark Supreme Court case *The New York Times Co. v. Sullivan* (1964), the court held that for a public official to succeed in a defamation suit, they must show that the false and defaming statements were made with "actual malice." The

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12 "Miller v. California, 413 US 15 - Supreme Court 1973 - Google Scholar," n.d. https://scholar.google.com/scholar_case?case=2871804421523136 59&q=miller+v+california&hl=en&as_sdt=4,60.

13 "Miller v. California, 413 US 15 - Supreme Court 1973 - Google Scholar," n.d. https://scholar.google.com/scholar_case?case=2871804421523136 59&q=miller+v+california&hl=en&as_sdt=4,60.

14 "Cohen v. California, 403 US 15 - Supreme Court 1971 - Google Scholar," n.d. https://scholar.google.com/scholar_case?case=7398433541275578772&q=cohen+v+california&hl=en&as_sdt=4,60.

15 "Cohen v. California, 403 US 15 - Supreme Court 1971 - Google Scholar," n.d. https://scholar.google.com/scholar_case?case=7398433541275578772&q=cohen+v+california&hl=en&as_sdt=4,60.

16 "Cohen v. California, 403 US 15 - Supreme Court 1971 - Google Scholar," n.d. https://scholar.google.com/scholar_case?case=7398433541275578772&q=cohen+v+california&hl=en&as_sdt=4,60.

17 The First Amendment Encyclopedia. "Defamation," n.d. https://www.mtsu.edu/first-amendment/article/1812/defamation.

18 LII / Legal Information Institute. "Defamation," n.d. https://www.law.cornell.edu/wex/defamation.

Court defined "actual malice" as a defamatory statement made "with knowledge that it was false or with reckless disregard of whether it was false or not."[19] Actual malice must also be proven by clear and convincing evidence, as opposed to the usual preponderance of evidence standard in civil cases. The Court further discussed the difference between private figures and public officials in *Gertz v. Robert Welch, Inc.* (1974), where Chicago lawyer Elmer Gertz was labeled a communist by a magazine for the recent murder conviction of a police officer, despite the fact that Gertz wasn't even involved with the case. Here, the Court noted two differences between public officials and private figures:

> "(1) [p]ublic officials and public figures have a greater access to the media in order to counter defamatory statements; and (2) [p]ublic officials and public figures to a certain extent seek out public acclaim and assume the risk of greater public scrutiny."[20]

Furthermore, the Court established that actual malice is not required for private individuals to recover compensatory damages, though is required for the recovery of punitive damages. Recently, Supreme Court Justices Clarence Thomas and Neil Gorsuch have voiced their concerns on this actual malice standard due to the amount of change in the media landscape since the *New York Times* decision in 1964. Though currently, the defamation standard remains incredibly difficult to prove.

The term harassment has, in the public purview, come to describe various types of unwelcome conduct, ranging from minor to severe. However, there is a notable distinction between this public understanding of harassment, and the legal standard for discriminatory harassment. As provided by *Davis v. Monroe County Board of Education*, discriminatory harassment must be conduct that is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[21] The American Bar Association (ABA) outlines three critical elements that must all be present in order to determine whether there is a violation of a harassment policy. These include:

> "Targeting of a protected class (gender, race, religion, etc.); Unwelcomeness of harassing behavior or verbal, written, and/or online conduct; *and* Deprivation of educational access, opportunities, rights, and/or peaceful enjoyment therefrom."[22]

While the first two elements are relatively easy to prove, the third element is often overlooked, despite its necessity in determining whether conduct is discriminatory harassment. As the ABA describes, "one instance of a comment, no matter how egregious or offensive" cannot be labeled discriminatory harassment.[23] Once this conduct escalates to a level of educational deprivation is when it loses protection, though this occurrence is rare.

These categories of unprotected speech are paramount in assessing and analyzing the rhetoric used in public discourse surrounding free speech. The public meaning behind some of these legal classifications of unprotected speech will be shown in this investigation to take on a different, less stringent definition at times. The 'double entendres' of legal terminology and public meaning (take for example 'obscenity') may lead to misconceptions about what protections the First Amendment and its jurisprudence actually provide. These misunderstandings can be manipulated in an attempt to justify unconstitutional suppression, censorship, and chilling of speech that would be otherwise protected

RESTRICTING SPEECH

Protected speech may still be limited by the government through the use of a proper time, place, or manner speech restriction (essentially and respectively: when, where, and how). The Supreme Court decision *Ward v. Rock Against Racism* clearly outlines a three-part-test that must be met for a time/place/manner speech restriction to survive under the First Amendment. So long as a regulation: (1) is content neutral; (2) is substantially related to

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19 LII / Legal Information Institute. "Defamation," n.d. https://www.law.cornell.edu/wex/defamation.
20 The First Amendment Encyclopedia. "Defamation," n.d. https://www.mtsu.edu/first-amendment/article/1812/defamation.
21 "The Intersection of Free Speech and Harassment Rules," n.d. https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/fall2011/the_intersection_of_free_speech_and_harassment_rules/.
22 "The Intersection of Free Speech and Harassment Rules," n.d. https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/fall2011/the_intersection_of_free_speech_and_harassment_rules/.
23 "The Intersection of Free Speech and Harassment Rules," n.d. https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/fall2011/the_intersection_of_free_speech_and_harassment_rules/.

serving an important government interest; and (3) leaves open ample alternative channels for communicating the speaker's message, the regulation is justifiable.[24]

Content neutrality is somewhat self-explanatory. Here, a government entity must show that its speech restriction had nothing to do with the subject matter, or content, of the speech in question. For example, a permissible content-neutral time/place/manner restriction could indicate that no flyers, under any circumstance, can be placed within 10-feet of a government institution's entrances. This regulation would lose its content neutrality – transforming it into a content-*based* restriction – if the restriction prohibited only flyers that contained political messages within 10-feet of the institution's entrance. While content-based restrictions are still permissible, they must survive *strict* scrutiny, which burdens the government with proving its law (or in this case, restriction) is *narrowly tailored* to serving a *compelling* governmental interest. This is far more difficult to justify comparative to the *intermediate* scrutiny standard for content-neutral time/place/manner restrictions, which requires the government to prove its law (or restriction) is *substantially related* to serving an *important* governmental interest. A type of restriction that can *never* be justified under any level of scrutiny are viewpoint-based speech restrictions. Returning to the flyer example, a viewpoint-based speech restriction would allow for flyers of all types – including those with political messages – within 10-feet of an institution's entrances but prohibit political flyers that take a certain position (or viewpoint) on an issue. For instance, a viewpoint-based restriction would allow for political flyers expressing pro-life viewpoints near the entrances but prohibit political flyers expressing pro-choice viewpoints.

A regulation that is substantially related to serving an important government interest, otherwise known as intermediate scrutiny, is satisfied under *Ward* so long as said interest would be "achieved less effectively absent the regulation."[25] Government entities will prevail more often than not on this prong so long as the restriction is not a categorical or substantial ban on a traditional medium of expression (e.g., an extensive and outright ban on parades or leafletting within a city).

Lastly, a speech restriction must leave open ample alternative channels for the communication of the speaker's message. In other words, a speech restriction must still provide a speaker with the means to communicate their message in a way that is both accessible, and in a way that does not substantially interfere with the intended message. Important considerations here relate to the speaker's intended audience, and the extent to which the location of the speech impacts its message. If a time/place/manner restriction imposes an undue burden on the ability of a speaker to voice their message, or if a speaker is relocated to a place where their message loses meaning, the restriction will fail on this prong. As an example, assume there is a group of students engaged in a picketing protest directly in front of an academic hall's doors, blocking other students from entering the building. A permissible time/place/manner restriction under this prong could move the protestors to some other location on campus that is still frequented by other students but does not limit access to the university's services. As another example, suppose a group of protestors are picketing for the removal of a Robert E. Lee statue in a city's central park. An impermissible time/place/manner restriction in this instance would move the protesters to a location far from the statue, likely interfering with their message to a substantial degree.

HATE SPEECH – A NECESSARY EVIL

The term 'hate speech' is stigmatized greatly by contemporary society. Though there is no official definition for hate speech under U.S. law, it has generally come to be known as a form of expression through which a speaker attempts to "demean on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground."[26] Nonetheless, hate speech *is* constitutionally protected speech. *Snyder v. Phelps*, and more recently, *Matal v. Tam* both affirmed this rule. This factual pattern within First Amendment jurisprudence is a difficult pill to swallow for many; and rightfully so. Why would we protect speech or expression that demeans or even vilifies individuals based on arbitrary classifications?

Returning to the categories of unprotected speech should help to answer this question; albeit in a way that may be unsatisfactory. Thematic to *every* category of unprotected speech is an onerous standard or test that must be satisfied. This is an intentionally high burden that has culminated in over 200 years of common law precedent. The

24 The First Amendment Encyclopedia. "Time, Place and Manner Restrictions," n.d. https://www.mtsu.edu/first-amendment/article/1023/time-place-and-manner-restrictions.
25 The First Amendment Encyclopedia. "Time, Place and Manner Restrictions," n.d. https://www.mtsu.edu/first-amendment/article/1023/time-place-and-manner-restrictions.
26 Wikipedia contributors. "Hate Speech in the United States." Wikipedia, May 9, 2023. https://en.wikipedia.org/wiki/Hate_speech_in_the_United_States.

necessary adherence to strict rules and tests when defining unprotected speech seeks to make restricting/censoring speech both objective and predictable. In theory, any reasonable member of any political alignment would be able to walk through the test for a given category of unprotected speech and determine whether or not certain speech is constitutional. Though true objectivity is not easily obtained, even within the court system, the current burdens on censorship and the protections provided to unpopular views are perhaps the best means of upholding the intentions of the founding fathers in an ever-changing society.

John Stuart Mill's theories of free expression and Supreme Court precedent has come to describe free speech as a "marketplace of ideas." This metaphor argues that truth will emerge from transparent and uncensored civil discourse in a reasonable society. Ideas, much like products, will be favored by the reasonable public according to their merit. Ideas that hold no value will still enter the supposed marketplace, but civil discourse will ultimately demonstrate their inferiority. Instead of the government stepping in to determine what should and shouldn't be said, the public is given the power to evaluate and judge the merit of any particular idea.

Perhaps this logic is still unreasonable to some. After all, some of these notions towards free speech date back to the 18th century, where slavery was commonplace, women's suffrage didn't exist, and ideas/information spread at a substantially slower rate. This is also an important consideration. But the fundamental doctrine of *stare decisis* – the concept that precedent should be honored within the court system – opens the door to some alarming outcomes should hate speech, or speech we deem offensive, become unconstitutional. As has been established, the contemporary understanding of hate speech leans more towards subjectivity as opposed to objectivity. With this in mind, consider the following hypothetical. A landmark Supreme Court case has just been decided addressing the issue of offensive/hateful speech. In a confoundingly unanimous decision, the Court holds that hate speech will no longer receive constitutional protection and can be subject to federal censorship. Many would celebrate. No longer would society be faced with the bigoted, sexist, and generally hateful messages that once plagued public discourse. No good deed goes unpunished, however. The U.S. political climate is inherently volatile. What once was the opinion of the majority may soon become that of the minority as differing political parties fluctuate in power. In time, there will be a new President, a new congressional body, and a new makeup to the Supreme Court. Perhaps this new political party has strong feelings against something you believe firmly in. Take for example the Black Lives Matter (BLM) movement and concept of white privilege. Perhaps these new legislators believe that attributing a white man's success to white privilege is an example of hate speech, or perhaps they view the BLM movement as a hateful organization which promotes racist sentiments. Though these perspectives substantially simplify the issue at hand, they would nonetheless become valid legal arguments now that there is established precedent indicating that hateful/offensive speech can be censored. In essence, the metaphorical door has been opened for this new political institution to legally censor a viewpoint they disagree with, contending that it is hateful and offensive.

Supreme Court Justice Anthony Kennedy summarizes this point well in the unanimous *Matal v. Tam* case. He provides that:

> "A law that can be directed at speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society."[27]

In summation, though we may not like the speech we view as hateful or offensive, the First Amendment and its jurisprudence indicates that these messages must nonetheless be given some venue so long as they do not surpass constitutional protections. Furthermore, to avoid opening the door to the dangerous world of government censorship, it is important to try and adhere to objectivity and civility in the evaluation of speech and expression.

CASE STUDY 1: THE SCHOOL OF EDUCATION CHALKING PROTEST

In April of 2022, School of Education (SOE) student tension with the UWL SOE as an institution peaked. SOE students had raised a variety of concerns relating to certain attributes and shortcomings of the institution, including (but not limited to): the required purchase of a $400 iPad, the $300 "educative" Teacher Performance Assessment (edTPA) portfolio, and required access to a personal automobile for attending field-teaching classes. The straw that broke the metaphorical camel's back, however, were the recent enrollment issues. In essence, there were not enough placement positions for all SOE students to enroll in field-teaching classes – a necessary prerequisite to graduating from the SOE at UWL. Without these classes, many students would be forced into either transferring or becoming 5-year students. Additionally, students would not be compensated for being held back.

27 "Matal v. Tam, 137 S. Ct. 1744 - Supreme Court 2017 - Google Scholar," n.d. https://scholar.google.com/scholar_case?case=14085180484211709676&q=matal+v+tam&hl=en&as_sdt=4,60.

Outraged, many SOE students devised a mass-chalking protest on campus sidewalks. The protest ensued, and many students would chalk some rather profane messages that expressed frustration with the SOE and its Dean – Dr. Marcie Wycoff-Horn.

The timing for this protest was exceptionally unfortunate for UWL. April is a month where many interested high school students visit the campus for a facilities tour, and it would likely reflect poorly on the school as a reputable institution if prospective students saw messages on the sidewalks such as "fire the SOE dean" or "the SOE steals your money."[28]

Despite its commitment towards encouraging the free flow of ideas, UWL chose to wash away many of the student's messages.[29] On April 29th, 2022, Chancellor Gow sent students and faculty a mass email detailing what was perceivably the universities official response to the protest, as evinced by the use of "[h]ere at UWL" and "the university." Notably, the email indirectly approaches the issue at hand, referring to the SOE chalking protest simply as a "wide range of messages" that the "campus community" has "raised concerns" of.[30] This lack of context seems intentional. Without background knowledge of the SOE chalking protests and the types of messages expressed therein, the email's later classifications of speech that is "not allowed" seem far more reasonable. Regarding chalking on campus, the email provides that "chalk messages, including those expressing dissenting views, are allowed. However, obscene, lewd or profane words, or messages that target individuals are not allowed."[31] Furthermore, the email justifies the erasure of certain messages by stating that "there were messages that targeted individual employees, and the university chose to remove those messages."[32] Generally speaking, two of the four types of speech mentioned here could indeed qualify as unprotected speech potentially subject to limitation; those being obscene speech and messages that target individuals. Nowhere within any binding precedent are "lewd or profane words" considered unprotected forms of speech. In fact, *Cohen* expressly provides the opposite, so these arbitrary descriptors will not be considered to have legal merit.

The identification of obscene speech should borrow directly from the aforementioned discussion of unprotected speech classifications, yet this email's loose (if not absent) definition doesn't seem to correlate well with the legal standard. Despite a distinct lack of a comprehensive record from UWL detailing exactly which messages were erased and why, pictures taken by students, faculty, and journalists archived in the UWL ARC seem to produce a satisfactory enough sample of the types of messages that were removed, none of which satisfy the Miller test for obscenity. Walking through this test, it would first be difficult to argue that these messages, when considered by the average person applying contemporary community standards, would, taken as a whole, apply to the prurient interest. Black's Law Dictionary defines "prurient interest" as a term "used for a morbid interest in sex, nudity and obscene or pornographic matters."[33] While many of the chalk messages contained the word "fuck," it would be a worrying leap in logic to simply classify this word as applying to the prurient interest, as noted by Justice Harlan in *Cohen*. Even messages such as "[h]ey SOE: at least take me out to dinner before you fuck me"[34] lacks a "morbid interest" in sex; using "fuck me" hyperbolically to demonstrate the speaker's irritation with the situation the SOE had put them or their colleagues in, likely not acting as an invitation for the SOE as a whole to be sexually involved with the speaker after a nice dinner. Second, none of the archived messages seem to depict or describe sexual or excretory functions in an offensive way. Once again, these messages protested the SOE's difficulty in finding field placement classes (along with numerous other things) while occasionally using swear words and criticizing particular faculty members. Archived evidence does not depict sexually explicit material in an offensive way. Lastly, even if these messages indeed applied to the prurient interest and depicted sexual functions in an offensive way, the messages still contained political value. These messages protested the SOE at UWL, a public

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28 "UWL: General – Sidewalk Chalking – School of Education (SOE) students – Protest – Spring 2022" folder, University of Wisconsin-La Crosse Murphy Library Special Collections/Area Research Center, La Crosse, Wisconsin

29 "UWL: General – Sidewalk Chalking – School of Education (SOE) students – Protest – Spring 2022" folder, University of Wisconsin-La Crosse Murphy Library Special Collections/Area Research Center, La Crosse, Wisconsin

30 Gow, Joe. "Campus Chalking." Email to UWL Students and Faculty. 4/29/2022, 1:28 p.m.

31 Gow, Joe. "Campus Chalking." Email to UWL Students and Faculty. 4/29/2022, 1:28 p.m.

32 Gow, Joe. "Campus Chalking." Email to UWL Students and Faculty. 4/29/2022, 1:28 p.m.

33 Staff, Tld. "PRURIENT INTEREST." The Law Dictionary, May 31, 2013. https://thelawdictionary.org/prurient-interest/.

34 "UWL: General – Sidewalk Chalking – School of Education (SOE) students – Protest – Spring 2022" folder, University of Wisconsin-La Crosse Murphy Library Special Collections/Area Research Center, La Crosse, Wisconsin

institution which receives financial aid from the government. Criticizing its actions as a government entity would thus be a textbook example of political speech. Alarmingly, the ability to censor political speech is precisely what the First Amendment seeks to prevent, yet here, the politically charged student protest had its messages erased for violating some unknown and unspecified criteria.

Thematic to the discussion of political speech is the Chancellor's discussion of messages that target individuals: the supposed impetus for the erasures. The use of "targeting," and the discussion of public v. private figures seems to imply a defamation argument. But once again there seems to be a disconnect between this classification of defamation and the actual legal standard. The email provides:

> "As your chancellor, I have the unique privilege of being seen and treated as a 'public figure.' It is one of the best aspects of my role at our university because it enables me to encourage students to use their voices and share their concerns with me. Consequently, I have no objections whatsoever to seeing my named chalked on our campus sidewalks. But our university employees should be seen and treated as private figures. And as such, chalking and other forms of speech targeting specific employees are not permitted."[35]

There are two problems with this argument. First, Chancellor Gow is not the only public figure on campus. The initial SOE protests were directed at either the SOE wholistically, or at SOE Dean of students Marcie Wycoff-Horn. As the Dean of Students at a public institution, Dr. Wycoff-Horn is indeed a public figure, and is therefore open to such criticism. No recorded messages seem to be directed at individual professors or other faculty (in fact, many messages seem to actually support and accommodate the SOE professors). Second, the SOE protests would not satisfy the legal test for defamation due to the fact that the *opinions* expressed by students via chalking were not false statements purporting to be fact. The act of chalking is almost always a form of expression viewed as an opinion, thus disqualifying it as defamatory.

In summation, the email incorrectly ascribes classifications of unprotected speech to a protest that should have received full First Amendment protection, attempting to justify a viewpoint-based speech discrimination.

Student response to this email was pronounced, and some students took note of the legal inconsistencies within it. On April 29th, the very same day as the email's release, an Instagram account titled "uwledmajors" – a "coalition of Education majors at UWL seeking justice and equity within the School of Education" – made a post discussing the situation. They stated that "this group of student activists does not agree with the opinion of the email sent out today."[36] Furthermore, they state:

> "We believe that the Dean of [the] SOE, Marcie Wycoff-Horn, is a public figure that can be subject to criticism, as she is in a head position at a public institution. Because we pay the salaries of these individuals, we feel it is our right to call attention to their station and decisions using their name and title. The First Amendment protects all speech other than violent speech or threats that may incite violence, and it is already very difficult to prove what violent speech even is. That said, we believe that any erasure of chalk on the UWL campus is a violation of our 1st Amendment right to free speech."[37]

The post then goes on to describe the Miller test for obscenity and concludes by providing that:

> "[Our] chalk falls under none of these categories. The words chalked did not include violence, depict anything sexually offensive, and we believe it contains serious political value. Therefore, it should not have been removed."[38]

Though the discussion of unprotected speech as it relates to violence misses a few details, the core issues at hand – defamation and obscenity – are well defined and consistent with legal standards. In the following days, SOE students engaged in further chalking protests, now discussing not only issues pertaining to the SOE, but also matters relating to free speech at UWL.

Six days later, on May 5th, 2022, Chancellor Gow provided students and faculty with a follow-up email, stating that:

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35 Gow, Joe. "Campus Chalking." Email to UWL Students and Faculty. 4/29/2022, 1:28 p.m.

36 "UWL: General – Sidewalk Chalking – School of Education (SOE) students – Protest – Spring 2022" folder, @uwledmajors Instagram page, April 29th, 2022, University of Wisconsin-La Crosse Murphy Library Special Collections/Area Research Center, La Crosse, Wisconsin

37 "UWL: General – Sidewalk Chalking – School of Education (SOE) students – Protest – Spring 2022" folder, @uwledmajors Instagram page, April 29th, 2022, University of Wisconsin-La Crosse Murphy Library Special Collections/Area Research Center, La Crosse, Wisconsin

38 "UWL: General – Sidewalk Chalking – School of Education (SOE) students – Protest – Spring 2022" folder, @uwledmajors Instagram page, April 29th, 2022, University of Wisconsin-La Crosse Murphy Library Special Collections/Area Research Center, La Crosse, Wisconsin

> "I have determined it is best for the UWL administration not to attempt to delete profanity from messages chalked on our sidewalks. Consequently, until we have a formal UWL chalking policy in place we will not attempt to delete profanity from messages chalked on our sidewalks."[39]

This email essentially retracted statements made prior to, promising to no longer remove "profane" messages without the guidance of an updated chalking policy. It noticeably forgoes any reference to messages that target individuals and obscenity. Gow concludes the email by stating that the formulation of this updated policy would facilitate robust discussion between students and faculty, reaching completion sometime in the fall of 2022. Despite these estimates, there would be no updated UWL chalking policy published that fall, leaving open the possibility for another incident relating to sidewalk chalk.

CASE STUDY 2: UWL REPUBLICANS CHALKING INCIDENT

On Tuesday, October 11th at 6:00 p.m., members of the University of Wisconsin-La Crosse College Republicans gathered at Hoeschler Clocktower to chalk the campus sidewalks after an email from their organization prompted them to "write about issues that are important [to them]."[40] Members at this gathering proceeded to chalk four controversial messages with antisemitic and racist themes. Members posted pictures of the messages to their twitter account afterwards. These messages include: "Kanye is right Def-Con III;" "Where's our straight/cis night?" "If gun control worked, explain Chicago;" and "RIP Gwen Casten. Cause of death: cardiac arrhythmia OR vaccine injury?".[41] While three of these messages certainly relate to controversial issues, one message in particular stood out to the campus community: "Kanye is right Def-Con III." This message references a tweet made by American rapper and songwriter Kanye West, where he stated that "I'm a bit sleepy tonight but when I wake up I'm going death con 3 On JEWISH PEOPLE." Though the exact intention of this message is not apparent due to its incorrect use of national security threat levels, West's statements at the very least advocated for the mistreatment of Jewish people and were promptly deleted.

39 Gow, Joe. "UWL Chalking Update" Email to UWL Students and Faculty. 5/5/2022, 11:35 a.m.
40 Hose, Morgan. "The UWL College Republican's Chair Resigns over Chalking Backlash." The Racquet Press, n.d. https://theracquet.org/13003/news/the-uwl-college-republicans-president-resigns-over-chalking-backlash/.
41 Hose, Morgan. "The UWL College Republican's Chair Resigns over Chalking Backlash." The Racquet Press, n.d. https://theracquet.org/13003/news/the-uwl-college-republicans-president-resigns-over-chalking-backlash/.

Figure 1. A collection of the four photographs used by the Racquet Press in their article on the issue

Amidst heated debate and widespread media coverage, Chancellor Gow would send another mass-email to students and faculty two days later. The email, titled "Civil Discourse at UWL," gave its recipients a markedly different response comparative to the previously discussed SOE chalking email. Instead of electing to remove these messages, the school resorted to its policy statements regarding the importance of First Amendment expression on campus. The email provides:

> "It is UWL policy to provide all members of the campus community the broadest possible latitude to speak, write, listen, challenge and learn. However, UWL's leadership team and I are deeply disappointed to see students abandoning civil discourse and engaging in speech that promotes hate, is threatening, or that alludes to violence."[42]

The email condemns the chalking but does so in a way that is *mostly* consistent with the First Amendment, an improvement compared to the last response. There is only one minor problem here, though not one that would violate a constitutional right. The email's rhetoric seems to detail the chalking incident using descriptors that could potentially be misconstrued. While the UWL Republicans' messages were certainly disrespectful, hateful, and scientifically/statistically inaccurate, it may be overreaching to describe them as threatening or alluding to violence. Stating that "Kanye is right" and calling for a "Def-Con III" is likely political hyperbole, an exaggerated albeit protected category of speech. Even if this message advocates for violence against Jewish people, as was perhaps West's intent in the original tweet, it does not rise to the level of incitement nor does it meet the standard for true threats as previously discussed. Yet using the descriptors "threatening" and "allud[ing] to violence," which closely resemble true threats and incitement, could potentially give those with less knowledge of the First Amendment the wrong idea. Aside from this minor detail, the school handled the situation in a manner consistent with First Amendment jurisprudence. UWL criticized but did not erase the messages, calling instead for civil discourse in the future while encouraging other students to express their own views as an act of counter-speech.

In this instance, however, it would be some members of the student body, and even political figures, who would retaliate against the chalked messages using rhetorical approaches to the First Amendment not entirely founded in legal standards. Following the incident, the UWL College Democrats twitter account made a post stating:

42 Gow, Joe. "Civil Discourse at UWL." Email to UWL Students and Faculty. 10/13/2022, 2:30 p.m.

> "The chalkings on campus reflect hateful, antisemitic, racist messaging that is dangerous and harmful to our community. Unfortunately, the leaders of the Republican Party in Wisconsin encourage this type of rhetoric, and now are bringing this fear to our campus … [O]ffensive speech should not be tolerated, and we are very concerned with the recent events at UWL."[43]

Political figures from Wisconsin would also opine on the issue. Wisconsin State Senator Brad Pfaff tweeted:

> "Racism and antisemitism have no place on our campuses, state, or country. It's a sad indictment on our current state of politics that this is somehow not surprising and that this rhetoric has become all too common in our discourse."[44]

Additionally, Wisconsin State Representative Francesca Hong would make a post, stating:

> "Inciting violence and threatening vulnerable students is f[*]cking cowardly. No one should be subject to hateful, racist or antisemitic threats on campus. UWL college Republicans must be held accountable for celebrating and encouraging violence. I urge @UWLaCrosse to act swiftly."[45]

Concurrently, many students proceeded to voice their concerns over the issue both on and off campus - calling for censorship of the messages and punishment for the speakers. Thematic to these reactions was the idea that offensive or hateful speech should not be tolerated in a campus setting. These concerns are easily justifiable; emotional injury can lead to serious consequences. However, as discussed previously, imposing liability for purely emotional distress would be difficult if not impossible to achieve without also permitting restrictions on the free flow of expression, ideas, and views as protected by the First Amendment.

Nonetheless, the rhetoric used in these arguments misrepresents the First Amendment (either intentionally or inadvertently) in an attempt to justify censorship. Much like in UWL's email, unprotected categories of speech are used to discuss an expressive act that would otherwise be protected. Here, however, the misclassifications of unprotected speech are not merely potentially misguided descriptors. They are used as definitions in an argument against the legality of supposedly protected but unpopular expressive activity. Though there is no constitutional violation in voicing an opinion which misclassifies protected speech, it is a potentially dangerous sentiment to foster in an audience that may be unfamiliar with the specificities and nuances of the issue at hand.

In a rather untimely fashion, UWL and the JCFSP would celebrate national 'Free Speech Week' only one week after the UWL Republicans chalked their messages, which certainly seemed inopportune to many. Nonetheless, while the incident created some newfound feelings of UWL being an unsafe and unwelcome campus, the vocal concerns seemed to eventually subside after no further controversy ensued. Yet despite this second controversy relating to chalking on campus, UWL administration still had not implemented its updated chalking policy. Though speculative, it is entirely possible, if not likely, that another similar incident will occur without a more workable policy in the near future; especially considering the inevitable 2024 presidential election, which is slated to be a rather controversial one.

THE UWL CHALKING POLICY AND FREE SPEECH PANEL

Chancellor Gow's emails discussing the SOE chalking protest mentioned twice the introduction of an updated chalking policy that would elucidate "the role of chalk messages on campus and the university's response and upkeep of [its] grounds."[46] The formulation of this updated policy would involve "robust discussions," reaching completion "likely in the fall [of 2022]."[47] Archival evidence from the emails of UWL public historian Ariel Beaujot to UWL administration reinforce the existence of this estimated deadline. In response to an inquiry from Beaujot about the SOE protests and chalking policy in the spring of 2022, UWL administration responded by stating that:

43 "UWL: General – Sidewalk Chalking – College Republicans – Anti-Semitism Controversy – fall 2022" folder, October 11th, 2022, University of Wisconsin-La Crosse Murphy Library Special Collections/Area Research Center, La Crosse, Wisconsin

44 "UWL: General – Sidewalk Chalking – College Republicans – Anti-Semitism Controversy – fall 2022" folder, October 11th, 2022, University of Wisconsin-La Crosse Murphy Library Special Collections/Area Research Center, La Crosse, Wisconsin

45 Hose, Morgan. "The UWL College Republican's Chair Resigns over Chalking Backlash." The Racquet Press, n.d. https://theracquet.org/13003/news/the-uwl-college-republicans-president-resigns-over-chalking-backlash/.

46 Gow, Joe. "Campus Chalking." Email to UWL Students and Faculty. 4/29/2022, 1:28 p.m.

47 Gow, Joe. "UWL Chalking Update" Email to UWL Students and Faculty. 5/5/2022, 11:35 a.m.

> "[T]he chalking policy will be release[d] to faculty senate in the fall. It is currently being reviewed by the UW System Legal. It is modeled after UW Madison's policy and a few other institutions" [11].[48]

Yet during the UWL Republican chalking incident that fall, there was no reference made to this updated chalking policy. Instead, Chancellor Gow's "Civil Discourse at UWL" email referred students and faculty to the UWL discourse and free speech policy on the UWL website, which does not address chalking on campus. Additionally, faculty senate member Laura Godden does not recall UWL administration moving to make any updates collaborating with the faculty senate to the existing chalking policy.

In an attempt to learn more about the missing policy, I attended the UWL Free Speech and Campus Discourse panel on Tuesday April 4th, 2023. The panel was composed of some JCFSP members, including Chancellor Gow, and Anti-Defamation League (ADL) Associate Director Dr. Lara Trubowitz. The panel was hosted in celebration of social justice week at UWL, and its advertisements indicated that it would:

> "[D]iscuss free speech policies at UWL as it pertains to student and academic environments … [and] consider perspectives from academics, practitioners, and administrators as it relates to the [F]irst [A]mendment as well as thoughts on how UWL can support free speech."

48 "UWL: General – Sidewalk Chalking – School of Education (SOE) students – Protest – Spring 2022" folder, Email from Ariel Beaujot to UWL Administration, University of Wisconsin-La Crosse Murphy Library Special Collections/Area Research Center, La Crosse, Wisconsin

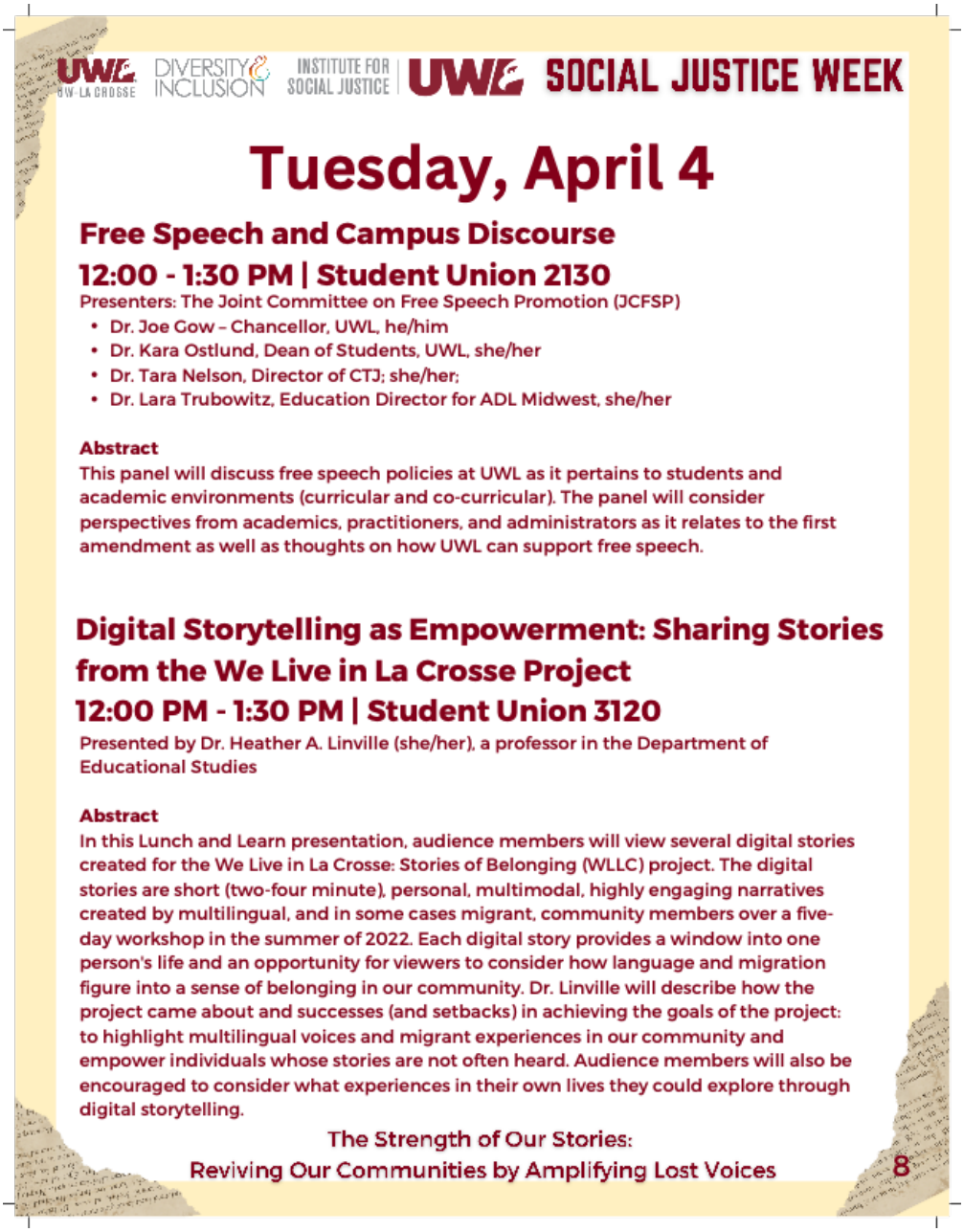


Figure 2. The digital copy of the advertisement used for the UWL Free Speech and Campus Discourse Panel

The panel would go from 12:00 p.m. to 1:30 p.m., with a 1-hour discussion of free speech and the First Amendment at UWL, and what would supposedly be a 30-minute conclusory segment dedicated to audience questions for the panel.

The panel would go on to discuss a variety of pressing issues relating to free speech at UWL, including (but not limited to): academic speech, hate speech, when speech becomes dangerous, and what UWL does to ensure First Amendment rights to students while also creating a welcoming learning environment. The panel noted that the pursuit of knowledge through free and open discourse can often be uncomfortable, and that students should be made well aware of their First Amendment rights if knowledge is to be gained through civil discourse. In pursuit of fostering a better understanding of the First Amendment within the campus community, the panel mentioned UWL's partnership with the ADL, and incoming freshman introductory material concerning free speech at UWL.

Thematic to many of these discussions was the importance of institutional transparency. If students were given a better understanding of their First Amendment rights, and if university administration could promote speech

policies that felt "real" to students and faculty, then perhaps there would be less confusion and controversy surrounding the First Amendment at UWL and on campuses throughout the nation. This notion of institutional transparency was an excellent point; yet ironically, institutional transparency was not a characteristic shared by some other components of this panel. Throughout the panel's duration, there was no discussion of chalking, the SOE chalking protest, or the UWL Republican chalking incident, nor was there any mention of the updated chalking policy. Worse yet, the panel ended prematurely at 1:00 p.m., leaving no time for the audience to ask members of the panel their own questions - which would have likely raised the topic of chalking at UWL. Though the panel's abrupt conclusion was attributable to scheduling concerns from one of the JCFSP members, the lack of direct availability for interaction between panel and audience does not exactly scream institutional transparency.

Further research indicated that UWL administration had indeed formulated an updated chalking policy but had only brought it to the UWL Student Senate, and evidently it had not been published thereafter. To gather more information about the policy, and to generally understand further the relationship between UWL students, administration, and the First Amendment, I interviewed College of Arts, Social Sciences, and Humanities (CASSH) Student Senator Morgan. Hose confirmed that UWL administration had gone to the senate with a chalking policy in a very unofficial capacity seeking feedback and opinions from the senators in the fall. The senators were told that the particularities surrounding the policy were to be kept confidential for the time being. This was due to the fact that the policy was a "very rough draft." Hose reasoned that this proposal was kept widely undisclosed to avoid any controversy relating to a policy that wasn't even finished. The draft was similar to the UW Madison chalking policy and sought to establish some very baseline parameters should another chalking incident take place. Nonetheless, there has been no further apparent action taken by UWL to implement this chalking policy.

Moving away from the policy, I then asked Hose a few questions about her general experience with issues of free speech at UWL. She mentioned that most of the student senate's involvement with First Amendment issues revolved around the SOE and UWL Republican chalking incidents. While there was concern expressed by SOE students relating to the erasure of their messages to the senate, the outrage was more or less contained to those in the SOE. On the other hand, Hose informed me that there was much more pronounced controversy surrounding the UWL Republican chalking incident. Students and student senators alike had voiced concerns over this incident, and there was a spike in hate and bias report form submissions on the UWL website. At issue here was not a discussion of First Amendment protections, but rather feelings of safety and security on campus. Some students had apparently argued that the UWL Republicans' messages constituted a hate crime, that the messages should be removed, and that the students responsible should be reprimanded. While the level of student outrage associated with each respective chalking incident is understandable, it is nonetheless interesting to see students express less concern over unconstitutional censorship, and more concern over one instance of antisemitic hate speech. Though these topics are not always easy to discuss, Hose recounted that it was very interesting for the student senate to navigate through these issues, discussing whether morality or legality should be prioritized in a campus environment.

Lastly, I asked Hose about whether or not she thinks that students outside of the political science and public administration areas of study have a generalized knowledge of their First Amendment rights, to which she responded with an unfortunate no. Despite the fact that high schools in Wisconsin require graduates to have completed a civics test, most students at UWL are not academically exposed to their constitutional rights unless they themselves pursue that knowledge. Moreover, some students may think that learning about their rights as a U.S. citizen has no pertinence to their career and is thus a waste of time. Hose concluded by stating that she hopes to be able to look back at UWL in five years and see more institutional priority given towards educating students about their constitutional rights, be it through mandatory Gen Ed political science classes, or some other means.

UNIVERSITY OF WISCONSIN (UW) SYSTEM FREE SPEECH SURVEY:

Pursuant to better understanding the generalized student knowledge of First Amendment rights as discussed in the interview, it is worth considering the recently published UW System Free Speech Survey of 2023. The study involved surveying an average of 500-600 students from 13 different campuses in the UW system, including UWL. While it is important to note that these survey responses do not reflect the sum of UW student values towards free speech, there are still some interesting data points that deserve discussion.

One data point, addressing student attitudes towards diverse viewpoints, showed that students are unlikely to consider viewpoints they disagree with, especially when more controversial issues such as climate change and abortion are in contention.

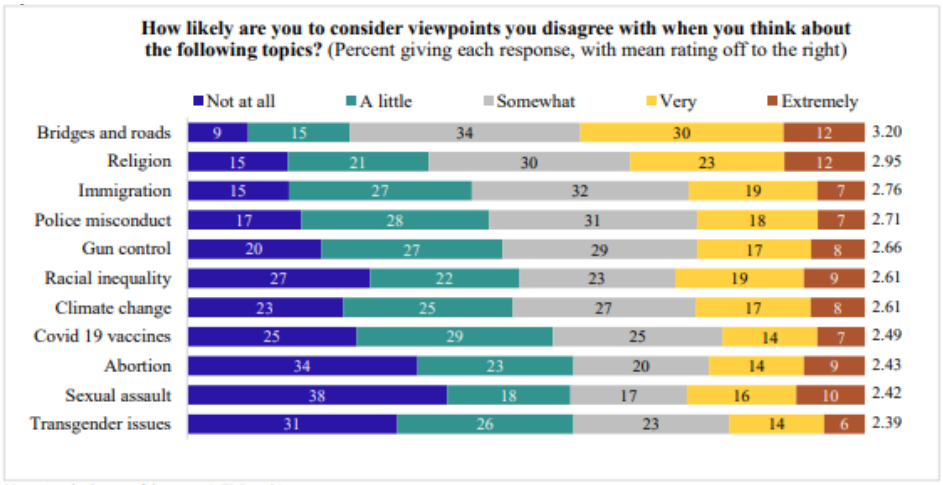


Figure 3. A figure from the UW System Free Speech Survey detailing the consideration of alternative viewpoints

Another data point, addressing offensive speech, showed that roughly 30% of students feel that offensive views can be seen as an act of violence towards vulnerable people.

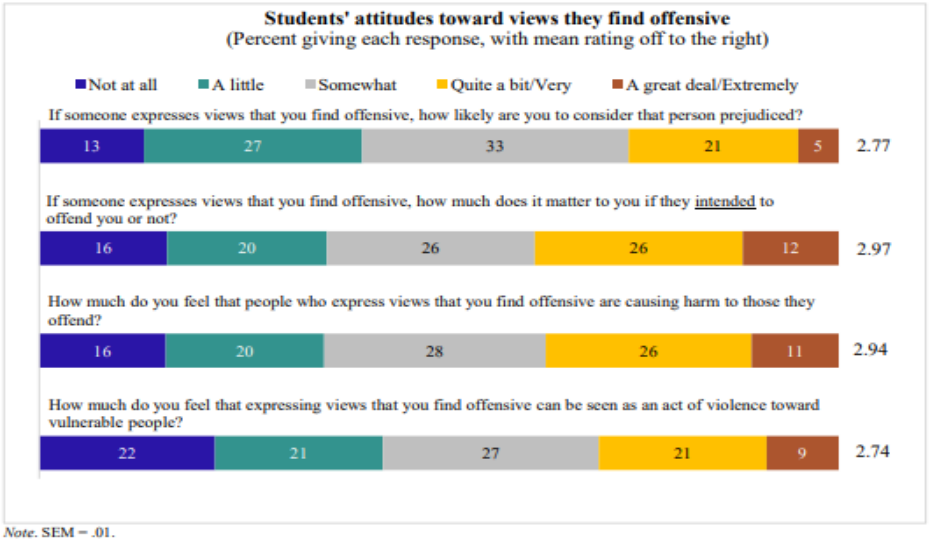
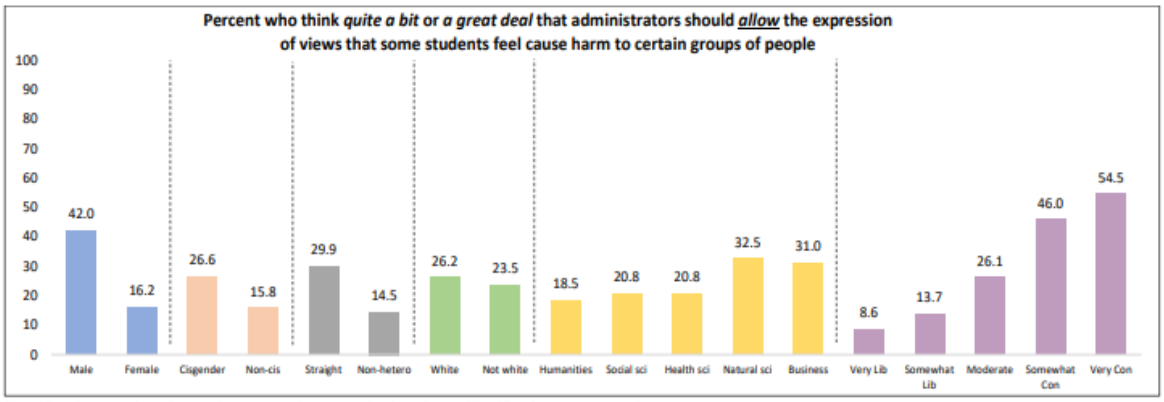


Figure 4. A figure from the UW System Free Speech Survey detailing students' attitudes towards views they deem offensive

Many students would also contend that university administrators should not allow the expression of views they feel could cause harm, with 22.1% of respondents from UWL answering "quite a bit" or "a great deal" to the question "to what degree should administrators allow the expression of views you feel cause harm."



Note. Non-cis = non-cisgender; non-hetero = non-heterosexual; sci = sciences; lib = liberal; con = conservative.

Figure 5. A figure from the UW System Free Speech Survey detailing participant opinions on what the limits to administrative censorship should be

Lastly, but perhaps most interestingly, the Survey asked participants a variety of quiz-like questions in an attempt to gauge the generalized knowledge that respondents possess concerning First Amendment issues. The most polarizing questions here concerned hate speech, which entities are bound by the First Amendment (with many students assuming private entities, such as Tik Tok, must follow the same regulations as a government entity), and student-on-student speech.

	Yes, this violates the student's rights	No, this does *not* violate the student's rights	Not sure
The residence hall director removes a political sign from a wall inside a student's dorm room	**78.1**	9.2	12.8
TikTok suspends a student's account because the student posted an anti-vaxx video	53.7	**28.4**	17.8
A university policy bans student protestors from blocking access to buildings on campus	16.5	**67.0**	16.5
Campus housing limits which movies students can watch in the privacy of their dorm room	**86.8**	5.1	8.1
A student's private employer says the student cannot hand out flyers about their campus organization at work	19.8	**58.4**	21.8

	Yes, this behavior is protected	No, this behavior is *not* protected	Not sure
A student distributes pro-hate group leaflets on a street corner near the campus	**36.6**	41.4	21.9
A student threatens another student with physical violence	4.0	**89.1**	6.9
An instructor criticizes an elected official on their personal Twitter account	**74.8**	10.9	14.3
A group of students tells another student in a face-to-face interaction that their views are not welcome on campus	**34.7**	40.6	24.7
A student accuses a university administrator of taking bribes on Instagram when the student knows the accusation is false	8.5	**72.4**	19.2
A group of students tells another student over social media that persons of their race or ethnicity are not welcome on campus	**15.1**	66.2	18.7

	Yes	No	Not sure
Does the First Amendment allow your university to ban hate speech on campus?	32.4	**26.4**	41.5
Does the First Amendment allow your university to ban threats, intimidation, or harassment on campus?	**75.0**	5.7	19.3

Figure 6. A table from the UW System Free Speech Survey highlighting questions asked to students pertaining to generalized First Amendment knowledge

Assuming some level of statistical accuracy, these data points support Hose's inference that a noteworthy percentage of students lack a generalized understanding of their First Amendment rights, and what speech those rights allow for or restrict. This potential knowledge gap, however, does not exactly stop speakers from engaging in discourse about free speech, nor does it alter the rhetoric used therein. For instance, whether or not a speaker knows that hate speech is protected does not necessarily stop them from making a logically sound and persuasive moral argument against its toleration. This is due to the aforementioned separation in legality and morality, which allows for speakers to make two entirely different yet equally valid arguments - one rooted in legal standards and the other in moral and ethical expectations - when debating the same issue: free speech rights on college campuses.

CONCLUSIONS: CIVIL DISCOURSE AND THE BURDEN OF TRUTH

These two case studies, the subsequent investigation relating to the UWL chalking policy, and the UW System Free Speech Survey all posit a superfluity of implications pertaining to the relationship between the First Amendment and rhetoric. Broadly speaking, it seems to be the case that for many, the First Amendment is an essential and fundamental right *until* they encounter a viewpoint that they overtly disagree with or disprove of. Thereafter, the protections afforded to speech lose their meaning, and the unfavorable message must be suppressed rather than deliberated upon; an understanding of free speech that is antithetical to the protections the First Amendment guarantees.

Take for instance the administrative actions of UWL as a university. UWL's ongoing dedication to and support of First Amendment rights on campus was perceivably unwavering until the university was faced with speech that negatively impacted its image during the SOE chalking protest. Their response to the reputationally detrimental expression of SOE students was a viewpoint-based speech restriction, perhaps the most proscribed action an institution can take under First Amendment jurisprudence. Whether or not the true intention behind the censorship was simply a spontaneously misguided or misinformed decision, or a deliberately manipulative rhetorical exploitation of First Amendment doctrines, is unclear. Regardless, attempting to answer that question now, with the limited information surrounding the issue, would be irresponsible. Though perhaps the intention behind this censorship is unimportant. What *can* be reasonably ascertained from these two case studies is that there was likely either some level of misunderstanding regarding the First Amendment on an institutionally administrative level at UWL, or said administration approached the First Amendment using rhetorically manipulative argumentation in furtherance of its own goals; an approach that is widely employed by speakers despite its incompatibility with First Amendment protections.

In UWL's defense, First Amendment jurisprudence is extensive; encompassing centuries of common law precedent. When spontaneously faced with a pressing constitutional question that must be answered promptly in accordance with this precedent, it may be difficult for those without years of experience to issue the correct response. However, First Amendment doctrines, though plentiful, are also clearly established. A search for 'legal obscenity' or 'true threats' will provide those interested with a comprehensive list of case law pertaining to these types of unprotected speech. Moreover, institutions should, in theory, have the resources necessary to make administrative and policy making decisions that are consistent with and founded in the law.

This idea raises the question, where should the burden of truth in rhetoric as applied to the law lie? Should institutions be solely responsible for providing citizens (or in this case, students) with information that is entirely and objectively legally accurate? Or should citizens (or students) take on some level of responsibility in being knowledgeable of constitutional protections and governmental procedures? Though it would certainly be easiest to answer this question by simply saying "both," this outcome would be more than difficult to effectuate. And while it would definitely be effortless to burden governmental institutions entirely with being rhetorically objective and legally correct, this conclusion may also be a facile one. Despite the fact that we are a democracy (or technically, a constitutional republic), citizens do not exactly have inherent control over the actions of institutions and politicians. Perhaps, then, it is more realistic for citizens (and students) to take into their own hands this burden of constitutional knowledge. Yet even this answer would be difficult to realize. After all, only ¼ of American citizens are able to correctly name the three branches of the U.S. government. Regardless, though many may not want to develop an understanding of their constitutional rights, it is likely the most realistic way of holding institutions accountable for their actions and engaging in the democratic process that the U.S. was built upon.

Adjacent to building knowledge of constitutional protections and free speech is determining what protections the First Amendment provides. Aside from the aforementioned categories of unprotected speech, the First Amendment guarantees the right for any and all speakers to express themselves in a meaningful way regardless of the viewpoint they take. What it does *not* guarantee is that speakers have a right to express their views however they may please. Through the designation of speech forums, and the use of time/place/manner restrictions,

institutions are indeed able to alter the when, where, and how of expressive activity. While these methods of restricting speech can certainly be manipulated to disparage the expression of some speakers, they also can be used to foster the civil discourse the marketplace of ideas metaphor is built upon. Though this metaphor is certainly an important one according to First Amendment jurisprudence, it requires a necessary assumption that deserves reconsideration in the modern context. The metaphor assumes that its marketplace is a reasonable one. If those within the supposed marketplace are all willing to abandon a firmly held belief after being faced with evidence that irrefutably contradicts it, then the pursuit of truth the marketplace seeks to encourage functions properly. Yet unprecedented advancements in technology in the years since the metaphors' inception have fabricated an environment where reasonableness is not always abundant. Many speakers in modern society are faced with a plethora of information that has been algorithmically tailored to their liking; the exposure to uncomfortable or contrary ideas can be all but avoided in some circumstances. In other words, the systematic creation of online 'echo chambers' has done a great disservice to the requisite reasonableness of the marketplace of ideas metaphor. Why engage in civil discourse about arguments that challenge a firmly held belief when you can simply retreat to a setting where you are always right? Though First Amendment protections do not extend to most interactions over social media, or online in general, there is still much to be learned from the environments that these platforms have manufactured.

In a way, chalking as an expressive activity is akin to making a tweet, or posting something on Facebook. It is speech that can be expressed and promptly abandoned without repercussion or engagement. Though social media and chalking both provide others with a medium to converse or deliberate with the original speaker: through comments or other chalk, these are indirect responses that can simply be removed or ignored. Using time/place/manner speech restrictions, governmental institutions should promote speech in a manner that subjects speakers to accountability for their message. Under the notion of civil discourse, a speaker wishing to simply inflict emotional distress should not be given the opportunity to simply chalk something offensive and walk away. Instead, the speaker should be encouraged to actively engage in deliberation against those with differing ideas or interpretations. In both the SOE and UWL Republican chalking incidents, the same message could have been achieved without chalk. Perhaps a picketing protest near the Hoeschler Clocktower, a designated public forum, could have been scheduled. The SOE students would have still been able to voice their message, albeit in a different manner. The UWL Republicans would be given the same protections, but now they would be subject to direct counter-speech, which is more likely to facilitate meaningful deliberation. It is important to remember that a "chalking policy" is more of an exception to vandalism rather than an actual regulation. Perhaps removing chalking outright as a permissible manner of speech on campus would better allow for, as put by Chancellor Gow in his "Civil Discourse at UWL" email, "robust and vigorous public debate, which is central to the purpose of the university."

Though we as speakers may be more inclined to believe that our viewpoint is the correct one, the First Amendment nonetheless provides that speech and expression, however unpopular, must still receive protection. Despite it being an imperfect solution to a complicated issue, perhaps a better understanding from citizens of constitutional protections combined with institutional promotion of speech that is more becoming of reaching truth through civil discourse would help revive a marketplace of ideas in the modern context.

NOTES FOR FUTURE RESEARCHERS

During this research project's creation, the University of Wisconsin (UW) System Free Speech Survey was published, answering many of my initial research questions. This resulted in the project's scope changing to some degree. Initially, the project sought to survey students and conduct focus groups to better understand UWL student's perceptions and knowledge of the First Amendment. After the UW System Free Speech Survey's publication, this project shifted focus more towards archival data analysis rather than quantitative data collection. Furthermore, many unexpected complications arose during the attempted collection of said data. This resulted in the creation, but no implementation, of many focus group/survey questions. I have elected to include the questions which me and my mentors created below in the event that future researchers take interest in this topic. The set of questions apply to both focus group and survey question and originate from the SOE and UWL Republican chalking incidents on campus.

Focus Group / Survey Questions:

1. Do you believe the First Amendment applies to college students. If so how, if not why?
2. To what extent do you think the First Amendment right to free speech and expression applies to college students on campus

3. Below are a set of examples of speech and/or expression. In a campus setting, do you think that you have the right to:

- Make a personal character attack
- State or express a highly controversial opinion
- State or express political hyperbole
- State or express a profane message
- State or express a harmful or hateful message

4. Do you think there is any value in permitting speech that you, or another student, may perceive as harmful on campus, why or why not?
5. Consider the following message:

"Here at UWL … obscene, lewd or profane words, or messages that target individuals, are not allowed." Which of the following types of speech do you believe this statement restricts? Check all that apply.

- Swear words
- Sexually explicit words or images
- Messages targeting individuals by name
- Messages targeting group identities (e.g., race, sex, religion, etc.)
- Other

6. Consider the following message:

"It is UWL policy to provide all members of the university community the broadest possible latitude to speak, write, listen, challenge, and learn." Which of the following types of speech do you believe this statement restricts? Check all that apply.

- Swear words
- Sexually explicit words or images
- Messages targeting individuals by name
- Messages targeting group identities (e.g., race, sex, religion, etc.)
- Other (comment)

7. Do you believe the following chalked messages should be allowed/receive First Amendment protection? (Images of these messages are provided in the focus group presentation slides, which will be included in the Supplementary Material section)

- "SOE = Shit"
- "Hey SOE, at least take me out to dinner before you fuck me."
- "SOE dean makes 126K a year but can't be bothered to do her job."

8. Do you believe the following chalked messages should be allowed/receive First Amendment protection?

- "Kanye is right Def-Con III."
- "If gun control works explain Chicago."
- "Where's our straight cis night?

9. Do you believe that any of these messages incite violence? Are a threat? Are obscene?
10. Is there anything else you would like to share regarding the First Amendment on a campus setting? End survey here
11. You're giving advice to a university administrator. There has been a chalking incident on campus. One group feels the messages create an unsafe and unwelcome learning environment, another group feels the messages are an example of protected speech and shouldn't be censored. How should the administrator respond and why?
12. Hypothetically, the administer sends out an email to students and faculty responding to the incident. Would you view this email as an official position on students' rights to free speech on campus? Explain your answer. If not sure, please say why?
13. Is there anything else relating to the topic of free speech on campus you'd like to discuss?

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