

The Freedom of Speech in Public Forums on College Campuses:
A Single-Site Case Study on Pushing the Boundaries of the Freedom of Speech

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Abstract

The purpose of this single-site study is to test how far speech can be pushed before it is no longer protected at the California Polytechnic State University. The purpose isn't merely to push limitations for the sake of testing boundaries, but it is to see what types of speech truly add to the marketplace of ideas and what types simply do not. The main points of the study are to understand what speech is protected and what speech is not protected on California Polytechnic State University's campus and to understand how the provocation that comes along with "negative speech" can be used to create "positive speech." The methodology for this study includes a questionnaire based on research questions as well as an in-depth literature review that is intended to answer the questions posed by the study. The study found that speech that is constitutionally protected outside of public forums in college campuses is also applied to public forums in college campuses and that negative speech often promotes positive response within the community. Educational programs teaching inclusivity and diversity are encouraged to erase "negative speech" as a trigger for "positive speech," as well as speaking up for what one believes in. Further research on other campuses is highly encouraged.

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Chapter 1

Introduction

“If freedom of speech is taken away, then dumb and silent we may be led, like sheep to the slaughter.”

-George Washington

Statement of the Problem

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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 First Amendment guarantees these freedoms, yet freedom of speech is still not guaranteed. This isn't because the First Amendment is a lie, but it's because society deems some speech to be unworthy of protection. Universities, like the rest of society, weigh some speech on this scale of worthiness and while some speech may be unfavorable, censorship can tame the marketplace of ideas. The question isn't whether speech should be protected; it's to decipher what speech is not worth of this protection.

Background of the Problem

The Supreme Court has determined some types of speech to be unworthy of protection: defamation (libel and slander), obscenity, fighting words, child pornography, perjury, blackmail, incitement, true threats and solicitations to commit crimes. In some

circumstances, the Court has stepped outside these nine categories to regulate speech, for example: *Morse v. Frederick*, *United States v. O'Brien*, *Tinker v. Des Moines School District*, *Hazelwood School District v. Kuhlmeier*, and many others.

Purpose of the Study

The purpose of this study is to test how far speech can be pushed before it is no longer protected at the California Polytechnic State University. The purpose isn't merely to push limitations for the sake of testing boundaries, but it is to see what types of speech truly add to the marketplace of ideas and what types simply do not.

Setting of the Study

This study was done as a senior project at California Polytechnic State University. It is a single-site case study and is strictly done with California Polytechnic State University as the test subject; however, the study may be applicable to other state universities in California as well as out of state universities, depending on state laws and university practices. The study will include interviews from Dr. Ronald Den Otter, Dr. Bill Loving and an unnamed university administrator.

Research Questions

This study used the following research questions that were designed to answer gaps in the existing literature on the topic of the freedom of speech in public forums on college campuses. Each question was created after investigating the existing literature

and information available on the topic in order to gather additional important and necessary data from professionals in the fields of constitutional law and administration.

1. What speech should be protected in a public forum on California Polytechnic State University's campus?
2. Should derogatory speech that is considered hate speech be protected on California Polytechnic State University's campus?
3. How far can speech be taken before it is considered unprotected on California Polytechnic State University's campus?
4. How can the provocation that takes place within certain types of speech create a movement of action against hate speech or negative speech?

Definition of Terms

These terms are defined to assist the reader and provide context for the study. They will be used throughout the body of text.

Defamation: a statement that injures a third party's reputation. The tort of defamation includes both libel (written statements) and slander (spoken statements) (Law.cornell.edu).

Fighting words: "words which would likely make the person whom they are addressed commit an act of violence" (Law.cornell.edu).

Incitement: at its most basic is communication intended to encourage others to take lawless action, and calculated or likely to bring about imminent harm the State has substantive power to prevent (Loving & Teeter, 2011, p. 130).

Hate speech: speech that offends, threatens, or insults groups, based on race, color, religion, national origin, sexual orientation, disability, or other traits (American Bar Association).

Public forum: include public parks, sidewalks and areas that have been traditionally open to political speech and debate.

Window dressing: “the act or an instance of making something appear deceptively attractive or favorable” (Merriam-Webster).

Organization of Study

Chapter 1 included the statement of the problem, the background of the problem, the purpose of the study, the setting for the study and definition of terms. Chapter 2 will identify precedence set by previous Supreme Court rulings as well as current literature on the topic. Chapter 3 presents the methodology used for the study. Chapter 4, data will be presented and organized based on the research questions posed in this chapter. The data will then be analyzed and compared to research present in the current literature available on the topic. Chapter 5 will conclude the study and pose recommendations for professionals looking to study freedom of speech in American universities, especially those in California.

Chapter 2

Literature Review

Freedom of Speech At California Polytechnic State University

The free speech policy at California Polytechnic State University states that it “seeks to foster and sustain a forum for the free, civil and orderly exchange of ideas, values and opinions, recognizing that individuals grow and learn when confronted with differing views” (University Organization and Campuswide Policies). This means that all views are equally protected if the exchanges are done in a manner that is considered orderly. Freedom of speech is vital for the marketplace of ideas. Without it, a democratic society would cease to function and it is equally important for higher education, like that which is taught at California Polytechnic State University.

There are, however, regulations to the freedom of speech on California Polytechnic State University’s campus. The right of free expression is a guaranteed right, so long as it does not “interfere with University functions, imperil public safety, obstruct or damage University facilities, or cause individuals to become audiences against their will” (University Organization and Campuswide Policies). This means that there can be content-neutral restrictions on the speech that takes place on the University’s campus, but there cannot be content-based restrictions made. Content-neutral restrictions deal with time, manner and place - even if the government cannot ban a specific speech, there are times where that speech would be unacceptable. California Polytechnic State University has this in place to preserve the safe operation of the campus.

When dealing with the ‘time’ aspect of these restrictions, 141.3.2.1. of California Polytechnic State University’s code limits “outdoor activities and events that involve amplified music or speech” to the hours of 7 a.m. and 10 p.m. and outdoor events that do not require amplified sound or music are limited to the hours between 7 a.m. and midnight” (University Organization and Campuswide Policies).

When dealing with the ‘place’ aspect of these restrictions, 141.3.2.2. of California Polytechnic State University’s code states that, “freedom of expression is an individual right and therefore is not restricted to place” (University Organization and Campuswide Policies). The University does have “University Commons” which are places where individuals are encouraged to exercise their freedom of expression. These include the UU Plaza, Dexter Lawn and the Theatre Lawn. The benefit of these areas is that they do not typically have to be reserved in advance.

When dealing to the ‘manner’ aspect of these restrictions, 141.3.2.3. of California Polytechnic State University’s code identifies the concept of solicitation. Title 5 of the California Code of Regulations (Section 42350) defines solicitation as, “means to importune, or endeavor to persuade or obtain by asking, but does not include ‘commercial’ solicitation. Title 5 (Section 42350.5) further explains that, “solicitation shall be permitted on a campus subject, however, to a reasonable regulation by the campus president as to time, place and manner thereof. Solicitation in violation of established campus directives regarding time, place and manner is prohibited” (University Organization and Campuswide Policies).

The freedom of expression at California Polytechnic State University isn’t simply the right to speak one’s mind, but according to section 141.3.2.3.5 of the university code,

“freedom of expression extends to the right to demonstrate, protest and advocate through public assemblies, marches and demonstrations” (University Organization and Campuswide Policies).

The Heckler’s Veto

The Heckler’s veto is a concept that deals with the suppression of speech. It typically takes place when a speaker opens a dialogue on a controversial issue and is censored by a crowd. The crowd may be demonstrating against the speaker’s message and to maintain order, and possibly prevent a riot, law enforcement steps in and the speaker is ultimately censored or taken away from the premises.

Important Cases on the Heckler’s Veto

Terminiello v. City of Chicago

A man named Arthur Terminiello delivered a speech in which he condemned multiple political groups as well as racial groups. A crowd gathered outside of the auditorium and the police were unable to settle the crowd. The police arrested Terminiello for “breach of the peace” after which he was tried and convicted for his role in inciting a riot.

The question here is whether or not the city of Chicago violated Terminiello’s right of free expression that is granted by the First Amendment.

The court found in a narrow 5-to-4 decision that the ordinance that Terminiello was charged under, infringed upon his freedom of speech. The court held that free speech could only be restricted in the event that it was, “likely to produce a clear and present

danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest” (Terminiello v. Chicago, 1947).

This case is vital to the context of the heckler’s veto. It decidedly said that a heckler’s veto could only take place if there is a clear and present danger. The “clear” element of the clear and present danger test deals with the likeliness that something will happen. To use the ever-so-warn-out example, if one tells someone to jump off a bridge, is it likely that they will do it? Depending on the likeliness, speech can be vetoed only if it is extremely likely that the event will take place. The present element of the clear and present danger test deals with proximity of time, meaning that there must be imminence existent. Going off the same example, is it likely the person will jump off the bridge immediately or is there time for good speech to counteract the bad? It all depends on these two elements.

Healy v. James

A group of students were seeking to form a chapter of Students for a Democratic Society (SDS) at a state-supported college. They were denied recognition as a school organization that would have granted them the right to use campus facilities for meetings as well as the right to use campus bulletin boards.

The U.S. Supreme Court stated that the denial of recognition infringed upon the First Amendment rights that guarantee the freedom of assembly. Just because the group can meet outside of campus does not absolve the university in curtailing the student’s rights.

While this case is not directly a heckler's veto case, it did however, deal with the attempt to ban an unwanted group due to their choice of affiliation. The court found that the group's relationship to a larger national organization was insufficient to deny recognition. The court also found that the chapter would not pose a substantial threat to the disruption of the campus.

Fricke v. Lynch

In 1979, a gay high school student, Paul Guilbert, sought permission to bring a male date to his junior prom in Rhode Island. The principle of the high school denied the request, claiming that the student reaction could cause a possible disruption at the dance as well as cause physical harm to Guilbert.

The following year, Aaron Fricke, who was also gay, sought the same permission and, like Guilbert, was denied. The principle of the high school wrote a letter explaining that the reason for the denial was a, "real and present threat of physical harm to [Fricke], the male escort and to others" (Fricke v. Lynch, 1980).

The court found that the threats of physical violence against Fricke and his date gave homophobic students an unconstitutional heckler's veto and thus would allow them to deny Fricke's request.

This set precedence for a violent response to allow for the censorship of speech. Even if there is no actual physical violence that has taken place, the real threat of violence is enough to veto a speaker.

Gregory v. City of Chicago

Social activists protested against school segregation in Chicago. They marched from Chicago's city hall to the mayor's place or residence. Once the march had concluded, a group of bystanders started to act with unruliness. The protesters refused to leave when asked by police and were consequently arrested and convicted for their demonstration.

The U.S. Supreme Court found, in a unanimous decision, that the protesters' rights had not been violated. Hugo Black, J., in his concurring opinion stated that the arrests were a consequence of unruly behavior of the bystanders and thus would amount to a heckler's veto.

These vetoes are not a restriction on speech itself due to content, but a protection of the speaker from physical harm. Therefore it is not a censorship of speech, and as such has no restriction on what is being said, but it is a time, manner and place restriction based on the nature of the keeping the speaker physically safe.

Feiner v. New York

In 1949, Irving Feiner gave a speech to a crowd of people that made derogatory remarks about President Harry S. Truman, the American Legion, the Mayor of Syracuse and other government officials. He urged that individuals rise up and fight for equal rights. The crowd became unruly and an onlooker threatened to use violence if Feiner refused to stop and if the police did not act. The police, in order to preserve the peace, arrested Feiner. He was convicted of violating Section 722 of the Penal Code of New York, which forbids incitement of a breach of peace.

The U.S. Supreme Court upheld the conviction due to the fact that Feiner's speech could have incited a riot. The issue here is that, like other heckler's veto cases, there was no content-based restriction on Feiner's speech. The suppression of the speech was not to silence an unpopular view, but instead to silence an individual who may incite a riot. With the clear and present danger restriction, it is apparent that there was an imminent threat – a riot breaking out due to Feiner's speech – and a high likelihood of the threat being carried out.

Hate Speech

Definition

Hate speech is, "speech that offends, threatens, or insults groups, based on race, color, religion, national origin, sexual orientation, disability or other traits" (American Bar Association).

The issue with hate speech is that it's almost a no-brainer for being banned; however, enacting these policies runs the risk of censorship and the infringement upon the exercise of the freedom of speech.

In this country there is no right to speak *fighting words*—those words without social value, directed to a specific individual, that would provoke a reasonable member of the group about whom the words are spoken. For example, a person cannot utter a racial or ethnic epithet to another if those words are likely to cause the listener to react violently. However, under the First Amendment, individuals do have a right to speech that the listener disagrees with and to speech that is offensive and hateful (American Bar Association).

Important Cases on Hate Speech

Brandenburg v. Ohio

Clarence Brandenburg, a Ku Klux Klan leader in Ohio, invited a Cincinnati television station reporter to cover a KKK rally. The reporter obliged and the film showed multiple men in KKK attire, burning a cross and then making racist speeches. One of the speeches mentioned “revengeance” against “niggers”, “Jews” and those who supported them (Brandenburg v. Ohio, 1969). Brandenburg was charged with advocating violence under an Ohio statute, which made illegal, “advocating ... the duty, necessity, or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform” (Brandenburg v. Ohio, 1969).

The U.S. Supreme Court reversed the conviction, holding that the government cannot punish abstract advocacy of force or law violation. A new test was articulated as a result of this case, the imminent lawless action test or also known as the Brandenburg test. This test is meant to determine whether a speaker or publisher was advocating an idea or inciting their audience to break the law. The test has three parts to it: (1) Was the speaker’s intent to incite or produce lawless conduct? (2) Was the lawless action imminent? (3) Was there a high likelihood of success of the incitement lawless action? If all three parts of the test have been met, incitement is present; however, if all three parts have not been met, incitement is not present and the speaker was merely advocating an idea.

Snyder V. Phelps

In 2006, U.S. marine Lance Corporal Matthew Snyder was killed in Iraq. Snyder, who was gay, had his funeral picketed by Westboro Baptist Church. Picketers held signs that lamented statements such as, “God hates you”, “You’re going to hell” and “Thank God for dead soldiers” among others (Snyder v. Phelps, 2011). Snyder’s father sued Westboro Baptist for defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress and civil conspiracy.

One of the main questions asked in this case was whether the freedom of speech granted by the First Amendment trumps the freedom of religion and peaceful assembly.

Chief Justice John Roberts, writing for the majority opinion stated that, “What Westboro said, in the whole context of how and where it chose to say it, is entitled to ‘special protection’ under the First Amendment and that protection cannot be overcome by a jury finding that the picketing was outrageous” (Snyder v. Phelps, 2011). The court also claimed that Snyder was not in a situation where he was coerced to hear the negative speech and thus could have avoided the negativity put forth by WBC.

Samuel Alito, J., was the lone dissenter in the case claiming that, “our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case” (Snyder v. Phelps, 2011). He concluded that “In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like [Snyder’s father]” (Snyder v. Phelps, 2011).

R.A.V. v. City of St. Paul

In 1990, the petitioner and other teenagers assembled a crudely made cross and burned it in the front yard of an African American family. One of the charges to the petitioner was a St. Paul ordinance that stated:

“Whoever places on public or private property, a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits a disorderly conduct and shall be guilty of a misdemeanor” (R.A.V. v. City of St. Paul, 1992).

The court stated that certain categories of expression are not within the area of protected speech, and that certain cases must be taken in context. There cannot be content-based restrictions on speech, but content-neutral restrictions can be made. For example, burning a flag can violate an ordinance against outdoor burnings, but burning a flag cannot violate an ordinance against disgracing the flag.

The real issue, explained by the court, was not that cross burning is necessarily acceptable speech, but that St. Paul’s ordinance was overbroad and thus, unconstitutional. A statute is considered overbroad if, in addition to banning speech that can be banned because the speech falls into an unprotected category, it also covers speech that cannot be banned, or speech that is constitutionally protected.

Virginia v. Black

Black was prosecuted because of burning a cross and was convicted of the same by a jury under the cross-burning statute of Virginia.

This case is a landmark case due to the nature of its content. The U.S. Supreme Court found that Virginia's statute was unconstitutional due to its regulation of speech that makes cross-burning itself illegal, but cross burning done with an intent to intimidate can be found to be an illegal action. The long history that comes tethered to cross burning, as far as a form of intimidation, allows for its practice to be deemed illegal in certain situations.

The aspect of Virginia's statute that was struck down was that, "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group or persons" (Oyez.org). Prima facie, in the context of this case, means that by the mere act of burning a cross, the jury was allowed to infer that the cross burner had the required intent to intimidate others.

The problem here is that a cross can be burned without the intent of intimidation, but the prima facie clause of Virginia's statute makes it so that there is no chance for this to be the case.

Public Forums

Definition

A public form is a place that has, by tradition or practice, been held out for general use by the public for speech-related purposes.

There are three different types of public forums: (1) a traditional public forum is a location that has a history of being used for the freedom of expression, such as a public park or a particular street corner; (2) a limited public forum is a location with a limited history of being used for the freedom of expression, such as a city-owned theater or a university hall; (3) a closed public forum is a location that has not historically been open to public forum, such as a military base or a prison (Law.cornell.edu).

Important Cases on Public Forums

Hague v. Committee for Industrial Organization

In 1937, a group of individuals gathered at the headquarters of the Committee for Industrial Organization in New Jersey to discuss the National Labor Relations Act and to recruit new workers. The police apprehended the group's materials and disallowed the meeting from taking place. The group argued that the ordinance under which their meeting was shut down was in violation of their First Amendment protection of freedom of assembly.

The U.S. Supreme Court concluded that the actions that took place did indeed violate the workers' First Amendment rights, stating, "Citizenship of the United States would be litter better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages and opportunities to accrue to citizens therefrom" (Hague v. Committee for Industrial Organization, 1939).

Perry Education Association v. Perry Local Educators' Association

PEA won an election against PLEA and as part of the collective-bargaining agreement, obtained the rights to the internal school mail system and PLEA was thus denied access. PLEA claimed that denying use of the mail system violated their First Amendment rights.

The court found that there was no violation of rights in the denial of PLEA's using the mail system. Mailboxes are not considered a public forum and the school district has no constitutional responsibility to allow PLEA to use the mailboxes as a means for freedom of speech.

Walker v. City of Birmingham

The petitioners wanted to march on Good Friday and Easter, but they were denied a parade permit, while others were able to receive permits. Noting that this denial was a violation of their rights, the petitioners decided to march anyways. They were arrested and sentenced for violating the ordinance.

The issue here is whether or not individuals can be sentenced for violating an ordinance that may be unconstitutional.

The court found that individuals can absolutely be charged and sentenced for violating an unconstitutional ordinance. Cities and states have the right to enforce their laws, whether or not they are actually constitutional. If a party wishes to challenge the constitutionality of a law, it should be done through the courts instead of taking matters into their own hands.

Other Important Cases

Chaplinsky v. New Hampshire

In 1941, Walter Chaplinsky, a Jehovah's Witness, was using a public sidewalk to pass out pamphlets while making unfavorable comments about organized religion. A crowd began to form and began blocking the roads and causing a scene. Eventually, a police officer removed Chaplinsky from the area. Chaplinsky became angered and told the officer, "You are a God-damned racketeer" and "a damned Fascist", for which he was charged and convicted under a New Hampshire statute preventing intentionally offensive speech being directed at others in a public place (*Chaplinsky v. New Hampshire*, 1942).

The court unanimously upheld the arrest of Chaplinsky. They claimed that certain "well-defined and narrowly limited" categories of speech are outside the bounds of protection (*Chaplinsky v. New Hampshire*, 1942). The case is known for being a fighting words case, and while fighting words do not technically exist in today's day and age, it is important to note that some speech is not worthy of being protected under the First Amendment (obscenity, for example).

Cohen v. California

In 1968, Paul Robert Cohen was arrested for wearing a jacket that proclaimed the sentiment, "Fuck the Draft". Cohen was inside the Los Angeles Courthouse during the incident. He was convicted of violating a code, which prohibited, "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person [by] offensive conduct" (*Cohen v. California*, 1971).

The Court overturned the ruling of the lower courts indicating that the case dealt with the concept of speech rather than that of conduct. This delves into the idea of content-based restrictions versus content-neutral restrictions and the core issue was the disliking of the speech that was published on Cohen's jacket. The court also found that the code that Cohen violated was unclear about what speech was regulated as unlawful. The four-letter word pronounced on Cohen's jacket does not fit into the category of "fighting words" because, "no individual actually or likely to be present could reasonably have regarded the words on the appellant's jacket as a direct personal insult" (Cohen v. California, 1971).

The most vital element of this case was that the Court was unwilling to allow censorship of unpopular ideas and allow the government to suppress types of speech that were unfavorable.

Miller v. California

Miller is a landmark Supreme Court case that dealt with obscenity. In 1971, Marvin Miller, a mail-order business owner sent out a brochure that advertised books and a film that depicted sex between men and women. The brochure contained graphic material.

Miller was arrested and charged with violating a California Penal Code that made it illegal for,

"Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, produces, or prints, with intent to distribute

or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is for a first offense, guilty of a misdemeanor” (Miller v. California, 1973).

As a result of this case, the Court crafted the Miller Test, a three-part test that checks whether material is considered to be obscene, and as such, unprotected under the First Amendment. The Court did however mention, “the inherent dangers of undertaking to regulate any form of expression” (Miller v. California, 1973). The Miller test has a set of three criteria that must be met for speech to be considered obscene: (1) an average person, applying contemporary community standards, would find the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes, in an offensive way, sexual conduct or excretory functions, as specifically defined by the applicable state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

It should be noted that it is extremely rare for speech to be considered obscene and the Miller Test is incredibly hard to pass.

United States v. O'Brien

In 1966, David Paul O'Brien and his companions burned their draft cards on the steps of the South Boston Courthouse in front of a crowd that included multiple FBI agents. Members of the crowd attacked the men and an FBI agent took O'Brien inside the courthouse and informed him of his rights. O'Brien represented himself at court and argued that the code he violated was unconstitutional due to its infringing upon his First Amendment rights.

The U.S. Supreme Court found that the statute was constitutional. The law did not necessarily restrict speech, but instead it addressed conduct that was not expressive and would have applied even if the draft card were burned in private. One of the key issues here was that the burning of the draft card supposedly made it difficult for the recruiting office to do its job. Chief Justice Warren wrote that when prohibiting conduct that includes both speech and nonspeech aspects, “a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms” (United States v. O’Brien, 1968). However, the regulation must have four elements for this to be the case: (1) it must be within the constitutional power of the government to enact; (2) it must further an important or substantial government interest; (3) the government interest must be unrelated to the suppression of speech or it must be a content-neutral restriction; and (4) it must not prohibit more speech than is essential to further that government interest.

Negative Speech Creating Positive Speech

California Polytechnic State University College Republicans Free Speech Wall

During the 26th Anniversary of the Berlin Wall’s falling, the California Polytechnic State University College Republicans created a free speech wall for students to speak their minds. That’s the thing about free speech, it allows for conventionally positive speech to emerge, but it also allows for conventionally negative speech to surface.

After the walls successful establishment on Dexter Lawn, which is considered to be a public forum on California Polytechnic State University’s campus, there were

remarks written that contained derogatory statements about Muslims as well as the LGBTQ community. One of the messages contained on the wall was a drawing of the Muslim prophet Muhammad carrying explosives and various rifles, the cartoon expressed the sentiment, “Islam is a political movement of violence and oppression.” Next to the drawing read, “Don’t draw me I’ll jihad your face! ALLAHU AKBAR” (Bandler, A., 2015).

The free speech wall also featured a mockery-style voting ballot with the check-boxes for “male” and “female” and a caption reading, “Gender: Pick One” (Bandler, A., 2015).

At first glance it would seem that free speech has created a soapbox for hatred, but this isn’t entirely the case. 130 students gather to protest the wall and to speak out against the hurtful statements. One of the California Polytechnic State University Republicans members expressed that people of all religions have committed terrorist attacks and that they do not represent their religious communities as a whole.

The thing is, that while some speech is vastly unpopular, it does not mean it is any less worthy of protection; however, it created positive feedback from the community. This speech created a safe environment for taboo issues to be brought to the surface instead of lying beneath the surface. This speech brought a group of 130 people together to stand and speak for what they believe in and that is the purpose of free speech – to allow a free marketplace of ideas to exist.

California Polytechnic State University Crops House Incident

Back in 2008, there was an incident that took place at California Polytechnic State University's on-campus crop science house that involved a noose, a confederate flag and allegations of a sign that contained racial and gay slurs. The sign and props were used as decorations for a Halloween party that took place on campus.

Hundreds of students gathered to protest the incident to try to foster an environment of acceptance. The students hoped to raise awareness about the happening that took place as well as showcase disapproval of the hate speech that took place. During the protest, a petition was also passed around that garnered 150 signatures for the expulsion of the students that were living in the crops house at the time.

Much like the incident that took place on the free speech wall at California Polytechnic State University, the free marketplace of ideas allowed for good speech to conquer the bad speech. The censorship of negative speech will not destroy it, but instead drive it under the ground; however, having it out in the open allows both sides of an issue to be presented and it allows for the people to decide which side of the coin they want to land facing the surface.

Charlie Hebdo Attacks

In 2015, Charlie Hebdo, a French satirical weekly magazine, was attacked due to a political cartoon that featured the prophet Muhammad. There were 11 individuals killed and 11 others were injured during the attack. The magazine is known for their non-conformist political cartoons that pushed the boundaries of speech. The cartoon was considered to be offensive as were other cartoons depicting Islamic leaders. The former

deputy director of the CIA claimed that the attackers' motive was, "absolutely clear: trying to shut down a media organization that lampooned the Prophet Muhammad" (Bilefsky, D., & Baume, M. D., 2015).

While this instance of speech going too far brought nothing short of tragic results, there was still massive positivity that emerged from the ashes of this horror. There were somewhere around two million people that showed up for a rally of national unity and about 3.7 million individuals joined in with demonstrations all across France. The following issue of the magazine ran 7.95 million copies in six languages compared to its normal running of 60,000 issues that were only in French.

While the clichéd phrase, "guns don't kill people, people kill people", is all but worn out by tired politics, the mirrored concept that the freedom of speech doesn't kill people, people kill people is not worn down by those same tired politics. The freedom of speech may anger some individuals to the point of no return, but it also brings people together to stand against ideas that they simply do not agree with. It's this power that creates the marketplace of ideas, and to individuals like those who worked at Charlie Hebdo, this may just be a freedom worth fighting for.

Unprotected Categories of speech

Subversive Advocacy For subversive advocacy (speech that advocates lawlessness) to fall outside the protections of the First Amendment the speech must satisfy a two-part test. The speech must consist of (1) advocacy directed to inciting or producing imminent lawless action and (2) speech that is likely to incite or produce such action. This is known as the Brandenburg test. In applying prong one of the Brandenburg

test, the Court engages in a literal interpretation of the speech to determine whether it advocates immediate lawless action as compared to speech that advocates lawlessness at some future time or only conditionally. In applying prong two, the best evidence of whether speech is likely to produce imminent lawless action is if there actually was lawless activity immediately following the speech.

Fighting Words

Fighting words are a narrow category of unprotected speech that are defined as words spoken in a face to face exchange such as personal insults or epithets which by their very utterance are likely to cause the person to whom they are addressed to respond with violence directed at the speaker. Fighting words must be insults personally directed at the person they are addressed to and not political statements that the hearer finds deeply offensive to his or her beliefs. Therefore, it is necessary to distinguish between provocative political speech that is fully protected and unprotected fighting words.

True Threats

True threats are defined as “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” (Hudson, D. L. Jr., 2008). To be a true threat, “the speaker need not actually intend to carry out the threat” (Hudson, D. L. Jr., 2008). True threats are distinguishable from political hyperbole, which is protected political expression. Intimidation “is a type of true threat, where the speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or

death” (Hudson, D. L. Jr., 2008).

Obscenity

As defined by *Miller v. California*’s three prong test, to be obscene material must (1) be a work that the average person, applying contemporary community standards would find, taken as a whole, appeals to the prurient interest and (2) the work must depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable obscenity law, and (3) the work, taken as a whole, must lack serious literary, artistic, political or scientific value.

Child Pornography

Under *New York v. Ferber*, child pornography is an unprotected category of expression and consists of visual depictions of actual children engaged in sexual activity or the lewd exhibition of the genitals. Unlike obscenity, it is not judged by the work taken as a whole and, therefore, can consist of isolated segments of an entire work. It also is unprotected even if it doesn't appeal to the prurient interest or portray child sexual activity in a patently offensive manner. In addition, in contrast to obscenity, the Court has, thus far, not carved out an exemption for child pornography with serious value. On the other hand, the reason for the Court’s willingness to allow child pornography to be prohibited is to protect actual children. Thus, child pornography is limited to visual images of actual children.

Commercial speech that concerns illegal activity or commercial speech that is false or misleading

Under the Central Hudson test, commercial speech is only protected if it concerns legal activity and if the content is true and not misleading. The Supreme Court, in the recent case of *United States v. Williams*, used this limitation on the protection of commercial speech. In that case, the Court upheld a federal law that criminalizes pandering of child pornography (advertising, promoting, presenting, distributing or soliciting) even if the defendant does not possess any actual child pornography because the advertising of an illegal product (child pornography) is not speech protected by the First Amendment.

Chapter 3

Methodology

This chapter presents the methods used to collect data for the study, including the data sources, participants, data presentation, limitations and delimitations.

Data Sources

This project will use interviews from three experts: An unnamed university administrator at an unnamed university, a constitutional theorist and a mass media law professor. The questionnaire has been created to answer the research questions presented in this project and will delve deeper into each issue.

Original Questionnaire

- What speech should be protected in a public forum on California Polytechnic State University's campus?
 - Can you give an example of speech that would be protected?
- Should derogatory speech that is considered hate speech be protected?
 - For example, hate speech took place on the Republican Club's free speech wall that made derogatory comments on the Muslim religion as well as gender identity – should this speech be protected?
 - Why or why not?
- How far can speech be taken before it is considered unprotected?
 - For example, should cross burning be protected?
 - Are there other examples of speech that should not be protected?

- What speech, if any, should absolutely not be protected in a public forum on California Polytechnic State University's campus?
 - Can you cite specific examples here at California Polytechnic State University?
- What kind of grey area exists?
 - Going back to cross burning, what if the speech isn't used as a form of intimidation and is strictly used as a form of political speech?
 - Are there other examples of speech that context can allow for a grey area?
- How can the provocation that takes place within certain types of speech create a movement of action against hate speech?
 - For example,
 - Can you state other examples?
- Why is it that so often, as my research has shown, that negativity has to surface for positive action to take place against speech that is widely considered negative?
 - What are some proactive steps that can be taken?
 - Why is it so common that people are on the reactive end of the situation?
- What would have to happen to erase the negativity that causes positivity such as SLO Solidarity?
 - What would you suggest as a next step to promote positivity within a community?

- Is something being done or will something be done to actually make change here at California Polytechnic State University?
 - Are things that are being done simply as window-dressing to make it look like positive changes are taking place, or are things being done to actually make fundamental changes here?

Participants

Ron Den Otter is an associate professor in the Political Science Department, College of Liberal Arts, at California Polytechnic State University. He specializes in constitutional law and has taught courses in political theory, American constitutional law, civil liberties and civil rights. Bill Loving, professor in the Journalism Department, College of Liberal Arts, at California Polytechnic State University, has taught classes in copyright law, mass media law and is known as one of the authors of one of the most recognized texts on mass media law. An unnamed university administrator at a California university, has had plenty of experience with administrative policies that deal with the freedom of speech.

Data Presentation

This project will utilize a handheld recorder as well as a phone recorder to document responses in each interview and note taking will also keep some record of each interview. Each interview will be transcribed by hand and data analysis will take place in the next chapter.

Limitations

One of the major limitations for this project is that it is a short-term study that will take place over two quarters (20 weeks). With more time, more information could have been gathered that mirror situations that have taken place at California Polytechnic State University to showcase that this either is or is not an isolated event.

Another limitation is the lack of resources available. For example, there are experts in the field of study, mainly constitutional theorists, which could have provided more insight; however, I do not have the money, or means, to get in contact with many of these individuals because many of them are not located within the Central Coast of California.

Delimitations

One of the delimitations of this study is that I opted to make this a 20-week study rather than simply taking a single quarter. I felt that the timeframe was too limited on something that is quite complicated because of all the grey area involved as well as the broadness of covering all types of speech and not just one.

Chapter 4

Data Analysis

This chapter will provide descriptions of the experts that were interviewed for the study and summarize the respondents' answers to the questionnaire. The data was collected during 45-minute interviews and due to the length of the interviews; the answers will be paraphrasing along with some direct quotations. The answers will be analyzed and compared to the original research questions as well as the existing literature on the topic as reviewed in Chapter 2.

Description of Participating Experts in Related Fields

Administration

An unnamed university administrator at an unnamed California university has experience with the freedom of speech. He holds a doctoral degree from a west coast university and has previous experience as an administrator at a southwestern university.

Mass Media Law

Bill Loving is a professor in the Journalism Department, College of Liberal Arts, at California Polytechnic State University who has taught classes in copyright law, mass media law and beginning reporting and writing. He is the co-author of one of the most recognized texts on mass media law, "Law of Mass Communications: Freedom and Control of Print and Broadcast Media" that recently released its 12th edition. He earned his B.A. in broadcast journalism at the University of Texas at El Paso and earned his law degree at Southern Methodist University.

Constitutional Law

Ron Den Otter is an associate professor in the Political Science Department, College of Liberal Arts, at California Polytechnic State University who has taught courses in political theory, American constitutional law, civil liberties and civil rights. He has written two books, “In Defense of Plural Marriage” and “Judicial Review in an Age of Moral Pluralism.” He earned his Ph.D. at UCLA and his J.D. degree from the University of Pennsylvania.

Freedom of Speech Questionnaire

Each expert was asked to respond to the following questions and probes about freedom of speech on California Polytechnic State University’s university campus:

1. What speech should be protected in a public forum on California Polytechnic State University’s campus?

Question #1 was asked to get a broad sense of what type of speech has ultimate protection in a public forum on California Polytechnic State University’s campus and also why the speech was protected.

- An unnamed university administrator: “I think all speech should be protected in a public forum” (Appendix A).
- Bill Loving: “Well, it would be, of course, political speech. Alexander Meiklejohn proposed that speech that bears on the process of democracy should get the ultimate protection, more so than speech that is not involved in the process of governing a country, but at the same time, pretty much all speech should be protected at California Polytechnic State University” (Appendix C).

- Ron Den Otter: “If there’s any place where people really should be exchanging ideas and trying to learn to get along with people that they disagree with and be exposed to new ideas, having people challenge what they really believe, I think it’s on a university campus” (Appendix B).

2. Should derogatory speech that is considered hate speech be protected?

Question #2 was asked to give an example of questionable speech and see if it is still something that should be protected under the First Amendment in a public forum on California Polytechnic State University’s campus.

- An unnamed university administrator: Yeah... I do think that it should be protected and individuals should have the right to say stuff like that” (Appendix A).
- Bill Loving: “The First Amendment exists for unpopular speech, speech that is unordinary, speech that a lot of people can cause great harm or even the destruction of society as we know it. But when we can protect speech on the fringes, then we can know that all other speech coming into the mainstream will be protected” (Appendix C).
- Ron Den Otter: “There may be kinds of hate speech that do have First Amendment value... I think it does have a place... I think a lot of stupid, bigoted things people say constitute as protectable speech. I hear all kinds of stupid stuff all the time. Bigots and idiots have free speech rights as well. I think the whole point is that it’s often hard to know in advance what might have some value or what might happen” (Appendix B).

3. How far can speech be taken before it is considered to be unprotected?

Question #3 was designed to highlight speech that is not protected in public forum. It serves as a sort of boundary of limitations on speech and was designed to determine various types of speech that are not protected under the First Amendment.

- An unnamed university administrator: “I would know it when I see it. I don’t know that there’s a specific policy, but if it were, for example, cross into involving a specific person, hate speech involving a person isn’t protected” (Appendix A).
- Bill Loving: “It depends on the circumstances, it depends on how society has defined crimes and it depends upon the good sense of people” (Appendix C).
- Ron Den Otter: “I think obscene sexually explicit speech shouldn’t be protected, I don’t think there should be a Miller Test. I think incitement because it’s so hard to differentiate it from advocacy. I don’t think criminal threats should be constitutionally protected. I’m pretty sympathetic to the fact that once you’re a public official or a public figure, you shouldn’t be able to sue people for damages because there is too much of a risk of a chilling effect. I don’t have really strong feelings about protecting advertising and commercial speech as much as some people do. I tend to think if it’s political speech it has potentially some First Amendment value and we should really just err on the side of protecting it. I don’t think that real child pornography should be protected and that’s because of its close connection to the production of child pornography in which children are harmed. I do think that virtual child pornography should be protected because no children are harmed. I’m pretty close to being a free speech absolutist with some pretty rare exceptions” (Appendix B).

4. Is there a gray area that exists within the freedom of speech and if so, what kind of gray area exists?

Question #4 was designed to understand the gray area that exists within the First Amendment's protection of speech. It is clear that there is a thin line in what is protected and what is unprotected speech and various people read into that gray area differently. This question was created to better understand this gray area.

- An unnamed university administrator: "It's all a gray area" (Appendix A).
- Bill Loving: "Yes. And that's why we have courts and appellate courts" (Appendix C).
- Ron Den Otter: "Well, a lot of it comes down to how one would characterize the fact pattern. There will be multiple interpretations so you just have to expect that there will be gray areas and there will be borderline cases" (Appendix B).

5. How can the provocation that takes place within certain types of speech create a movement of action against hate speech?

Question #5 was designed based off of research that shows, in many situations, when hate speech takes place, there is "good speech" that counteracts the "bad speech." This question was made to highlight this notion and uncover other possible instances where negativity in the form of speech creates positivity in the form of action.

- An unnamed university administrator: "We have seen a lot of students stand up and say that this isn't welcome in this community. It galvanized a movement that said we need to do better" (Appendix A).
- Bill Loving: Now, a lot of them are calculated slurs, but they do so in a vacuum. So if someone were to, as I was walking down the sidewalk, hurl an ethnic slur at

me, I could, as I have done in the past, say that, ‘you have misidentified me. I am not of that national origin. I am of this national origin. You are betraying your ignorance.’ And that would be one thing. But if other people, walking on the same sidewalk, instead of simply turning their heads or rushing away or listening so they could tell a story about how bad this person was, if only they would have said, ‘excuse me, I disagree with that. What you’re saying is not appropriate. It betrays your ignorance, your hatred and your small mindedness.’ If racial slurs were met with more conversation, evil councils being remedied by good councils, then how long would that atmosphere remain on campus?” (Appendix C).

- Ron Den Otter: “I think any time that there’s some kind of racist incident on campus, people start talking about it. They’re made more aware of it. It’s not something that’s usually on people’s radar and it’s then put on their radar. People become more aware of these kinds of things and hopefully these are teachable moments where people can become more educated about what’s going on” (Appendix B).

6. Why is it that so often, as my research has shown, that negativity has to surface for positive action to take place against speech that is widely considered negative?

Question #6 was designed to help understand why more positive speech doesn’t surface on its own. Research has shown that negative speech is typically met with positive speech, but it is curious that positive speech doesn’t exist as often without a trigger. This question tries to get to the root of this issue.

- An unnamed university administrator: “I think, like if you look at our campus, there’s a lot of stuff that is put in place or is in progress that is trying to create a

more inclusive environment, but sometimes things like that happen that galvanize people and they feel that their own safety, security or sense of well-being is threatened and that often energizes people to say that they've had enough and that they want to see change or see change faster" (Appendix A).

- Bill Loving: "Negativity doesn't have to come up. There doesn't have to be a trigger if people simply extend themselves in the course of their everyday activities" (Appendix C).

7. What would have to happen to erase the negativity that causes positivity, can anything be done to erase the negativity?

Question #7 was designed to brainstorm ways that negativity can be replaced as a trigger for positivity.

- An unnamed university administrator: "I don't think so, as a realist. I think it will always happen. Human beings are human beings and we can try to do everything we can to reduce it, but we can't get rid of the negative things that happen on campus" (Appendix A).

8. Are there things that are being done at California Polytechnic State University as window dressing to make it look like positive changes are taking place, or are things being done to actually make fundamental changes?

Question #8 was designed to try and uncover instances where California Polytechnic State University is using window dressing as a form of public relations in which it is made to seem like the university is combating some of the issues that are happening at California Polytechnic State University, but is only putting on a façade rather than actually working toward core changes.

- An unnamed university administrator: “I think the way you tell if something is window dressing or not is whether the commitment to it is sustained over time. I think we see a sustained commitment to things in the improvement of climate and diversity. We don’t always agree on what that is. If it was window dressing, we would have thrown a speaker and a forum at the issue in November and just walked away. Nothing is coming to mind as window dressing, but I do know that universities do that” (Appendix A).
- Bill Loving: “Well, you can say its window dressing, I say more often it’s kind of like a story from the depression. Everybody is out of work and so you have people selling pencils, selling apples on the sidewalk. A commenter from the Times said of a friend, “Yes, he’ll buy an apple for a few cents from a guy standing on the street and walk away like he’s solved the depression.” And so it’s a small step, but people think that small step is enough to make us better. It’s not. It’s not hiring one person. It’s not hiring three people. It’s not creating four or five committees. It’s every day and in every way, extending yourself, letting people know that you believe in inclusivity and diversity” (Appendix C).
- Ron Den Otter: “All the time. I really do think it’s often about window dressing and show at universities and not addressing problems and I think it has a lot to do with how administrators think about these kinds of things. They’re not really trying to get to the bottom of it or trying to improve the educational quality. They just have a different incentive structure. They think differently and they have different reasons or incentives for doing certain kind of things” (Appendix B).

Freedom of Speech: Other Questions Answered

1. If hate speech was to take place toward another student that wasn't a threat or intimidation, would that be protected?

- An unnamed university administrator: "It's going to depend. This is the grayness of law. Would it potentially violate our code of conduct? More likely. Would a court consider it free speech? They might. It's hard to say without knowing the actual incident what would happen" (Appendix A).

2. Should something like cross burning be protected?

- An unnamed university administrator: "I think it has been upheld as free speech, but it becomes a time, place and manner issue. Would we allow that on our campus? Probably not. We would not allow it on campus by saying that we wouldn't allow open flames on campus. Right? Not by saying we don't want you to burn a cross on campus.
- Ron Den Otter: "I think that there is a case to make against cross burning...because of its history it's probably inherently intimidating to members of certain groups including African Americans. That has everything to do with historically what its meaning has been.
- Bill Loving: "Well, understand that cross burning laws, the one that made it to the Supreme Court, *Virginia v. Black*, did not ban cross burning. It made putting up a cross on property where the public could see it a crime. It was the crime of intimidation because in the deep south, the Virginia Court is part of that, burning crosses were used by the KKK as a symbol of its power and a warning to people that if there was a cross burning, somebody was going to die. Under that special

circumstance, the burning cross could be viewed as an act of intimidation...In

California, we don't have that history... So it doesn't mean the same thing.

3. How do you feel California Polytechnic State University's diversity, or lack thereof, we're kind of notorious for not having as much diversity as some places like UCLA or some place like that, how do you think that impacts the speech that takes place on campus?

- An unnamed university administrator: It probably makes it easier to call out groups because there isn't a critical mass. On that free speech wall, people made horrible misogynistic comments against women, and more than half of our student body is female.

4. What are some proactive steps that can be taken to try and combat (negative speech) before it happens?

- An unnamed university administrator: I think we need to do different things in our orientation programs about setting up expectations. We need to increase the compositional diversity of our campus. Folks need to have more regular interactions with people that are different from themselves. We need to have more opportunities for students to learn about issues of difference, about systemic issues of oppression and how they might contribute to them unintentionally. How do we structure that through out of class experiences, through orientation, through new intentional first year experiences that will do for students in the residence halls? We try a whole host of things and we'll see what works.

- Ron Den Otter: Yeah, I don't know. This environment is so polarized and people just seem to want to provoke other people. It's all about getting angry and judgmental. There's never been a golden age on college campuses. I don't know. I think a lot of things would have to change - just people's attitudes.
- Bill Loving: Negativity doesn't have to come up. There doesn't have to be a trigger if people simply extend themselves in the course of their everyday activities. But going out of your way to shake a black person's hand is, well, it's a gesture. Being friendly and saying hello and acknowledging people that does a lot more. As a minority person, I don't want to be picked out so that you can do your symbol of the week – I shook this person's hand and that means I've done my part for diversity and equality – no, all you've done is make yourself feel better. But every day you say hello and you may have a conversation, and it's not, 'I'm having this conversation with you because you're a minority person and don't you feel good?' No, it's I'm a human being talking to another human being just as you would talk to anyone back home or where you grew up. We still tend to think of each other as being different when it comes to the color of the skin, the eyelids, the hair, the clothes, but we're all people and we need to recognize our common humanity. When we can do that, we can have a society where nobody is afraid to walk outside.

5. Do you have any other suggestions that may help promote positivity within California Polytechnic State University's campus, especially between diverse groups and people

who may not have the same upbringing or same cultural identity as others? Are there any other steps that others can take that help promote positivity that don't include having a trigger to get people together?

- Bill Loving: Well, it's making the conscious choice every day to think about people being people and not things. We can't have a parade and make everything better. We can't have an e-mail with the president making everything better. We can't have a photo opportunity with everybody working toward diversity on campus make everything better. It is making everything better on a day-to-day basis by everybody. It's not winning a badge for taking a selfie with more minority people than everybody else. It is simply treating them like people. Treating us like people.

Freedom of Speech Research Questions

Research question 1: What speech should be protected in a public forum on California Polytechnic State University's campus?

The free speech policy at California Polytechnic State University states that it, "Seeks to foster and sustain a forum for the free, civil and orderly exchange of ideas, values and opinions, recognizing that individuals grow and learn when confronted with differing views" (University Organization and Campuswide Policies). However, there are limitations to this speech and the policy notes that, "To ensure that exercise of the right of free expression does not interfere with University functions, imperil public safety, obstruct or damage University facilities, or cause individuals to become audiences against their will, the University will establish and enforce campus

regulations regarding the time, place and manner of the exercise of free expression by individuals and groups (and) The University recognizes that causing discomfort and even causing offense is not, of itself, a basis for limiting free speech” (University Organization and Campuswide Policies).

Research question 2: Should derogatory speech that is considered hate speech be protected on California Polytechnic State University’s Campus?

“In this country, there is no right to speaking fighting words—those words without social value, directed to a specific individual, that would provoke a reasonable member of the group about whom the words are spoken...However, under the First Amendment, individuals do have a right to speech that the listener disagrees with and to speech that is offensive and hateful” (American Bar Association).

Research question 3: How far can speech be taken before it is considered unprotected on California Polytechnic State University’s campus?

Subversive advocacy (speech that advocates lawlessness), fighting words, true threats, obscenity, child pornography and commercial speech that concerns illegal activity or commercial speech that is false or misleading are not protected under the First Amendment (Western New England University School of Law).

Research question 4: How can the provocation that takes place within certain types of speech create a movement of action against hate speech or negative speech?

Various incidents, such as the *California Polytechnic State University College Republicans Free Speech Wall*, the *Crops House Incident* and the *Charlie Hebdo Attacks* have created movements against the negative speech that took place. Many times when “bad speech” shows its face, there are people who use “good speech” to combat the issue.

Chapter 5

Discussion and Recommendations

Summary

This study was performed in response to the recent events of hate speech that have taken place on California Polytechnic State University's campus. Even with the social progression that has taken place within society, hate speech and other forms of negative speech still persist. This study was searching to push the boundaries of speech within California Polytechnic State University's campus, while looking for solutions to the issues that both cause and surface as a result of negative speech.

To find information on what speech is protected and unprotected, experts from both the administrative field and constitutional law field were interviewed based on a single questionnaire designed to answer the research questions for this study:

1. What speech should be protected in a public forum on California Polytechnic State University's campus?
2. Should derogatory speech that is considered hate speech be protected on California Polytechnic State University's campus?
3. How far can speech be taken before it is unprotected on California Polytechnic State University's campus?
4. How can the provocation that takes place within certain types of speech create a movement of action against hate speech or negative speech?

Discussion

By analyzing the data collected from Chapter 4, both consistencies and inconsistencies that were present during the interview process and the existing literature found in Chapter 2, it is possible to draw conclusions regarding the following original research questions.

Research question #1: What speech should be protected in a public forum on California Polytechnic State University's campus?

All three experts had varying perspectives on what speech should be protected in a public forum on California Polytechnic State University's campus. Den Otter and Humphrey believed that nearly all speech should be protected. Den Otter states that, "If there's any place where people really should be exchanging ideas and trying to learn to get along with people that they disagree with and be exposed to new ideas, having people challenge what they really believe, I think it's on a university campus" (Appendix B).

Loving on the other hand did not take an all-inclusive stance. He stated that political speech should be the speech that is protected in a public forum on California Polytechnic State University's campus. He also, however, noted, "At the same time, pretty much all speech should be protected at California Polytechnic State University" (Appendix C).

The literature is in slight concurrence with all three experts as it states that the free speech at California Polytechnic State University, "Seeks to foster and sustain a forum for the free, civil and orderly exchange of ideas, values and opinions, recognizing that individuals grow and learn when confronted with differing views" (University

Organization and Campuswide Policies). One issue that surfaces from this policy is that the idea of “civil” is subjective and the policy does not define what this word means in its context. One can only conclude that it means that all speech is not protected on California Polytechnic State University’s campus, but without more information from the writers of this policy, there can be no conclusion made on what is or is not considered to be “civil.”

The policy also states that there are limitations on speech in hopes to, “Ensure that exercise of the right of free expression does not interfere with University functions, imperil public safety, obstruct or damage University facilities, or cause individuals to become audiences against their will, the University will establish and enforce campus regulations regarding the time, place and manner of the exercise of free expression by individuals and groups (and) The University recognizes that causing discomfort and even causing offense is not, of itself, a basis for limiting free speech” (University Organization and Campuswide Policies). This is also a somewhat vague description that lends itself to subjectivity and discretion.

Without knowing more about what types of speech are restricted by time, manner and place and what is considered to be “civil” or not, the only rational conclusion is that the experts believe that all speech should be protected and the literature states that there are limitations to this protection without defining what these limitations are.

Research question 2: Should derogatory speech that is considered hate speech to be protected on California Polytechnic State University’s Campus?

All three experts agreed that hate speech should be protected on California Polytechnic State University’s campus; however, Humphrey did add that hate speech that

is directed at an individual should not be protected. Loving and Den Otter both stated that even unpopular speech such as hate speech has some value and thus should be protected on campus. Loving states that, “The First Amendment exists for unpopular speech, speech that is unordinary, speech that a lot of people can cause great harm or even the destruction of society as we know it. But when we can protect speech on the fringes, then we can know that all other speech coming into the mainstream will be protected” (Appendix C).

The literature concurs with all three experts even though it states that fighting words are not protected. The thing is, fighting words no longer exist within society, those word which at their very utterance causes violence; “However, under the First Amendment, individuals do have a right to speech that the listener disagrees with and to speech that is offensive and hateful” (American Bar Association).

Research question 3: How far can speech be taken before it is considered unprotected on California Polytechnic State University’s campus?

Humphrey could not explain how far speech could be taken before it is considered to be unprotected on California Polytechnic State University’s campus, but he did mention that, “I would know it when I see it. I don’t know that there’s a specific policy, but if it were, for example, cross into involving a specific person, hate speech involving a person isn’t protected” (Appendix A). The other experts, as well as the literature, seem to disagree with this notion. Hate speech directed at an individual is, in fact, a protected form of speech, so long as it is not a threat. Den Otter states, “I don’t think criminal

threats should be constitutionally protected” (Appendix B). They are not protected under the First Amendment.

There are other forms of speech that are not protected by the First Amendment as stated by the literature, “Subversive advocacy (speech that advocates lawlessness), fighting words, true threats, obscenity, child pornography and commercial speech that concerns illegal activity or commercial speech that is false or misleading are not protected under the First Amendment (Western New England University School of Law).

Den Otter tends to agree with these limitations noting that obscene sexually explicit speech should not be protected; incitement should not be protected, real child pornography should not be protected and criminal threats should not be protected. He also notes that, “I don’t have really strong feelings about protecting advertising and commercial speech as much as some people do” (Appendix B).

Loving takes note that circumstances may impact what is and what is not protected speech, stating that, “It depends on the circumstances, it depends on how society has defined crimes and it depends on the good sense of people” (Appendix C).

Research question 4: How can the provocation that takes place within certain types of speech create a movement of action against hate speech or negative speech?

All experts agreed that negative speech creates awareness that surrounds a certain topic. They all noted that “good speech” surfaces to combat the “bad speech.” Humphrey notes that, “We have seen a lot of students stand up and say that this isn’t welcome in this community. It galvanized a movement that said we need to do better” (Appendix A). Den Otter notes something very similar, stating that, “I think any time that there’s some kind

of racist incident on campus, people start talking about it. They're made more aware of it" (Appendix B). And Loving advocates for people to not just stand idly while hate speech is taking place around them, that, "If racial slurs were met with more conversation, evil councils being remedied by good councils, then how long would that atmosphere remain on campus?" (Appendix C).

The research shows that these suggestions and statements are true, if history is used as an indicator. Various incidents that have occurred, such as the *California Polytechnic State University College Republicans Free Speech Wall*, the *Crops House Incident* and the *Charlie Hebdo Attacks* have created movements against the negative speech that took place. Many times when "bad speech" shows its face, there are people who use "good speech" to combat the issue.

Recommendations for Practice

Following completion of the study, substantial data has been collected and analyzed on the topic of freedom of speech and public forums on college campuses. Given the information present, it is vital to highlight the most important content and present it for further practice for freedom of speech and public forums on college campuses.

Allowing for Conversation

There is a reason that the freedom of speech has been such a vital element of creating the society that is present in the United States today. The free marketplace of ideas comes from allowing all ideas to surface and then allowing the public to decide

which ideas they agree with and which ideas they do not. So long as there is any sort of censorship on campuses, these ideas cannot freely flow and will be suppressed underground. This does not mean that they will no longer exist. It is quite the contrary. They will just be spoken in places where others cannot openly disagree. It is important that these ideas move freely so that ideas can be exchanged and attitudes and minds can be changed. Even though some views may be harmful or unpopular, without a public veto of these types of speech, they are still valid points. To disallow for certain types of speech out of fear is to create censorship that is fear-based. To allow for certain types of speech that may be fearful is to truly allow for a marketplace of ideas. Yes, there are limitations on certain types of speech, but not because of their content, rather because of their repercussions. What this means is that some speech like child pornography, true threats or incitement cause actions that are not mere words. Child pornography harms children. True threats can turn into acts of violence. And incitement can lead to breaking the law. Thus, it is not the content of the speech that is being censored, it is the actions that are a by-product of these types of speech. Allowing for unfavorable speech to be present is what must be done to allow for a marketplace of ideas, especially on college campuses where learning must be at its most potent.

Speak up

As the great Martin Luther King Jr. said, “Some of us who have already begun to break the silence of the night have found that the calling to speak is often a vocation of agony, but we must speak. We must speak with all the humility that is appropriate to our limited vision, but we must speak” (King Jr., Martin L., 1967). This has been found true

with this project. Even though negative speech deserves protection on California Polytechnic State University's campus, the same is to be said for positive speech. When speech surfaces that one disagrees with, it is vital that both parties speak up and not behind closed doors, but right then and there. The freedom of speech, in part, exists so that an exchange of ideas can take place – so that one side is not censored by fear of imprisonment. And with this freedom comes responsibility. Not only the responsibility to stay within the confines of legal speech, but the responsibility of input. Loving states that:

“So if someone were to, as I was walking down the sidewalk, hurl an ethnic slur at me, I could, as I have done in the past, say that, ‘you have misidentified me. I am not of that national origin. I am of this national origin. You are betraying your ignorance.’ And that would be one thing. But if other people, walking on the same sidewalk, instead of simply turning their heads or rushing away or listening so they could tell a story about how bad this person was, if only they would have said, ‘excuse me, I disagree with that. What you’re saying is not appropriate. It betrays your ignorance, your hatred and your small mindedness.’ If racial slurs were met with more conversation, evil councils being remedied by good councils, then how long would that atmosphere remain on campus?”

(Appendix C).

And this is true. People cannot sit by when they hear objectionable speech if they want change to take place. People need to stand up for what they believe in and remedy evil councils with good councils, as Loving would say. Without this opposition, there is no point in communication. There is no point in the freedom of speech. And there is no point

in complaining about any type of speech. It should not take a mass incident for people to stand up for what they believe in. The way to combat negative speech is to combat it every day – every time that it surfaces.

And for those who have a questionable point-of-view, this should also not be silenced. Just because an idea has the possibility of being unpopular does not mean that it should be censored. It should be out in the open to be debated; to be questioned; to be either right or wrong; to be heard. Both sides of every conversation should be witnessed and communicated about. But if either side is silenced by censorship, whether it be from an administration or by self-censorship, then both sides have lost because communication has ceased to serve its purpose. Speak up.

Recommendation for Research

This study was a single-site study on California Polytechnic State University's campus. The topic of freedom of speech in public forums on college campuses would be served best if it was conducted on multiple campuses. This study was also done on the campus of a state university and the information would be bolstered by research done on campuses that were private college campuses, community college campuses, multiple-site studies, other state campuses and campuses in other countries. This would allow for varying perspectives, cultures, site populations of various sizes and authorities. The use of varying questionnaires is encouraged to encompass more information.

Study Conclusion

In conclusion, given the various findings of the study, there should be consistent research done on the topic of freedom of speech in public forums on college campuses. Routine data collection and interviews should be conducted based on the changing ideals of political correctness and what constitutes free speech on college campuses. The changing nature of ideals is constant and thus presents both opportunities and drawbacks to the topic of freedom of speech in public forums on college campuses. Overall, the study presented the collective opinions and knowledge of several experts in related fields and review of literature on the topic. This study can be applied to various university campuses, especially those within the state of California and includes both professionals and students alike. The study does serve as an educational tool for those who engage with campus communities and those who wish to ensure the freedom of speech on college campuses. Anyone with these interests is encouraged to produce further research in the subject area. The freedom of speech is a vital practice within our country. It is an ideal on which this country was founded. It creates a marketplace of ideas that allows the popular to rise and the unpopular to be heard. Without it, this country would be gagged. College campuses would be muted into the submission of the popular view. Voices would be only in unison, but not because of harmony, because of fear.

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Appendix A

Interview Transcripts: An unnamed university administrator

The following interview was conducted to get expert opinions from an administrative perspective based on a questionnaire about freedom of speech on California Polytechnic State University's campus.

Interviewer: Alexander Davidson

Respondent: An unnamed university administrator at an unnamed California university
(An unnamed university administrator)

Date of Interview: 5/11/2016

Interview Transcription:

AD: "What speech should be protected in a public forum in an unnamed university?"

UUA: "So when you say public forum, what does that mean to you?"

AD: "A public forum is essentially somewhere like Dexter Lawn where speech has ultimate protection."

UUA: "So like the UU Plaza?"

AD: "Exactly."

UUA: "So what speech should be protected? I think all speech should be protected in a public forum. Even, well, we saw at the beginning of the school year on Dexter Lawn, where very hateful things that didn't promote the climate of inclusion and were not very welcoming were said but they're protected. I think if we tried to restrict that there, we would probably lose in court."

AD: "So when you said the issue that took place on Dexter, can you elaborate more on that for the record?"

UUA: "Sure. It goes back to the fall where there was, I believe it was the college Republicans, put up a wall that I believe they called the "free speech wall." It's an annual thing that they do around the fall of the Berlin Wall – I think; I'm pretty sure. It was just write whatever you want and people who we assume were an unnamed university students, but we don't know because people come in and out of our campus, wrote things that were derogatory toward Muslims, misogynistic comments about women, anti-LGBT individual comments, and all sorts of things that were not directed at a specific individual but were directed at groups - things that were designed to make those groups feel unwelcome. While hurtful to some, not everyone, and words that created an unwelcoming environment to some, still are protected by the First Amendment. We couldn't say that we were going to take the wall down."

AD: “Are there other examples that you can think of, instances like this that have happened that had the same sort of protection even though its questionable speech?”

UUA: “I’m trying to rack my brain. They happen all the time but I’m just trying to think of an example. So I think, for example, we’ve had Greek organizations that hold themed parties in the past that were not inclusive and were derogatory, but were protected. It’s not welcoming and its contrary to our values and doesn’t promote inclusion, but the university doesn’t have the right to restrict their right to do that.”

AD: “Do Greek organizations fall under the same umbrella as an unnamed university?”

UUA: “They’re a club. They’re different than the Vines to Wines Club. Greek organizations have a national headquarters and they’re on hundreds of campuses. They have to agree to abide by campus policy to affiliate on our campus.”

AD: “Do you think that derogatory speech that is considered something like hate speech should be protected?”

UUA: “Yeah. The situations that I’ve named, I do think that it should be protected and individuals should have the right to be able to say stuff like that. I think it presents the challenges of people feeling included, but I don’t think the university has the right to restrict that speech. We have the right to restrict speech if they are naming a person. They cross into a different manner of how they’re doing it.”

AD: “Like slander, defamation and that kind of stuff?”

UUA: “Right. Just saying, “All Muslims should go back to the Middle East”, as much as I personally don’t like it and don’t want it in our community, it should be allowed.”

AD: “My next question really dealt with the hate speech that took place on the Republican Wall and whether that should be protected, but you pretty much answered that.”

UUA: “It should. What happened is that wall got marred and destroyed. What happened was that some people ripped things out and some people came with markers and scribbled over some of the stuff. Some people came and wrote comments that were contrary to it. We were watching a little microcosm of the principle and value of free speech happening right there.”

AD: “How far can speech be taken on an unnamed university’s campus before its considered unprotected?”

UUA: “I would know it when I see it. I don’t know that there’s a specific policy, but if it were, for example, cross into involving a specific person, hate speech involving a person isn’t protected. We experienced that this year as well, where an individual student made

threatening comments directed at an individual. That's not free speech. It's still hate speech, but it crosses a line."

AD: "If they're not threatening comments, because I know threats constitute a different category of speech, if hate speech was to take place toward another student that wasn't a threat or intimidation, would that be protected?"

UUA: "It's going to depend. This is the grayness of law. Would it potentially violate our code of conduct? More likely. Would a court consider it free speech? They might. It's hard to say without knowing the actual incident what would happen."

AD: "How does an unnamed university deal with incidents like these? For example, with the student that was threatening the other student on social media..."

UUA: "Well, we arrested him. Not only is that not free speech, but it violates a number of state statutes. We take it pretty seriously when we have someone who is doing something and we can hold them accountable, that's part of our responsibility to do that."

AD: "Kind of an example based on the previous question, should something like cross burning be protected?"

UUA: "I think it has been upheld as free speech, but it becomes a time, place and manner issue. Would we allow that on our campus? Probably not. We probably would not allow it on campus by saying that we wouldn't allow open flames on campus. Right? Not by saying we don't want you to burn a cross on campus."

AD: "I know that cross burning flows into this issue of intimidation because of its historical context, but if it wasn't used as a form of intimidation, like if someone wasn't using it to intimidate another student or to intimidate a certain group, and it was just used as political speech, is that protected?"

UUA: "It's hard to know the motivation behind someone. That's part of the challenge. The motivation that we often place on why someone wrote something on a free speech wall or what someone is burning a cross, is the motivation that we put on it, not necessarily what the person who is creating that speech."

AD: "Their actual intent?"

UUA: "Right. I can make an assumption and that's it."

AD: "What speech have you been able to, on an unnamed university's campus, say is absolutely not protected? Are there examples beyond the threatening incidents?"

UUA: "I haven't in the time that I've been here come across anything."

AD: "What kind of gray area exists?"

UUA: “It’s all a gray area.”

AD: “Yeah. Are there things that you can put your finger on and say that it’s definitely a gray area?”

UUA: “I’ll go back to the wall and create a gray area scenario around that for you. We have the whole wall and if something on there was incredibly hateful speech directed at a person, the grayness that we would encounter would be if we should take down the whole wall; should we remove that section of the wall? Should we find a way to cover it up? It’s that one little piece of speech that we’re concerned about surrounded by all this other free speech. If we chose to take down the wall because of one thing on there that’s not protected, are we trampling on the free speech rights of everyone else who have writing on the wall?”

AD: “How can the provocation of other students through various types of speech create positive movements against the hate speech or against the negative speech?”

UUA: “We’ve seen it a lot this year. We have seen a lot of students stand up and say that this isn’t welcome in this community. It galvanized a movement that said we need to do better – to be more inclusive and look at the systemic factors that allow folks to feel that it’s okay to write something like that on a wall. That’s a positive example, right? I’m one who believes that the movement that came out of this year, while many folks can say it’s incredibly annoying to administrators, I think it is exactly the work we do. Other examples are the campus preachers that come to many campuses. The campus I used to work at, there would be a counter-protest right next to them, people with giant wings to block them. It can expire the exact opposite and can be very powerful.”

AD: “Why is it so often that negative speech has to show its face before good comes out? It seems like so many instances in my research, and not only on an unnamed university’s campus, but various campuses, that some sort of hate speech or derogatory comment is made, and then you have groups of hundreds of people that come together to combat it. You look at instances, even like the Charlie Hebdo shootings in France where you had the greatest instance of people gathering together to stand against that, why is it so often that negativity has to surface for people to stand against something?”

UUA: “I think, like if you look at our campus, there’s a lot of stuff that is put in place or is in progress that is trying to create a more inclusive environment, but sometimes things like that happen that galvanize people and they feel that their own safety, security or sense of well-being is threatened and that often energizes people to say that they’ve had enough and that they want to see change or see change faster. I think often times, like the Charlie Hebdo thing, it’s around issues of violence. These things can promote violence and things that we don’t want to see or experience. At an unnamed university, there’s been a lot of progress around the issue of inclusion. When the Free Speech Wall went up in November, we weren’t where we wanted to be but we weren’t doing nothing. This happened and folks said, we need more and faster because we don’t want this to ever

happen again. I've been on campuses for twenty-something years and these things are cyclical. This will happen again in another four or five years at an unnamed university. Only because we will put a lot of attention around this and students will experience it and they will think differently, but they'll graduate and move on and new students will take their place who haven't experienced it and don't remember the pain that the campus went through. There aren't people on campus to say, "No. We went through this in the fall of 2015. We're not doing that again." Time will come, people will all live through it, we'll all move on with our student culture and something will happen again. It's nature."

AD: "How do you feel an unnamed university's diversity, or lack thereof, we're kind of notorious for not having much diversity as some places like UCLA or some place like that, how do you think that impacts the speech that takes place on campus?"

UUA: "It helps from a skeptic's prospective. It probably makes it easier to call out groups because there isn't a critical mass. On that free speech wall, people made horrible misogynistic comments against women, and more than half of our student body is female. Why did that happen? These things happened at the campus I worked at before which was 60 percent students from underrepresented backgrounds. I don't know that what happened had anything to do with our lack of diversity. I think it has to do with potentially different ways that individuals approach that concept of inclusion. These things happen on lots of campuses."

AD: "At your time at a southwestern university, did you see more hate speech or less or equal? How did that break down?"

UUA: "Probably about the same. Maybe slightly more because it was a more politically active campus. As a large land-grant public university we have preachers, we were the home of every protest that was going on and we'd have the counter stuff going on. We probably saw more of it, although the community was used to it a little more so they were able to put it into perspective – this person is saying these horrible things to try and provoke. They're not saying those things because a southwestern university is a welcoming campus."

AD: "Do you think that because the campus was, well, not immune, but more numb to it, do you think there was less uprising? I know with an unnamed university, every time there tends to be a big group that stands against it, was a place like a southwestern university less likely to stand up against something because it happened more?"

UUA: "No. I think they were as likely. The campus is twice the size of an unnamed university, more than twice the size of the student body, in the middle of a city. Some of it is sheer demographics. Some of it is the way that at an unnamed university, we intentionally stop and think that this is a way for us to learn and grow as a community. We shine a spotlight on it. The night after the Free Speech Wall, I sent a letter out to the entire student body. Potentially there were 200 students there that night when they had a discussion about it at the wall, but it was powerful and I wanted every student to know about it. That would not have happened at a southwestern university. We said we're

going to use this moment to start that conversation about values and inclusion with the risk that it's going to make people feel uncomfortable. Part of the process of becoming more inclusive in speech is that we have to get ugly and messy first. We said that we were going to make the choice to get ugly and messy. And people who either weren't offended by the wall or didn't know the wall was there, I'm going to tell them to look at this and make their own decision about it. I'm potentially going to make more people offended. I'm certain that the e-mail I sent out drove several hundreds of people to go and look at it. Some of them were angrier and more upset than before they looked at it."

AD: "Do you think it's easier for a campus that's smaller like an unnamed university to shine a light on instances like these?"

UUA: "Yes and no. We could have at a southwestern university, but we have a different approach here and a different type of a relationship that people like the president and myself and senior leaders want to have with the student body than the type of relationship that our counterparts at a much larger university are able to have with the student body at large."

AD: "What are some proactive steps that can be taken to try to combat this type of speech before it happens?"

UUA: "We have had all sorts of ideas that came out in forms of demands. It's interesting because there is a lot of responsibility put on universities to fix it right away. However, students come to us with 18 years of life experience and so often times universities are considered the place that we should clean everything up that happened before and set everyone on a good path that sets up the rest of their lives up, all in four years, while you're earning 180 credits and that's hard. I think we need to do different things in our orientation programs about setting up expectations. We need to increase the compositional diversity of our campus. Folks need to have more regular interactions with people that are different from themselves. We need to have more opportunities for students to learn about issues of difference, about systemic issues of oppression and how they might contribute to them unintentionally. How do we structure that through out of class experiences, through orientation, through new intentional first year experiences that will do for students in the residence halls? We try a whole host of things and we'll see what works. And then we have to do it all over again. 4500 people are leaving this June and 4500 new people are coming in September. It needs to keep repeating."

AD: "So there is this negativity that happens that has a by-product that's good, like SLO Solidarity, is there any way to completely get rid of the step that is that negativity?"

UUA: "I don't think so, as a realist. I think it will always happen. Human beings are human beings and we can try to do everything we can to reduce it, but we can't get rid of the negative things that happen on campus. Our hope is that the next time it happens, it's not as pronounced or it's further away in time. We want students to know that it's the action of that individual and not an action that's facilitated by the institution. Part of what we experienced this year is the feeling that the institution allowed those things to happen

because we haven't done everything that we could in their perception – as much or as fast enough.”

AD: “Are there things that are happening at an unnamed university that are kind of window dressing as far as making it look like positive things are taking place when they're actually not taking place – they're just there as a façade to make it look like things are being done?”

UUA: “I'm trying to think what could be described as window dressing.”

AD: “I know that a lot of times, there's all this talk about bringing more diversity to an unnamed university. Are there instances like that which may just be kind of a “Hey, look at what we're doing” rather than actually taking place to fix a core issue?”

UUA: “I know what you mean. I think the way you tell if something is window dressing or not is whether the commitment to it is sustained over time. I think we see a sustained commitment to things in the improvement of climate and diversity. We don't always agree on what that is. If it was window dressing, we would have thrown a speaker and a forum at the issue in November and just walked away. Nothing is coming to mind as window dressing, but I do know that universities do that. We're going to have an open forum, let people say how they feel, let them say how impacted they were and then tomorrow we're going to wake up and go about our business the same way.”

Appendix B

Interview Transcripts: Ron Den Otter

The following interview was conducted to get expert opinions from a constitutional law perspective based on a questionnaire about freedom of speech on California Polytechnic State University's campus.

Interviewer: Alexander Davidson

Respondent: Associate Professor in the Political Science Department, College of Liberal Arts, at California Polytechnic State University

(Ron Den Otter)

Date of Interview: 5/16/2016

AD: What speech should be protected, no matter what, on a campus like California Polytechnic State University?

RDO: My view of universities is more traditional. If there's any place where people really should be exchanging ideas and trying to learn to get along with people that they disagree with and be exposed to new ideas, having people challenging what they really believe, I think it's on a university campus. I mean, where else is it going to happen in our society? We know that a lot of that doesn't take place in K-12 school, certainly not at private schools and probably not at a lot of public schools, either because we know students in junior high school have limited free speech rights. I would hope that universities could be these places where people could be free to say whatever they believe and defend it. People ideally wouldn't take it too personally when they happen to disagree with what someone has said, or they don't like the politics of the speaker so they disinvite that speaker. But it's pretty clear, I think, today that many universities just aren't like that. They aren't anything like free speech zones.

AD: Can you give an example of some sort of speech that may be sort of questionable but should still be protected on a campus like California Polytechnic State University?

RDO: I think these days on any campus people are very sensitive about, what is sometimes called "hate speech", anything that rubs a very, and understandably so, sensitive spot about race, gender or sexual orientation. I think anytime there's any speech where you're in those areas, people are often very sensitive about what's being said. Normally when people say they're offended by certain kinds of speech, it's not usually very hard to take a guess that it has to do with this or that or this or that. It's not normally the Mormons on campus that are all offended by what people are saying about them. Generally, I find that students both on the left and on the right, maybe more with students on the right because I'm a professor that's on the left, I find a lot of hypersensitivity. I certainly wouldn't just say this is conservative students, I think there are a large number of students on the left that get very sensitive about certain issues. My impression is that this is something that is happening across the entire United States, it's not just limited to California Polytechnic State University. I don't know that anyone has any idea of what to

do about this. I must say that many people who teach here are very careful sometimes, maybe too careful, about what they say in the classroom. The learning experience won't be the same because you're trying to be sensitive to people's feelings, but you never know how people are going to react and what they might be sensitive about. People might get offended by certain ideas and it's tough. I'm probably misremembering in the past, but it didn't seem to me when I was a college student, people were as sensitive or so 'how dare you criticize my beliefs' or it's like somehow if they're your beliefs, they're yours and you couldn't possibly be wrong about anything. I think that's a problem on a college campus where the whole point is for people to be better informed. Also, realize when you're having a serious discussion about something, that the person you're having the discussion with may not be an idiot or may not be evil, they may just have different values, give different weight to different values, may have different factual understandings. I don't think that means that everything is always in the eye of the beholder, I don't think that's the case at all, but sometimes I think that a lot of students think that, 'as long as it's my belief, how dare you criticize me' so I guess there's something unsettling about challenging anyone's beliefs about anything, especially when they feel strongly about these particular beliefs. Again, I don't think this is a right/left kind of thing. I mean, there are people on the left that are very sensitive about different things. You know, in a million years, don't bring a pro-life speaker to campus, that's the worst thing you could possibly do. There's unfortunately, I think, a lot of intolerance on the right that I don't think there's any question about, but there's certainly intolerance on the left as well. One of the things that I've seen in my lifetime, it used to be to be a liberal democrat, and now we say progressive, that was to be in favor of free speech. It was a conservative position when you weren't defending free speech because it was social and religious conservatives in communities that wanted to suppress sexually explicit speech even though it had First Amendment value. These days it's just weird to me how all of the sudden conservatives are in favor of free speech and I don't know how this got turned on its head in the last 20 or 30 years. When I was in college, believe me, it wasn't the conservatives on campus who were the champions of free speech, it used to be liberal or progressive positions. Let's face it, people who are pushing campus speech codes, like anti-hate speech codes, are almost always people on the left and then the right is opposing them. It used to not be the case. It's not like it was true 6,000 years ago, but in my lifetime I've seen this change. For someone who's on the left, I'm much more old-school about free speech, especially on a university campus. I mean, what other forums are there for people at a formal part of their life to have these kinds of experiences. And most of the time discussions are pretty civil in classrooms, I think people are pretty respectful. Not always so much when it comes to what happens on campuses. My impression is there is a lot of, and I think this happens more on the right than on the left, but conservatives on California Polytechnic State University's campus love to do things that are like 'let's get in your face' or 'let's see how much we can get a rise out of you and offend you' so they'll invite this outrageous speaker to campus. I don't know, maybe they're just enjoying themselves by getting a rise out of liberals and then liberals fall into this trap of playing that game instead of doing what's best and ignore them. A few years ago there was islamo-facism week on campus, and that's not something that's unique to California Polytechnic State University, they do this in a lot of places, but it's just done to be deliberately provocative and if the goal is to somehow find common ground and to

interact with people that you disagree with but at least you respect the person, as long as you're on good terms with people and you respect them, it's very easy to disagree and not get all bent out of shape about it. We don't have a ton of that. It seems like when people disagree politically, it's because that person is an idiot. I find myself sometimes feeling that way, it's like 'god, that's so stupid,' you know? Like who thinks building a wall is a good idea? I don't know that there's much that can be done at the college level, but I happen to think that it's worth a try. If people got more used to conversing with people that they disagree with and were more willing to understand where they're coming from, to have more feelings about how 'these are people like me – I think they're wrong, they think I'm wrong – we sincerely disagree but I can understand why that person happens to believe that.' I think it's very hard to really put yourself in the shoes of someone else who is very different than you in any way, whether it's religious or something else. As someone who's not religious, I sometimes have a very hard time understanding people who are deeply religious. I usually chop it up to it's a matter of conscience, it's a personal decision and if they want to be that way, that's fine, this is a free country, but I'm never going to feel the pull of something theistic, it's just out my personal experience. Now obviously as a white person, I don't know what it's like to be a black person. I don't know what it's like to be politically conservative, and I must admit I'm very curious to understand people like that better because there are a lot of people like that on campus, obviously not faculty, but certainly some of the staff are more conservative and a fair number of the students are. I'd just want to understand why this is important to them. I think a lot of the people on the left are that way. It's hard to understand, you know, 'why are you so obsessed with Jesus; why are you so obsessed with guns; why are you so obsessed with both; can you really be an Evangelical Christian but also be like a gun person as well; what's this abortion thing, of all the things to get worried about?' People just think it's rhetoric on both sides. If you're someone who's pro-choice on the left, you think that anyone on the right is evil. I guarantee if people spent more time around other people, you know, we self segregate so most of our friends have pretty similar political beliefs. The research that they've done on college campuses is it's pretty common for people with similar political beliefs not to interact with people with different political beliefs so then the classroom setting is really the only time where you're almost forced to engage with people who don't share your particular views and where else is that going to happen? I don't think it happens in too many other places in our society.

AD: You've kind of already answered this, but you do think that hate speech should be a protected form of speech?

RDO: Let me preface this by saying that I do struggle with this, but at the end of the day, I think it should be. Think of the Crops house incident from a number of years back here. Is there really a lot of First Amendment value to hanging a noose as a Halloween decoration or a Confederate flag, which is obviously a symbol of the Confederacy and the protection of the institution of slavery and later resistance to civil rights for African-Americans and also school desegregation so there's a lot of historical baggage that's associated with symbols like that. Probably symbols like that don't have a ton of First Amendment value, unless we're talking about starting a discussion where "good speech" as you've heard me say before can counteract "bad speech." But there may be kinds of

hate speech that do have First Amendment value. I mean, when Malcolm X is talking about “by any means necessary” or the nation of Islam is talking about “blue-eyed devils”, sure, it’s hate speech against white people, but it’s subversive and why can’t people say things like that if they feel that way? Maybe the whole problem is that people are too polite sometimes. I think it does have a place. I don’t think anti-hate speech laws should be turned around to be used against these particular groups, which they may be. I always think it’s always hard to say in the abstract how much value certain speech might have. We get so caught up in this particular fact pattern that we forget about if this is a policy, then what about this? Can someone be disciplined for saying something like that? Obviously something like a racial threat would be very different, I don’t think that should be constitutionally protected. I do think that universities can sometimes go overboard and this can have a chilling effect. There was a student who was, this was a little bit before my time at California Polytechnic State University, the President of the Republicans on campus and Mason Weaver, who is a black Republican was coming to campus and was going to give a talk that was on, I think it was on how it’s okay to leave the plantation – something deliberately provocative. The student was putting up these posters at one of the student centers or something. Black students who were a part of a bible study got upset when they saw this and they reported the student and all that. I do think that’s constitutionally protected speech. California Polytechnic State University tried to discipline him, by the way, but he ended up hiring a lawyer and there was a civil settlement. If I had one point to make, just more generally, I really don’t trust administrators to make confident, fair-minded decisions about these kinds of things. I don’t think they care much about speech. They’re very much like government. They care about lawsuits. They care about bad publicity. But look, if you expel someone for hate speech, you may very well have a lawsuit on your hands. They care about bad publicity that can translate into fewer donations – less money coming into the campus. I don’t think their priorities are usually about the quality of intellectual life on the campus and the exchange of ideas. Quite frankly, I think, “it’s okay to leave the plantation” is just quite stupid. I don’t even take it that seriously. I think that was protected speech. I think a lot of stupid, bigoted things people say constitute as protectable speech. I hear all kinds of stupid stuff all the time. Bigots and idiots have free speech rights as well. I think the whole point is that it’s often hard to know in advance what might have some value or what might happen. I know it’s going to come across that I’m insensitive to racial minorities who have to deal with this. When students say at the University of Missouri, ‘I’m walking on campus and white students call me the n-word,’ I think you’re hard pressed to say that there’s First Amendment value. It shouldn’t just be because it’s constitutionally protected speech that it’s the end of the story. I think people should criticize people for saying certain things, but I usually think the best remedy is just more speech. I think most of the time that’s better than administrators to expel or discipline some students even when they do some egregiously awful things. Like SAE and that racist chant on that bus at the University of Oklahoma. You know, it’s really just ridiculous. But I don’t think people should be expelled for what they say, unless it’s some sort of criminal threat or you’re threatening the safety of other people. By the way, there aren’t any torts for hate speech or racial insults or anything like that. You can’t just sue someone. You can sue them for intentional infliction of emotional distress, but then you

have to prove that all the elements of the tort of intentional infliction of emotional distress are present.

AD: Going back to the Crops House, I know that in one of our classes we talked about *RAV* and *Virginia v. Black* and how the historical context of cross burning was enough for the court to say that it's not protected because it can be considered a form of intimidation, can you explain that?

RDO: In *RAV*, the speech was protected – the cross burning. In *Virginia v. Black*, cross burning done with intent to intimidate wasn't constitutionally protected. So in California, for example, it is a crime to burn a cross to intimidate as it probably is in many other states. But if you're burning a cross not to intentionally intimidate others, then it is constitutionally protected. And that's a pretty nasty way to express white supremacy. I think that there is a case to make against cross burning, as you were saying, because of its history it's probably inherently intimidating to members of certain groups including African Americans. That has everything to do with historically what its meaning has been. When I was in college, I remember one of our RAs had a Confederate flag on his wall and this was our RA. I remember there some kids in another dorm a few floors up that had a Nazi flag in the window. It's not as if this is something new like people never engaged in hate speech. I just think it's probably important when things like this happen that the community reacts in a certain way and not like you can just solve the problem and make things go away by prohibiting speech, that might be really hurtful to people. And there is all kind of speech that can be hurtful to people. I get that California Polytechnic State University wants to make this a campus where people are more comfortable, but I think the reality is that if you could ban all hate speech on campus, and you can't because of *RAV*, but even if you did and you tried to enforce an anti-hate speech code, I don't know how much the lives of non-white students would improve on this campus. There are all kinds of ways that you can express hostility toward people – just not be friendly or not be welcoming – what are sometimes called microaggressions. If the idea is that we'll really solve the lack of diversity problem on campus just by vigorously enforcing an anti-hate speech code that we don't have. I think it's naïve and it's the kind of thing that administrators like because it looks good; it looks like we're doing something, but then you'll talk to students and they'll tell you nothing's changed. There still will be hostility and people won't be friendly. Sometimes I think it seems like it's often about hate speech or other things that are happening on campus.

AD: Do you think something like the noose of the Crops house has enough historical background in the context of it being paired with a Confederate flag to mirror something like *Virginia v. Black* where it almost seems like it could be a form of intimidation?

RDO: That's again a tough one. I think it'd be very clear if some students put a noose on a student's door or a Confederate flag on a student's door. I don't think there's any question that it's intended to be intimidating or intended to be a threat. I understand and am pretty sympathetic to the idea that just having a noose on campus or a Confederate flag on campus would probably scare the shit out of lots of people. I mean, would you really feel safe walking around campus? That's what makes it a very difficult issue.

Again, going back to cross burning, if that's inherently intimidating, isn't there something about a Confederate flag or especially a noose? It's not very subtle, right? That's tricky because not all hate speech is as intimidating as that particular kind of hate speech. If it does cross the line into being a threat, I think that can be treated differently. We obviously can't allow for people to be racially intimidating on campus. How could we ever have anything like a university with that? It is definitely a struggle to make the community more inclusive. This is something that people at California Polytechnic State University don't like to talk about that much. We have a lot of very conservative students that a lot of people on the left would see as somewhat racist even though they don't see themselves as being racist. No one is perfect when it comes to these kinds of things. At the very least, I think there's a decent amount of racial insensitivity. People who think they're not racist are sometimes the worst ones because they're so complacent and don't see that this might be a problem. They don't think they're judging people a certain way when they are. I think it's a much deeper problem, and I certainly don't think that getting rid of hate speech with some sort of campus code. Then there's worries about arbitrary enforcements so this person can get away with this but not that. And obviously there are many different kinds of hate speech. There's hate speech against religious minorities, hate speech against racial minorities, hate speech against sexual minorities. There are all kinds of hate speech. And obviously universities care about some kinds more than other kinds. I think a lot of it has to do less with the culture on campus and more with our student body. I'm really surprised how many students on my Introduction to American Government midterm say they don't like the idea of a non-natural born citizen being president of the United States. They say that they don't think they can trust someone who was born somewhere else and all this anti-foreign, anti-immigrant stuff is thinly veiled racism. That's just the nature of our student body. Obviously people come to this campus with many beliefs and it doesn't really matter what kind of evidence they have for them and sometimes it's hard to dislodge those beliefs. I always have thought that anti-hate speech codes are well intentioned and even if they were constitutionally permitted, but I think there are certainly problems with enforcement and how they might be used in the hands of administrators who often make incompetent calls, at least many faculty feel that way. Again, it may look like a solution to the problem, but I'm not so sure it actually is. I'm not sure it makes things better. If anything, it turns conservative students into victims and free speech martyrs. Like that silly free speech wall is deliberately designed to be provocative and just to make people angry and I wish people on the left on this campus would have just completely ignored them because they were just trying to have, it's a very common conservative strategy on campuses, it brings the 'I told you so. You're intolerant. You're insensitive to us. You're sensitive.' All that kind of stuff. Sometimes it's best to not be provoked and be dragged into exactly what they were trying to do. That's what college campuses are like these days. I mean, did you learn anything?

AD: It didn't completely create SLO Solidarity, but it was one of the stepping-stones to creating it.

RDO: Interestingly, they're just being strategic about this. If the goal of getting in people's face and provoking them is to cause a movement that people have more sympathy for. Again, maybe you pleased yourself and you're more happy about this

but politically you probably made things worse for yourself and then when you do really stupid stuff that you feel so great about doing this, like writing racist stuff and it's okay. Well, it's not okay because it's constitutionally protected or because the university doesn't crack down on it. You certainly haven't reached the vast majority of students who are in the middle. Conservatives often think that universities are just bastions of a whole bunch of wildly left, it might be true at a place like Santa Cruz, but it definitely isn't the case at a place like California Polytechnic State University. Probably the vast majority of students here are moderate students who don't have strong political beliefs. If you're really trying to convert people or trying to get them to be sympathetic to your point of view, I think it's probably counter-productive because you just come across as being an idiot. Some of the stuff that the campus Republicans do is just, by the way, it's common on the west and it's something about the style of conservatism, all this affirmative action bake sale, get in people's faces and be provocative. It seems anti-intellectual. If your ideas are really better, why don't you just exchange ideas? Not just try to find the most conservative person you can just to piss the liberals off. And I really wish the liberals would just stop letting themselves be pissed off because they're just fueling this dynamic.

AD: It really does seem alienating to people who might want to move toward a conservative style when you're out there writing "gender: pick one" or the anti-Muslim hate speech that was on the Republican wall.

RDO: Look, that's only going to be appealing to someone who has already drunk the Cool-Aid. What else could it be? I guess it depends on what their payoff is, but if you're really trying to spread the word and get support for a candidate on campus, I really think it's counterproductive about what they're doing all the time. I can't imagine that more moderate students would hear something like that and think that they really want to be a part of that.

AD: I can't remember the last time I heard someone say something about conservatism that didn't make it out to seem like a joke.

RDO: Yeah. It's like, isn't there someone out there who is intelligent, who wants to be intellectual about this? I don't care for that kind of style of politics at all, as you can probably tell.

AD: Is there some speech that you think absolutely shouldn't be protected?

RDO: I think obscene sexually explicit speech shouldn't be protected, I don't think there should be a Miller Test. I think incitement because it's so hard to differentiate it from advocacy. I don't think criminal threats should be constitutionally protected. I'm pretty sympathetic to the fact that once you're a public official or a public figure, you shouldn't be able to sue people for damages because there is too much of a risk of a chilling effect. I don't have really strong feelings about protecting advertising and commercial speech as much as some people do. I tend to think if it's political speech it has potentially some First Amendment value and we should really just err on the side of protecting it. I don't

think that real child pornography should be protected and that's because of its close connection to the production of child pornography in which children are harmed. I do think that virtual child pornography should be protected because no children are harmed. I'm pretty close to being a free speech absolutist with some pretty rare exceptions.

AD: I think that's pretty close to my list of things that shouldn't be protected, at least what I learned from taking classes and doing my literature review.

RDO: Yeah. There are small categories. I don't think there are things like fighting words that are left. Under the First Amendment Doctrine there are very narrow categories that the Court have said are unprotected. It's almost impossible to prove all three parts of the Brandenburg test, all three parts of the Miller Test. In affect, when it comes to speech these days, almost anything goes.

AD: What kind of gray area exists when there are things that could be protected in one instance, but in another instance couldn't be protected?

RDO: Well, a lot of it comes down to how one would characterize the fact pattern. There will be multiple interpretations so you just have to expect that there will be gray areas and there will be borderline cases. Sometimes trying to make rules in individual cases that will cover just about any situation is just difficult to do. One of the traditional criticisms of a common law system is that maybe it's not best for courts to make rules about these things on the basis of some fact pattern. Basically our Constitutional doctrine when it comes to hate speech is *RAV*. And that's basically driven by the facts of that case, but in the common law system that's just how we do things.

AD: Do you think you can make a hypothetical of something that would be protected in one instance and not in another instance?

RDO: I'm sure I could come up with a situation where it's pretty clear that someone is inciting people to break the law, but there are so many situations in which I'd be afraid that it's too easy to show incitement in this one case and then people would go overboard on suppressing valuable speech. I can imagine tweaking facts that would make it so that I didn't want the speech protected. I could make the facts in such a way that you wouldn't be very sympathetic to the person who is engaging in the free speech – see anything Westboro Baptist church. Just about anything they're involved in I wouldn't be all that supportive in what they did in that particular situation. But that's always the challenge when it comes to protecting speech. When you really dislike the group and the things they're saying, how they are treating other people, they may still have a legal right to say this. Like for example, I think it's really stupid, Holocaust denial, but I don't think that the situation in say Germany or Austria is somehow better because they have laws against Holocaust denial. We don't have laws against Holocaust denial and it's not like believers in Holocaust denial are on the rise. People actively challenge them. I guess, generally speaking, it's good for people to come out in the open and have their beliefs challenged. I guess I have confidence that most people will be open to the evidence and aren't just going to believe anything. You know, there are people who believe all sorts of things, but

the vast majority of people? Are we helping the Holocaust denial side by making it illegal to deny the Holocaust? Possibly. It's hard to know what the effects are going to be, but I think we've done pretty well with that. You're not going to reach everyone. Sometimes people are going to believe whatever they want to believe. But to a greater or lesser extent, most people want to hear the evidence and want to be informed on these kinds of things if they really care about it. Not everyone falls into that category though.

AD: How can hate speech become a positive thing? We've kind of touched on how the provocation of good speech coming from bad speech. Are there other instances that you can think of, whether it is something at California Polytechnic State University or even a national picture, where provocation has created a positive movement?

RDO: I think any time that there's some kind of racist incident on campus, people start talking about it. They're made more aware of it. It's not something that's usually on people's radar and it's then put on their radar. People become more aware of these kinds of things and hopefully these are teachable moments where people can become more educated about what's going on. I think if things like this never happened, and obviously we don't want more of them, but I think Mill was right in thinking that we don't want this to be dead dogma, but lived truth. People need to have these kinds of experiences. One of the problems with sugarcoating racism or racist practices or brushing them under the rug, is that there are lots of things that need to be talked about openly and honestly if we're ever going to make any progress on anything. It comes at a cost because people can be very hurt or very offended, I just don't think the alternative is somehow better – we don't talk about these things and then people continue to hold these same beliefs and then begin to feel victimized in the sense that they feel like they're being gagged. I also think there are a lot of conservatives that feel like, 'I wish I could express my politically incorrect views, but I can't in class because the liberal students will jump on me and the professor will hate me and give me a bad grade' and all this stuff. I think some of that is in their heads, it's like they thrive on this, 'oh, I'm being persecuted'. I'd rather have an environment where everything is as open as it could be. Do you ever make any progress in anything when you don't talk openly and honestly about things and people just leave when they don't, and feel like they've been mistreated and they haven't been able to express their view. No one likes to be silenced. By the way, even if they might be wrong about stuff, they're still human beings and they should be able to express their views. Maybe they'll learn something and maybe they won't. I don't think of college students as being lost causes. People change their views a lot after college and hopefully you get some exposure to some things that make you think more critically about why you have the beliefs that you do. I think it'd be a shame if someone graduates here at age 22 and 10 years later they don't have any new beliefs and they don't see anything differently. I think most people will tell you the longer that they've lived they start to see things in very different ways and your views aren't often all that similar to what they were 10 years ago or 20 years ago and if they are, did your intellectual growth just stop?

AD: What do you think could be something that could happen to start erasing the negativity that seems to have to take place for the good speech to come out? Do you think there are things that could happen?

RDO: Yeah, I don't know. This environment is so polarized and people just seem to want to provoke other people. It's all about getting angry and judgmental. There's never been a golden age on college campuses. I don't know. I think a lot of things would have to change - just people's attitudes. My feeling is that it's more people on the right, college students that like to provoke and get in people's faces just to get a rise, at least more than it is on the left. I don't know. Maybe that's just my bias. What would be the equivalent of people on the left doing something like a free speech wall designed to say hurtful things or insulting things just to piss people off? I don't think there really is an equivalent for people on the left where they do that deliberately. I think a ton of things would have to change. And I think you're right, for good speech to counteract "bad speech." I think there are a lot of preconditions about how people see these kinds of things and whether they take a more cerebral approach, how they feel about others who disagree, whether they're really interested in the quality of the argument and how the facts mattering and things like that. I really do think if people were more informed about certain things, they definitely change certain positions, especially if they're factually informed. There are certain issues where I wouldn't expect there to be any movement, like abortion or something like that. I actually do think that many white students who oppose race conscious affirmative action are not particularly well informed about it. They might think they are and they might say, "how would you feel if you were a white student who lost their seat to a black student?" I wouldn't be happy about it, but I think there's a long conversation to be had. And maybe that's just because you identify with a position that's in your own self-interest or you oversimplify. College is really about trying to show how over-complicated things actually are, right? Isn't that what every class is about? You know, you leaving thinking, 'damn, that was a lot harder question than I thought it was. It seemed so simple when I walked into this.' You know, what I call a good kind of confusion. I've always like when Socrates says, "I know nothing, at least I know nothing." And at least he knows enough to know that he doesn't know very much or at least he knows he's ignorant. I like to think that we really took that to heart and you realize that you really aren't as informed as you think you are. You're thinking is much more flawed than you think it is and even if you are really a bright person who has achieved a lot either educationally or professionally, you're still prone to all kinds of errors. If accepting this wasn't some kind of blow to our identity, and it was okay to be wrong, ignorant or ask that dumb uniformed question without taking it personally, things would probably be a lot better. It's probably unrealistic though.

AD: Do you think that sometimes California Polytechnic State University has window dressing about trying to fix certain things?

RDO: All the time. I really do think it's often about window dressing and show at universities and not addressing problems and I think it has a lot to do with how administrators think about these kinds of things. They're not really trying to get to the bottom of it or trying to improve the educational quality. They just have a different incentive structure. They think differently and they have different reasons or incentives for doing certain kind of things. The whole idea of the benefits of diversity, which Justice O'Connor sings the praises of in *Grutter*, was all about how this is what white people

need, like, this is just great for white people. Everything is somehow about how can this help white people.

AD: Are there any things that you think could be done to change the way that it's just window dressing and not actually trying to fix the root of the problem?

RDO: You have to change incentive structures. Administrators are the people who have the real power here at the university. Faculty don't have as much power as people believe they do. If you're really concerned about say, getting rid of racism on campus, probably you'd have to have much more extensive educational programs and not have this mentality of 'we've done what we need to do and we'll let kids do what ever they want.' You'd have to have a university president who wouldn't make fundraising a priority and would make other things a priority, and you know that's not going to happen. Administrators make decisions on the basis of fear, of lawsuits and this and that and publicity all the time. The reaction of administrators with the Crops house incident was not, 'let's solve this problem and make things better,' it was, 'we don't want to be known as the university that has a bunch of racist kids on campus, we don't want this on the national news. We don't want people who would otherwise donate a bunch of money saying they're not going to give money to a racist institution.' The natural reaction is to brush everything under the rug. It's not about changing individual administrators; it's about changing the institutional structure and giving them incentives to care. If you don't give them incentives to care, they're not going to treat these things any differently. They'll just talk about it and make it seem like they're really committed. I'm not saying that we shouldn't have a diversity and inclusion center on campus, but you know, if you think that's like 'oh, we've really solved the problem,' you're being really naïve about it.

Appendix C

Interview Transcripts: Bill Loving

The following interview was conducted to get expert opinions from a mass media law professor's perspective based on a questionnaire about freedom of speech on California Polytechnic State University's campus.

Interviewer: Alexander Davidson

Respondent: Professor in the Journalism Department, College of Liberal Arts, at California Polytechnic State University

(Bill Loving)

Date of Interview: 5/20/2016

AD: What kind of speech should ultimately be protected at California Polytechnic State University?

BL: Well, it would be, of course, political speech. Alexander Meiklejohn proposed that speech that bears on the process of democracy should get the ultimate protection, moreso than speech that is not involved in the process of governing a country. But at the same time, pretty much all speech should be protected at California Polytechnic State University.

AD: Would you include commercial speech?

BL: Commercial speech does have First Amendment protection, just not as strong as non-commercial speech. Now because the university is a state institution, there may be limits as to what commercial speech would be allowed, if for no other reason than the apparent endorsement of the state for a particular product or service, but even with that, as long as it's speech, it should be protected. The only speech that wouldn't be protected are those categories of speech outside the protection of the First Amendment: Criminal speech, obscenity, incitement; those things have never been protected by the First Amendment so it seems to be working.

AD: Should derogatory speech that's considered something like hate speech be protected?

BL: Are you talking about going up to someone and saying, 'I'm attacking you and I'm using words' or are you talking about using words that some people find to be degrading, harmful and insensitive?

AD: I'd say both.

BL: Well, incitement isn't protected by the First Amendment so if someone wants to go pick a fight and incite lawless action, then they have to deal with incitement laws. Here's the way I explain it to students. I grew up in the nascent period of the Civil Rights

movement. The same First Amendment that protected Dr. King is the same First Amendment that protected George Wallace and Lester Maddox. It protected Medgar Evers and it also protected the Grand Kleagle of the Ku Klux Klan. The First Amendment exists for unpopular speech, speech that is unordinary, speech that a lot of people think can cause great harm or even the destruction of society as we know it. But when we can protect speech on the fringes, then we can know that all other speech coming into the mainstream will be protected. So as an Asian American, I have had hateful words directed at me, I've heard hateful words directed toward my mother and to my brother. They weren't always pleasant, but if we start to gag people, where do you stop? Right now there are folks in the country who say persons advocating for trans people to use their gender-identified bathrooms is an attack on everybody and that it is "hate speech" to suggest that a "man" can go into a woman's bathroom. The same thing with respect to same-gender marriage – some people say it's "hate speech" because it's attack the institution of marriage that they grew up with and they know. They'll say, 'it's attacking my religion and my culture.' So who's hateful speech are you going to oppress?

AD: Wasn't that kind of the case in *RAV* where Scalia kind of says that you can't stop one type of symbolic burning but not all others?

BL: It wasn't Scalia that said that, it was the concurrences. Scalia was only talking about elevating fighting words and giving them First Amendment protection, but in that case, it's the same thing, yes. Who do you punish? In that case, it's which is the speech that's okay? If you say "oriental," is that bad? If you say, "Asian," is that better? Words change. I remember as a young person people saying, "The American negro should enjoy the same rights as everybody else." And then Negro became a term that was pejorative. Black, African American. Things change as society changes so what are you going to do?

AD: I'm sure you're familiar with the Free Speech Wall put up by the Republicans on campus and how there was derogatory comments on the Muslim faith and also on gender identity. Should something like that be protected speech?

BL: Yes. And it should be protected just as the people who responded to that speech with their own statements should be protected. Justice Louis Brandeis said that the fitting remedy for evil councils is good councils. That is to say if there is speech that you find abhorrent, then speak out about it. The First Amendment guarantees everybody's right to express an opinion so if someone is expressing an opinion that you think is hateful, then you have the same right to go out and say, 'I think this is hateful.' You have the same right to make the argument as to why that speech isn't true. And if your argument is sound, then you may win somebody over. If your argument is not sound, they might not be won over or they may be so intractable that no matter what you would say, they would never change. But it's not just a debate in which the two speakers are engaged, it's a debate that everybody participates. Everybody gets to see what you have to say compared to the other person and they can choose because we have a marketplace of ideas. The marketplace says that the way to find the truth is to see all versions of the truth and that seeing falsehoods helps us understand what is true. So, I tell a story in class about the story of Pocatello, Idaho. It had a public access channel and the public access channel

would allow anybody to come in and create a 30-minute cable show. And so there were shows on knitting, macramé and home canning – anything you wanted to talk about. A group of white separatists came down from the northern part of the state and they said, ‘oh, we’d like to have our own 30-minute show,’ and then they waited to see what would happen. A lot of people said, ‘you can’t let the white separatists get on the cable channel, they’ll say hateful things, they’ll be mean, they’ll be terrible, they’ll incite violence; don’t let them on.’ But the question was: How do you discriminate against that point of view when you haven’t discriminated against any point of view in the past? So the city fathers and mothers got together and the white separatists were expecting that they would be denied, which would make them First Amendment martyrs and demonstrate how the government really is against their point of view or their particular race. But that didn’t happen. Instead, the city said, ‘you may have your 30-minute cable program and we’re going to let anybody who wants to talk about what you have to say in your cable program have 30-minute programs before yours comes on and have 30-minute programs after yours comes on and great, everybody gets a say.’ That wasn’t what the white separatists were looking for. They were looking for controversy. They were looking for a way to say, ‘we’re being persecuted.’ So the day that they were supposed to show up and take the 30-minute program, nobody appeared because they didn’t get what they wanted. They wanted a symbolic victory over the forces arrayed against white people. Well, that was the best way to deal with that. If someone has a terrible idea, then counter that with a better idea or counter it with speech showing that it’s a terrible idea.

AD: It makes sense. When I’ve looked at my research, that’s pretty much what I’ve found. A lot of the time when you have these terrible things that happen across campuses, you more times than not have people who stand up. You have one person doing something terrible and then you have a hundred people who gather the next day and say, ‘we’re not like that.’ But going off the derogatory speech, with the Crops house incident that happened, one thing they did is they hung a noose that was involved with their display, and I know that with cross burning, a part of the reason it can be banned is because of the historical context as far as being used to intimidate. Is something like the noose at the Crops house unprotected because there seems to be a historical context of intimidation?

BL: Well, understand that the cross burning laws, the one that made it to the Supreme Court, *Virginia v. Black*, did not ban cross burning. It made putting up a cross on property where the public could see it a crime. It was the crime of intimidation because in the deep south, the Virginia Court is part of that, burning crosses were used by the KKK as a symbol of its power and a warning to people that if there was a burning cross, somebody was going to die. Under that special circumstance, the burning cross could be viewed as an act of intimidation. It didn’t say you couldn’t have a burning cross, it just said that if you burn a cross you are engaged in the criminal act of intimidating people. In California, we don’t have that history. In California, well, and in the west, in the west, yes, there was racism, a good deal of it directed at Asians, but we didn’t have the Klan as active and as violent as we had in the south. So it doesn’t mean the same thing. In the west, a noose means lynching somebody and people who got lynched weren’t always black or Hispanic. A lot of times it was the mob deciding that it would take justice into its own

hands because they either didn't trust the system or they thought the system was taking too long. So the noose in and of itself isn't that. You could make an argument that the noose represents suicide and it reminds people of loved ones who have killed themselves and therefore it's hateful in that respect. So it doesn't have the same history and so the effect isn't as deeply felt. If they had a burning cross at the Crops house, yes it would be something that was viewed as hateful, but California didn't have the lynchings, the beatings and the shootings that the south had so while it's a symbol that's an anathema to people, it's not the symbol that it evokes the deep down primal fear that a burning cross in the south would. Now, you'll notice that following the Crops house incident, a lot of people spoke up and they said, 'we think this is not a good idea, we think, in fact, that this is hateful speech,' and that's exactly what the First Amendment exists for. Someone can say something and you can agree or disagree and your expression of agreement or disagreement is defining who you are and also helping to further a discussion with the hopes of winning people over to your side or at least getting people to consider things that they might not consider.

AD: So how far can speech, I know that you've talked about the certain categories of speech that isn't provided the protection given by the First Amendment, but how far can speech be pushed before it is considered unprotected?

BL: Well, how far is the limit of a statute, the judgment of the judge, that of the jury and then the appellate courts and we've been really sensitive at different times in our history. We were afraid of anarchists and so we made speech about anarchy a crime. We were afraid of communists so we made speech or action about communism a crime. We were afraid of fascists. We get scared of a lot of things and then we criminalize them and then decades later we realize that we went overboard. Every so often I think we've progressed and we've gotten better and then something comes up and we're back to the same old caveman fear-reaction and rather than figure out what's going on we will just make it a crime and put those people away where they can't make us upset. So, how far can speech go? It depends on the circumstances, it depends on how society has defined crimes and it depends upon the good sense of people. Good sense of people, very often, isn't good.

AD: Can you cite specific examples of some sort of speech that either has gone on or hypothetically could go on at California Polytechnic State University that would absolutely not be protected – speech that could take place but wouldn't be tolerated at California Polytechnic State University?

BL: Okay. Let's say somebody made a declaration that if they saw somebody go into the women's bathroom, who they didn't think was a woman from birth, that they would go in and make a citizen's arrest and then beat the snot out of that person. Well, that's a threat. That's intimidation. That is coming close to skirting that. If you have someone engaged in symbolic speech in which the person says, 'I think the drug laws are crazy so I'm going to make meth and I'm going to use meth here on Dexter Lawn.' It's symbolic speech, but it's also a crime. So that could be punished. What else? Oh, Donald Trump. People say, 'I believe in what Donald Trump says and all of the people coming from Mexico are criminals so if I see anyone who I think is Mexican, I will arrest them or I

will shoot them before they commit a crime.’ Then, there you go. Same thing for Muslims. Trump is saying, ‘oh, we don’t know who is good or who is bad,’ and if someone picks up on that and threatens someone they believe to be Muslim, then that would be something that could be punished. Otherwise, you’re just dealing with simple crimes: Assaults, batteries. Language is language.

AD: Now, is there some gray area that exists in some of these forms of speech where it kind of is a toss-up whether or not someone could be punished or where there is a thin line where one small thing part of the speech can make it so that it’s not protected versus being protected?

BL: Yes. And that’s why we have courts and appellate courts. Remember that many years ago, maybe a decade or so, a student put up a flyer, I think it was in the Union, which bore a caricature of a minority. The university was very upset. How dare you draw this hateful picture. How dare you put this up. The university suspended the student – they may have expelled the student – and then a law firm took up the student’s case, sued the university. The university had to reinstate the student and apologize for its conduct in punishing speech that it had no right to punish.

AD: Talking about the gray area still, if cross burning was used as a form that was not seen as a form of intimidation and was strictly political speech, is that something that would be protected on California Polytechnic State University’s campus?

BL: It could be. Here’s the thing, and it goes back to a case called *Locurto v. Giuliani*. Two firefighters and a police officer from New York City participate in a Labor Day parade in the burrow of Queens. The three dress up in blackface; they have a flat bed truck, they have a bucket of fried chicken, they’ve got watermelons and one of them pretends to be a black man who was dragged behind a truck to his death in Texas some months earlier. They were fired. They sued. They won in the district court who said they were engaged in expression and that they couldn’t be fired for that, but when the case was taken up by the court of appeals, it reversed and ruled for the city. The city’s theory in firing these three first responders was that their conduct would make it more difficult for the city to deliver their services. That is to say, if people in the minority community were contacted by the police or if the fire department showed up, because of this conduct, people might be less likely to want to cooperate or might even be inclined to oppose what was going on. Now, the expression, having the potential to disrupt the services was enough to justify their termination. If someone burned a cross on campus, that might be something that the university would say, ‘well, you’re making it difficult for us to deliver our services because now people of color may not choose to come here or they may not choose to trust the administration, they may not choose to participate in campus life because of this. That’s one possibility. On the other hand, there’s a case out of George Mason University in which members of a fraternity, during a discussion of opening up the campus to make it more diverse, did a fundraiser in which they had an ugly woman contest and the male members of the frat dressed up as ugly women. One of them dressed up in black face in a caricature of an African American woman. The university punished the frat, the frat went to federal district court and the court overturned the university’s

punishment saying that the frat had been engaging in political speech, that its ugly women contest, however sophomoric in nature, still addressed a controversy on the campus. The controversy was: Are we going to lower standards in order to bring in more students of color? So it's difficult to say because cases have gone both ways. We'd just have to see what happens in court.

AD: Now, would the same thing go for something like flag burning?

BL: Actually, flag burning would be an easier case. If someone stole the university's flag and burned it, in which case you'd have theft and destruction of property. If you burned a flag as a political statement, you're protected by the First Amendment. The flag burning case out of Texas, the Supreme Court said, 'no, you can't criminalize that political expression.'

AD: Is that simply because it was a content-based restriction versus a content-neutral restriction?

BL: No. It was more fundamental First Amendment. You cannot criminalize expression that you disagree with.

AD: Are there other examples that you can think of that really just fit this gray area of could be legal or could not be legal.

BL: Well, it wouldn't be illegal but it would really tick some people off. When I was in law school, in my second year, I founded the Asian Law Students Association. Interestingly enough, the vice president was Caucasian and more than half the membership was not Asian. About that time, a flyer was posted on the college campus; this was a private school so it's not a state school. In private schools, your First Amendment rights are pretty much nonexistent. The flyer promoted a white law students association and the school administration was aghast, they were up in arms, they found out who put the flyer out and punished those students. I am still firmly convinced that was an overreaction. Rather than punishing the students, it was an opportunity to have a discussion across the campus as to people's beliefs about affirmative action or leveling the playing field. Instead, by punishing the students, they drove that opinion underground. They made martyrs of the students to free speech and their political beliefs and they told the world that on this campus, there are things that we're not mature enough to discuss, things that we are so afraid of that words on a piece of paper will be enough to result in a student's expulsion. The First Amendment is there because of these speakers. It wasn't just to protect people writing about motherhood, the flag and apple pie, but we forget about that. Sometimes we forget about that because we're so eager to protect "the poor minority kids." Well, I've been to conferences where people have talked about the need to have rules and laws to protect "the poor minority kids" or the "poor minority people" and I have from time to time stood up and said, "Do I want you to protect me? Am I asking you to criminalize speech because it might upset me? Do you think that I'm so fragile that I can't listen to the word chink or gook? If that's the way you're thinking, then how racially insensitive are you? How little credit are you giving me as a minority

person? It's kind of paternalistic to think that you have to protect me and however guilt-ridden you are, you could expiate your guilt by speaking out when someone uses a racially derogatory term. You could say, 'no, he's not a Jap, he's a chink.' You could say, 'how dare you use this language about someone who you don't know.' But no, you're not willing to do that. You don't have the courage of this conviction. You want somebody else to punish these people for you, when you could, on your own, speaking for yourself, do a lot more to change things. Don't ask somebody else to fix a problem that you have let go." I talk about this in class and sometimes I talk about a movie called "A Gentlemen's Agreement." There was a period of time in the United States where there was institutional precedence against Jews so if you were a Jew, you couldn't belong to certain country clubs, you couldn't stay at particular hotels, you were not welcome in some restaurants and of course you couldn't belong to some clubs. In the movie, a reporter is assigned to do a story on what it's like to be Jewish in the United States. The reporter of course is gentile, not a Jew, he identifies himself as being Jewish and when he goes to places, initially they're saying, 'we're glad to have you here, it's really great, you fit right in' and when he gives them a Jewish name, they say, 'oh, we're sorry, it turns out that we don't have room for you after all.' The plot of the story also involves the reporter's friend who is a decorated veteran of World War II who is a Jew, who has been subject to this discrimination and who has a girlfriend. The girlfriend is not Jewish. And in a very telling scene, the Jewish war veteran is meeting with his girlfriend who is very upset and tells him about a dinner party that she went to that night and she's almost in tears as she describes the language that people at the dinner party used saying things about Jews; saying derogatory things about Jews. And the woman is saying, 'I felt so bad and I thought of you and I just feel so bad and it was just terrible. I'm so upset.' Well, instead of being sympathetic, her Jewish boyfriend says, "What did you say? What did you say when these people said these things? It does no good for you to tell me how upset you were now when you're here with me, you could have done some good if you spoke up at the party; if you had answered those remarks with remarks of your own." Well, that's what a lot of these hate speech codes deal with. We could, every day, have a campus which we could discuss anything, but why do you need some administrator or campus police officer to force what you don't have the courage to do yourself?

AD: Kind of going off of that, how can the provocation lead to something good? When someone is using this kind of speech, how can it change things? So if the tone of the campus is racist, but that provokes a group of people who wants to stand up against that, how can it change the whole environment?

BL: A lot of people say these things because it's pretty much automatic. Now, a lot of them are calculated slurs, but they do so in a vacuum. So if someone were to, as I was walking down the sidewalk, hurl an ethnic slur at me, I could, as I have done in the past, say that, 'you have misidentified me. I am not of that national origin. I am of this national origin. You are betraying your ignorance.' And that would be one thing. But if other people, walking on the same sidewalk, instead of simply turning their heads or rushing away or listening so they could tell a story about how bad this person was, if only they would have said, 'excuse me, I disagree with that. What you're saying is not appropriate. It betrays your ignorance, your hatred and your small mindedness.' If racial slurs were

met with more conversation, evil councils being remedied by good councils, then how long would that atmosphere remain on campus? So the people who want rules, let them speak up, but they don't. At the same time, they feel so noble and empowered for have had talking about the bad thing. When I came to this campus, I was interviewed by an administrator. One of the things the administrator noted about the campus is that it lacked diversity and the administrator said, 'it's terrible because we try to do things to make it better but it just keeps getting worse.' The administrator talked about a group of black students who had left in mass from California Polytechnic State University because they said they didn't feel welcome. The administrator said, 'this is terrible, this is awful, this is the sort of thing that we wish we could fix.' And so I said to the administrator, "This group of black students, how often did you invite them over to your office? How many times did you go to lunch with them? How many times did you say hello to them on campus and let them and everybody else on campus know that you valued their presence?" And of course, the administrator had never done that. And so it was, really? Really? You really believe so much in diversity and inclusiveness that you never even went out of your way once to buy somebody a cheeseburger? You aren't committed. You're fashionable. And fashionable people are what let bad things happen.

AD: I'm going to skip ahead a few questions because that ties in well into what my last question is. How much of what California Polytechnic State University does is window dressing rather than actually getting to the core an issue and fix it or help it? How much is it, 'hey we need more diversity so we hired a black administrator kind of thing?' How often is it window dressing rather than addressing the problems that exist?

BL: Well, you can say its window dressing, I say more often it's kind of like a story from the depression. Everybody is out of work and so you have people selling pencils, selling apples on the sidewalk. A commenter from the Times said of a friend, "Yes, he'll buy an apple for a few cents from a guy standing on the street and walk away like he's solved the depression." And so it's a small step, but people think that small step is enough to make us better. It's not. It's not hiring one person. It's not hiring three people. It's not creating four or five committees. It's every day and in every way, extending yourself, letting people know that you believe in inclusivity and diversity. It is being a public symbol of that. It is being a public voice for that. And if you don't do that, then you are just like the people who want speech codes. You want somebody else to fix the problem because you have neither the courage or the will to act on this noble sentiment that you express over and over again.

AD: Do you think, like you're saying, acting every day and every possible way, do you think that could help fix the lack of diversity at our campus and some of the speech that does occur on our campus?

BL: It couldn't hurt and it would help a great deal. It's not some statute that gets enforced by some impersonal guy or girl with a badge, it is the community that changes itself. When ordinary people choose not to condone hatred through their silence, when ordinary folks decide to speak up in favor of equality, diversity and inclusivity, that's when things will change because it, kind of like church, it doesn't do a hell of a lot of good to go to

church on Sunday and then forget the teachings of your religion the other six days of the week. If you only practice piety only one day of the week, we're not going to have a very religious society.

AD: What would have to happen, if it's even possible at all, to make it so that there wasn't negativity to come up for us to combat these issues?

BL: Negativity doesn't have to come up. There doesn't have to be a trigger if people simply extend themselves in the course of their everyday activities. But going out of your way to shake a black person's hand is, well, it's a gesture. Being friendly and saying hello and acknowledging people that does a lot more. As a minority person, I don't want to be picked out so that you can do your symbol of the week – I shook this person's hand and that means I've done my part for diversity and equality – no, all you've done is make yourself feel better. But every day you say hello and you may have a conversation, and it's not, 'I'm having this conversation with you because you're a minority person and don't you feel good?' No, it's I'm a human being talking to another human being just as you would talk to anyone back home or where you grew up. We still tend to think of each other as being different when it comes to the color of the skin, the eyelids, the hair, the clothes, but we're all people and we need to recognize our common humanity. When we can do that, we can have a society where nobody is afraid to walk outside.

AD: Do you have any other suggestions that may help promote positivity within California Polytechnic State University's campus, especially between diverse groups and people who may not have the same upbringing or same cultural identity as others? Are there any other steps that others can take that help promote positivity that don't include having a trigger to get people together?

BL: Well, it's making the conscious choice every day to think about people being people and not things. We can't have a parade and make everything better. We can't have an e-mail with the president making everything better. We can't have a photo opportunity with everybody working toward diversity on campus make everything better. It is making everything better on a day-to-day basis by everybody. It's not winning a badge for taking a selfie with more minority people than everybody else. It is simply treating them like people. Treating us like people.