

The Cynical Manipulation of Universities as Public Forums in the Age of Trump

Susan Balter-Reitz, Montana State University Billings & Michael Lane Bruner, University of Nevada, Las Vegas ¹

“Set up like a bowling pin. Knocked down, it gets to wearing thin. They just won’t let you be” (Truckin’ – The Grateful Dead).

On the evening of February 1, 2017, Milo Yiannopoulos, then editor at Breitbart, a far-right social media outlet, brought his highly controversial “Dangerous Faggot Campus Tour” to the University of California, Berkeley. A self-described provocateur, Yiannopoulos reveled in, and profited from, the constant controversy surrounding his university appearances across the United States. Only two weeks before his scheduled appearance at Berkeley, for example, on the day of U.S. President Donald Trump’s inauguration, a counterprotest at the University of Washington turned violent. A young man named Joshua Dukes, drawn to the controversy surrounding Yiannopoulos’s speaking engagement in Seattle, was shot during protests there, drawing widespread media attention (Woodard, 2017). At Berkeley, CNN reported that over 1,500 protesters and counterprotesters gathered in Sproul Plaza that February night, where, despite the large police presence, violence once again erupted due to Yiannopoulos’s presence. The university’s administration felt compelled to cancel the speech just hours prior to its scheduled start (Park & Lah, 2017). The newly inaugurated president was not happy.

In point of legal fact and precedent, UC Berkeley’s decision to stop Yiannopoulos from speaking during a violent scene was well-considered. The cynical and circus-like atmosphere of the “Dangerous Faggot” tour had infuriated members of campus communities nationwide, rightfully concerned that universities ought to

¹ *Dr. Balter-Reitz is a Professor of Communication at Montana State University, Billings and Dr. Bruner is a Professor of Communication at The University of Nevada, Las Vegas.*

remain devoted to the development of public reason and civic virtue. More than 100 members of Berkeley's faculty signed a letter of protest, imploring Chancellor Dirks to cancel Yiannopoulos's appearance weeks before it was scheduled (Fuller & Mele, 2017). Chancellor Dirks, however, felt compelled to follow the campus policy. Therefore, the Berkeley College Republicans, who invited Yiannopoulos, received a letter of support reaffirming their right to invite the speaker, despite the administration's strong statement that "Mr. Yiannopoulos is a troll and provocateur who uses odious behavior in part to 'entertain,' but also to deflect any serious engagement with ideas" (Dirks, 2017, n.p., emphasis added). The Berkeley College Republicans nonetheless insisted on hosting the event, and it was only after a full-blown riot that the university cancelled the appearance, with Yiannopoulos surreptitiously escorted off campus by police.

Within hours, Trump, recognizing an attack on an ideological ally, weighed in on the controversy with the following tweet: "If U.C. Berkeley does not allow free speech and practices violence on innocent people with a different point of view—NO FEDERAL FUNDS?" The tweet, sent at 5:13 a.m. on February 2, 2017, intensified an already difficult debate about the role of college and university campuses as public forums: our primary focus in this essay. It is a profound irony that the target of Trump's ire, UC Berkeley, was arguably the birthplace of the modern Free Speech Movement during the Vietnam War (Henry, 2018), a movement which deeply influenced the present shape of public forum doctrine. Drawing upon Peter Sloterdijk's (1987) definition of cynicism as "enlightened false consciousness" (p. 5), or knowing something is false but acting as if it is true, our position is that Milo Yiannopoulos cynically manipulates the free speech rules that are a legacy of the Free Speech Movement of the 1960s and that Trump's tweet supports the conditions that allow this type of manipulation to thrive. This controversy reflects the tenuous balance that institutions of higher education must negotiate between providing an open forum that allows students, faculty, and staff freedom while protecting the university's role as a bastion of public reason.

In many ways, the discursive drama surrounding the cancellation of Yiannopoulos's performance mirrors broader campus debates on a range of issues related to expression: trigger warnings, safe spaces, micro-aggressions, and the appropriateness of material in the college classroom (Chemerinsky & Gillman, 2017). The threat behind the tweet, however, ratcheted up the disquiet felt by university administrations around the country about the difficult relationships among their policies on free speech, their responsibilities to public reason and civic virtue, and their ability to keep their doors open. Only a year before the controversy over Yiannopoulos's appearance, UC Berkeley found itself facing a substantial and growing budget deficit (Anderson, 2016). As with most public institutions across the country, Berkeley was compelled because of systematic defunding by the state and federal governments to increase its reliance on private donations and grant funding (Asimov, 2012). Very few universities in the United States, whether public or private, could withstand a full withdrawal of public dollars. Although Trump's tweet has little possibility of becoming policy (Kim, 2017), and its generic wording about "freedom of speech" coupled with a lack of a substantive threat belies its weakness, the threat alone could negatively influence private donors. Universities are in an unenviable position where negative media attention can threaten their financial viability, especially if the media suggest they are strongholds of liberalism where difficult conversations are disallowed. While UC Berkeley is unlikely to close its doors in the face of empty threats, smaller colleges and universities could face more serious ramifications when challenged with bad press.

Yiannopoulos, as well as his supporters at Breitbart, understand the potential value of the media attention that accompanies controversial campus visits. Scandal attracts media, and media create influence. A purportedly gay conservative Republican who, for example, mocks private transgendered individuals publicly, insists that "fat women" be deported, and refers to Trump as "daddy" (Yiannopoulos, 2016), Yiannopoulos travels, invited usually by young Republicans, from university to university, disrupting, or short-circuiting, reasonable deliberative discourse. The intended purpose of the "marketplace of ideas" concept, introduced by Justice

Holmes's dissent in *Abrams v. United States* (1919) was to protect reasonable minority positions from the tyranny of the majority, not to protect cynical provocation. The shooting at the University of Washington in 2017 is an example of how cynical provocation can play out. Two Yiannopoulos supporters arrived with weapons, a pistol and pepper spray, boasting before the event they were going to "crack some skulls" (Carter & Miletich, 2017). While one of these skull crackers was pepper spraying those who had come to protest Yiannopoulos's speech, Dukes, a member of the crowd who was attempting to grab the weapon, became the shooting victim. During his opening remarks at the University of Washington event, Yiannopoulos cynically maintained, as did Trump in his later tweet, that his supporters, as a repressed minority, were the true victims, and what a shame it was that things had come to this for presumably innocent people with a different point of view.

The spirit behind the marketplace of ideas is to ensure that all relevant opinions, no matter how marginal, have the right to be heard; it is not to ensure that cynical provocation be granted the status of a repressed minority opinion. While we acknowledge an exceptionally wide range of reasonable discourse, we assert that it should not be controversial to claim that not all utterances can be viewed as meeting the well-known and broadly acknowledged criteria for reasonable public discussion (Toulmin, 1958; Habermas, 1981; Perelman, 1982).

Furthermore, the dangers to a government when people perform seriously like persons they are not, and act as if they care when they do not, are well-known. During the ancient Roman republic, for example, one forfeited one's citizenship by performing as an actor on a stage, whereas Nero married his horse and on stage wore masks of himself and the wife he had murdered (Beacham, 1999). Does a democratic citizenry want a republic of laws based on reasonable public argument, where marginalized and easily overwhelmed populations are protected by free speech law, or an empire of brute power, where the lines between the true and false are intentionally blurred to create controversy for controversy's sake, and where power is maintained by intentional obfuscation and backhanded critiques of the truly marginalized? To be reasonable does, in fact, require the ability to step outside of one's own frame of

reference to understand complex issues from as many relevant perspectives as possible. The cynical manufacture of conservative spectacle, however, where positions are taken that are not believed, and where scandal exists purely for scandal's sake, or perhaps most cynically as a bald display of the power to erase the boundaries between facts and fictions rhetorically, has nothing to do with critical reasoning or open debate on controversial public issues, for there is no true perspective to discover, no sincere values to compare, no corroborated evidence to debate.

If someone refuses to take a sincere position, but instead performs a character using provocation for provocation's sake in what are supposed to be legally protected state forums for public reason, then one must wonder what sort of public reason will result from the speech of such persons. Comics such as Stephen Colbert use satire to unmask political propaganda, and, in a debate, they could articulate the values that influence their comedy, which tends to attack the corruptly powerful. Scandal mongers, however, have no sincere values to defend because they are there simply to create scandal, often supporting hegemonic powers by surreptitiously attacking the weak. In fact, university public forum regulations presently place campuses in a paradoxical position: they are supposed to be bastions of free speech in the service of reasonable public debate, but the rules themselves undermine the very conditions required for reason to flourish. When all voices must be heard for the sake of public reason, where do we responsibly draw the line between relevant and irrelevant voices, or voices that have and voices that do not have something relevant to say? We claim that multiple viewpoints must be heard because we are reasonable people, who when presented with multiple, honest, perspectives, are able to think more richly about public issues, and, hopefully, produce wiser policies. How Yiannopoulos and his ilk contribute to that enterprise, however, has not been proven.

The Quagmire of the Public Forum on Public University Campuses

Public colleges and universities are subject to the First Amendment, meaning that university administrations may not abridge freedom of speech. Although campuses are not completely open, and law has recognized that not all public places

are appropriate venues for unfettered expression, the purpose of universities should be “to dedicate themselves to the creation of disciplined free thinkers who seek new knowledge and are willing to challenge received wisdom if that’s where fact and reason take them” (Chermerinsky & Gillman, 2017, p. 51, emphasis added). Thus, colleges and universities are required to create policies that provide venues for multiple viewpoints while carefully maintaining an atmosphere that promotes students’ ability to learn.

Before providing a review of the current legal constraints public universities face when limiting speech, it is important to acknowledge the wide range of speakers who reside in the university environment, as our focus here is specific. When considering freedom of expression, students, faculty, staff, and administrators have different legal rights and responsibilities on a campus; however, for our purposes, following the threatening Trump tweet, we focus on the role that university administrations play in permitting or preventing speech in public forums under their control. Speech that occurs in classrooms, in dorm rooms, or in narrower speech settings is beyond our present scope.

Public colleges and universities are built on public lands and funded in part by taxpayers; therefore, restrictions on speech must be viewpoint neutral. That said, because campuses contain a mixture of private spaces, non-public forums, designated public forums, and traditional public forums, universities have different policies that apply to expressive access (Chermerinsky & Gillman, 2017). This reasonable mixture of policies can, however, cause confusion for discourse communities that are not part of the university and do not grasp the legal complexities of private and public space (Bowman v. White, 2006). Administrators control access to only a few of these; however, their decisions become lightning rods for criticism of campuses that disallow speakers or limit their access to campus.

From the perspective of First Amendment jurisprudence, the most obvious issue campus administrators must negotiate is the public forum doctrine. Spaces designated as traditional public forums and designated public forums are subject to strict scrutiny, translated by the courts to mean that campuses must protect speech as

a primary value. Reciprocally, relevant institutional entities have the responsibility to keep these forums safe, and they must create regulations to keep the public from harm. These regulations, however, must limit no more speech than is necessary to achieve the twin goals of public safety and viewpoint neutrality. Though the value of content neutrality is heralded as a First Amendment truism, we should at least consider how providing an open forum to speakers whose very goal is to undermine the development of public reason may work directly against the ability of colleges and universities to create an atmosphere that allows for ideas to be debated responsibly and civilly.

Despite the unassailable fact that public colleges and universities occupy a space that is owned by the government, these sites have not always been viewed as completely open forums for controversial viewpoints. Many campuses imposed sharp restrictions on student speech prior to the 1960s, when student activists began to demand access to campuses to protest the Vietnam War and to demonstrate their support for civil rights. Here, minority voices were being repressed, as well as their arguments that addressed important public concerns. In 1964, when the Chancellor of UC Berkeley denied access to Slater Gate by student activists, a location on campus where students traditionally had been allowed to advocate for political causes, student protesters staged a massive sit-in that led to the arrests of hundreds (Henry, 2018). These events are widely heralded as marking the birth of the Free Speech Movement. Subsequently, the 1960s activists' demand that campuses allow space for controversial ideas to be expressed has become the norm for both legal thinkers and higher education doctrine. For example, see *Bowman v. White*, a 2006 case where the 8th Circuit waxes philosophic about the importance of defining public colleges as public forums because "a university's mission is education and the search for knowledge—to serve as a 'special type of enclave' devoted to higher education" (p. 978, emphasis added).

Healy v. James (1972), which is a direct progeny of the campus Free Speech Movement, provides the Supreme Court's first characterization of the role of the campus as a champion of free speech. In this case, a group of students were denied

permission to organize a local chapter of the Students for a Democratic Society (SDS) at Central Connecticut State University. The President of the University, Dr. James, rejected a recommendation that the SDS chapter be afforded official status as a student organization because he found their “philosophy was antithetical to school policies” (p. 175). While this case does not explicitly address the public forum doctrine, it does define a value structure that underlies its application. In mandating official recognition for the SDS, Justice Powell proclaims the following in his majority opinion:

The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James's responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of “destruction” thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent (p. 187).

Powell's opinion provides two important dicta for future courts: 1) that a college is the instrument of the State, and therefore it must adhere to its First Amendment responsibility to provide a forum for views it does not condone; and 2) that the possibility of destruction is not sufficient to justify restricting students' ability to receive communication and associate with others who have the same need to share unpopular viewpoints. The opinion takes for granted that the students who petitioned to form the SDS chapter on campus held sincere viewpoints that had been previously repressed on campus.

Widmar v. Vincent (1981) provides an unlikely bedfellow to the precedent established in *Healy*. In this case, Cornerstone, a Christian student group, sued the University of Missouri at Kansas City (UMKC) because it had denied them the ability to use a classroom for religious purposes. Cornerstone had previously been allowed to use university facilities for its meetings; however, in 1977, UMKC informed the group that it could no longer meet on campus because it was using State property for religious worship or teaching. Powell, also the author of this majority opinion, granted Cornerstone the right to use campus facilities, making the unanalyzed assumption that

the campus of a public university, on the whole, “at least for its students,” possesses the characteristics of a public forum” (p. 267). Though Powell does not explicitly invoke public forum analysis, his opinion uses the language of public forum doctrine, including the following statements: “UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion” (p. 269); and “the University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech” (p. 273).

Justice Stevens’s concurrence in this case usefully problematizes the purportedly open nature of the notion that college campuses are public forums writ large. He argues,

facilities are not open to the public in the same way that streets and parks are. University facilities...are maintained primarily for the benefit of the student body and the faculty. In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative messages . . . [and] a university legitimately may regard some subjects are more relevant to its educational mission than others. (p. 278)

Yet despite Stevens’s well-articulated caution about the pragmatic institutional limits on fully public forums on university campuses, the most formal and structural consequence of the decision in both *Healy* and *Widmar* is that universities have, for the most part, subsequently inscribed public forum rules that defer to officially recognized student groups who wish to use campus facilities to support their rights of association and to bring in speakers of their choice. These speakers are not vetted to ensure that they further the mission of the university to consider the “broad range of ideas, especially those that test conventional wisdom” (Herbeck, 2018, p. 246).

States, however, do have the ability to limit access to their public forums if they create appropriate time, place, and manner regulations (*Cox v. New Hampshire*, 1941). In *Cox*, a group of 68 Jehovah’s Witnesses marched on the sidewalks of the business district in Manchester, New Hampshire. They were charged with taking part in a parade or procession without a permit. The defendants claimed that their rights to exercise their freedom of religion were infringed upon by the requirement to obtain

a permit. However, a unanimous court found that “Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses” (p. 312). In other words, the administrator of a city (or in our case a university) has a responsibility to protect its citizens from unreasonable actors who have other means to communicate their messages. We do not deny Yiannopoulos’s right to expression; instead, we are concerned by the uncritical acceptance of his right to speak in university public forums.

When analyzing the validity of a regulation concerning access to a public forum, courts use a consistent set of questions (Chermerinsky & Gillman, 2017). Does the regulation forward a significant government interest? Is the regulation narrowly written to accomplish the goal the government is trying to achieve? Does the regulation allow for other means to communicate a message? University administrations, in attempting to answer these questions responsibly, have worked to address safety concerns by requiring student groups to help offset the costs of security for highly controversial campus speakers, such as Yiannopoulos, and, in the case of UC Berkeley, the Berkeley College Republicans (BCR) were indeed required to offset the cost of basic security. Furthermore, to display his neutrality regarding speech content, Chancellor Dirks, in his message supporting the event, argued as follows:

We have treated the BCR’s efforts to hold the Yiannopoulos event exactly as we would that of any other student group. Since the event was announced, staff from our Student Affairs office, as well as officers from the University of California Police Department (UCPD), have worked, as per policy and standard practice, with the BCR to ensure the event goes as planned, and to provide for the safety and security of those who attend, as well as those who will choose to protest Yiannopoulos’s appearance in a lawful manner. (Dirks 2017)

Are these, though, the most appropriate criteria for ensuring the relationships between public forums and a university’s mission of nurturing public reason? Surely, the students at the forefront of the Free Speech Movement in 1964 had an important perspective, sincerely held, that was repressed by a hegemonic authority. Their censorship by the administration was a clear violation of viewpoint neutrality. We

might ask, however, what intentional, cynical provocation has to do with the search for knowledge and higher education? Whatever our answer might be, public forum doctrine at present is premised on the blanket assumption that a State entity cannot engage in viewpoint discrimination (*Perry Education Association v. Perry Local Educators*, 1982). Perhaps the real question is, do speakers such as Milo Yiannopoulos even have a viewpoint? What minority voice is being repressed here? What definitions, values, criteria, and evidence are being brought to bear in the construction of argument, and what reasonable policy alternatives are thereby entailed?

Conclusion

The history of the First Amendment is populated by heroic figures who fought orthodoxy to encourage meaningful and serious dissent, whether in comic or tragic forms. It would be a disastrous end to have the First Amendment re-imagined as the sanctum of the powerful and the cynical, portrayed as the innocent. It would also be a tragic end to the honor of public forums if reasoned debate were replaced by cynical speech. It would behoove us to rethink our criteria for university public forums in this, our age of cynical reason, ensuring that the voices we protect are actually trying to say something meaningful and worthy of Constitutional protection.

Milo Yiannopoulos is certainly not a hero of the First Amendment. His “Dangerous Faggot” tour did little to advance public reason or diversify the marketplace of ideas. Rather, as he did at the University of Colorado, Boulder, he used his platform as a way to vilify liberals, feminists and the media (Edge, 2017). Even using the most generous definition of reasonableness, nothing in the corpus of Yiannopoulos’s presentations justifies either the claim that campuses must defend his right to speak or lose their federal funds or that his rhetoric is providing a much needed counter-argument to University dogma. Campuses must guard against mere agitation to ensure that reasonable and rational debate is possible.

References

- Abrams v. United States, 250 US 616 (1919).
- Anderson, N. (2016, February 10) "Berkeley is facing big budget trouble, 'painful' measures ahead for nation's top public college" Washington Post. Retrieved from: https://www.washingtonpost.com/news/grade-point/wp/2016/02/10/berkeley-is-facing-big-budget-trouble-painful-measures-ahead-for-nations-top-public-college/?utm_term=.9eeb169c2b0d
- Asmiov, N. (2012, August 23). "Berkeley private donations make it happen" SF Gate. Retrieved from: <https://www.sfgate.com/education/article/Berkeley-private-donations-make-it-happen-3811571.php>
- Beacham, R. C. (1999). *Spectacle Entertainments in Early Imperial Rome*. New Haven CT: Yale University Press.
- Bowman v. White, 444 F.3d 967. (8th Cir. 2006).
- Carter, M. & Miletich S. (2017, April 24). "Couple charged with assault in shooting, melee during speech by Milo Yiannopoulos." The Seattle Times. Retrieved from: <https://www.seattletimes.com/seattle-news/crime/couple-charged-with-assault-in-shooting-melee-during-uw-speech-by-milo-yiannopoulos/>
- Chemerinsky, E. & Hillman H. (2017). *Free speech on campus*. New Haven CT: Yale University Press.
- Cox v. New Hampshire, 312 U.S. 569 (1941).
- Dirks, N. (2017, January 26). "Chancellor's message on campus appearance by Milo Yiannopoulos." Retrieved from: http://news.berkeley.edu/2017/01/26/chancellor-statement-on-yiannopoulos/?utm_content=bufferc3ddf&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer
- Edge, A. (2017, January 28). "Two nights on Milo Yiannopoulos's campus tour: As offensive as you'd imagine" Guardian. Retrieved from: <https://www.theguardian.com/world/2017/jan/28/milo-yiannopoulos-campus-speaking-tour-colorado>
- Fuller, T & Mele, C. (2017, February 1), "Berkeley cancels Milo Yiannopoulos speech, and Donald Trump tweets outrage. New York Times. Retrieved from: <https://www.nytimes.com/2017/02/01/us/uc-berkeley-milo-yiannopoulos-protest.html>
- Goldberg, S.B. (2018) "Mitigating the Costs of Contentious Speakers" *Harvard Journal of Law and Public Policy* (41): 163-186.
- Habermas, J. (1981). *The Theory of Communicative Action, Vol. 1*: Boston, MA: Beacon Press.
- Healy v. James 408 U.S. 169 (1972).
- Henry, D. (2018). "Free speech at Berkeley: Then and now." *Spectra*. 54 (1): 8-13.
- Herbeck, D.A. (2018). "Freedom of speech and the communication discipline: Defending the value of low-value speech." *Communication Education* (67), 245-268.
- Kim, M. (2017, February 7). "UC Berkeley Chancellor: Trump's threat to cut federal funding 'ill informed.'" Retrieved from: <https://www.kqed.org/news/11306317/uc-berkeley-chancellor-trumps-threat-to-cut-federal-funding-ill-informed>
- Mitchell, D. (2013) "The liberalization of free speech: Or, how protest in public space is silenced" in *Spaces of Contention: Spatialities and Social Movements*, Walter Nicholls and Byron Miller (Eds) London: Routledge, 47-68.
- Office of the General Counsel The California State University (2009) *Handbook of Free Speech Issues*. Retrieved from: http://www.calstate.edu/gc/Docs/Free_Speech_Handbook.doc
- Park, M. & Lah, K. (2017, Feb 2). "Berkeley protests of Yiannopoulos caused \$100,000 in damage" CNN. Retrieved from: <https://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/index.html>
- Perelman, C. (1982). *The Realm of Rhetoric*. Notre Dame, IN: University of Notre Dame Press.
- Perry Education Association v. Perry Local Educators' Association* 460 U.S. 367 (1983).

- Sloterdijk, P. (1987). *Critique of Cynical Reason*. Minneapolis, MN: University of Minnesota Press.
- Toulmin, S. (1958). *The Uses of Argument*. New York, NY: Cambridge University Press.
- Woodard, B. (2017, January 23). "How the shooting at the UW protest of Milo Yiannopoulos unfolded" *Seattle Times*. Retrieved from: <https://www.seattletimes.com/seattle-news/northwest/how-the-shooting-at-the-uw-protest-of-milo-yiannopoulos-unfolded/>
- Yiannopoulos, M. (2016, June 19) "Happy Father's Day, Daddy Donald." *Breitbart*. Retrieved from: <http://www.breitbart.com/milo/2016/06/19/happy-fathers-day-daddy-donald/>