**TESTIMONY OF RODNEY A. SMOLLA**
**DEAN AND PROFESSOR OF LAW**
**WIDENER UNIVERSITY DELAWARE LAW SCHOOL**

## I. Introduction

I thank the Committee for this opportunity to submit this written testimony on behalf of the Association of Independent Colleges & Universities of Pennsylvania. I submit this testimony against the backdrop of my past experience as the former President of Furman University, in Greenville, South Carolina, as the former Dean of the University of Richmond and the Washington and Lee University Law Schools, as current Dean of the Widener University Delaware Law School, and as a faculty member with nearly four decades of experience at many different state and private colleges and universities across the United States. I am also an active litigator and scholar in matters relating to constitutional law, particularly issues relating to freedom of speech, and have often written on free speech conflicts on American campuses.

Free speech controversies on modern American campuses are often in the news. We constantly hear stories about decisions of colleges and universities to allow or not allow controversial speakers to speak on campuses, stories about "trigger warnings" and "safe spaces," stories about colleges and universities deciding to discipline or not to discipline students, faculty members, coaches, athletes, administrators, or staff for social media posts on Twitter or Facebook, controversies surrounding protests and counter-protests, and heated rhetoric invoking phrases such as "academic freedom," "coddling," and "political correctness." To say the least, these are interesting times.

Colleges and Universities vary widely in their formal rules and informal cultures regarding these conflicts, and often both are works in progress. The University of Chicago, for example, has declared: "Our commitment to academic freedom means that we do not support so-called

'trigger warnings'... and we do not condone the creation of intellectual 'safe spaces,' where individuals can retreat from ideas and perspectives at odds with their own." On the other side of town, in contrast, the President of Northwestern University defended the creation of safe spaces.

I begin this testimony with the observation that it is important to try the best we can to avoid caricatures and over-generalizations in our discussions about free speech on campus. In this testimony, I draw on the long traditions of American thinking about freedom of speech and traditions of academic freedom in American higher education in an attempt to explain, in a balanced manner, the competing interests that colleges and universities must weigh and reconcile.

## II. The Dual System of Public and Private Colleges and Universities

America's robust dual system of public and private universities invites constant engagement with the distinction between the public and private sphere. Private universities are not legally bound by the First Amendment's guarantee of freedom of speech. While the First Amendment directly controls what limits Penn State may place on campus speech, the First Amendment does not directly control what limits the University of Pennsylvania may place on campus speech. Even so, it is quite common for private universities to adopt voluntarily principles that mirror the formal First Amendment principles that bind public universities.

## III. Colleges and Universities are Both "Free" and "Ordered" Spaces

The real world of the modern college or university, public or private, is what A. Bartlett Giamatti, former President of Yale (and later Commissioner of Baseball), described as "a free and ordered space." The modern university is a reflection of society itself. The most successful societies worldwide are those that have managed to achieve a healthy balance between freedom and order in the three great marketplaces of human endeavor: the political marketplace, the economic marketplace, and the marketplace of ideas. Our efforts to find this healthy balance are

best guided by one overarching goal: to achieve the maximum freedom possible, consistent with our basic needs for stability and security.

This core tension between liberty and order extends far beyond "order" in the physical sense. The modern university is sometimes conceived of as a cauldron of fierce competition—for admission, for tenure and promotion, for athletic championships, for giant endowments—and as a "super marketplace of ideas," a no-holds-barred place where anything goes, nothing is censored, and only the strongest and fittest survive. Yet simultaneously, the modern campus is often conceived of as an orderly and moral space—a community of scholars and students organized around such values as respect for human dignity, cultural and religious pluralism, collegial civility, and rational discourse. Both of these conceptions have value, and the trick is to strike the best balance.

## IV. The Two Great American Conceptions of What "Free Speech" Means

For well over a century, American thinking about the meaning of "free speech" has been a contest between two different conceptions, which I will conveniently call the "marketplace theory" and the "order and morality theory."

The American reverence for the marketplace is most famously embodied in one paragraph from a dissenting opinion of Justice Oliver Wendell Holmes, in *Abrams v. United States* (1919):

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an

> experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Holmes' powerful passage lives in poetic tension with yet another beautifully written paragraph by another Supreme Court Justice, Frank Murphy. In *Chaplinsky v. New Hampshire* (1942), Justice Murphy, writing for a unanimous Court, wrote the following elegant words:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

The two passages just quoted, from Justice Holmes and Justice Murphy, represent the yin and yang of the constitutional struggle to balance liberty and order. As a constitutional law teacher, I often invite students to explore the implications of the two opposing passages.

The two passages are remarkably different. Holmes tells us to tolerate speech we *loathe*, speech we are convinced is *fraught with death.* It is the marketplace, not law, that will decide the value of speech. The government may intervene through the force of law only if there is an *immediate* need to check the speech *to save the country*.

Justice Murphy, in contrast, admonishes us to take a stand against the demise of order and the disintegration of morality: "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." In this one sentence he captured elegantly and economically the view that competes against Holmes,

the view of all those who believe that in the end, freedom of speech must always be measured against other vital societal interests in order and morality.

This is the "values conscious" view of freedom of speech, adhered to by those who believe society can and should draw lines between speech of high value and speech of low or no value. *Chaplinsky* articulates with pristine clarity the theory that drives the balance it strikes: these examples of low-value speech are of such "slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." This is decidedly not the stuff of the marketplace of ideas. For *Chaplinsky* does not leave the test of truth to the power of the idea to command the market. Rather, *Chaplinsky* contemplates that the test of truth has already been administered, and that these forms of speech have flunked the test. They have been certified already as truth retarded, as of only "slight social value as a step to truth," and perhaps more importantly, they have been certified already as unfit for decent society, as "outweighed by the social interest in order and morality." *Chaplinsky*, moreover, is not just about keeping order; it is about keeping morality. *Chaplinsky* is not limited to the speech that might breach the peace; it extends to speech that offends our moral sensibilities.

## V. Resolving Free Speech Conflicts on the Modern Campus

Neither the Holmes marketplace view nor the *Chaplinsky* "order and morality" view has ever fully dominated free speech law. Like dominant and recessive genes, the Holmes view has ultimately prevailed as the dominant theory in the "general marketplace" of American life. The *Chaplinsky* view periodically reasserts itself, however, in special settings that constitute "carve outs" from the general marketplace, settings in which the wide-open freedom of the marketplace is displaced by an overriding interest in order or morality or both. The workplace is a prime example.

This tension between the Holmes marketplace position and the *Chaplinsky* moral space position exists with special intensity on American campuses. Debates over the meaning of free speech on campus are largely debates over whether the Holmes ethos or the *Chaplinsky* ethos best captures the soul of what an American college or university should be about. Both views may stake a fair claim. Both views have their appropriate place within American universities, just as they do in society generally. The trick is to articulate a coherent rationale for explaining *when* and *where* and for *whom* the Holmes wide-open marketplace view should prevail, and *when* and *where* and for *whom* the *Chaplinsky* order and morality view should prevail. When should it be out of order to punish speech, and when should it be permissible to rule speech out of order? When may a college or university appropriately decide that the ethos of the open marketplace is trumped by the institution's commitment to integrity in argumentation, in experimentation, in the presentation of data, in traditions of collegial civility, or in the values of an inclusive sense of community and human dignity?

Without attempting to resolve every conceivable free speech conflict that might arise, I can articulate certain guidelines regarding several of the issues that have recently drawn great public attention.

**Outside Speakers.** Campuses should adopt the "marketplace" approach to outside speakers. While outside speakers must obey the general rules of law that apply to everyone—rules prohibiting true threats, or incitement to riot, or defamation, for example—campuses should not censor outside speakers merely because their views are deemed offensive to the campus itself, or to large segments of the campus community.

**Protests and Counter-Protests.** Protests and counter-protests are common on campuses, as they are common in society. The combination can be volatile and tragic, as evidenced by the

violence in August 2017 in Charlottesville, near the University of Virginia campus. Colleges and universities should protect the rights of both protestors and counter-protesters to peaceably assemble and demonstrate. Campuses may and should employ reasonable efforts, however, to maintain peace and security, deploying campus safety officers, physical barriers, zones for various groups, and other established methods, to ensure safety and order.

**The Heckler's Veto.** When counter-protesters inside a venue for an event become disruptive, shouting down or otherwise disrupting an invited speaker's attempts to speak, campus authorities can and should insist that those protesting the speaker or the event refrain from disruption, or be forced to leave the venue. In First Amendment law this is known as the "heckler's veto" issue, reflecting the principle that persons have a free speech right to protest against a view with which they disagree, but do not have a free speech right to completely shut down or "veto" the delivery of an opponent's message by disrupting the event at which the opponent is speaking.

**Trigger Warnings and Safe Spaces.** Before the term "trigger warning" became part of the lexicon of modern campus conflicts, Americans were accustomed to occasional warnings that certain news reports might contain graphic depictions of violence, or that movies, video games, or music recordings contained explicit sexual or violent content.

The phrase "trigger warnings" took on a more expansive meaning, however, when some individual academics and some academic institutions began to issue trigger warnings prior to exposing students to ideas that were deemed potentially disrespectful or offensive.

In First Amendment law, the general rule is that speech is not censored, and trigger warnings are not required, merely because the speaker is about to engage in speech deemed highly offensive. Similarly, the general American marketplace is not a "safe space." To take one of the most difficult examples, "hate speech" (such as speech attacking others for their racial, ethnic,

religious, or sexual identity) is protected in the general marketplace. Most Americans of good will deem such speech to be evil and repulsive, but there is no general First Amendment right to be sheltered from it. The traditional First Amendment standard, applicable to adults in the general marketplace, is that they should simply avert their eyes or cover their ears or look the other way. Decent Americans may loathe the Ku Klux Klan. Yet under the First Amendment, our laws may not ban membership in the Klan, or prohibit any dissemination of its message.

This might tempt us to conclude that campuses with trigger warnings or safe spaces are all violating free speech principles. I urge a measure of caution and restraint, however, before jumping to this conclusion. First Amendment law recognizes that there are contexts in which persons have a right to *not* be exposed to certain forms of insult, even though such insults would be protected as "free speech" in the general marketplace, such as a Klan rally in public park.

The workplace is a simple example. A person traveling to work in the morning who must take a route on a public street past a supremacist rally has no First Amendment right to be free from degrading insults targeting race, gender, or religion. But once the person arrives at work, civil rights laws *do* protect the person from a "hostile work environment," in which supervisors or co-workers repeatedly expose the person to insults and disparagement based on race, sex, or religion. Thus we have made the workplace a safe space, at least with regard to certain extreme expressions of hate speech.

It is no great leap to say that similarly, campuses may impose a requirement that students attending classes ought not be exposed to explicit expressions of racial, sexual, or religious insults by professors or fellow-students during class sessions. Students have no right to be sheltered from exposure to disagreeable *ideas*. But at least while attending class, surely the campus (and indeed, the law) may provide them with protection from repeated personal insults based on their identity.

Or to take another example, a student athlete has no right to avoid being mocked or insulted by others in society for his or her race, sexuality, or religion. But it does not follow that the student-athlete must endure similar repeated personal insults from a coach or a teammate.

The general point here is that there *are* certain contexts on a campus, just as there are certain contexts in society generally, in which the "marketplace" principle that generally provides protection even for the most offensive and insulting speech should give way to the "order and morality" principle that insists that such speech is not allowed in *this* specific context.

I do not believe it is consistent with our free speech traditions to treat campuses *as a whole* as safe spaces, any more than society as a whole is a safe space. I do believe there are pockets of activity within a campus (the two examples I've given are inside classes and athletic teams) in which it is appropriate to provide participants with protections akin to those traditionally provided to workers in the workplace. I am not trying to canvass all the contested speech conflicts that arise on modern campuses, but simply provide a few examples of situations in which some sensible balancing of competing interests is justified.

## VI. Conclusion

These issues are complicated and nuanced, and impossible to cover exhaustively in this testimony. Most American colleges and universities, public and private, are committed to robust protection for free speech. Not all campuses, administrators, faculty, and students fully embrace these free speech traditions, however, or interpret them in the same way. Freedom of speech in America includes the right to *not* believe in freedom of speech. To the extent that some in higher education may have drifted away from strong protection of free speech on campus, that is regrettable. Yet we must all be careful not to engage in the equally regrettable view that *all* regulation of speech on campuses in *all* contexts is wrong-headed and contrary to free speech values.