

IN RE DISPLAYS NAMING SPECIFIC PEOPLE

Opinion of the Emory University Senate Standing Committee for Open Expression

No. CFOE-19-2

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Executive Summary

The Emory University Standing Committee for Open Expression exists to promote and protect the rights to open expression, dissent and protest among Emory Community members. As part of our responsibility to provide advice and counsel regarding the interpretation of Emory's Open Expression Policy, this Committee clarifies how the University may respond to displays (e.g. posters or chalkings) that name specific people.

Displays, posters, chalkings, and the like are fully protected under the Open Expression Policy; the Policy does not justify their being treated less protectively than other forms of expressive activity. Discussing other people by name is likewise generally protected under the Policy. However, some forms of expression are not protected under the Policy. One example is harassment under state or federal law. Whether particular expression is harassing is a very contextual matter, depending on, among other things, how pervasive the expression is. There may be some cases in which some expression about a particular person—otherwise not harassing—may become harassing if it is widely displayed to the public.

I. INTRODUCTION

Emory University’s Open Expression Policy¹ (“Policy”) “reaffirms Emory’s unwavering commitment to a community that inspires and supports courageous inquiry through open expression, dissent, and protest.”² Under the Policy, the University “affirms the rights of members of the Community to assemble and demonstrate peaceably.”³ The Policy “is paramount to other policies of the University that may conflict, except those grounded expressly in local, state, or national law.”⁴

The Committee for Open Expression serves as “a working group of [Emory University] community members—faculty, staff, and students—who seek to *promote* and *protect* the rights and responsibilities of community members related to issues and controversies involving speech, debate, open expression, protest, and other related matters.”⁵

The Committee’s responsibility is to “provide advice and counsel to Community members interpreting the Policy and the rights and responsibilities of individuals and groups under it.”⁶ One way that it does so is by “investigat[ing] alleged infringements of the right of members of the Community concerning speech, debate, open expression, Protest, Dissent, and other related matters.”⁷ To that end, Emory Community members who believe their open expression rights have been infringed are encouraged to contact the Committee for Open Expression at openexpression@emory.edu.⁸

But the Committee may also proceed more generally, even in the absence of a complaint by a Community member, by “provid[ing] education . . . to the Community” about these issues and in any other way that is “necessary to effectuate [the] Policy”⁹—for instance, by clarifying the provisions of the policy and exploring how it may apply in particular recurring scenarios. It is this clarifying power that we are exercising in this opinion.

Emory University has a permissive policy on “flyers, chalking, signs, and displays”: while their use can be regulated, the Policy requires that any regulation not be unreasonable

¹ The Policy is available at <http://policies.emory.edu/8.14>. We have discussed the Policy in greater depth in our recent opinions, *In re Emory Students for Justice in Palestine*, No. CFOE–16–1 (Feb. 10, 2016) [hereinafter *In re ESJP*], http://senate.emory.edu/documents/past_documents/cfoe-palestine-16.02.10-revised2.pdf, *In re Donald Trump Chalkings and Related Matters*, No. CFOE–16–2 (Apr. 26, 2016) [hereinafter *In re Trump*], http://senate.emory.edu/documents/past_documents/Open%20Expression%20Trump.pdf, *In re Definition of Community Member*, No. CFOE–16–3 (Nov. 21, 2016) [hereinafter *In re Community*], and *In re Emory Integrity Project Chalkboards and Other Limited Public Forums*, No. CFOE–17–1 (Sept. 26, 2017) [hereinafter *In re Limited Public Forums*]. The Policy was revised on April 12, 2017, so some quotes in previous opinions may refer to the previous version of the Policy.

² Policy 8.14.1.

³ Policy 8.14.1.

⁴ Policy 8.14.2.

⁵ Policy 8.14.3. The members of the Committee are listed at the end of this opinion.

⁶ Policy 8.14.3.2.

⁷ See, e.g., *In re ESJP*.

⁸ Policy 8.14.4 describes generally the procedure for filing complaints to the Committee.

⁹ Policy 8.14.3.2.

and not discriminate based on content.¹⁰ In particular, Emory has a permissive chalking policy that one can summarize in the phrase “If you can walk it, you can chalk it”: chalking “is permitted on most sidewalks and streets on university property that are exposed to the elements.”¹¹ Moreover, it is common for such displays to mention people by name: recent examples have involved praise for Donald Trump,¹² accusations that a speaker invited by a student organization is racist,¹³ and calls to vote for or against particular candidates for student government office.

This raises the question of whether displays mentioning a person by name can be prohibited or removed consistently with the Policy—for instance, if the target of the expression complains, or if the expression makes serious accusations against the individual.

We conclude that:

1. Displays, posters, chalkings, and the like are fully protected under the Open Expression Policy; the Policy does not justify their being treated less protectively than other forms of expressive activity.¹⁴
2. Discussing other people by name is likewise generally protected under the Policy.
3. However, some forms of expression are not protected under the Policy. One example is harassment under state or federal law. Whether particular expression is harassing is a very contextual matter, depending on, among other things, how pervasive the expression is. There may be some cases in which some expression about a particular person—otherwise not harassing—may become harassing if it is widely displayed to the public.

Therefore, displays that name particular individuals are presumptively protected under the Policy, though there may be some cases in which they may be removed.

II. THE EQUIVALENCE OF DIFFERENT CHANNELS OF EXPRESSION

People may express themselves in a variety of different ways: orally and person-to-person, by e-mail, by handing out literature, by posting flyers, by chalking sidewalks, or by participating in a protest. In general, all of these methods of expression are protected by

¹⁰ Policy 8.14.5.8.

¹¹ Emory University Posting Guidelines and Practices, <http://policies.emory.edu/uploads/Emory%20Posting%20Guidelines%20and%20Practices2016.pdf> (updated May 2016).

¹² See *In re Trump*.

¹³ Erin Penney, *Anti-Milo Yiannopoulos Chalk Has Appeared on Emory Campus*, *The Tab*, Apr. 13, 2016, <https://thetab.com/us/emory/2016/04/13/ant-milo-yiannopoulos-chalk-appeared-emory-campus-2893>.

¹⁴ The discussion here is not limited to flyers or chalkings; the same would apply, for instance, to Facebook pages maintained by the University, though the University has somewhat broader leeway to curate the content on such pages. See *In re Limited Public Forums*.

the Policy: “Expression that communicates a viewpoint, *regardless of form*, is protected as long as it does not violate the guidelines of this Policy.”¹⁵

According to the Policy’s statement of principles, the Policy “reaffirms Emory’s unwavering commitment to a community that inspires and supports courageous inquiry through open expression, dissent, and protest.”¹⁶ And the very definitions of “dissent” and “protest” refute any idea that some channels of communication should be treated less favorably than others: “Dissent” is defined as “the fundamental right of expression of counterpoint(s) through *symbols, speech, expression, satire, flyers or leaflets, action, and other comparable forms of expression.*” And “Protest” is defined to include “an actual gathering of people . . . such as picketing, rallies, sit-ins, vigils, or similar forms of expression,” as well as “more individually-based forms of Dissent such as *posting flyers, wearing t-shirts or arm bands, and other similar actions.*”¹⁷

The Policy explicitly takes a protective position with respect to “nonpersonal expression such as flyers, chalking, signs, and displays”: as mentioned above, while the Policy allows for some regulation, it requires that any posting requirements not be “unreasonable” and not discriminate based on content.¹⁸

Finally, though Emory University is a private institution and thus not bound by the First Amendment of the U.S. Constitution,¹⁹ “the Policy incorporates at least the same substantive standards that the First Amendment imposes on public universities, so that the Emory Community has at least the same rights as the communities of the University of Georgia or Georgia State University.”²⁰ And the First Amendment broadly protects expression regardless of form.

III. THE INTEREST IN TALKING ABOUT OTHER PEOPLE

People have a strong interest in talking about other people and mentioning them by name: “Don’t take Professor X’s class: I think she’s racist.” “Don’t vote for Y for SGA President: he’s incompetent.” “Stay away from our classmate Z: he’s kind of creepy.”

As these examples indicate, we have a free expression interest in talking about other people—even when those other people don’t want to be talked about, even when what we

¹⁵ Policy 8.14.5.2 (emphasis added).

¹⁶ Policy 8.14.1.

¹⁷ Policy 8.14.2 (emphasis added).

¹⁸ Policy 8.14.5.8.

¹⁹ See *In re ESJP*, Part I.B, at 2; *In re Community*, Part II, at 2.

²⁰ *In re Trump*, Part II.A, at 3 (footnote omitted); see also *In re ESJP*, Part I.B, at 2–3; *In re Community*, Part II, at 2–3; Policy 8.14.5 (“Emory University respects the Constitutional rights of free speech and assembly. As such, the only responsibilities outlined in this section that limit the free exercise thereof have been done in a way to ensure maximum open expression and narrowly tailoring exceptions to specific safety or community concerns.”).

are saying about them is unpleasant, and even when they would dispute the truth of what we are saying.

An accusation of a crime, like “X stole my wallet” or “X raped me,” may obviously be made to University or government authorities as part of an official complaint. But whether to make such a complaint is within the discretion of the victim, and whether or not the victim makes such a complaint, they also have the choice to tell people outside of official channels. Whether to tell one friend or many strangers is up to the speaker. In this #metoo age, it is clear that the speakers have autonomy and dignity interests in making statements about other people, and those who hear the statements likewise have an interest in the information in order to make decisions about whether and how to associate with the alleged perpetrator.

It is true that certain negative statements about others could count as defamation under state law, whether slander (oral) or libel (written)—in which case they are unprotected by Emory policies.²¹ (For instance, a statement that someone has embezzled University funds or has committed electoral fraud in a University election might fall within this category.) But the University clearly cannot suppress Emory Community members’ expression based on a mere objection, by the individual named, that the statements are defamatory. A statement cannot be defamatory unless, at a minimum, it is *false*—and the burden must lie on the challenger to show that the statement is false, not on the speaker to show that the statement is true, at least when the speech is on an issue of public concern.²² Even if the speech is on an issue of purely private concern, when normal defamation standards might put the burden of proving the truth on the speaker, the University should tread carefully, because someone’s complaint regarding a statement made about them is not the same as a full-blown defamation lawsuit, and the University is unlikely to be in a good position at that moment to determine the truth of the statement.²³

The University could adopt a rule along the lines of “posters, flyers, and chalkings may not mention people by name.” But such a policy, if evenhandedly enforced (as it must be), would sweep far too broadly and even prohibit, for instance, statements in favor of or against candidates for student government office. Moreover, such a rule would also

²¹ Policy 8.14.5.5 & (a) (“Community members . . . violate other policies of the University . . . and are no longer operating within the spirit of Open Expression at Emory if [t]hey violate any . . . state . . . law . . .”).

²² See, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254, 271 (1964) (“Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker.”); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986) (“[A]t least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.”).

²³ Determining the procedural protections that the University should respect if someone complains that a statement about them is defamatory is beyond the scope of this opinion.

conflict with the Policy’s insistence that regulation of displays not discriminate based on the content of the display.²⁴

IV. WHEN NAMING SOMEONE MAY BE UNPROTECTED

However, this is not to say that such statements are protected by the Policy in all cases. Despite the Policy’s broad protection of open expression, the Policy lists several categories of expression that are not protected.²⁵

Even though there is no general prohibition against naming people, and even though displays are not generally treated differently than other forms of expression, there may be some cases where naming a specific person on a display can contribute to that expression’s falling within a prohibited category.

A simple example may illustrate the point. Various state and federal statutes prohibit harassment, and such harassment is unprotected under the Open Expression Policy.²⁶ One example is Title IX of the Education Amendments of 1972, which provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”²⁷

Harassment is defined in different ways under different statutes, but in the Title IX context, the Supreme Court has stated that universities may be liable to victims of harassment if the universities “are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”²⁸

Not every unpleasant sexual statement about a person constitutes sexual harassment covered by Title IX. The elements of severity, pervasiveness, and objective offensiveness (not to mention the elements of actual knowledge and deliberate indifference, and the

²⁴ Policy 8.14.5.8.

²⁵ Policy 8.14.5.5 (providing that “Community members . . . violate other policies of the University . . . and are no longer operating within the spirit of Open Expression at Emory if” they fall within nine listed categories).

²⁶ Policy 8.14.5.5(a) (statements unprotected if they “violate any federal, state, local or other applicable law”); Policy 8.14.5.5(h) (statements unprotected if they constitute “harassment, as defined by state law”).

²⁷ 20 U.S.C. § 1681(a). A similar example is Title VI of the Civil Rights Act of 1964, which has similar language based on race. 42 U.S.C. § 2000d. Under some conditions, these statutes impose duties on schools to control certain forms of expression—for instance, in the Title IX context, sexual harassment of students by staff or by other students. See, e.g., *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 63 (1992); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 632–33 (1999). Violations carry the risk of termination of funds by the governmental funding bodies, as well as private lawsuits for damages. See, e.g., 20 U.S.C. § 1682; *Cannon v. Univ. of Chi.*, 441 U.S. 677, 689, 709 (1979); *Franklin*, 503 U.S. at 76; *Alexander v. Sandoval*, 532 U.S. 275, 279–80 (2001).

²⁸ *Davis*, 526 U.S. at 650. These factors are also incorporated into Emory’s discriminatory harassment policy. See Policy 1.3.2.A–B.

overall effect of deprivation of access) place severe limits on the sort of speech covered by the law.

Thus, if one person made sexual statements about someone privately to another person, this is unlikely to be covered by Title IX. Even if the statement were made directly to the person concerned, it may not be covered by Title IX because, at the very least, any harassment would not be “pervasive.” However, if someone made the statement to everyone at the University, this may rise to the level of a Title IX violation.

And this is true even though there is no general prohibition against telling things to many people—even though telling things to many people is presumptively protected under the Policy. In this example, the fact that a sexual statement was spread widely may contribute to its falling within a prohibited category.

In the same way, making such a statement about a person on a display, such as a poster or chalking, may satisfy the “pervasive” element because of its relative permanence and visibility. As mentioned above, Title IX liability for the university also depends on whether the university is “deliberately indifferent to sexual harassment, of which [it has] actual knowledge”; and when a statement appears on a highly visible display, it is more difficult for the university to avoid knowing about the statement. Whether the other elements are satisfied, of course, depends on the particular case. This example merely illustrates that a statement may sometimes move from protected to unprotected under the Policy because of the way it is made—even though displays and naming people are presumptively protected under the Policy.²⁹

V. CONCLUSION

This discussion illustrates a few basic principles. First, there is, in general, no different treatment under the Policy for oral statements in private conversations and written statements in displays; on the contrary, the Open Expression Policy protects statements “regardless of form.”³⁰ Second, there is no general prohibition against talking about people by name, even when one is saying unpleasant things about them that they would rather people not say and that they claim are false.

However, if a statement is written and widely displayed, that may contribute to its falling into a prohibited category, such as harassment prohibited by federal law.

²⁹ Other federal laws impose similar burdens. Title VII of the Civil Rights Act of 1964 applies to employees: “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a) & (a)(1). The Supreme Court has held that, “[w]hen the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ Title VII is violated.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986)).

³⁰ Policy 8.14.5.2.

These prohibited categories are not infinitely broad. We express no opinion here as to whether any given statement falls within a prohibited category; we merely note that values of Open Expression should guide the University in its determinations as to whether speech is legally prohibited. (For instance, University media, such as the Emory Wheel, should presumptively be able to report on harassment even though doing so spreads the statements more widely.) The mere fact that someone might argue that certain expression might violate federal or state law would not justify the University in removing that expression unless the argument is likely to be legally correct. Usually, displays naming particular individuals should not be prohibited or removed.

Composition of the Committee for Open Expression:

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Nicole Gerardo, faculty, Emory College & Laney Graduate School
Erica Lee, faculty, School of Medicine
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Owen Mattocks, Constitutional Council (ex officio, non-voting)
Ilya Nemenman, faculty, Emory College & Laney Graduate School
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