On Freedom of Expression in the University of Wisconsin System

Analysis and Recommendations of the Legislative Proposals

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May 15, 2017

I. Introduction

Summary:

- The UW System has a history of protecting free speech but is at risk of being swept up in the tidal wave of the anti-speech movement.
- Governor Walker tried to address the issue in his budget but the provisions were removed. Two bills have now been offered by Rep. Kremer and Sen. Harsdorf, and Sen. Vukmir and Rep. Jarchow.
- Both bills are a good start in that they seek to reaffirm the UW's historic commitment to free speech and address the disturbing trend of official censorship and student interference with and "shout downs" of speech. Each contains valuable contributions.
- But both bills must be improved. Authors of both bills have said they wish to adequately and constitutionally protect the right of protest and the freedom of expression, and have said they are open to improvements.

The University of Wisconsin (UW) System has a history of supporting freedom of expression among its students and teachers. In 1894, Oliver Wells, the State Superintendent of Education and ex-officio member of the Board of Regents, charged Professor Richard Ely with teaching and advocating socialism. The board appointed a committee to examine the charges. Ely was exonerated and the committee proclaimed, "*Whatever be the limitations which trammel inquiry elsewhere, we believe that the great state University of Wisconsin should ever encourage that continual and fearless sifting and winnowing by which alone the truth can be found*." The committee's statement is now enshrined on a plaque on Bascom Hall at the heart of the UW-Madison campus.

In the past, the University has made clear that while protest is permitted, disruption and the silencing of speech and restriction of association is not. Thus, in the 1960s, it permitted both protest and the disagreement with protest by allowing Dow Chemical, the makers of napalm, to recruit on campus, despite student demands that it not do so. Later in the decade, with the help of the National Guard, the Madison campus stayed open – free inquiry and expression continued – despite massive anti-war demonstrations attempting to shut it down.

This positive history did not keep the University from instituting a Speech Code in 1989, directing each of the UW System's campuses to prepare "non-discriminatory conduct policies" that would include speech. In September 1992, the University repealed the Code after its legal validity was called into question by both the Wisconsin Supreme Court and the United States Supreme Court, and the Code was ultimately struck down by a court.[1]

More recently, Chancellor Rebecca Blank caused concern by sending an e-mail to the campus community stating that "*[w]hile individuals are always free to express their own beliefs, no one is entitled to express them in ways that diminish others, or that devalues the presence of anyone that is part of our Badger community*."[2] Such a vague and malleable limitation would be wholly inconsistent with both the United States and Wisconsin Constitutions and traditional notions of academic freedom.

[1] *See UWM Post, Inc. v. Board of Regents of University of Wisconsin System*, 774 F. Supp. 1163 (1991).
[2] To her credit, Blank clarified her remarks, stating that she did not mean to "imply a limitation of individual speech."

But, although she did not intend it,[3] her initial comments raised concerns because they were uncomfortably evocative of an anti-speech doctrine that has been gripping college campuses across the country. Too often, students and administrators have espoused the belief that speech can be restricted because it makes some of us uncomfortable or advances propositions with which we strongly disagree. Too often, university administrators, fearing controversy and disruption, have recognized a form of heckler's veto, disinviting speakers – usually, but not always conservative – who are met with "too much" opposition.[4]

There is a developing ideology that supports this restriction of speech. In a recent *New York Times* column, Ulrich Baer, an administrator at NYU, appeared to endorse the rejection of the "old" and "pure model of free speech," citing post-modern philosophy to suggest that speech that some might think "discredit[s]" or "delegitimize[s]" groups is somehow "less worthy of participation in the public exchange of ideas."

Even if the First Amendment did not protect "racist" or "sexist" speech (it does), Baer's view is often wedded to a capacious view of what is "discrediting" and "delegitimizing" that defers to the subjective response of those who claim offense. If enforced by state action, it is wholly inconsistent with Justice Jackson's observation that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

II. The 2015 UW Regents' Statement

In December 2015, the Regents of the University of Wisconsin weighed in on this controversy by adopting (by a 16-2 vote) a statement on "Academic Freedom and Freedom of Expression." Among other things, it notes:

- Academic freedom includes "the freedom to explore all avenues of scholarship, research and creative expression, and to reach conclusions according to one's own scholarly discernment."
- "Although the university greatly values civility, concerns about civility and mutual respect can never be used as justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members within the university community."
- This does not mean members of the university can say whatever they wish: "[c]onsistent with longstanding practice informed by law, institutions within the System may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the university."

[3] In a recent statement, Blank supported the right of Charles Murray, a social scientist who has faced intemperate, inaccurate and even violent opposition to his appearances on college campuses, to speak at UW-Madison. Nevertheless, the organizers of Murray's recent appearance in Madison did not believe they could safely hold the event on campus.

[4] It apparently doesn't take much to raise the ire of certain students and faculty. The long list of "disinvited" speakers includes Laura Bush, Bill Maher, Condoleezza Rice, Ayaan Hirsi Ali, Alec Baldwin, and George Will.

- But these exceptions are narrow and can "never be used in a manner that is inconsistent with each institution's commitment to a completely free and open discussion of ideas."
- Exploration, deliberation, and debate may not be suppressed because the ideas put forth are thought by some or even by most members of the university community (or those outside the community) to be offensive, unwise, immoral, or wrong-headed.

Although there are potential problems with the statement (the ability to proscribe statements that are incompatible with the functioning of the university is susceptible to abuse) the Regents' statement is a strong defense of academic freedom on campus and was generally well-received.

However, opposition to the statement demonstrates that there remains substantial illiberal opposition to the concept of academic freedom. The American Civil Liberties Union (ACLU), while ostensibly supporting the sentiment of the statement, expressed its disappointment that the statement "does not address protection of the free speech rights of students who have little or no power."[5] It called on the Regents to make clear that "freedom of expression and academic freedom will not be used to allow discriminatory harassing conduct that diminishes educational opportunity for any and all students."[6] By suggesting that a commitment to the open expression of ideas must have a "harassment" exception, the ACLU suggests that ideas themselves may constitute harassment and discrimination.

III. Proposed Legislation

But the UW Regents' statement is only a statement, with no mechanisms or requirement for enforcement. Given the anti-speech tidal wave that has swept up colleges across the country, Wisconsin Governor Scott Walker and certain members of the legislature have called for stronger protection of free speech and expression at its public educational institutions.

A. Governor's Proposal.

In his 2017-2019 budget proposal, Governor Scott Walker included a provision that would codify principles of freedom of expression within the University of Wisconsin system. (Assembly Bill 64, Section 36.02, "Freedom of Expression.") The language Governor Walker proposed closely resembled, but was not identical to, the language adopted by the Board of Regents in December 2015 discussed in the previous section. But this provision was stripped from the budget (along with all other "non-fiscal" items).

[5] Karen Herzog, *UW Regents Statement Affirming Freedom of Expression Stirs Concerns*, MILWAUKEE JOURNAL SENTINEL, Dec. 11, 2015.
[6] ACLU of Wisconsin, *UW Commitment to Academic Freedom*, Dec. 9, 2015, available at http://www.aclu-wi.org/story/uw-commitment-academic-freedom.

B. Kremer Bill.

On April 26, 2017, Representative Jesse Kremer, along with Representatives Vos, Murphy, and Senator Harsdorf introduced the "Campus Free Speech Act."[7] (AB 299) The Kremer bill follows, but does not completely track, model legislation proposed by the Goldwater Institute.[8]

Takeaways from the Kremer Bill:

- Closely tracks the Goldwater Institute's model legislation.
- Would require the Board of Regents to adopt a policy on free expression.
- The Board's policy must contain a series of statements specifying, among other things: campuses and public forums are open to all invited speakers, the UW system cannot prohibit speech some may disagree with, peaceful protests are permitted.
- The Board's policy must include disciplinary sanctions for violations. The only activity that can be restricted is activity not protected by the First Amendment.
- Creates a Council on Free Expression to annually report on speech-related activity and discipline on campus.
- Only applies to Colleges and Universities, not Technical Colleges.

It would create a new section of the Statutes, sec. 36.02. Proposed sec. 36.02(4)(a) would require the Board of Regents to adopt a policy on free expression that must contain a series of statements that can be summarized as follows:

1) The primary function of an institution of higher learning is "the discovery, improvement, transmission, and dissemination of knowledge" and the institution must strive to ensure the "fullest degree of intellectual freedom and expression";

2) It is not the proper role of an institution to shield individuals from speech protected by the First Amendment, including "ideas and opinions they find unwelcome, disagreeable or even deeply offensive";

3) Students and faculty have the freedom to discuss any problem as permitted by the First Amendment, limited only by "reasonable viewpoint neutral restrictions on time, place and manner of expression" consistent with the other protections of speech mandated by the bill, provided that these are "necessary to achieve a significant institutional interest" and that these restrictions "are clear, published and provide ample alternative means of expression." The policy must state that "students and faculty shall be permitted to assemble and engage in spontaneous expressive activity as long as such activity is not unlawful and does not materially and substantially disrupt the functioning" of the institution;

4) Any person lawfully present on campus may protest or demonstrate, but protests and demonstrations that interfere with the expressive rights of others are subject to sanction;

5) Campuses are open to any invited speakers;

[7] The Kremer bill now has a total of thirty-two sponsors.

[8] Available at: https://goldwater-media.s3.amazonaws.com/cms_page_media/2017/2/2/X_Campus%20Free%20Speech%20Paper.pdf.

6) Public areas are public forums and open on the same terms to any speaker; and

7) Each institution – as an institution – must "strive" to remain neutral on public policy controversies and may not – as an institution – take action on such controversies "in such a way as to require students or faculty to publicly express a certain point of view."

The policy must also include a range of disciplinary sanctions for violations and provide that institutions may restrict student expression only for expressive activity that is not protected by the First Amendment. The bill also requires the Board of Regents to appoint a council on free expression that would submit annual reports to the governor, legislature, and Regents that would, among other things, describe barriers to and disruptions of speech, including the handling of related disciplinary matters. It requires institutions to describe free expression policies and rules in freshman orientation programs and, significantly, provides a right of action for persons whose expressive rights are violated.

C. Vukmir-Jarchow bill.

On May 3, 2017, Senator Leah Vukmir and Representative Adam Jarchow introduced a separate bill.[9] Their bill takes a slightly different approach than Kremer's. First, it would establish new provisions (ss. 36.02 and 38.05) that would address the issue at colleges, universities, and technical colleges. The provisions for the University of Wisconsin and technical college systems are identical and mandate the following:

1) Students, faculty, and academic and university staff have the right to assemble and engage in expressive activity. This applicability to staff expands on the Kremer bill;

2) Campuses are open to any speaker who is invited by students, faculty, or academic or university staff;

3) The public areas of campuses are traditional public forums;

4) University and college campus administrators shall remain neutral on public policy controversies and may not take any action that requires students, faculty, or academic or university staff to express specified viewpoints. Unlike the Kremer bill, the Vukmir-Jarchow bill does not address schools as institutions and imposes an actual ban directly on administrators (although it's unclear how an institution could take a position if administrators could not);

Takeaways from the Vukmir-Jarchow Bill:

- In addition to colleges and universities, also covers technical colleges.
- Ensures that First Amendment rights extend to staff at the UW System.
- Mandates that campuses are open to any invited speaker.
- University administrators must be neutral on public policy issues and cannot take action to require students to express viewpoints.
- Proposes a range of sanctions for anyone who infringes on free speech.

[9] https://legis.wisconsin.gov/senate/05/vukmir/media/1101/17-2443_1.pdf.

5) Any person on campus may lawfully protest or demonstrate;

6) University and college campus administrators shall make all reasonable efforts and make available all reasonable resources to ensure the safety of individuals invited to speak on campuses;

7) University and college campus administrators shall notify an individual invited to speak on campus if the administrators determine that they cannot ensure the individual's safety and shall allow the individual to speak on campus in spite of that determination;

8) Any protest or demonstration that infringes on the rights of others to engage in or listen to expressive activity is prohibited and university and college campus administrators shall sanction individuals who violate that prohibition; and

9) No person may threaten an invited speaker or threaten to organize protests or riots or to incite violence with the purpose to dissuade or intimidate an invited speaker from attending a campus event.

The Vukmir-Jarchow bill establishes a range of sanctions for students who interfere with free expression and would extend those sanctions to faculty and staff. It does not explicitly create procedural rights for students (or others) charged with interfering with speech, as the Kremer bill does, and does not specify what sanctions should be imposed.

It also does not explicitly prescribe the conditions under which institutions can limit speech, but notes that *"[n]othing . . . shall be construed to prohibit the Board of Regents or a university or college campus from regulating speech or activities that are prohibited by law or that substantially disrupt the functioning of a university or college campus*."

The Vukmir-Jarchow bill does not create a right of action for aggrieved persons but instead requires "[a] process allowing any individual to complain to a university or college campus that his, her, or any other individual's free speech rights have been or will be inhibited."

The Vukmir-Jarchow bill does not create a Council on Free Expression as the Kremer bill does.

IV. Recommendations

The Kremer and Vukmir-Jarchow bills are a good start. Based, as it is, on the Goldwater model legislation, the former is more comprehensive. But the Vukmir-Jarchow bill makes important contributions and adds technical colleges. But this is difficult stuff. We *should* all agree (although it is increasingly evident that not all of us do) that "shout downs" and physical obstruction and intimidation of speakers are not protected by the First Amendment. Such activity results in less speech, and it has long been accepted that the state may impose reasonable place, time and manner

restrictions so that all may be heard. While some commentators have made the rather specious arguments that protecting speech from obstruction is government intervention to "level the playing field" for unpopular (usually conservative) speech or that doing so "forces" students to listen to particular speakers, neither argument bears scrutiny. These bills do no more than permit speakers to be heard. They do not subsidize their speech or restrict the expression of opposing speakers. They do not "force" anyone to listen.

Our Recommendations:

- Tighten broad language on protection of free expression is broad to ensure the scope is clear.
- Modify disciplinary sanctions section to ensure that regulation of speech is narrow and clear.
- Remove or modify the neutrality language.
- Clarify time, place, manner, and other restrictions.
- The legislature should not prescribe specific punishment for violation of the policy.
- Empower the Attorney General to enforce the law.
- Clarify protections and role for faculty

But just as speakers at the UW should not be shouted down or prevented from speaking, those who oppose these speakers have the right to be heard, including the right to protest. Neither bill does an adequate job of protecting that right. Each has language that needs to be tweaked to avoid constitutional issues. Because the authors of these bills have made clear that they are open to changes that will protect the right of protest and better preserve speech on campus, we offer the following observations and suggestions.

A. Preserve the right of protest while preventing interference with speech

As noted above, proposed section 36.02(4)(a)(4) in the Kremer bill requires the Regents to make clear "that protests and demonstrations that interfere with the rights of others to engage in or listen to expressive activity shall not be permitted and shall be subject to sanction." The Vukmir-Jarchow bill has similar language. While one might think that this language is clear enough, a growing ideology believes that the expression of unwelcome opinions interferes with the "right" of others to speak.

In general, this ideology espouses that certain opinions – those that challenge the ways in which some groups choose to define themselves and the policies that they believe these identities imply – prevent members of these groups from speaking. In this view, the need to respond to certain opinions that one does not like burdens the expression of one's own opinions. It turns on its head the classic admonition that the remedy for bad speech is more speech or, as Justice Brandeis put it, "the fitting remedy for evil counsels is good ones."[10] It ignores John Stuart Mill's admonition in *On Liberty* that a society that is afraid to defend challenges to the truth will eventually lose it:

> The peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the

[10] *Whitney v. California*, 274 U.S. 357, 375 (1927). Brandeis explained that "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Id. at 377*.

> opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

We have seen that many judges do not hesitate to construe statutory or constitutional language to give it new meaning.[11] In light of this, both bills can be improved to better protect free expression, including the right of protest, by adding the following language:

> **The expression of a particular viewpoint, without more, does not constitute interference with the rights of others to engage in expressive activity. Criticism – or the expression of an opinion that some find unwelcome, disagreeable, or even deeply offensive – does not constitute interference with the expressive rights of those who disagree with that criticism or opinion.**

Turning to the Vukmir-Jarchow bill, the bill's proposed language that "No person may threaten an invited speaker or threaten to organize protests or riots or to incite violence with the purpose to dissuade or intimidate an invited speaker from attending a campus event" could be improved by making it clear that only "true threats," as provided in the Kremer bill, are prohibited.

Proposed language in the Vukmir-Jarchow bill providing that "[a]ny protest or demonstration that infringes on the rights of others to engage in or listen to expressive activity is prohibited and university and college campus administrators shall sanction individuals who violate that prohibition" is unconstitutionally overbroad and should be replaced with the language from the Kremer bill with the changes we have proposed and the clarification that the expression of a particular point of view never constitutes interference with someone's speech rights.

The Vukmir-Jarchow bill includes a provision that "[u]niversity and college campus administrators shall make all reasonable efforts and make available all reasonable resources to ensure the safety of individuals invited to speak on campuses." This would be a good addition to the Kremer bill.

B. Modify disciplinary sanctions provision

Proposed section 36.04(b)(1) of the Kremer bill directs the Regents to specify disciplinary sanctions for anyone who engages in "violent, abusive, indecent, profane, boisterous, obscene, unreasonably loud or other disorderly conduct that interferes with the free expression of others." This provision of the bill has attracted criticism with some suggesting that the language is unconstitutional. Rep. Kremer has indicated that he is open to modification of the language.

While we believe that the language is susceptible to a saving construction that might avoid invalidity, much of the criticism is well-taken. It is important that permissible regulation of speech be scrupulously clear and narrow. Protests that are "indecent," "profane," or "boisterous" may

[11] Some even boast about it. *See Hively v. Ivy Tech Community College*, 853 F.3d 339, 357 (7th Cir. 2017) (Posner, J., concurring) (acknowledging that the court is adopting an interpretation of the law that the Congress which enacted it would have rejected and arguing that judges should "avoid placing the entire burden of updating old statutes on the legislative branch").

well be protected by the First Amendment. Terms like "abusive," "unreasonably loud," and "disorderly" are vague. While the proposal's structure should be read to permit discipline of only such conduct that "interferes with the free expression of others" and our proposed addition to proposed section 36.02(4)(a)(4) limits the scope of interference, not all levels of "interference" would constitutionally justify discipline. For example, it might "interfere" with expression to have a large crowd gather outside a venue; that does not mean that those who gather can be constitutionally disciplined. To use a recent example, Secretary of Education Betsy DeVos was met with sporadic booing during a commencement address at Bethune-Cookman University. While this discourteous behavior did not reflect well on the students who participated in it, it did not substantially interfere with Secretary DeVos' remarks. She was able to speak and the students' expression was constitutionally protected. Only substantial and material interference should be restricted. We are also concerned that the language of the bill might be read (or perhaps misread) to suggest, for example, that "boisterous" or "profane" protests in and of themselves interfere with speech. For that reason, we suggest that this section be amended as follows:

> **Subject to the protections for expressive conduct set forth elsewhere in the policy prescribed by the Regents, including but not limited to those required by sec. 36.02(4)(a)(4), and consistent with the dictates of sec. 36.02(4)(a)(3) and limitations of sec. 36.02(9), the policy shall include a range of disciplinary sanctions for anyone under the jurisdiction of the institution who engages in conduct that substantially and materially interferes with the free expression of others.**

The Kremer bill also specifies that a student who has twice been found to have violated the policy against interfering with freedom of speech must be suspended or expelled. In light of the need to report the outcome of disciplinary complaints by the council of free expression, this is well-intentioned and designed to prevent administrators from ignoring anti-speech activities. However, WILL does not believe that the legislature should prescribe the particular punishment for violations of this policy. We believe that the requirement that the council report to the legislature will aid public oversight of enforcement, but that the specific punishment in any given incident should be left to the educational institution.

The Vukmir-Jarchow bill does not specify particular discipline but does provide a range of sanctions. This seems like an appropriate way to address the issue, although it might benefit from a requirement that any discipline be progressive.

C. Remove or modify language regarding the universities' neutrality

Section 36.02(4)(a)(7) of the Kremer bill requires the Regents to provide that universities – as institutions – "strive to remain neutral . . . on the public policy controversies of the day." This provision has been incorrectly described as "requiring" neutrality (it is only aspirational) and as prohibiting faculty from taking such provisions even as part of their scholarly pursuits. The latter would be unconstitutional, but the proposed bill does no such thing.

But it is not clear that it should be included. It is certainly a good idea for a public university – as an institution – to remain neutral on most public controversies. Universities are a forum in which

faculty and students are free to express themselves and engage in the "sifting and winnowing" that the University of Wisconsin, when it has been at its best, has been committed to. There is always a danger that when it weighs in – as an institution – it will exert a chilling effect on that free expression that this "sifting and winnowing" requires.

On the other hand, there are public controversies relating to the functioning of the university and in which it is a participant, such as disputes over budgetary policy, admissions, and even free speech on campus. For this reason, the policy is properly aspirational. But we are concerned that even an aspirational statement could chill protected speech. We suggest that it be removed. But if it is to be included, it ought to be softened and the right of faculty and students to take positions should be even more clearly affirmed by adding the following language:

> **Each institution should be reluctant to take a position on the public policy controversies of the day, and may not require students or faculty to publicly express or affirm any view on those controversies. Notwithstanding the foregoing, individual members of the university community are free to take positions on the public controversies of the day as more fully described and protected elsewhere in this policy.**

The Vukmir-Jarchow bill does go further than the Kremer bill stating that "University and college campus administrators shall remain neutral on public policy controversies." This is unconstitutional and should not be enacted into law. Similar to all citizens, university and college campus administrators have free speech rights that cannot be restricted, except in extremely narrow circumstances as we discuss elsewhere. We suggest this language be removed or replaced by language in the Kremer bill with the modifications that we have suggested.

D. Clarify permissible limitations on speech

Section 36.02(4)(a)(3) of the Kremer bill specifies the type of reasonable time, place, and manner restrictions that can be placed on speech and accurately states the current constitutional rule on those limitations. Section 36.02(9) goes on to specify those other limitations that may be permitted, making clear that only those restrictions permitted by the First Amendment are allowed. While it does not take a statement by the Regents to make the Constitution applicable, this is a worthy part of any statement on free speech policy. This proposed section goes on to more specify classes of restrictions that are permitted in more detail. *See* proposed sec. 36.02(9).

We have two concerns. First, the structure of ss. 36.02(4)(a)(3) and 36.02(9) make it a bit unclear how they fit together. Second, while sec. 36.02(9) is taken from the Goldwater legislation, the Kremer bill omits other language from the Goldwater proposal that identifies those limitations that the First Amendment places on restrictions other than reasonable time, place and manner limitations. It is not, for example, true that anything that violates state or federal law or that "interferes with the functioning of the university" is not protected by the First Amendment. While, as noted earlier, the Constitution does not require enabling action by the Wisconsin legislature or the University of Wisconsin Board of Regents (and cannot be limited by them), a policy statement on free speech on campus must be understood by persons who are not constitutional lawyers, so we suggest the following revisions.

First, sec. 36.02(4)(a)(3) should be amended as follows:

> That students and faculty have the freedom to discuss any problem that presents itself, as the First Amendment of the U.S. Constitution permits. **The university may adopt reasonable viewpoint-neutral and content-neutral restrictions on the time, place, and manner of expression that are consistent with this section and that are necessary to achieve a significant institutional interest, provided that these restrictions are clear, published, and provide ample alternative means of expression.** Students and faculty shall be permitted to assemble and engage in spontaneous expressive activity as long as such activity is not unlawful and does not materially and substantially disrupt the functioning of an institution, subject to the requirements of this section.

Second, sec. 36.02(9) should be replaced with the following section:

> **RESTRICTION OF STUDENT EXPRESSION. Except as further limited by this section, institutions may restrict only student expression not protected by the First Amendment of the U.S. Constitution, *i.e.*, only if the institution demonstrates that the restriction is necessary to achieve a compelling governmental interest. Such expression includes**
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> **(a) Expression that a court has deemed unprotected defamation;**
> **(b) Peer-on-peer harassment;**
> **(c) Quid pro quo sexual harassment;**
> **(d) True threats;**
> **(e) An unjustifiable invasion of privacy or confidentiality not involving a matter of public concern;**
> **(f) An action that unlawfully disrupts the function of an institution; and**
> **(g) A violation of a reasonable time, place, and manner restriction on expressive activities that is consistent with sub. (4)(a)(3).**

The Vukmir-Jarchow bill does not really address these limitations. It should – along the lines that we have outlined above.

The Vukmir-Jarchow bill provides that "Nothing in this section shall be construed to prohibit the Board of Regents or a university or college campus from regulating speech or activities that are prohibited by law or that substantially disrupt the functioning of a university or college campus." This is a straightforward application of existing law. However, the phrase "substantially disrupt" is vague and subject to abuse. Therefore, we recommend the language in the amended sec. 36.02(4)(a)(3) of the Kremer bill, described above.

E. Empower the Attorney General to bring actions on behalf of those whose speech rights have been violated

The Goldwater Institute model legislation provides that the state attorney general may bring actions on behalf of those whose speech rights have been violated. Given the difficulty that

students may have in prosecuting such actions on their own, we believe that this would be a useful addition to the Kremer bill.

The Vukmir-Jarchow bill does not provide for any private cause of action. It should. While no one likes litigation, it is a good way to enforce the rights of free expression and association against the prevailing sentiment on campus.

F. Clarify the protections provided for faculty members and their role in preserving academic freedom

Neither bill defines faculty. It may make sense to make clear that this includes, at least, academic staff and perhaps others in the university whose role it is to engage in public expression. Courts have sometimes struggled to articulate the extent to which government employers can restrict the speech of their employees. The Supreme Court case, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), addressed this issue, holding that "When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." However, the Court specifically reserved the question of whether and how this rule applied to academic freedom in the context of public universities.[12] To avoid any confusion regarding the rights of university faculty to speak, we recommend the following language be added to the both bills:

> **This right of academic freedom and freedom of expression shall not be limited by the university's role as employer and fully applies to speech by members of the university community as citizens in addition to speech undertaken as members of the university community.**

We also suggest that both bills include a provision that requires the Regents to adopt statements that 1) affirm that it is the role of the university to encourage diverse points of view and it is the university's policy to take affirmative steps to ensure and encourage that a diverse set of views are presented on campus, and 2) clarify that the protection of academic freedom and freedom of expression does not curtail the right of the university, or of university faculty in their capacity as teachers, to insist upon academic excellence and competence in a manner that is viewpoint neutral and does not curb the free and open discussion of ideas.

G. Miscellaneous

Finally, we recommend that the Vukmir-Jarchow bill add provisions protecting the procedural rights of students facing disciplinary charges, establish a Council on Free Expression that reports back to the Legislature, and require that the policy on free expression be regularly communicated to students.

[12] The Court's specific language was, "There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.* at 1962.

V. Conclusion

WILL believes that the issues of academic freedom and freedom of expression on college and university campuses are both extremely important and timely. For this reason, we believe that it is important for the Regents to enshrine these policies in an official statement that has the force of law. Both the Kremer bill and the Vukmir-Jarchow bill would direct the Regents to establish such a policy. Subject to our recommendations above, we believe both bills will provide strong protection for freedom of expression by students, faculty, and staff within the UW System.