



*Note: This position paper below was drafted by Beauvais Lyons on November 11, 2018 for input from Faculty Senate leadership and others.*

### **The UTK Rock and Free Speech**

During the past year the “Rock” on the University of Tennessee, Knoxville campus, which is regarded as a publicly accessible bulletin board, has been used for racist, anti-Semitic, homophobic, and misogynist messages by white nationalists. These messages were made by people wearing masks, typically at night. It is unclear if the people doing this are students. Recently swastikas were painted over a “Stronger than Hate” message that had been painted to accompany a vigil organized by the UTK Hillel Center in response to the killing of 11 people at the Tree of Life Synagogue in Pittsburgh, PA.

The university, while publicly condemning these messages, has taken the position that hate speech is protected by both the first amendment as well as state law. Increasingly members of the campus community do not think that this is correct legal or moral position for the university to take. Below are campus policies and state law that inform how the university might best respond to this situation as well as two recommendations for next steps.

### **Tennessee State Law:**

The Tennessee Campus Free Speech Protection Act, passed in the Spring of 2016, which is intended to ensure free speech on college campuses, in Section 5.1 also makes provisions for placing appropriate time, place and manner restrictions on speech where it states:

"Constitutional time, place, and manner restrictions" means restrictions on the time, place, and

manner of free speech that do not violate the First Amendment to the United States Constitution or Article I, Section 19 of the Tennessee Constitution that are reasonable, content- and viewpoint-neutral, narrowly tailored to satisfy a significant institutional interest, and leave open ample alternative channels for the communication of the information or message to its intended audience;”

In section 5.3 the law also states: “Free speech’ means speech, expression, or assemblies protected by the First Amendment to the United States Constitution or Article I, Section 19 of the Tennessee Constitution, verbal or written, including, but not limited to, all forms of peaceful assembly, protests, demonstrations, rallies, vigils, marches, public speaking, distribution of printed materials, carrying signs, displays, or circulating petitions.”

It is worth noting that all of the forms of speech cited in this definition are authored, and are not made as anonymous speech. It should be noted that the emphasis in the law is on forms of speech or assembly that are qualified as “peaceful.”

### **Campus Policies:**

The following student code of conduct regulations apply to these questions, and are addressed in the *Hilltopics Student Handbook*:

#### Section 4.6 Harassment:

Unwelcome conduct that is so severe or pervasive, and objectively offensive, that it substantially interferes with the ability of a person to work, learn, live, or participate in or benefit from the services, activities, or privileges provided by the University. In no event shall this rule be construed to discipline a student for speech protected by the First Amendment to the United States Constitution (e.g., mere insulting or offensive speech).

#### Section 4.13 Imminent Lawless Action:

Engaging in speech either orally or in writing that is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

#### Section 4.26 Obstruction or Disruption of University Activity:

Obstructing or disrupting teaching, learning, studying, research, public service, administration, disciplinary proceedings, emergency services, or any other University-affiliated activity, or the free flow of pedestrian or vehicular traffic on University-controlled property. In no event shall this rule be construed to discipline a student for speech protected by the First Amendment to the United States Constitution.

In addition to the campus policies cite above, students or student groups who wish to use the Joe Johnson – John Ward Pedestrian Walkway to set up a display or table to promote a social event, or to advocate for a political cause are required to submit a “solicitation or event request” application through the campus Center for Student Engagement. Requests must be submitted at least three days prior to the proposed event.

### **Recommendation One**

The University of Tennessee should affirm the Rock's role as a community bulletin board, which allows members of the campus community to express and promote projects, events and causes they value. Working within the provisions of the Campus Free Speech Protection Act, The University of Tennessee, Knoxville should implement a system of content and viewpoint neutral, time, place and manner controls for the Rock similar to those that are currently in place for members of the campus community to set up displays on the Joe Johnson – John Ward Pedestrian Walkway.

### **Recommendation Two**

So that we may better coordinate and communicate our diversity and inclusion mission, which is the 6<sup>th</sup> pillar of the Vol Vision Plan, Interim Chancellor Wayne Davis should immediately appoint an interim chief diversity officer for the campus who reports directly to the chancellor, and conduct a national search to fill this position. Having a campus administrator serve in this role is the standard at our peer and aspirational peer institutions.

### **Conversations with Constitutional Experts**

The position paper above was shared with a few free speech advocates and constitutional law experts. Below is a summary of some of the issues.

It was observed that it is most useful to regard The Rock as akin to a community bulletin board, and that this could guide how the institution would impose time, place and manner restrictions. However, concern was expressed that there are clear procedures to ensure that the review of proposals to use The Rock are content and viewpoint neutral. The example of an Earth and Planetary Sciences bulletin board in which members of the (imaginary) UT Flat Earth Society wanted to promote a campus event was used as an example in which the department should not prevent the group from posting their flyer. It was noted that the pedestrian walkway on campus accommodates a variety of student and campus organizations that span a full spectrum of social, political and religious beliefs. There was also discussion of how the university might have authority to reschedule a group that had been authorized to use The Rock if a time sensitive matter required doing so.

In discussions with Jordan Smith <jsmith15@utk.edu> from the UTK Center for Student Engagement, it was noted that there is a process for anyone denied use of the pedestrian walkway to petition their denial. Most often these denials have to do with illegal or certain forms commercial activities.

There was discussion regarding the current lack of a schedule for paintings on The Rock, such that a message from one student group can be, and is often is, painted out within a couple of

hours. In this context, one needs to consider if this system encourages the heckler's veto? Those consulted noted that this is an issue of debate among free speech advocates, and that the standard position has often been that disagreeable speech should be countered with contrary speech.

The issue of whether The Rock should be accessible to any member of the public from outside of the university for messaging was also discussed. For example, there are laws in Tennessee protecting the rights of citizens to leaflet or speak in public spaces on campus, and that university honors these laws, as preachers and others are often present in public areas of the campus. In addition, if members of the public wished to schedule an event in a classroom or auditorium, the university has a process for public groups to apply for the scheduling of such activities, as well as assessing reasonable fees for use. If the university treats The Rock as a campus bulletin board, it is not obligated to let members of the general public to it for messaging.

The inclusion of the "Kill Jews" messages on The Rock from the November 9, 2018 might not be protected speech. The constitutional test is whether the people who wrote the message had the ability to carry this out. It was agreed that without knowing who wrote the message, there is no way for the university to assess this threat. The speech might also be unprotected if the message is meant to, or incites imminent lawless action or is likely to do so (see [Brandenburg v. Ohio](#), 395 US 444, 1969). It is also worth noting that the constitutionality of the current state law on wearing masks during protests is in question.

There was also discussion about how the UTK Police enforce painting on The Rock. At present, the campus police take a "hands off" approach, treating all uses of The Rock as protected speech. Considering the potential threat to life represented by the "Kill Jews" message, the police are not well positioned to make such a call.

It was agreed that the university had the legal authority to implement an application procedure (similar to the pedestrian walkway application process) for campus groups who wished to use The Rock for messages, so long as it maintained content and viewpoint neutrality. Doing so would give greater clarity to the role of the campus police, who could treat violations of the policy as a form of vandalism.

In addition, Dean Rivkin, the UTK Williford Gragg Distinguished Professor of Law Emeritus, <drivkin@utk.edu> emailed the following statement regarding this matter:

This is a hard problem, and I wholeheartedly appreciate your efforts. Here are several *reactions*:

1. Framing this problem in First Amendment terms doesn't do justice to the immediate magnitude of the issue. In my view, first and foremost, this is a law enforcement matter. In my view, publicizing "Kill Jews" is very arguably a hate crime, no matter how much disagreement may exist about swastikas and other hate symbols or about the definitions of hate crimes. I've been distressed by the absence of this information in the

press. Whether these words can be considered “imminent lawless action” under University policy or the First Amendment is subject to differing opinions. To me, hate crimes fall in a different category. Having said that, and having read the article, [“How Law Enforcement Failed to See the Threat of White Nationalism,”](#) by Janet Reitman in this past Sunday’s *New York Times Magazine*, I’m deeply skeptical that local law enforcement, whether UTK, City, or County, is equipped to respond effectively to these episodes. Until such a response is publicly and urgently mounted, I feel quite sure that many students, staff, faculty, and the public will not feel safe on campus. At this stage, safety and security should be the paramount goal of any response.

2. What would such a response look like? I’m by no means an expert, but I can’t imagine that, in this day and age, there are not better means of lawful “surveillance” to deter the perpetrators of these incidents, whether they be persons affiliated with the University or not. Perhaps the University should promptly hire a security expert to advise the administration on various options. Such an action would demonstrate a proactivity that has been absent from the official responses thus far. I’m versed enough in the First Amendment to know that “surveillance” is a loaded term that can be deployed across the spectrum of political and ideological beliefs, so I would urge utmost prudence and caution in devising a proactive response, at least in the long run.
3. Moving to your thoughtful proposal, I’m left with some of the concerns that we discussed last night. “Time, place, and manner,” are venerable First Amendment accommodations, but I’m having trouble envisioning how your proposal actually would deter the surreptitious activities that have occurred? I’m not sure that it’s necessary to move to a system that “allocates,” however constitutionally, the public commons of the “Rock” until I’m convinced that all means and methods to stem the palpable threats posed by these recent incidents have been exhausted. Are there other accommodations (“alternatives”) that could be devised that would not “chill,” and I use that word advisedly, the free flow of communication that the Rock symbolizes? Tom Castelli, General Counsel, of the Tennessee ACLU is a keen source of information about “surveillance” by law enforcement. Currently, he is litigating an ACLU case in Memphis on this general issue.
4. Finally, I have always been a strong proponent of “more speech” to counter condemnable speech. The campus leadership should step out front to promote such dialogue. Thus far, the bromides penned by the University have, in my view, fallen short. As you recognize, there are legal and moral dimensions at work. The University should be an action- and thought-leader. The times demand no less.