

October 28, 2016

To: Hank Foley, Interim Chancellor  
Ben Trachtenberg, Chair, University of Missouri Faculty Council

From: Bob Jerry  
Isidor Loeb Professor of Law  
Senior Fellow, Center for the Study of Dispute Resolution  
Chair, Ad Hoc Joint Committee on Protests, Public Spaces, Free Speech, and the Press

Re: *Transmittal of “Revised Final” Report; Ad Hoc Joint Committee on Protests, Public Spaces, Free Speech, and the Press*

The Ad Hoc Joint Committee on Protests, Public Spaces, Free Speech, and the Press was appointed by the Chancellor and the Faculty Council in January 2016 for the purpose of making recommendations on two charges. We were asked to “(1) recommend how public spaces can be regulated on campus while protecting safety, free inquiry, and free expression and (2) suggest how the University might diffuse future conflicts should they arise concerning the use of public spaces on campus.”

The Committee began meeting regularly in January. In March, we submitted an interim report in which we recommended that the University approve a proposed statement reaffirming its commitment to free expression. This “Commitment to Free Expression” statement was endorsed by the Chancellor shortly after we made our report and by the Faculty Council in April.

The Committee continued its work, and on May 23 we submitted to you a proposed policy titled “Policy on Use of University Facilities and Grounds.” In preparing this proposal, we reviewed policies and regulations on public space and free expression at 40 different universities, consulted with individuals with experience in these areas both inside and outside the University, and made our own assessments of the needs of our University. The result was a proposed policy that, as stated in its “General Principles” section, “seeks to ensure that individual and group rights of expression, assembly, dissent, and protest are not infringed or abridged at the same time it seeks to support and preserve the means to maintain the safety of all members of the University community and visitors to the campus, to enable the University to fulfill its missions of teaching, education, and research, and to provide all members of the University’s academic enterprise with the broadest possible latitude to speak, write, listen, challenge, and learn.”

In the transmittal memorandum accompanying the May 23 report, we recommended that our proposal “become the subject of further discussion and vetting in appropriate campus governance organizations.” We explained that the issues addressed by the proposal and logistical aspects of its implementation are complex, and we acknowledged “that continued discussion and

review are likely to identify ways the proposal can be improved.” The vetting process that ensued involved two public university-wide forums, discussion sessions with staff and students, and public comment facilitated by a website that included a link enabling email communication directly with the Committee. We received many helpful comments. Through a process involving email communication and a meeting on October 12, we revised the May 23<sup>rd</sup> proposal, and it is this “revised final proposal” which is transmitted to you by this memorandum.

The revised proposal, like its predecessor, has these elements:

- It is crafted to adhere to the requirements of Mo. Rev. Stat. § 173.1550.1, which became effective in August 2015 and places special requirements with respect to how outdoor spaces on public university campuses in Missouri are made accessible for expressive events and activities.
- The policy states that the University will not interfere with expressive activities unless participants engage in one of the policy’s specifically enumerated behaviors. These behaviors fall within the scope of reasonable time, place, or manner limitations the Supreme Court of the United States has authorized government authorities, such as public universities, to place on expressive activities.
- The policy creates a default principle that allows impromptu expressive activity in any outdoor area on the campus unless the location is specifically listed in either Appendix B (listing spaces that can be reserved for expressive activities but in which impromptu expressive activities may not occur; also listing other spaces where impromptu activities are allowed without a reservation in the absence of a prior reservation for use of the space) or Appendix C (listing spaces in which no event or activity, including an expressive activity, is allowed).
- The policy creates a clear, understandable procedure through which students, student groups and organizations, campus departments and units, other campus groups, and noncampus groups can reserve facilities and grounds for events and activities.
- The policy assembles in one place a number of existing University policies relevant to free expression in public spaces. These policies are, for the most part, difficult to access, and general campus awareness of these policies is limited. We hope that the proposed policy will alleviate this gap in understanding.

We are placing on the Committee website a version of the May 23<sup>rd</sup> proposal that shows all the changes made in it to produce this revised final proposal. Among the most significant changes are:

- Substantial simplification and reorganization of the proposal to aid clarity, especially in Section IV on procedures and standards for scheduling the use of facilities and grounds.

- Elimination of “disturb” in the descriptions of prohibited behaviors in Section III and the addition of discussion in Appendix D on the meaning of “disrupt,” “interfere with,” and “prevent.”
- Including explicit references to the existing regulations on camping and sound amplification and decoupling this revised proposal from the process of making needed changes in those regulations; also, removing language on moving and flashing lights, thereby decoupling this revised proposal from the drafting of a new regulation on that topic.
- Clarifying the meaning of “University official” for purposes of this policy.
- Substituting “impromptu” for “spontaneous, unscheduled” as a descriptor of certain kinds of expressive activities; clarifying the default principle that impromptu expressive activities are permissible and protected, and that scheduling is not necessary but can be useful as a way to reserve particular space at a particular time for expressive activity.
- Improvements in the table in Appendix A identifying contacts (*i.e.*, the appropriate “Coordinators”) for making space reservations.
- Clarification of the policy’s affirmation of the right to engage in expressive activities at events scheduled in locations where impromptu assemblies are not permitted.

The second charge to the committee asks for recommendations about how future conflicts regarding the use of public space on campus can be diffused. We reaffirm the two other recommendations we made (in addition to the recommendation for further vetting of the Committee’s proposal in a campus-wide process) when transmitting our proposal in May:

As an initial observation, we believe that adopting a clear policy on use of public space is the most direct way to both avoid and diffuse future conflicts over the use of such space.

That being said, we also observe that no single policy can anticipate and answer all questions about the full range of possible future disputes about the use of public space. Thus, senior university leadership will inevitably be required to make decisions about particular cases and situations as they arise. It is important that university leadership, guided by the advice of the University’s General Counsel, exercise its discretion thoughtfully. Appendix D to the proposed policy is intended to assist university leadership in the exercise of that discretion. We also intend that Appendix D serve as a tool to educate members of the University community about how each of us can contribute positively to avoiding disputes about the use of public space and to resolving such disputes fairly and expeditiously when they arise.

Beyond those two observations, we have three specific recommendations.

First, we recommend that the Campus Mediation Service (“CMS”) be made available to mediate disagreements about free expression issues that arise on the campus as well as disagreements that involve the use of facilities and grounds. Mediation provides a setting in which people who are in conflict can work with a neutral third party in an attempt to resolve their differences. Making the CMS resource available to assist with conflict resolution when free expression disagreements arise will help diffuse these conflicts.

The First Amendment issues that inevitably arise with respect to these kinds of disagreements are complex. Thus, we suggest that three to four mediators on the CMS panel be trained at the University’s expense in foundational principles of the First Amendment and that these “specialist mediators” be available for service in resolving disputes that arise under the proposed policy. We recognize that implementing this recommendation would expand the jurisdiction of CMS; thus, we suggest that the number of mediators on the existing CMS panel be expanded to accommodate this increased role.

As a corollary to this first recommendation, we suggest that, if a University ombuds office is created sometime in the future, at least one ombudsperson on the staff should be trained in foundational principles of the First Amendment and be available to offer resources, referrals, counseling, and informal dispute resolution services for those who raise free expression questions, complaints, or concerns.

Second, we recommend that the University take steps to improve the understanding of all members of the University community – faculty, administration, staff, and students – of the meaning and importance of the First Amendment and the values embedded in it. To this end, we recommend that the University’s *Commitment to Free Expression* be included in student orientation materials and that each school, center, and institute on the campus be invited to identify ways to encourage conversations about the *Commitment* statement. We encourage appropriate campus departments to schedule speakers and symposia on free speech and free expression issues. We further recommend that these occasions be used to impress upon all members of the University community the importance of respect for the dignity of all people, for the values of diversity and inclusivity, and for a diversity of viewpoints. Although the First Amendment requires the University to protect the right to make statements opposing these values, nothing in the First Amendment restricts the University’s efforts to teach and model respect for human dignity, to promote diversity and inclusivity, and to encourage respectful debate.

We have one new recommendation. Because the proposal is expected eventually to be codified as an agency rule, it has some of the complexities typical of and unavoidable in statutes, ordinances, and administrative regulations. Although this revised version is simplified from the earlier version, it does not stand as, nor is it meant to be, a “quick and easy guide” to the rules for and process of reserving and using space on campus. We agree with the suggestion that an “executive summary” or “guide” to the policy be drafted and placed on the University’s website

for use by students and others who want to know how to reserve space on campus and the essence of the rules relevant to such use. A first effort to draft such a summary has been made, but we believe that this project should be completed by the office or staff more familiar with the techniques of effectively communicating such content through the University's website and other media.

Please let us know if you have questions about our "revised final" proposal or any of our other recommendations.

### Members of the Committee

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