

In Search of the Boundary Between Protected and Unprotected Speech

**VIRTUAL ROUNDTABLE BREAKFAST: January 6, 2022
ACR-GNY & CUNY Dispute Resolution Center at John Jay College**

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Goals of This Presentation

- **Understand** <United States+> law, institutional policies, and principles governing free speech
- **Distinguish** between protected and unprotected speech as informed by <United States+> law, policies, and principles
- **Review** when and how public actors may act formally to address inflammatory, offensive, or provocative speech
- **Elicit** strategies/actions to help participants prepare for and manage situations involving uncomfortable yet protected speech

Question:

Why is it important to *preserve* a space for conflict and disagreement?

What's our role?



**#WHEREIS
PENGSHUAI**

IMAGE : TWITTER/ @USOPEN

Tennis Star Peng Shuai Disappears After Sexual Abuse Accusations Against Ex-Chinese Official— And Top Stars Begin Speaking Out

A Chinese Tennis Star Accuses a Former Top Leader of Sexual Assault

Tennis star Peng Shuai disappears following sexual assault accusations

Peng Shuai: Who is the Chinese Tennis Star, and Where is She?

PENG SHUAI SITUATION EXPLAINED: WTA SUSPENDS ALL TOURNAMENTS IN CHINA AMID CENSORSHIP OF FORMER WORLD NO. 1



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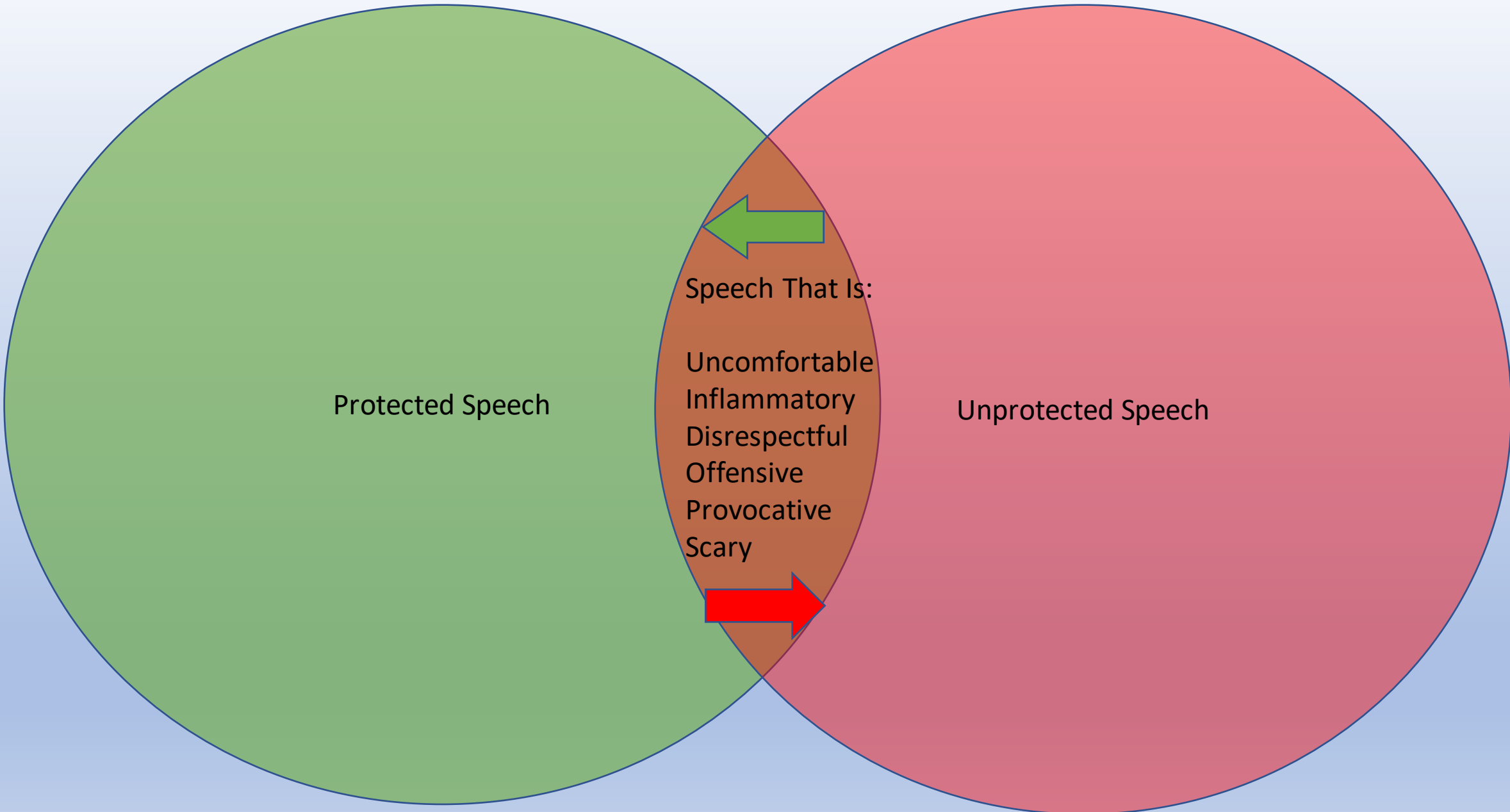
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HATE U

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Protected Speech

Unprotected Speech

Speech That Is:
Uncomfortable
Inflammatory
Disrespectful
Offensive
Provocative
Scary

What Is “Speech”?

- Spoken words, comments, monologues, diatribes
- Written texts, snaps, tweets, posts, blogs, articles, op-eds
- Gestures, motions, behaviors, expressions
- Clothing or other ways of dressing or appearing
- Parades, marches, demonstrations
- Plays, performances, skits, drawings, graffiti, songs
- Organizational clubs, unions or other “associations” (formation, membership)
- Political or religious views and affiliations
- Faculty or staff scholarship, curricula, instruction, opinions
- Institutional policies, protocols, announcements, statements
- **Any mode of communication or expression**

How Speech Is Regulated or “Protected”

- **Law** (UN Declaration of Human Rights, national/federal constitutions, state or territorial/provincial constitutions, local ordinances; legislation and regulations; executive orders; court rulings; contracts)
 - Discuss: applicability to public versus private actors
- **Policies** (institutional, corporate, professional)
 - Freedom of speech/anti-discrimination/anti-harassment policies, student codes of conduct, employee manuals and contracts, professional license requirements
- **Individual Behaviors/Practices** (based on norms or customs)

U.S. Constitution First Amendment: Basic Concepts

- The government should avoid regulating or restricting the CONTENT of speech (except in limited cases)
 - HOWEVER: the government may regulate the TIME, PLACE, and MANNER of speech if it has a good reason and isn't being *too* restrictive
- The government is practically never allowed to restrict a person's speech because it disagrees with the VIEWPOINT expressed
 - Discuss: What's the difference between CONTENT and VIEWPOINT?
- The government may not place restrictions on speech that are overly BROAD or VAGUE
 - Such restrictions could be struck down if challenged in court

U.S. Education Context – Defining “Protected” Speech

- *Tinker v. Des Moines* (1969): the “material and substantial interference” test
- See also: *Mahanoy Area Sch. Dist. v. B.L.* (2021): off-site speech is likely protected - but isn’t totally off-limits from governmental scrutiny
- *Pickering v. Board of Educ.* (1968): the “matters of public importance” test (but see subsequent cases)
- *Rosenberger v. Univ. of Va.* (1995): the “limited public forum” concept - and limitations on suppression of speech

Speech That Is Not “Protected” by the First Amendment

- Defamation (Libel or Slander)
- Invasions of Privacy
- Copyright Infringement
- Obscenity
- Limited Situations Involving Very Aggressive Speech, Including:
 - “True Threats”
 - “Fighting Words”
 - “Incitement to Imminent Lawless Conduct”
 - Speech or Behavior That Constitutes a Recognized Personal Injury (Tort) (such as Intentional Infliction of Emotional Distress) or Crime (such as Physical/Sexual Assault)
 - Speech That Constitutes Legal “**Harassment**”

U.S. Education Context – “Unprotected Speech”

Davis v. Monroe County (1999):

The “severe, pervasive, and objectively offensive”
harassment test

U.S. Employment Context – “Unprotected” Speech (EEOC)

- Harassment is unwelcome conduct that is based on a protected category (including race, national origin, religion, sex, pregnancy status, sexual orientation, gender identity, age, disability, or genetic information).
- Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

<https://www.eeoc.gov/harassment>

Institutional Policies and “Unprotected” Speech – City University of New York (Example)

- **Harassment:**

- unwelcome conduct based on a protected characteristic
- Conduct has the purpose or effect of unreasonably interfering with an individual’s work or academic performance or creating an intimidating, hostile or abusive work or academic environment.

CUNY Sexual Misconduct Policy – “Unprotected”* Speech

- **Suggestive body language or inappropriate or unwelcome physical contact**
- **Verbal abuse or offensive comments of a sexual nature**, including sexual slurs, persistent or pervasive sexually explicit statements, questions, jokes or anecdotes, degrading words regarding sexuality or gender, suggestive or obscene letters, notes, or invitations
- Making **lewd or sexual comments** about an individual’s appearance, body, or clothing
- Visual displays or distribution **of sexually explicit drawings, pictures, or written materials**
- Undue and unwanted attention, such as repeated inappropriate **flirting, staring**, or making **sexually suggestive gestures**; or
- **Offensive comments** regarding a person’s **sexual orientation, gender identity or gender expression**, such as persistent mocking or disparagement of a person based on a perceived lack of stereotypical masculinity or femininity

* *Probably*

Uncomfortable, Yet Protected, Speech

- Offensive or disparaging statements about people or issues in group or private conversations (that don't meet the definition of harassment)
- Rude or aggressive comments online (that don't meet the definition...)
- Outrageous views on matters of public concern (the Holocaust, slavery, Black Lives Matter, #MeToo, LGBTQ rights, immigrant rights)
- Membership in inflammatory groups or organizations
- Shocking or titillating works of art, performances, displays
- Et cetera . . .

Strategies/Actions for Situations Involving Uncomfortable AND Protected Speech

- Institution-level policies or initiatives
 - Create clear and legally sound policies addressing permissible and impermissible behavior in different types of forums
 - Launch curricular or educational initiatives and forums to increase civic awareness and respect for diverse communities and opinions
 - Expand programmatic offerings (e.g., mediation, coaching, alternative dispute/conflict resolution, counseling, ombuds, restorative justice approaches) to address sticky situations
- Individual actions
 - Improve understanding of how to deescalate tensions and address feelings/trauma of parties involved in uncomfortable situations
 - Recognize your value as stewards of democracy – and expand your influence

Q: Why is it important to *preserve* a space for [the successful resolution of] conflict and disagreement?

A: A healthy democracy needs a citizenry that can express disagreement without resorting to violence, and that gains respect for pluralism through the robust exchange of information and ideas and through shared experiences.

Q&A + Thank You

Connect with me on Twitter: [@bob__kim](https://twitter.com/bob__kim)