

Limits to Free Speech

Note: This orientation module features the script for a forthcoming short video. If you'd like to be updated once the video is available, please email jackie@thefire.org.

Introductory Statement

At [college name] we value your right to participate in expressive activity that challenges orthodoxy and pushes boundaries. We hope that you will do this in a respectful manner, as civility makes it possible to engage in discussions that are truly meaningful—discussions in which we really listen and learn from each other.

The reality, however, is that not all interactions are respectful, and that's as true on campus as it is in the community at large. You may experience discourse that will ruffle feathers or outright offend you or some of your peers. That may happen in meeting rooms, on the quad, or in social media posts directed at you or your friends.

Many decades of litigation have firmly established that the vast majority of speech, however offensive, is protected by the First Amendment. But it is important for you to understand the limits to your rights not just here on campus as students, but also as citizens in our broader community. While the First Amendment protects most speech, it is not a free pass to threaten, harass, or otherwise violate the rights of others.

In this next video, you'll get an overview on three categories of speech that are not protected by the First Amendment.

Video Script

The First Amendment's protections include the vast majority of speech and expression, but it does have its limits. These limits have been carefully honed over decades of case law into a handful of narrow categories of speech that the First Amendment does not protect. Because of this winding legal landscape, there are many misconceptions as to what actually constitutes unprotected speech.

Whether you choose to be politically active on campus or just want to try your hand at stand-up comedy at a local open mic night, it's important to have an understanding of where the courts draw the line between protected and unprotected speech. So, I'm here to give you a quick rundown on three of the most commonly misunderstood categories of unprotected speech.

True Threats and Intimidation

First, let's talk about "true threats," a recognized exception to the First Amendment. In the 2003 decision *Virginia v. Black*, the Supreme Court of the United States defined true threats as "statements where the speaker means to communicate a **serious expression** of an intent to commit an act of unlawful violence to a **particular** individual or group of individuals" (emphasis added). The Court also held that speech becomes unprotected intimidation when it is "a type of true threat, where a speaker directs a threat to a person or group of persons with the **intent** of placing the victim in fear of bodily harm or death" (emphasis added).

These definitions place emphasis on the actual intent and seriousness of the threat. This allows the authorities to take things like bomb threats seriously while also keeping the government from punishing clearly hyperbolic expression, such as the infamous photo of Kathy Griffin holding a depiction of Donald Trump's head or someone yelling "I'm gonna kill you!" at another Fortnite player. It's important to keep in mind that these definitions envision



speech or conduct aimed at a specific individual or set of individuals. They do not include more generalized comments.

In 2007, one student at Valdosta State University in Georgia learned the importance of the narrowly tailored definition of true threats.

Student Hayden Barnes chose to protest VSU President Ronald Zaccari's plan to use \$30 million in student fees to construct two parking garages on campus. He did so by posting a satirical collage on Facebook and emailing campus leaders with his environmental concerns regarding construction. The collage included pictures of Zaccari, a parking garage, and the caption "S.A.V.E.-Zaccari Memorial Parking Garage," a sarcastic reference to statements Zaccari had made about preserving his "legacy" as president of VSU through the parking garages.

Claiming that Barnes' use of the word "memorial" implied a threat to Zaccari's safety, Zaccari had Barnes expelled on the grounds that he was a "clear and present danger" to the campus. Shockingly, he did this unilaterally and without any kind of hearing or process. Barnes filed a lawsuit in part on First Amendment grounds and ultimately prevailed at the federal appellate court, winning \$900,000 in damages and fees. Without the Supreme Court's careful definition of true threats, those in power could punish anyone for pushing back against them, like Barnes did.

Harassment

The legal standard for student-on-student (or peer) harassment in the education setting was set by the Supreme Court in the 1999 case *Davis v. Monroe County Board of Education*. To be considered unlawful peer harassment, behavior must be **unwelcome; discriminatory** on the basis of a protected status, like gender or race; directed at an individual; and "so **severe, pervasive, and objectively offensive**" that the victim is "effectively **denied equal access** to an institution's resources and opportunities."

In short, isolated pure speech or expression is unlikely to constitute harassment on its own. To be peer harassment, speech must be targeted, discriminatory, and typically **part of a larger pattern of behavior** that hinders the educational experience of the targeted individual. This narrowly tailored definition gives the government power to punish behavior that truly impairs the educational environment, but also protects students from being punished for one-off statements that subjectively offend someone. Following someone, repeatedly targeting them with your conduct, and refusing to leave them alone after requests to do so can rise to the level of harassment that lands you in the student conduct office.

Let's take a look at a case where a student was improperly charged with harassment by their university. Back in 2014 at the University of Oregon, a student was hanging out in her friend's dorm room when she looked out of a window and spotted a male student and female student walking together. She proceeded to shout "I hit it first!" out the window at them in jest. Despite apologizing to the students in question when they confronted her about her off-color joke, she was charged by the university with "harassment," "disruption," and "disorderly conduct." Knowing her rights, this student pushed back against the university, and the charges were ultimately dropped.

Her speech is not something I'd recommend going out and repeating, but it was absolutely not punishable by the university consistent with the First Amendment. If she had followed the other students to class and continued to yell at them, if she had figured out their schedule so she could continue to pester them, and if she had specifically targeted them for their identities, her speech might have crossed the line into harassment. But this isolated comment does not meet the Supreme Court's standard for peer harassment, discussed earlier.

Unlawful Conduct

The last category I'd like to discuss is speech that involves unlawful or unprotected conduct such as vandalism, destruction of property, and disruption. While you may not agree with every event held on campus, flyer you see, or viewpoint you hear, vandalizing property or disrupting events is not protected expressive activity. This includes shout-downs, grabbing microphones, illegally recording others, blocking entrances, and related activity.

Now, some of the examples I just mentioned are tactics used by some protest groups as forms of civil disobedience. While you may consider civil disobedience to be a vehicle for change, you should remember that civil disobedience is by definition not protected speech or activity, and that participating in such activity can lawfully result in punishment. Knowing the law, and in particular knowing the limits to your First Amendment rights, is important before thinking about taking such actions.

Conclusion

The First Amendment has been held to allow you to wear a jacket that says “Fuck the Draft” in a public courthouse (*Cohen v. California* (1971)), yell “We’ll take the fucking street later!” during a protest (*Hess v. Indiana* (1973)), and burn the American flag in protest (*Texas v. Johnson* (1989) and *United States v. Eichman* (1990)). You can even call for the overthrow of the United States government (*Brandenburg v. Ohio* (1969)).

If you encounter speech that sets off some red flags for you, but you’re not necessarily sure if it crosses the line into any unprotected categories, consider reaching out to the dean of students or public safety. It doesn’t hurt to ask!

Your own voice is your most powerful tool when advocating for yourself, your fellow students, and your causes. If you see behavior that rubs you the wrong way, write an op-ed for your student newspaper, organize a protest, or join student groups that encourage the kind of environment you want to be around. Be proactive in creating the college community you want to be a part of!

Video Reflection

Note to administrators: The following sample remarks leave space to discuss your school’s specific policies on student expression. We encourage you to collaborate with your general counsel and/or dean of students to highlight your most relevant policies and provide realistic examples of speech that would violate your policies. Think about recent controversies that have occurred on your campus and which policies you wish your students understood better. Additionally, making the discussion on “time, place, and manner” restrictions more specific, so as to include the names of academic buildings and common spaces on campus, can give students a better idea of their rights. If your school has certain bulletin boards or other forums that facilitate spontaneous speech, think about highlighting those areas for your students.

The First Amendment is a powerful tool for responding to viewpoints or actions you disagree with, but it has its limits. While college is a time to explore your beliefs and push boundaries, you must make sure that your expressive activities are not at odds with the rights of others. No student should feel unsafe when expressing themselves, even those ideologically opposed to you.

On campus, our administration has the ability to apply narrow “time, place, and manner” restrictions. These restrictions apply narrow limits to when, where, and how a speaker may present a message. For example, while it may be permissible to shout “Stop the war!” or “Support our troops!” at noon in the open space on campus, our administration has the right to prevent the same speech from being delivered at the same decibel level in the hall of a dormitory at 3:00 AM or right outside of a classroom window, disrupting a class.

It's important to understand that time, place, and manner restrictions are valid if they're reasonable; however, the First Amendment does not permit targeting the actual content of speech in most instances. The goal of the university is the pursuit of knowledge, so we have an obligation to maintain an environment free of harassment and substantial disruption to the educational experience.

It is important to know where we as an institution draw the line regarding inappropriate student conduct. Our school's policies regarding [demonstrations / harassment / posting flyers / other policies you would like to highlight] can be found at [web url or handbook name and page numbers]. If you have questions about any of these policies, please reach out to us. We can only have productive discourse on campus if we all understand our own rights and respect the rights of our fellow community members.