Limits to Free Speech

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.

Unfortunately, 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

Link: Limits to Free Speech
Length: 8:49
Transcript:

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 an open mic night, it’s important to have an understanding of where the courts draw the line between protected and unprotected speech. So, let’s go through a quick rundown on some 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”. 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”.

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 stopping the government from punishing clearly hyperbolic expression, such as the infamous photo of Kathy Griffin holding a depiction of Donald Trump’s head or a gamer yelling “I’ll 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 emailing campus leaders with his environmental concerns, and posting a satirical collage on Facebook. 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. Barnes filed a lawsuit in part on First Amendment grounds, and ultimately prevailed. Without the Supreme Court’s careful definition of true threats, those in power could punish anyone for pushing back against them, like Barnes did.

Incitement

Speech also becomes unprotected when it is used to promote imminent violent or lawless action.

This exception, also known as incitement, originated from a 1969 case called *Brandenburg v. Ohio*. In that case, the Court distinguished between mere advocacy of lawless behavior and incitement to imminent lawless action. In order for speech to lose its protected status, the Court ruled that there had to be evidence that the language in question was being used to encourage immediate lawlessness and that illegal action was likely to take place.

Four years later, the Court applied this standard to a case involving an anti-war protester on a college campus. Gregory Hess had been arrested for disorderly conduct after he shouted that protesters would “take the fucking street later.” The Court overturned his conviction on the grounds that Hess’s speech “amounted to nothing more than advocacy of illegal action at some indefinite future time.”

Harassment

To be considered unlawful student-on-student (or 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 qualify as 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.

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 would land 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 when she looked out of a window and spotted two strangers, a male 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 when they confronted her about the 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 may not have been the height of comedy, 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, and if she had specifically targeted them for their identities, her speech might have crossed the line into harassment. But this isolated comment did not meet the Supreme Court’s standard for peer harassment.

**Unlawful Conduct**

The last category we’ll 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, every flyer you see, or every 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 just mentioned are tactics used by some protesters as forms of civil disobedience. While civil disobedience can 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.

The First Amendment has been held to allow you to wear a jacket that says “Fuck the Draft” in a public courthouse, yell “We’ll take the fucking street later!” during a protest, and burn the American flag in protest. You can even call for the overthrow of the United States government.

But the university administration has the ability to apply reasonable “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, the 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 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 it has a moral obligation to maintain an environment free of harassment and substantial disruption to the educational experience.

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.

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.

**Additional Resources for Students**

- [Unprotected Speech Cheat Sheet](#)
- [Do’s and Don’ts of Activism](#)
- [Video: FIRE Presents: The Do's and Don'ts of Campus Activism](#)
- [Video: ‘The Talk’: How to ‘Do’ Free Speech](#)