

Say what? Your policy on free speech

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Overview

- The landscape
- Speech and/or/vs inclusion
- The law
- What you can and can't do
- Considerations for policies on speech, demonstrations and protests
- Proactive strategies to manage campus unrest

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The Landscape

- Race and diversity, including problematic legacies (e.g building names/monuments)
- Gender equality and harassment (#MeToo)
- Immigration and nationality

- Demonstrations and marches meet counter protests and shout downs
- Chalking, leafleting, and stickering
- Social media
- Curriculum, mirco-aggressions, trigger warnings, and academic freedom

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Speech and/or vs Inclusion

- There is a perceived tension here, because we are at the intersection of two pillars of higher education – free speech and inclusion – but they are not mutually exclusive, and can be complementary.

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The Law

- First Amendment
 - Rights and values (conduct as speech)
 - Publics and privates
 - Hate Speech
- Exceptions to First Amendment protection
 - True threats
 - Inciting or producing an imminent lawless action
 - Fighting words
 - Obscenity
 - Libel and defamation
 - Discriminatory harassment
 - Time Place and Manner Restrictions are acceptable
 - Must be content neutral and reasonable

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The Law

- Other Important Concepts
 - Overbreadth and Vagueness
 - Application and enforcement of the policy must also be content neutral
 - Anti- discrimination laws (Title VI and VII)
 - Academic Freedom

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What you can and can't do*

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| A campus can't censor or punish speech merely because a person or group considers it offensive or hateful | A campus can censor or punish speech that meets the legal criteria for harassment, true threats, or other speech acts unprotected by the First Amendment |
| A campus can't prevent protestors from having a meaningful opportunity to get their views across in an effective way | A campus can impose time, place, and manner restrictions on protests for the purpose of preventing protestors from disrupting the normal work of the campus, including the education environment and administrative operations. |
| A campus can't impose content-based speech restrictions in dormitories | A campus can impose content-neutral restriction in dormitories designed to ensure a supportive living environment for students |

© 2017. Used by Permission. Material for this section from Chemerinsky, Erwin and Howard Gillman. *Free Speech on Campus*. Yale University Press. 2017.
 Presenter's Note: this book is available at many retailers, and is a practical and concise resource for professionals in legal, compliance, and student affairs

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What you can and can't do

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| A campus can't censor or punish some speakers, but not others, for putting up handbills, writing messages in chalk, or engaging in similar acts of expression | A campus can create general content-neutral regulations governing on campus expression |
| A campus can't engage in content-based discrimination against faculty, students, or other speakers or writers who seek to express themselves outside the professional educational context. | A campus can engage in content-based evaluation of faculty and students who are operating within the professional educational context, as long as this evaluation is based on professional standard or peer assessments of the quality of scholarship or teaching. |
| Faculty members may choose to provide students warnings before presenting material that might be offensive or upsetting to them | Colleges and universities should not impose requirements that faculty provide "trigger warnings" before presenting or assigning material that might be offensive or upsetting to students |

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What you can and can't do

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| Campuses can create "safe spaces" in educational settings that ensure that individuals feel free to express the wildest array of viewpoints, and can support student efforts to self-organize in ways that reflect shared interest and experiences | Campuses can't use the concept of safe spaces to censor the expression of ideas considered too offensive for students to hear |
| A campus can't prohibit students or faculty from using words that some consider to be examples of "microaggressions" | A campus can sensitize students and faculty to the impact that certain word may have, as part of an effort to create a respectful work and learning environment |

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| What you can and can't do | |
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| A campus can ensure that all student organizations, as a condition for recognition and receipt of funding, be open to all students, and can impose sanctions on student organizations for conduct if it is not protected by the principles of freedom of speech. | A campus cannot deny recognition to a student organization or impose sanctions against it for views or ideas expressed by the organizations, its members, or its speakers |
| Colleges and universities can punish speech on the internet and social media that is otherwise not protected, such as true threats and harassment or speech inconsistent with professional standards | Colleges and universities can't punish speech over the internet on the ground that is offensive |
| A campus should expect university administrators to speak out against especially egregious acts and, most important, encourage the community to make its own decisions about that speech acts deserve praise or condemnation | A campus should not expect university administrators to comment on or condemn every campus speech act that some person considers offensive |

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Considerations for Policies on Speech, Demonstrations, and Protests

- Content neutral - Focus on conduct
 - Clearly define disruptive conduct
 - Discuss conduct expectations for counter protest
 - Discuss safety, and commitment to providing it to the community
- Define who can sponsor an event, or invite a speaker (faculty, student, alumni, public?)

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Considerations for Policies on Speech, Demonstrations, and Protests

- Decide if you are going to have policy statements about various types of protest activities (e.g. chalking/posting, dorm windows)
- Specifically include first amendment exceptions in the policy
- Be explicit with regard to process and fees (if any)
 - Cannot be related to content, or likely response to content.
 - Flat fees for use of a space, security, or cleanup are generally acceptable (ie everyone has to pay the same) – but additional fees for additional security, or to clean up counter protests/riots are likely not acceptable

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**Considerations for Policies
on Speech, Demonstrations, and Protests**

- Work with your campus on developing the policy (or at least the underlying philosophy), and involve the Senate, Student Association, Alumni groups.
- Be inclusive and use it as an opportunity to discuss and promote your values
- For an interesting discussion/ranking of many university speech policies, see Foundation for Individual Rights in Education (FIRE) [Spotlight on Speech Codes 2018](#)

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Questions?

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Proactive strategies to manage campus unrest

- Apply your policy in a fair and uniform way
- Invite Dialogue/engage students
- Know your role, and prepare for it
- Know your institution
- Clarify the students agenda/concern
- Convene small group meetings and talk it out
- Involve high-level senior leadership
- Educate everyone
- Follow up

• Based on Combe, Holly E. *Proactive and Responsive Strategies for Managing Campus Unrest*. National Association of College and University Attorneys. June 26, 2016

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