



Unprotected Speech

“Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”

—*Terminiello v. Chicago* (1949)

FIRE advocates for robust free speech rights for students, but not all expression is protected by the First Amendment. Below, we have detailed a few categories of speech that fall outside of constitutional protections. Unfortunately, too many college administrators have demonstrated a propensity to censor and punish a great deal of student expression based on a misapplication and misunderstanding of these principles. The only way to effectively identify and combat censorship is to stay informed and to understand and assert your rights on campus. For a more thorough analysis, read [FIRE's Guide to Free Speech on Campus](#).

Incitement

Incitement is speech that is intended and likely to provoke imminent unlawful action. In *Brandenburg v. Ohio* (1969), the Supreme Court of the United States held that in order to lose First Amendment protection as incitement, speech must be “directed to inciting imminent lawless action and is likely to produce such action.”

True Threats

In *Virginia v. Black* (2003), the Supreme Court defined true threats as “those 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 clarified that the speaker “need not actually intend to carry out the threat.”

Fighting Words

Fighting words are those that, by the very act of being spoken, tend to incite the individual to whom they are addressed to respond violently and to do so immediately, without any time to think things over. The fighting words category is an exceedingly limited classification of speech, encompassing only face-to-face communications that would obviously provoke an immediate and violent reaction, such that both speaker and provoked listener would be in violation of the law.

Obscenity

The Supreme Court in *Miller v. California* (1973) outlined a three-prong standard that material



must meet in order to be considered legally obscene.

1. Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the “prurient interest” (an inordinate interest in sex);
2. Whether the work depicts or describes, in a patently offensive way, sexual conduct;
3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (Note: This third prong is considered an “objective” standard and is judged by reference to national rather than community standards.)

If each prong is met, the material enjoys virtually no First Amendment protection and a university may choose to regulate its transmission, communication, or sale. Each of these criteria must be met in order for expression to lose First Amendment protection as obscenity.

Defamation

In *Rosenblatt v. Baer* (1966), Justice Potter Stewart wrote that the tort of defamation “reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.” Defamation is defined as a false communication that harms an individual’s reputation, causes the general public to despise or disrespect them, or damages their business or employment. To be defamatory, a statement must be an assertion of fact (rather than mere opinion) and capable of being proven false. In addition to being false, the statement, to be defamatory, must identify its victim by naming or reasonably implicating the person allegedly defamed.

In addition to the aforementioned categories of unprotected speech, there are also some types of punishable conduct that can be carried out, at least in part, through speech. These include harassment and the heckler’s veto.

Harassment

The Court held in *Davis v. Monroe County Board of Education* (1999) that student-on-student (or peer) harassment in the educational context consists only of unwelcome, discriminatory conduct that is “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.” By definition, this includes only extreme and usually repetitive behavior—behavior so serious that it would prevent a reasonable person from receiving his or her education. As the Court’s only decision to date regarding the substantive standard for peer harassment, *Davis* is controlling on this issue.

Heckler’s Veto

A heckler’s veto occurs when someone wishing to prevent someone else from speaking threatens a “breach of the peace” or disruption of public order if the speaker were to continue



speaking, and the authorities, rather than discipline or arrest the heckler, remove the speaker or cancel the event. A variation of the heckler’s veto occurs when a member of the audience who wishes to silence a speaker shouts down the speaker so as to make it impossible for the speaker to be heard. Allowing the heckler’s veto to stand confers a veto on speech to the least tolerant and most illiberal members of society. The heckler’s veto infringes on the speaker’s First Amendment right to express their ideas or opinions.

A **number** of colleges and universities have adopted speech codes that prohibit “indecent speech,” so-called “hate speech,” or other expression that may offend or upset the listener. This approach is misguided and, at public institutions, unconstitutional. The vast majority of what is considered indecent speech and hate speech is **nevertheless protected by the First Amendment**. At FIRE, we believe that this is a good thing. Legally defining both terms has proven to be **impossibly challenging**.

Indecent Speech

Indecent speech may include material that is deemed by some or many individuals to be sexually explicit, tasteless, or offensive, but does not meet the previously described *Miller* test for obscenity. Public universities cannot outright ban or punish speech simply because it is indecent. The Supreme Court held in *Papish v. Board of Curators of the University of Missouri* (1973) that “the mere dissemination of ideas — no matter how offensive to good taste — on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”

Hate Speech

In the U.S., there is no constitutional exception for so-called “hate speech.” The First Amendment fully protects speech that may be unpopular or that some may find downright offensive. It’s important to note that the constitutional protection of hateful speech is not a recent development in constitutional law—cases that have explored issues of hate speech date back to 1949.

The First Amendment has been held to allow you to wear a jacket that says “Fuck the Draft” in a public building (*Cohen v. California* (1971)), yell “We’ll take the fucking street later!” during a protest (*Hess v. Indiana* (1973)), burn the American flag in protest (*Texas v. Johnson* (1989) and *United States v. Eichman* (1990)), and give a racially charged speech to a restless crowd (*Terminiello v. Chicago* (1949)). You can even call for the overthrow of the United States government (*Brandenburg v. Ohio* (1969)).

In *Texas v. Johnson* (1989), the Supreme Court stated the general rule regarding protected speech when it held: “The government may not prohibit the verbal or nonverbal expression of an idea merely because society finds the idea offensive or disagreeable.” Federal courts have consistently followed this holding when applying the First Amendment to public universities and have consistently used this principle in striking down college speech codes that regulate dissenting, offensive, or unpopular language.