



Campus Speech

A Discussion of Policies, Protest, and Encampments

Speakers



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Agenda

- Institutional Liability for Restricting Speech
- Title VI and Hostile Environment Based on Speech
- Responding to Student Activism Consistent With the First Amendment
- Restoring Civil Discourse on Campus

Institutional Liability for Restricting Speech



Institutional Liability

Public Institutions

- First Amendment
- Qualified Immunity
 - Clearly Established Constitutional Right
 - *Josephson v. Ganzel*, 2024 U.S. App. LEXIS 22971 (6th Cir. Sept. 10, 2024)

Potential Sources of Liability for Restricting Speech

Private Institutions

- Unique State Laws
 - California's Leonard Law
 - State v. Schmid, 423 A.2d 615 (N.J. 1980)

Contract Law

Private Institutions

- Tuition Class Action Litigation
 - Implied contracts based on amorphous “promises” in promotional literature
 - "When you come to Temple, you also come to Philadelphia," and that students could "choose from a diverse range of activities on campus and in the surrounding city." *Hickey v. University of Pittsburgh*, 81 F.4th 301 (3d Cir. 2023)

Contract Law

Private Institutions

- *Doe v. University of the Sciences*, 961 F.3d 203 (3d Cir. 2020)
“We hold that USciences's contractual promises of "fair" and "equitable" treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers.”
- *Manco v. St. Joseph's Univ.*, 2024 U.S. Dist. LEXIS 13181 (E.D. Pa. Jan. 24, 2024) (professor stated breach of contract based on promise in harassment policy that harassment will not include free expression)

Potential Sources of Contractual Right to Free Speech

Private Institutions

- Student Handbook
- Policies on Free Expression
- Harassment Policies
- Academic Freedom Policies

Review Policies to Avoid Unqualified Grant of Rights to Free Speech

Private Institutions

- “The University is committed to providing all of its students the right to unfettered exchange of ideas and expression as set forth in the First Amendment.”
- “The University believes that the truth is best discovered through the free exchange of ideas; however, we also recognize the right of all of our students to learn in a safe and supportive academic environment, so rights to free expression are not unfettered.”
- “This Policy sets forth the institution’s values; however, it does not create enforceable contract rights”

Community Effort

Private Institutions

- Consider a comprehensive community effort to define policies around freedom of expression on campus

Considerations for a Campus Speech Policy

1. Institutional Liability - Public or Private Institution
2. Avoid Unqualified Grant of Rights
3. Consider a Comprehensive Community Effort
4. Time, Place, and Manner Limitations

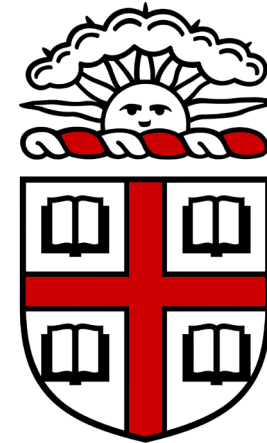
Title VI and Hostile Environment Based on Speech



Recent Title VI Litigation

- *Kestenbaum v. President & Fellows of Harvard College*, 2024 U.S. Dist. LEXIS 139180 (D. Mass. Aug. 6, 2024)
- *StandWithUs Ctr. For Legal Justice v. MIT*, 2024 U.S. Dist. LEXIS 13414 (D. Mass. July 30, 2024)
 - “That MIT’s evolving and progressively punitive response largely tracked its increasing awareness of the hostility that demonstrators directed at Jewish and Israeli students shows that MIT did not react in a clearly unreasonable manner”
- *Harvard*: “The court . . . is dubious that Harvard can hide behind the First Amendment to justify avoidance of its Title VI obligations. At any rate, whether this argument has any teeth is a decision best reserved for a different day.”

Recent OCR Enforcement Actions



BROWN

Lafayette College Resolution Letter

- “OCR interprets Title VI to mean that the following type of harassment creates a hostile environment: unwelcome conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe **or** pervasive that it **limits** or denies a person’s ability to participate in or benefit from a recipient’s education program or activity.”
- ***“Harassing acts need not be targeted at the complainant to create a hostile environment.”***
- “If OCR determines that the harassment was sufficiently severe or pervasive that it would have limited the ability of a reasonable person, of the same age and national origin as the victim, under the same circumstances, from participating in or benefiting from **some aspect** of the recipient’s education program or activity, OCR will find that a hostile environment existed.”

OCR Guidance

- “A hostile environment based on race, color, or national origin may result from a single severe incident if the conduct is subjectively and objectively offensive and so severe that it limits or denies a student’s access to the education program or activity.” July 2, 2024 OCR Fact Sheet
- “The relevant Title VI nondiscrimination standard requires the University to take steps reasonably calculated to end and redress any hostile environment related to shared ancestry affecting the education program if one exists, even if the conduct occurs off campus ***or on social media.***” Drexel Resolution Agreement
 - Compare *Dei v. Boyd*, 2024 U.S. App. LEXIS 23566 (6th Cir. Sept. 17, 2024)
- OCR believes a hostile environment under Title VI can be created by speech that is protected by the First Amendment. (Catherine Lhamon remarks to NACUA June 2024)

Recommendations from OCR Guidance

- Have a system for addressing each and every report of a hostile environment or discrimination based on a protected class
- Always offer a responsive action; OCR will not excuse it just by labeling it “free speech”
- Document, document, document, including the overall campus environment

Is Harassing Speech Outside the First Amendment?



Categories of Unprotected Speech

- Incitement to Imminent Lawless Action
- Fighting Words
- Obscenity
- Defamation
- False Statements of Fact/Fraud
- True Threats

Fighting Words/Incitement



We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by -- as one witness here did -- according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

— *Texas v. Johnson*, 491 U.S. 397 (1989) (Brennan, J.)

Hate Speech and True Threats

Virginia v. Black 538 U.S. 343 (2003)

- Held that the statute making cross burning per se illegal was unconstitutional, absent a showing that the person burning the cross intended to intimidate by doing so.

The First Amendment and Harassing Speech

- *Counterman v. Colorado*, 600 U.S. 66 (2023)
Hundreds of harassing Facebook messages sent to local singer and musician. Supreme Court, Justice Kagan, requires showing that the defendant consciously disregarded a substantial and unjustifiable risk that his conduct will cause harm to another
- *Snyder v. Phelps*, 562 U.S. 443 (2011)
Picketers holding signs outside of funeral of Marine stating things like “Thank God for Dead Soldiers” and “F*gs Doom Nations” protected by the First Amendment as speech on a matter of public concern even if a jury finds that the speech is “Outrageous”

The First Amendment and Harassing Speech

- *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)
Harassment must be “so severe, pervasive, and objectively offensive . . . And so undermine[] and detract[] from the victims’ educational experience, that the victims are effectively denied equal access to an institutions’ resources and opportunities.”
- *Schmidt v. Siedel*, 2023 U.S. Dist. LEXIS 240319 (D. Wyo. Aug. 18, 2023)
Display on table in public exhibition space on campus that stated “God created male and female and [student] is a male” protected speech notwithstanding argument it constituted discriminatory harassment

OCR vs. The Judiciary

- *Department of Education v. Louisiana*, 144 S. Ct. 2507 (Aug. 16, 2024)
Allowing injunction to remain in place over claims that Department of Education’s “watered down” definition of hostile environment violates the First Amendment
- *Loper Bright Enterprises Et Al. V. Raimondo*, 144 S. Ct. 2244 (June 28, 2024)
Overruling Chevron Deference

Recommendations for Identifying Hate Speech

- Provide a detailed definition of hate speech, even if it's not prohibited
- Explain the differences between hate speech and hate crimes
- Examine reporting options
- Educate the community about what speech is allowed

Recommendations for Responding to Hate Speech

- Craft protocols for administrators' response in conjunction with campus safety
- Create an institutional response team
- Prepare a communications response
- Make resources available
- Consider task forces or audits to assess how hate speech impacts the community

Responding to Student Activism Consistent with the First Amendment



Permissible Regulation of Speech on Campus

Conduct vs. Speech



Disruptive Speech and Pedagogical Control

- *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)
- *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)

Time, Place, and Manner Restrictions

- Nature of Forum
- Viewpoint Neutrality

Essential Elements of an Events and Demonstration Policy

- Viewpoint Neutral/Equal Enforcement
- Requirements for Scheduling/Notice to Institution of Events
- Reasonable limitations on location for posters, chalkings, and other displays
- Prohibition on Encampments

Essential Elements of an Events and Demonstration Policy

- Reasonable limitations on locations for demonstrations
 - No private spaces
 - Limitations on disruption to rights of others, including amplified sound
- Heckler's Veto
- Community Input and Buy-In



Restoring Civil Discourse on Campus

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