



ILLINOIS STATE UNIVERSITY

Illinois' first public university

Context...

Increased polarization

Increase in intensity

Increase in expression/challenge
of difference (in your face)

And our university is a
microcosm of the greater world



**University
Context: A
Conundrum of
Juxtapositions**

Universities should be environments of
exploration and vigorous debate of all ideas

vs.

Universities should be environments where all of our
students feel welcome to learn, particularly for students
from marginalized identities

**First
Amendment
to the United
States
Constitution -
Freedom of
Speech**

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

First Amendment Tenets

Freedom of Speech

The Right to Assemble
Peacefully

Cannot implement a
law, policy, or practice
that abridges these
rights

OVERVIEW

- Freedom of Speech
 - What is not First Amendment Speech:
 - Fighting words
 - Interference/Disruptions
 - Harassment
 - Illegal Conduct (Hate Crime vs. Hate Speech)
- Time, Place and Manner Restrictions Permitted
 - Must be reasonable
 - Must be content neutral

Fighting Words

- The Supreme Court ruled in 1942 in Chaplinsky that the First Amendment does not protect “fighting words,” but this is an extremely limited exception.
- THREE PART TEST
 1. Intimidating speech that is directed at a specific individual;
 2. in a face-to-face confrontation;
 3. that is likely to provoke a violent reaction.

**DID NOT
QUALIFY AS
“Fighting
Words”**

- Speakers addressing a large crowd on campus, no matter how much discomfort, offense, or emotional pain their speech may cause.
- Political speech where context indicates that the words are not intended to incite direct violence.
- Verbal criticism of police/law enforcement
- Speech directed at a group generally

NOT fighting words CASE examples

- In [*Brandenburg v. Ohio*](#) (1969), the Supreme Court held that the government cannot punish inflammatory speech unless it **intentionally** and **effectively** provokes a crowd to **immediately** carry out violent and unlawful action.
 - the court held that a Ku Klux Klan leader could not be jailed for a speech stating:
 - “that there might have to be some revengeance [sic] taken” for the “continued suppression of the white, Caucasian race.”
- For example, in [*NAACP v. Clairborne Hardware*](#) (1982), the court held that civil rights icon Charles Evans could not be held liable for damage by other individuals later for the statement:
 - “If we catch any of you going in any of them racist stores, we’re going to break your damn neck.”
- In [*Hess v. Indiana*](#) (1973), the court held that an anti-war protestor could not be arrested for telling a crowd of protestors:
 - “We’ll take to the fucking street later.”

Qualified as “Fighting Words”

- [Calautti v. Shanahan](#), (S.D.Ind. Aug 7, 2019)
 - Plaintiff was a Ph.D. student at Indiana University’s Media School, and also employed as a student academic appointee.
 - A community member emailed the Dean of the Media School alleging social media posts that included “repeatedly expressed racist views and threatened violence against myself, my family (including my children) and others on social media.”
- Social Media posts:
 - Don’t forget about forcing you to watch as I beat your shitskin children into being wheelchair bound, brain damaged, drooling drones.
 - PS you still live in a small town and you and your kin have a rather unusual last name. Watch out.
- Plaintiff was disciplined and terminated from employment. NO First Amendment Protection

Symbols of Hate

PROTECTED

- Symbols of hate are constitutionally protected if they're worn or displayed before a general audience in a public place – say, in a march or at a rally in a public place.
 - The Supreme Court has ruled that the First Amendment protects symbolic expression, such as swastikas, burning crosses, and peace signs because it's “closely akin to ‘pure speech.’”
 - The Supreme Court has accordingly upheld the rights of students to wear black armbands in school to protest the Vietnam War, as well as the right to burn the American flag in public as a symbolic expression of disagreement with government policies.
 - Posting something inside your residence hall room that others could see it as they walk by in the hall or in your apartment window such as a confederate flag, a political sign, or a poster with song lyrics

NOT PROTECTED

- But the First Amendment does not protect the use of nonverbal symbols to directly threaten an individual, such as by hanging a noose over their dorm room or office door.

Interference/Disruption

- University Policy
 - Use the University Policy on University Facility and Space Use
 - Specifically prohibited behaviors
 - Use University Policy on Classroom Disruption
- Case Law
 - Must be a true interference/disruption
 - Any action/rule must be applied equally and without regard to the content of the interference/disruption



Policy 6.1.1: University Facility and Space Use

<https://illinoisstate.edu/about/facility-space-use/>

- This section establishes the generally prohibited behaviors that apply to use of University facilities and spaces.
 - These requirements supplement existing University policies that establish safety requirements or standards of behavior for members of the University community, including but not limited to the Code of Student Conduct.
 - The University also reserves the right to establish additional requirements with respect to specific University venues.
- In general, the University will not interfere with events, meetings, assemblies, rallies, demonstrations, vigils, or protests in public areas of University facilities and spaces **unless** participants engage in one or more of the prohibited behaviors.



4.1.7 Classroom Disruption

- Faculty Rights:
 - Students or **others** who engage in prohibited or unlawful acts that result in disruption of a class or an unsafe environment may be directed by the faculty member to leave the class for the remainder of the class period.
- Prohibited Acts:
 - Behavior prohibited by University Polices (smoking, weapons, class disruptions)
 - Behavior prohibited by the professor – cannot prohibit free speech (persistently speaking without being called on, refusing to be seated)



Proper Operation of University in Case of Disruptive Activity

<https://policy.illinoisstate.edu/health-safety/5-1-12.shtml>

- In order to maintain the proper operation of Illinois State University in case of disruptive activity by any persons, the following procedure shall be followed:
 - In the first instance, appropriate University officials shall seek ... to obtain voluntary compliance, cooperation, and the exercise of restraint on the part of all parties concerned.
 - In the case of disruptive activity involving students, officers of the University Police shall advise such students of their legal obligations and duties, urge them to disperse and to cease committing such disruptive activity, and where necessary, give notice pursuant to the criminal laws of the State of Illinois.



What to do in case of a disruptive student:

- Take steps to identify yourself (if applicable)
- State what capacity you are acting in
- Provide directions/instructions: cease behavior/ move
 - Use the least restrictive measure to allow sufficient opportunity for protecting speech
 - Must be a true interference/disruption
 - Remember lawful expression of a disagreement with the professor or another student is not itself “disruptive behavior”
 - Content neutral
- If you do not get compliance; state your next actions.
 - I am going to have to ask you to leave
 - I am going to have to call for assistance

HARASSMENT

Harassment is conduct which is:

- (1) unwelcome;
- (2) discriminatory;
- (3) on the basis of a protected status, such as gender, race, sex, disability, or age;
- (4) directed at an individual; and
- (5) “so severe, pervasive, and objectively offensive, . . .”

[Davis v. Monroe Cty. Bd. Of Educ.](#), 526 U.S. 629 (1999)

Harassing Speech

- [Hayut v. State University of New York](#), 352 F.3d 733 (2nd Cir. 2003) A professor made ongoing statements to a female student, calling her “Monica” and asking her about her “weekends with Bill” (reference to Bill Clinton) to the point of making the student cry in class on at least one occasion.
- The Court held: “Academic freedom” for professors does not provide a shield against creating a classroom environment so “permeated with discriminatory intimidation, ridicule, and insult” that it “alter[s] the conditions” of a student’s educational environment.

**NOT
Harassment
Which
element is not
met?**

- A one-time comment to an individual
- A one-time social media post with no threat
- A comment made during a speech or to a group
- A comment based on a protected class not directed at an individual

The Three Rules of **HATE SPEECH** AND THE FIRST AMENDMENT



https://youtu.be/Ea2ntXnCD_M

HATE SPEECH

- There is no legal definition of "hate speech" and it is protected by the First Amendment unless it meets one of the exceptions
- Why is HATE speech protected by the First Amendment?
 - A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all.
 - The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.
- What is defined?
- Why the University does not expand what is currently defined.

What is defined by the University?

- 1.2 Anti -Harassment/ Anti-Discrimination Policy
- Code of Student Conduct sections that are relevant:
 - VI. A. 2. Disruption
 - VI. A.6. Failure to Comply
 - VI. A. 10. Disorderly Conduct
 - VI. B. f. General Safety
 - VI. B. 4. Threatening and Intimidation
 - VI. B. 5. Physical Misconduct
- University Policies
 - 5.1.12 Proper Operation of University in Case of Disruptive Activity
 - 6.1.1 University Facility and Space Use
 - 4.1.17 Classroom Disruption

Hate Speech Case

- *Doe v. University of Michigan* (1989) case struck down that university's speech code aimed at regulating hate speech.
- Why was the code enacted:
 - Administrators had adopted the speech code in 1988 after a campus anti-discrimination group threatened to file a class-action suit against the university.
 - The group was upset over several incidents, including the distribution of a flier on campus that declared "open season" on African Americans and referred to African Americans with vicious racial slurs

The Code prohibited

- “Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed ... and that ... “Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University[-]sponsored extra-curricular activities.”
- The university published a guide explaining the speech code. The guide provided examples of harassing conduct, including:
 - “You exclude someone from a study group because that person is of a different race, sex, or ethnic origin than you are.
 - “ You display a confederate flag on the door of your room in your residence hall.
 - “You comment in a derogatory way about a particular person or group’s physical appearance or sexual orientation, or their cultural origins, or religious beliefs.”

Supreme Court Ruling on Hate Speech

- [Matal v. Tam](#), 137 S.Ct. 1744 (2017)
 - The court ruled that the government cannot ban expression merely because it is offensive.
 - In an opinion for the Court, Justice Alito writes:
 - Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.”
 - Effectively, the Supreme Court unanimously reaffirmed that there is no 'hate speech' exception to the First Amendment.



Illegal Conduct Illinois Hate Crimes Statute

(720 ILCS
5/12-7.1)

- Hate crime requires:
 1. ILLEGAL activity
 2. Evidence of an INTENT that is motivated by a protected class
 3. If you have both of these you can then enact an INCREASED PENALTY
 1. “Hate crimes are charged as felonies (possible prison time), and restitution or fines can be imposed.
- Victims may also bring civil actions for damages, injunction or other appropriate relief.

Time, Place, and Manner Regulation

- University can articulate clear university policies that set forth reasonable time, place, and manner parameters for the use of indoor and outdoor campus space – **so long as those policies are viewpoint and content neutral.**
 - Time slots: ISU amplification policy regulates amplification in business hours, at night, and no outdoor area amplification after midnight.
 - Place: How University space and facilities can be used; places where gatherings are permitted, what facilities can be available for an event.
 - Manner: Security, law enforcement measures to establish protest areas, bag search, weapons policies, etc.

**Why does the
ACLU use its
resources to
defend the free
speech rights of
white
supremacists,
misogynists,
homophobes,
transphobes, and
other bigots?**

Free speech rights are indivisible.

Restricting the speech of one group or individual jeopardizes everyone's rights because the same laws or regulations used to silence bigots can be used to silence you.



Empowering our Students
<https://youtu.be/Zms3EqGbFOk>