The First Amendment to the United States Constitution says:

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.

The FAPC was formed in 2011 to design a process by which the university could reasonably address free speech related complaints and educational material to assist the campus in understanding what is and is not protected speech. The Protocol is defined and described in a separate document. This document introduces the reader to some of the major relevant legal definitions, distinctions, categories, tests and cases regarding freedom of speech at a public university. It is intended to serve as a foundation for discussion and additional research; it is not an exhaustive or definitive framework or list, nor is it legal advice or advocacy nor is it necessarily an endorsement of the judicial decisions included. It is important to bear in mind that courts make decisions in individual cases on the basis of the total set of circumstances and the precedents they decide are applicable; moreover, the purposes and procedures and policies used to restrict speech have critical importance. Most of the cases below can be read by accessing the library’s Lexis/Nexis database, then click on the “Look up a Legal Case” panel and enter either the names of the two parties (such as Cohen v. California) or the case citation (such as 403 U.S. 15) into the appropriate search tool. Readers unfamiliar with the U.S. court system and its legal reports can find out more at http://lib.law.washington.edu/ref/repdig.html

1. What counts as “speech”? Generally, anything primarily intended and understood to be expression.

1.1 Speech can be verbal or nonverbal behavior (“symbolic expression” such as posters, signs, clothing, flags, etc.). See, e.g., Cohen v. California, 403 U.S. 15 (1971) (“Fuck the Draft” jacket); and Texas v. Johnson, 491 U.S. 397 (1989) (flag burning).

1.2 Some purely verbal behavior is unlawful conduct (not protected speech/expression) and therefore lacks First Amendment protection. Examples include perjury, blackmail, criminal solicitation, and quid pro quo sexual harassment.


Ex 2: Email true threats are punishable: U.S. v. Machado, 195 F.3d 454 (9th Cir. 1999)

Ex 3: University can restrict certain websites pursuant to narrow exceptions to First Amendment: Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000)

1.4 Free speech also involves the First Amendment rights to the free exercise of religion (religious expression), freedom of the press, and freedom of association (assembly). See, e.g., NAACP v. Alabama, 357 U.S. 449 (1958) (civil rights); Healy v. James, 408 U.S.
What is the status of free speech at a public university? Since the First Amendment protects citizen rights against government intrusion and a public university is a government agency, it is subject to the First Amendment. First Amendment was first applied to state government in Gitlow v. New York, 268 U.S. 652 (1925). University cases include, e.g., Sweezy v. New Hampshire, 354 U.S. 234 (1957) (guest class lecturer); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (NY law banning communists from state employment); Healy; and UWM Post v. Bd. of Regents of Univ. of Wisconsin, 774 F. Supp. 1163 (E.D. Wis. 1991) (student speech code).

NOTE: First Amendment legal guarantees can apply to private schools when state laws incorporate them. See, e.g., Corry v. Stanford (speech code) and Abramowitz v. Trustees of Boston University, C.A. No. 82680 (Suffolk Super. Ct. 1986) (student dorm banner).

2.1 The loss of First Amendment freedoms, for even a minimal period of time, unquestionably constitutes irreparable injury (Elrod v. Burns, 427 U.S. 347 (1976)) and public universities have a heightened and unique obligation to protect freedom of speech due to its distinctive function in search for truth and knowledge. See, e.g., Sweezy; Healy; UWM Post; and Bd. of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217(2000) (student activity fees for funding student groups must be awarded on viewpoint-neutral basis).

2.2 Public university officials who violate speech rights can be held personally liable. Qualified immunity (42 U.S.C. § 1983) protects gov't officials from liability for civil damages for violating legal rights when making job-related decisions except when s/he violates a clearly established law a reasonable person in the official’s position would be aware of. Harlow v. Fitzgerald, 457 U.S. 800 (1982) (Nixon aides case). Here are some cases in which university officials lost qualified immunity.


- Third party cases: Giebel v. Sylvester, 244 F.3d 1182 (9th Cir. 2001) (handbills); Putnam v. Keller, 332 F.3d 541 (8th Cir. 2003) (former instructor banned from campus); Davis v. Stratton, 575 F. Supp. 2d 410 (N.D.N.Y.2008) (preacher removal).

2.4 Generally speaking, the presumption under First Amendment standards and principles is that hostile, hateful, offensive, vulgar, etc. speech should be met with counter-speech, not university discipline. Whitney v. California, 274 U.S. 357 (1927), “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” See, e.g., Rodriguez v. Maricopa County Community College Dist., 605 F3d. 703, 708, 711 (9th Cir. 2010).

2.5 Generally speaking, a university does not have the right to restrict student off-campus speech. See, e.g., Tatro v. University of Minnesota, No. A10-1440, Minnesota Supreme Court, June 12, 2012 (restriction permissible only where student in professional program violates narrowly tailored standards of conduct in a public message) and Iota Xi v. George Mason University, 773 F. Supp. 792 (E.D. Va. 1991) (overturning university punishment of fraternity for allegedly racist event).

2.6 Universities cannot ban all anonymous speech: Justice for All v. Faulkner, 410 F.3d 760 (5th Cir. 2005). Generally speaking, anonymous speech (e.g., leaflets or posters) is protected by the First Amendment. See, e.g., McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995); Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 199-200 (1999); and Talley v. California, 362 U.S. 60, 64 (1960).

3. How can a university violate speech rights? A university policy may violate the First Amendment on its face, in its application, or both.

3.1 Overbreadth. A policy is overbroad if it substantially restricts protected speech. Broadrick v. Oklahoma, 413 U.S. 601 (1973). University speech policies have been ruled

A policy that has a “chilling effect” on free speech, even if no one has been punished under the policy, can be overturned. See, e.g., Corry v. Stanford, Santa Clara Superior Court, No. 740309, 27 February 1995 (university speech policy); Roberts v. Haragan, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (university speech policy); and McCauley v. University of the Virgin Islands, 618 F.3d 232 (3rd Cir. 2010) (university speech policies). Free speech is “chilled” when protected speech is inhibited or stifled by a realistic fear of punishment. Lamont v. Postmaster General, 381 U.S. 301 (1965).

3.2 Void for vagueness. The due process right to be immune from laws whose language is so unclear a reasonable person cannot determine what behavior falls within the scope of the law. Connally v. General Construction Co., 269 U.S. 385 (1926) (wage law). University speech policies have been ruled void for vagueness in numerous cases. See, e.g., Doe v. Univ. of Michigan, UWM Post; and Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir. 1996) (sexual harassment policy).

3.3 Arbitrary enforcement. A policy may be held unconstitutional because it has been arbitrarily (unfairly) enforced. See, e.g., Cohen v. San Bernardino; and Silva v. University of New Hampshire, 888 F. Supp. 293 (D.N.H. 1994) (sexual harassment policy).

3.4 Due process procedural rights. Courts have not provided an exhaustive or definitive list of due process rights in the educational setting, and lower courts have reached different results. However, procedural rights more broadly include the right to present evidence on one’s own behalf, the right to counsel, the right to know one's accuser and the incriminating evidence, the right to confront and cross-examine the accuser, and the right to have a decision based solely upon a record generated in open proceedings. Some higher ed cases include: Goss v. Lopez, 419 U.S. 565 (1975); Megill v. Board of Regents of State of Fla., 541 F.2d 1073 (5th Cir. 1976); Ingraham v. Wright, 430 U.S. 651 (1977); Horowitz v. Board of Curators, 435 U.S. 78 (1978); Hart v. Ferris State College, 557 F. Supp. 1379 (W.D. Mich. 1983); and Joksa v. Regents of Univ. of Mich., 597 F. Supp. 1245 (E.D. Mich. 1984).

4. What speech is not protected by the First Amendment? Generally speaking, in order for a public university to restrict speech, it must fit a category of unprotected speech under First Amendment jurisprudence; and most of these categories are narrowly defined. Here are some of the major First Amendment exceptions, as well as relevant doctrines.

4.1 Captive audience. Speech may lose protected status because it is forced on an unwilling audience who cannot reasonably avoid or respond to the message. Has been applied to a person in his/her home (Frisby v. Schultz, 487 U.S. 474 (1988), an employee at work (Aguilar v. Avis Rent-a-Car, 980 P.2d 846 (Cal. 1999) and student in class (Martin v. Parish, 805 F.2d 583 (5th Cir. 1985).

4.2 Time, Place, and Manner. Universities can place reasonable restrictions on speech based on the time, place and manner of the expression. However, these must be

- A traditional public forum has the most First Amendment protection. It is public property whose primary purpose is amenable to free expression such as street, sidewalk, park or college “quad.”
- “Designated” and “Limited” public forums have less protection. These are public properties open for expressive activity on a limited basis or for a designated purpose such municipal theater or university meeting room.
- A non-public forum has the least protection. It is public property whose primary purpose is not designated for free expression, such as a prison or airport terminal.

Universities are composed of all three forums.

Ex 1: Areas that are traditionally considered public forums (e.g., sidewalks, streets, common areas, parks) do not lose that character merely because they are on a college campus. See, e.g., *Roberts v. Haragan* at 861-73; and *Smith v. Tarrant County College Dist.*, 670 F. Supp. 2d 534, 538 (N.D. Tex. 2009). Other spaces, such as bulletin boards and display cases can be considered traditional public forums too. See, e.g., *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (enbanc).

Ex 2: Generally speaking, a residence hall is a non-public forum (*Chapman v. Thomas*, 743 F.2d 1056, 1059 (4th Cir. 1984) in which speech may be limited if it is (1) incompatible with the defined purposes of the hall and the restriction is (2) reasonable, and (3) viewpoint neutral. A policy is not content neutral if it restricts speech due to the message it conveys (e.g., a political message) and is not viewpoint neutral if it restricts speech due to the speaker’s viewpoint (e.g., a conservative political message). However, dormitories can be limited public fora with respect to commercial speech. *Fox v. Bd. of Trs. of State Univ. of N.Y.*, 841 F.2d 1207, 1214 (2d Cir. 1988). Students may display messages, patriotic symbols, political messages, etc. on walls, doors, windows. See, e.g., *Abramowitz v. Trustees of Boston University*, No. SUCV1986-82680 (Mass. Super. Ct., Suffolk Division, Dec. 2, 1986) (unpublished). Universities should avoid ideological re-education that amounts to casting “a pall of orthodoxy over the classroom” (*Keyishian* at 603) or elsewhere (e.g., a freshman orientation program). “[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.” *Lee v Weisman*, 505 U.S. 577, 594 (1992) (school prayer).


Ex 3: Generally speaking, a classroom is not an open public forum. Classroom speech may be restricted so long as the restrictions are reasonable and are not an effort to suppress expression merely because public official oppose the speaker’s view.
Hazelwood at 267, Bishop at 1071. Students do not have the right to require instructor speech be viewpoint-neutral (Edwards v. Aguillard, 482 U.S. 578, 586 n. 6 (1987)) and may be required to express a point of view with which they do not agree (Brown v. Li, 308 F.3d 939, 953 (9th Cir. 2002)).

Ex 4: Restricting free speech to “free speech zones” is problematic given their terms often are not narrowly drawn and restrictive of protected speech and expressive activity. See, e.g., Roberts v. Haragan; and University of Cincinnati Chapter of Young Americans v. Williams, No. 1:12-cv-155 (S.D. Ohio Aug. 22, 2012).

4.3 True Threats: Virginia v. Black, 538 U.S. 343, 359 (2003): only "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" are outside the boundaries of First Amendment protection. State v. Perkins, 2001 WI 46 and Wisconsin Statutes 940.203(2)(c): “a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech.”

Ex 1: U.S. v. Machado, 195 F. 3d 454 (9th Cir. 1999) (upholds student email true threat conviction)  
Ex 2: U.S. v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997) (protects student “snuff” essay)

4.4 (Civil Rights Act) Hostile Environment Harassment:

- Applies to instructional and non-instructional employees (as agents of the university): discrimination in employment or education consisting of unwelcome verbal or nonverbal behavior that is sufficiently severe or pervasive that a reasonable person effectively would be denied equal opportunity in the workplace (Title VII) or educational environment (Title IX). First applied to university: Moire v. Temple, 800 F. 2d 1136 (3rd Cir. 1986).


- Applies to students (non-university agents): standard for student-to-student harassment is *Davis v. Monroe*, 526 U.S. 629, 650 (1999): school liable under Title IX only if it is aware of and deliberately indifferent to student conduct that is so severe, pervasive, and objectively offensive harassment, and so undermines and detracts from the victim’s educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.

Ex 1: university sexual harassment policy rejected: *DeJohn v. Temple*, 537 F. 3d 301 (3rd Cir. 2008)
Ex 2: university harassment policy rejected: *McCauley*.
Ex 3: student challenge to policy rejected for lack of realistic chilling effect: *Lopez v. Candaele*, 630 F.3d 775 (9th Cir. 2010)

4.5 Disorderly conduct: behavior that substantially disrupts or is likely to substantially disrupt legitimate (university) function.

- Can apply to written speech that failed to cause an actual disturbance, but state must prove that the speech is constitutionally unprotected “abusive” conduct. *State v. Douglas*, 243 Wis. 2d 204 (2001)(student death threat)

- Can apply to verbal speech alone when it is not an essential part of any exposition of ideas, utterly devoid of social value, and can cause or provoke a disturbance. *State v. A.S.*, 243 Wis. 2d 173 (2001) (student death threat)

- Can apply when disruption will spill over, disrupt the peace, order, or safety of the community. *State v. Schwebke*, 253 Wis. 2d 1 (2002) (obsessive mailings)

- In some cases, lower courts have applied the “substantial disruption of or material interference with school activities” standard in *Tinker v. Des Moines*, 393 U.S. 503 (1969) or a related state disruption law.

Ex 1: UC-Irvine 11 convictions (on appeal), Orange County (Cal.) Superior Court, No. 11CM01351, September 23, 2011.
Ex 3: *People v. Rapp*, Michigan Supreme Court, No. 143343; 143344, July 27, 2012 (Mich. State Univ. disruption rule facially overbroad)
Ex 4: *Kyriacou v. Peralta Community College Dist.*, 2009 U.S. Dist. LEXIS 32464 (N.D. Cal. 2009) (student prayer in class and faculty office not disruptive and non-establishment)

4.6 Academic freedom. Courts have not provided a consistent or exhaustive definition; however, it has been upheld as a right possessed by institutions, faculty and students to pursue truth, speak freely, conduct research, and write scholarship consistent with professional standards. The American Association of University Professors (AAUP) 1940 Statement of Principles of Academic Freedom and Tenure has been highly influential. See [http://www.aaup.org/aaup/pubsres/policydocs/contents/1940statement.htm](http://www.aaup.org/aaup/pubsres/policydocs/contents/1940statement.htm)
The AAUP also has reprinted an influential 1967 statement of academic freedom for
students. See http://www(aaup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm

- Academic freedom protects instructor classroom speech, but not all classroom speech is protected. Bishop v. Aranov, 926 F. 2d 1066 (11th Cir. 1991) (teaching intelligent design not germane to exercise physiology class).


4.7 Obscenity. An expression is obscene if (a) ‘the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) it depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) taken as a whole, it lacks serious literary, artistic, political, or scientific value. Miller v. California, 413 U.S. 15 (1973) (mail order commercial pornography). The local standards element makes obscenity impossible to define generally, although erotic speech, adult nudity and simulated adult sexual contact are generally protected (see, e.g., Jenkins v. Georgia, 418 U.S. 153 (1974)) and child pornography is not (see, e.g., New York v. Ferber, 458 U.S. 747 (1982).

4.8 Fighting words. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) defined fighting words as those which (1) directly inflicted injury or (2) tended to incite a breach of the peace. However, the Supreme Court has overturned every fighting words conviction sent to it thereafter, thereby narrowing the scope of fighting words to such a point the doctrine is nearly extinct. Gooding v. Wilson, 405 U.S. 508 (1972) eliminated the first prong. Further cases restricted the incitement prong to situations in which the speech does not bear on social issues, is targeted, almost certain to cause a reasonable person
to react violently, is in a captive audience context, and does not amount to a “heckler’s veto.” See, e.g., Terminiello v. Chicago, 337 U.S. 1 (1949) (racist speech); Hess v. Indiana, 414 U.S. 105 (1973) (per curiam) and Cohen v. California. As a result, convictions are rarely upheld except in cases involving law enforcement (see, e.g., cases at http://www.firstamendmentcenter.org/fighting-words) or including conduct elements (see, e.g., In Re A.R., 2010 ND 84 (fighting words)).

- University hate speech policies based on fighting words have consistently been rejected. See, e.g., Doe v. Univ. of Michigan; UWM Post; and Dambrot.

4.9 Incitement to imminent lawless behavior. Brandenburg v. Ohio, 395 U.S. 444 (1969) (KKK rally) defined incitement as speech intending to directly incite others to imminently use violence or other unlawful means to support speaker’s interests. Later cases have demonstrated this is a very strict standard that is rarely met. See, e.g., NAACP v. Claiborne Hardware, 458 U.S. 886 (1982) (“break their necks” threat); R.A.V. v. St. Paul, 505 U.S. 377 (1992) (cross burning); and Rice v. Paladin, 128 F.3d 233 (4th Cir. 1997) (hit man manual).


4.12 Generally speaking, universities cannot require speech be civil, tolerant, support diversity, etc.; these types of provisions and value statements must be purely aspirational (voluntary compliance). See, e.g., College Republicans v. Reed, 523 F. Supp. 2d 1005 (N.D. Ca. 2007) and Bair v. Shippensburg University, 280 F. Supp. 2d 357 (M.D. Pa. 2003). See also Terminiello 337 U.S. at 4 (“a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. 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.”).