

TOOLKIT FOR FACULTY & INSTRUCTORS

Free Speech, Hate Speech and Academic Freedom

One of the greatest challenges for universities is the occurrence of hateful speech and conduct. Although many of these incidents have been student-initiated, these expressions are not isolated to colleges and universities, and they reflect broader societal post-election tensions.

Many university teachers feel unprepared to “referee” emotionally charged political disputes between students in (or outside of) classes. Indeed, many instructors are concerned about the perception of political bias in their lectures and classroom comments, and about how to address the post-election climate (if at all) in class.

This toolkit provides some helpful information and guidelines to assist faculty members with these challenges. In particular, the toolkit will focus on the following topics:

1. Survey of Campus Racial Incidents Since Election 2016
2. Free Speech versus Academic Freedom
3. Guidance on Hate Speech
4. Guidance for Disruptive Student Conduct in the Classroom

1. Survey of Campus Racial Incidents Since Election 2016

For an example of racial campus incidents that have occurred at UB since the election, see:

- News Desk, [“UB student finds ‘anti-white propaganda’ flyer in Clemens Hall,”](#) *The Spectrum* (November 14, 2016)
- A. Inkumah and S. Crowley, [“A campus divided: Robert Spencer’s visit met with chaos and opposition from UB community,”](#) *The Spectrum* (May 2, 2017)

For racial incidents on other campuses in Buffalo, see:

- D. Funke, [“At Canisius College, a black doll with a noose was found in a dorm elevator,”](#) *USA Today* (November 10, 2016)
- J. Tokasz, [“Daemen suspends 2 students over KKK hood incident inside residence hall,”](#) *The Buffalo News* (November 23, 2016)

For racial incidents that occurred on campuses across the U.S., see:

- N. Dreid and S. Najmabadi, [“Here’s a Rundown of the Latest Campus-Climate Incidents Since Trump’s Election”](#) *The Chronicle of Higher Education* (December 13, 2016)
- S. Jaschik, [“The Incidents Since Election Day,”](#) *Inside Higher Education* (November 11, 2016)
- C. Johnson, K. Rumore, J. Berlin, [“Trump election fallout: Racial tension and incidents, raucous protests,”](#) *Chicago Tribune* (November 13, 2016)

- UC Davis: K. Phillips, "[Protests derail UC Davis event with Breitbart's Milo Yiannopoulos, 'Pharma Bro' Martin Shkreli](#)," *The Washington Post* (January 14, 2017)
- Evergreen State College: K. Long, "[Long-simmering discord led to The Evergreen State College's viral moment](#)," *The Seattle Times* (June 10, 2017)
 - Video went viral when professor was confronted outside classroom after critiquing a "Day of Absence" where white students were asked to leave campus to promote reflection about issues of race, equity, and inclusion
- Georgetown University: A. Athey, "[Criticizing Sharia is 'hate speech,' Georgetown students say](#)," *Campus Reform* (March 1, 2017)
- Middlebury College: A. Stranger, "[Understanding the Angry Mob at Middlebury That Gave Me a Concussion](#)" *The New York Times*, (March 13, 2017)
 - Op-ed written by college professor attacked by protestors during Charles Murray visit. Recommends college campuses work on promoting civil conversations between opposing sides in today's politically charged climate
- University of Washington: K. Long, L. Thompson and J. Lee, "[Man shot during protests of Breitbart editor Milo Yiannopoulos' speech at UW; suspect arrested](#)," *The Seattle Times* (January 20, 2017)

2. Free Speech versus Academic Freedom

Much of the incivility taking place on campuses raises issues of Free Speech and its relationship to Academic Freedom.

Academic Freedom defined:

Academic Freedom refers to the freedom that teachers enjoy in research and publication of the results, as well as their freedom to discuss matters within their expertise in and out of class without institutional censorship or discipline. Academic freedom protects the "marketplace of ideas" that is the classroom. Faculty members enjoy academic freedom by virtue of membership in a learned profession. That freedom comes with the corresponding responsibility to speak with accuracy, exercise restraint, respect the opinions of others, and make every effort to indicate that the viewpoint being expressed is that of the individual, not the institution.

Academic Freedom distinguished from Freedom of Speech:

Academic Freedom addresses rights within the educational contexts of teaching, learning and research both inside and outside the classroom for individuals at private, as well as public, institutions. In contrast, the First Amendment guarantee of Free Speech encompasses academic freedom, but only applies to governmental constraints on speech.

- The [AAUP's 1940 Statement of Principles on Academic Freedom and Tenure](#), a document that was amended in 1970, has been endorsed by many scholarly

associations, and is the generally agreed upon professional standard of academic freedom. Below are a few highlights:

- “Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.”
- “College and university teachers...should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.”
- For a brief, cogent explanation of the relationship between Academic Freedom and Free Speech, see, [Modern Language Association Toolkit on Academic Freedom](#) (Created by the MLA Committee on Academic Freedom and Professional Rights and Responsibilities in April 2012 and updated in February 2015). Below are a few highlights:
 - “rights to academic freedom that protect teaching and debating controversial ideas should not be conflated with practices of harassment, workplace bullying, and other intimidating or injurious conduct that may be subject to legal action.”
- A few campuses have grappled with the line between Academic Freedom and Free Speech:
 - University of Oregon: E. Volokh, [“At the University of Oregon, no more free speech for professors on subjects such as race, religion, sexual orientation,”](#) *The Washington Post* (December 26, 2016)
 - U of Oregon grappled with distinction between academic freedom and racial harassment with regard to law professor’s “blackface” costume during party in her home at which students were present. The professor was suspended by the university. Report on incident states: “The University does not take issue with the subject matter of Shurtz’s expression, or her viewpoints, but the freedoms under this policy end where prohibited discrimination and/or discriminatory harassment begin.”
 - C. Flaherty, [“Talking it Out,”](#) *Inside Higher Ed* (February 13, 2017)
 - Students unsettled when professor used N-word while recounting prior altercation in classroom. When challenged by students, professor stated it makes no sense to avoid epithets since they are subject to in-class discussions, and often appear in court cases and novels
 - Wellesley College: M. Levenson, [“Wellesley College student newspaper ignites free-speech debate”](#) *Boston Globe* (April 14, 2017)
 - Editorial in Wellesley News argued against protecting hateful forms of speech, leading to negative reactions from news outlets and college President

- Also see:
 - [“The Free Speech-Hate Speech Trade-Off,”](#) *NY Times* (September 13, 2017)
 - Transcript of interview with Erwin Chemerinsky, a legal scholar and recent co-author of [Free Speech on Campus](#)

3. Guidance on Hate Speech

Hate Speech defined:

Speech that offends, threatens or insults groups based upon traits that go to the core of their identity – race, color, religion, national origin, sexual orientation, disability, etc. Most, but not all, of these traits are immutable.

Hate speech is generally protected by the First Amendment:

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.” It has been interpreted to prevent public institutions, including public colleges and universities, from regulating the content of speech without *substantial justification*. The rationale for protecting hate speech from content regulation by the government is that the amendment was designed to protect individuals who criticized the government from censure.

If hate speech is protected by the First Amendment, is there no limit to what individuals can say and do to offend groups?

- Certain categories of speech are not protected, such as lewd and obscene speech, profanity, and libelous speech. One important limitation on speech and conduct is that **people do not have the right to utter “fighting words.”** When a speaker’s words do not contribute to dialogue or the expression of ideas, but are instead intended to provoke harmful conduct, the US Supreme reasoned that those words have no value as instruments of “speech”, and therefore may be regulated by the government without running afoul of the First Amendment.
- In addition, even protected speech may be subjected to **“content neutral” time, place and manner restrictions**. Whereas speech is virtually unrestricted on public lands and in public parks, public universities can impose restrictions on the time, place and manner of speech because the campus is a limited public forum – public land with a specified purpose – so long as the restrictions are neutral as to the viewpoint expressed.
- This piece by the American Civil Liberties Union (ACLU) has quite a few links to judicial decisions about hate speech: [“Speech on Campus.”](#) Below are a few excerpts:
 - “To be clear, the First Amendment does not protect behavior on campus that crosses the line into targeted harassment or threats, or that creates a pervasively hostile environment for vulnerable students.”

TOOLKIT: Free Speech, Hate Speech and Academic Freedom

- “In [Brandenburg v. Ohio](#), the Supreme Court held that the government cannot punish inflammatory speech unless it intentionally and effectively *provokes a crowd to immediately carry out a violent and unlawful action.*”
 - “In fact, the Supreme Court has made clear that the government cannot prevent speech [simply] on the ground that it is *likely to provoke a hostile response*...the First Amendment requires the government to provide protection to all speakers, no matter how provocative their speech might be.”
 - “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 park.... But the First Amendment does not protect the use of nonverbal symbols to directly threaten an individual...Nor does the First Amendment protect the use of a non-verbal symbol to encroach upon or desecrate private property, such as by burning a cross on someone’s lawn or spray-painting a swastika on the wall of a synagogue or dorm.”
 - “When schools shut down speakers who espouse bigoted views, they deprive their students of the opportunity to confront those views themselves...The better approach, and the one more consistent with our constitutional tradition, is to respond to ideas we hate with the ideals we cherish.”
- The Newseum Institute also discusses several court cases related to this issue: D. Hudson Jr., “[Hate Speech and Campus Speech Codes](#),” (March 2017)
 - For a recent article focused on UB’s campus, see: “[Letter to the editor: UB should stand against hate speech](#),” The Spectrum (April 30, 2017)
 - For a general discussion of the protection of hate speech on campus:
 - Mary Ellen Flannery, “[Conflict Between Free Speech and Hate Speech Reaches Boiling Point on College Campuses](#),” *National Education Association (NEA)* (March 20, 2017)
 - B. DiPietro, “[There’s a World of Difference Between Free Speech and Hate Speech](#)” *Center for American Progress* (April 21, 2017)
 - Argues colleges should protect freedom of speech of individuals on campus, but not invite speakers making discriminatory remarks about specific groups on campus
 - D. Lieberman, “[Milo Yiannopoulos is trying to convince colleges that hate speech is cool](#),” *CNN* (February 2, 2017)
 - Description of events involving controversial speaker Milo Yiannopoulos during his college visits, and the complications created for college campuses

4. Guidance for Disruptive Student Conduct in the Classroom

Disruptive behavior defined:

Conduct that interferes with instruction or threatens the safety of members of the campus community, and can include hate speech.

Disruptive behavior is not:

“lawful, civil expression of disagreement with the instructor or other students”

- [UB policy on disruptive classroom behavior and consequences for students](#) This policy provides guidance for students and faculty about what constitutes disruptive behavior. It sets out a course of progressive discipline in order to correct disruptive student behavior, and includes expectations for student behavior in class. Below are a few excerpts:
 - “The term ‘classroom disruption’ means behavior that a reasonable person would view as substantially or repeatedly interfering with the conduct of a class. Examples could include persistently speaking without being recognized, continuing with conversations distracting the class or, in extreme cases, resorting to physical threats or personal insults.”
 - “If a student is disruptive, he/she should be asked to stop and warned that continuing such disruptive behavior can result in academic or disciplinary action...Should the disruptive behavior continue, the faculty member is authorized to ask the student to leave the classroom or site.”
 - “To prevent and respond to distracting behavior, faculty should clarify standards for the conduct of class, either in the syllabus, or by referencing the expectations cited in the Student Conduct Regulations.”

For additional tools for dealing with disruptive students in the classroom and creating an inclusive environment, see:

- R. Curwin, “[How to Respond When Students Use Hate Speech](#),” *Edutopia* (May 1, 2017)
 - Activities and ideas for reducing the likelihood of hate speech in the classroom
- S. Saunders and D. Kardia, “[Creating Inclusive College Classrooms](#),” *Center for Research on Learning and Teaching* (2011)
 - In-depth exploration of how to create an inclusive classroom. Focuses on course content, instructor biases, course planning, and responding to difficult situations

For a discussion of the political scrutiny of professors and curriculum, see:

- C. Flaherty, “[Being Watched](#),” *Inside Higher Ed* (November 22, 2016), which discusses the website professorwatchlist.org