

Free Speech and Protests on Campus: Strategies to Protect Reputation and Safety

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“If there be time to expose through
discussion the falsehood and fallacies, to
avert the evil by the process of education,
the remedy to be applied is more speech,
not enforced silence.”

-Justice Louis D. Brandeis
Whitney v. California (1927)

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Topics

- What is **campus unrest**?
 - What has campus unrest looked like over the course of **history**, and how does it compare **today**?
 - How have protests changed in the **immediate** present?
- How free is “**free speech**”?
 - Which **policies** are associated with free speech?
- What are some strategies to **prepare** for campus unrest?
- How should colleges and universities **respond** to campus unrest?

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CAMPUS UNREST

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What Is Campus Unrest?



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Video

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Peaceful and Orderly Protests

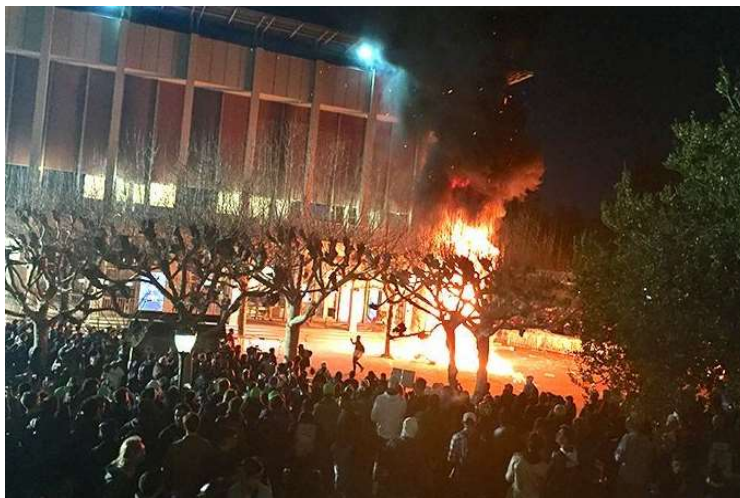


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Disorderly Unrest



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Campus Unrest In History



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Campus Unrest In History



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Campus Unrest In History



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Poll #1

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Campus Unrest Today

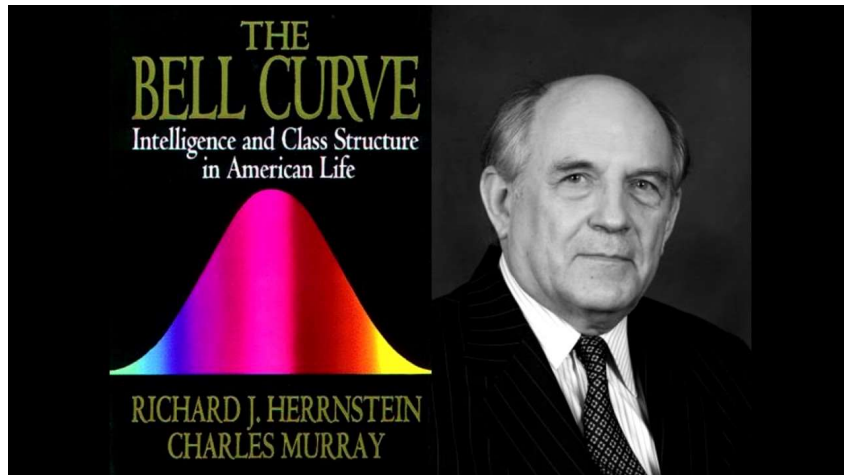


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Campus Unrest Today



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Campus Unrest Today



Organizing for Survivors
@O45swarthmore

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HOW FREE IS “FREE SPEECH”?

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THE FIRST AMENDMENT
CONGRESS SHALL MAKE NO LAW RESPECT-
ING 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.

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Poll #2

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Free Speech Quiz

- What is “speech”?
- How does the First Amendment protect speech?
- Is all speech protected by the First Amendment?
- Why should we care about protecting speech?

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Categories of Unprotected Speech



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TRUE THREAT

In order to constitute a “true threat”, the speaker must: (1) intend to communicate (2) a serious expression of intent to commit an unlawful act of violence (3) to a particular individual or group of individuals.



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INCITEMENT

- “The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to **inciting or producing imminent lawless action.**”

Brandenburg v. Ohio.



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HARASSMENT

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

- *DeJohn v. Temple University*
- *College Republicans at San Francisco State Univ. v. Reed*



- Be cautious not to prohibit protected speech. *Davis* and *DeJohn* set a high bar for unlawful harassment – speech that qualifies as harassment must cause actual, material disruption to warrant prohibiting it.

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Harassment on the Basis of Race Under Title VI

- Are higher education institutions in a double bind?
 - Preventing a hostile environment v. Preserving freedom of speech
- What is wrong with this “Harassment” Policy?
 - *Doe v. U. of Michigan*
- **Higher Ed:**
 - Some African-American students told school officials that they did not feel safe at school due to offensive notes placed in dorm rooms, racial slurs on students’ white boards, and threats in dining hall. OCR 2010 Dear Colleague Letter - situation qualified as a pattern of harassment (racially hostile environment in violation of Title VI.)

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Harassment on the Basis of Sex Under Title IX

- Title IX prohibits discrimination on the basis of sex, including sexual harassment
- **Higher Ed:**
 - Tufts University – student newspaper
- Striking the balance between preventing sexual harassment and protecting free speech requires caution on the part of colleges and universities, especially when it comes to avoiding overbroad policies.



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SPEECH THAT SUBSTANTIALLY DISRUPTS CAMPUS OR INTERFERES WITH CAMPUS OPERATIONS

- Depending on a fact specific inquiry, an institution that “reasonably believes” certain speech will cause a substantial disruption on campus may regulate such speech.
- *Tinker v. Des Moines Indep. Cmty. Sch. District*



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Other Categories of Unprotected Speech

- Defamation
- Obscenity
- Fighting Words
- Intentional Infliction of Emotional Distress
- Speech that encourages crime
- Public employee speech

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Free Speech and Federal Grant Money

- Notice of Proposed Rule Making (**NPRM**) – January 15, 2020
- Certain federal grants (not Title IV) conditional on compliance with ...
- **First Amendment obligations** (for **public** institutions and their employees)
- **Stated** institutional free speech or academic freedom **policies** (for **private** institutions)
- ... as they relate to “**freedom of inquiry**”

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Free Speech and Federal Grant Money

- Which grants?
- What is considered a violation under this proposed rule?
- Who determines whether there is a violation? Not Dept. of Ed, but the courts.
- How might this affect your policies?
- How might this affect how you handle speech-related litigation?

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POLICIES



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HARASSMENT POLICIES

- Do Include a “Reasonable Person” Standard
- Do Include “Severity and Pervasiveness” Elements
- Don’t Include “Examples” Lists
- Do Track the Legal Standard
- Do be Mindful of Varying Legal Standards Applicable to Faculty, Staff, and Students
- Don’t Use Vague, Undefined Terms

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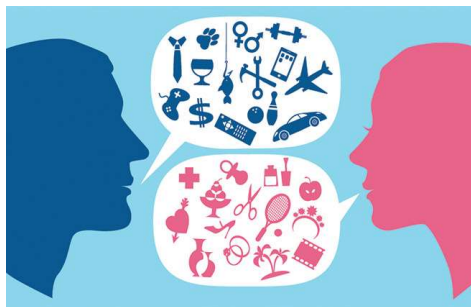
- “Free Speech Zones”?
- Prior Registration?
- Content-Neutral Fees
- Content-Neutral Distribution Policies



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BIAS REPORTING POLICIES

- Don't Include Protected Speech
- Do Look at Your Existing Policies



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RESTRICTIONS ON POLITICAL SPEECH

- Don't Unduly Prohibit Political Speech



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HECKLER'S VETO

- The suppression of otherwise lawful speech in order to appease disruptive, hostile, or threatening members of the audience.
- **Higher Ed:**
 - *Jones v. Board of Regents*



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POSTING POLICIES

- Do Use Clear, Viewpoint Neutral Standards



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ELECTRONIC COMMUNICATION POLICIES

- Don't Limit Protected Categories of Speech



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BULLYING, CYBERBULLYING, AND WORKPLACE VIOLENCE POLICIES

- Don't Use Overly Vague Language Encompassing Protected Speech



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CIVILITY

- Do Encourage Students to Respect Institutional Values Such as Tolerance and Civility
- But Don't Prohibit All Expressions Inconsistent with Those Values



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ADMINISTRATIVE ISSUES

- Do Assure that Institutional Policies are Consistent
- Do Update Websites
- Don't Hide Policies



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PREPARING FOR CAMPUS UNREST

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Poll #3

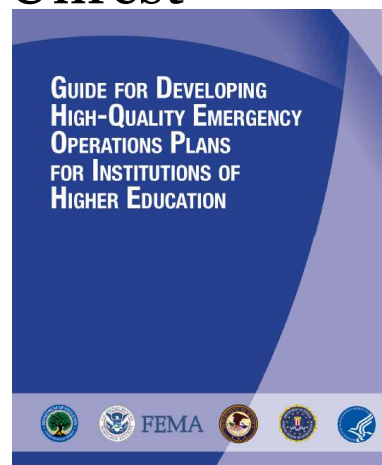
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Preparing for (significant) Campus Unrest

- Organize a crisis response team.
- Address gaps in your emergency operations plan
 - Identify threats and hazards
 - Assess risk
 - Develop goals and objectives
 - Identify and select preferred courses of action
 - Training and implementation
- Examine the capabilities of your security or police force.
- Establish a good relationship with law enforcement.



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Preparing for Campus Unrest

- Joint Contingency Plan:
 - Who will be the institution's liaison to law enforcement?
 - Who will be in command?
 - When will the institution call in the police?
 - What degree of force/weapons will be used?
 - How will you communicate?
- Crisis Communications Plan
 - Who will be your spokesperson?
 - How will you monitor and respond on social media?

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Preparing: legal compliance

- Clery compliance: emergency notifications and timely warnings
 - Emergency notification: confirmation of significant emergency involving an immediate *threat* to the campus community
 - Timely warning: confirmation of crime representing serious or ongoing threat

These are not the same!

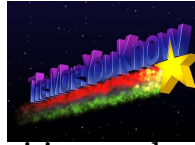
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Preparing: the big picture

- Create opportunities to teach the campus community about free speech.



- Consider taking a position on the presence of controversial speakers.
- What policies should you create/update?
- What should you consider when revising your policies?
 - Understand what speech is unprotected.
 - Understand the best methods to regulate speech.
 - Consider who you will allow to engage in expressive activity on campus – outsiders? Invited outsiders?
 - Beware creating “rights” through your policy language.

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Preparing: big-picture considerations

- Align your college’s/university’s policies with its values
 - How accessible are those policies to students?
 - What is your college’s/university’s tolerance for demonstrative/vocal dissent?
- Review your contracts with outside speakers/performers

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RESPONDING TO CAMPUS UNREST

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Poll #4

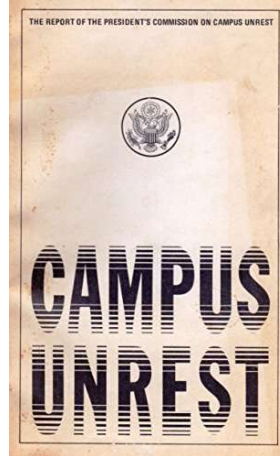
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Responding to Campus Unrest

- Criminal violence: call law enforcement.
- Disruptive but nonviolent conduct, consult with law enforcement, gather intelligence, and consider your options:
 - Negotiate
 - Wait It Out
 - Get An Injunction
 - Disciplinary and Judicial Sanctions
 - Close the Institution



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Responding—dealing with students

- Students = your clients and your constituents
 - People who do not agree with message of those sowing unrest may sympathize with them if treated harshly or unfairly



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Responding—dealing with students

- Listen. *Really* listen.
 - Includes paying attention to media (including social media), observation, and meetings (informal or formal), all as appropriate
 - Why are they upset?
 - What is it that they want?
- *Fully* understand the position of the college/university
 - Message vs. tactics

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Responding—public relations considerations

- Follow crisis communication plans
 - Generally, and ...
 - ... those prepared in advance for situations of unrest
- Who will speak on behalf of the university?
Spokesperson? President?
- Consider hiring an outside consultant trained in these issues

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Responding: a case study



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Responding: final thoughts

- Priority number 1: keep everyone safe
- Be aware of, and acknowledge, precedent
- Do not dismiss concerns for lack of organization or unfavorable tactics
- After period of unrest subsides, consider next steps to address concerns—they're not going to vanish into thin air

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“Here in America we are descended in blood and in spirit from revolutionaries and rebels—men and women who dared to dissent from accepted doctrine. As their heirs, may we never confuse honest dissent with disloyal subversion.”

-President Dwight D. Eisenhower

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Questions?



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