



GUIDE TO THE ISSUES

Free Speech on Campus in Alabama

Introduction

A college campus is traditionally thought of as a place where the discussion and debate of diverse ideas is welcomed, and new ideas are born. Free speech and open dialogue are the basis for challenging one's convictions and stimulating intellectual growth. In recent years, however, free speech debacles on America's campuses are reflected in front page news.¹ Revoked speaker invitations, "free speech zones," and the emergence of "safe spaces" for students opposed to certain speakers or ideas—all have reopened the debate on what types of expression should or should not be allowed on campus. Today's college students—over 70% of them—believe that speech only has to be "offensive" to warrant disciplinary action at a school.²

Free speech is a constitutionally protected right for all Americans—and those attending colleges and universities are no exception³. The ability to discuss controversial or offensive ideas must be adamantly protected, not only as a fundamental American right, but as a staple of higher learning.

This *Guide* explains the status of free speech on public campuses in Alabama, and offers policymakers recommendations to ensure student free speech is a constitutionally protected right.

Background

The First Amendment of the United States Constitution prohibits infringement on an individual's right to freedom of expression; this protection extends to individuals attending public colleges and universities. (U.S. Const. amend. XIX) The United States Supreme Court has faced the question of what falls under protected free speech in numerous cases. First, direct calls for immedi-

ISSUE SNAPSHOT

- ★ Free speech is a constitutionally protected right for all Americans—and those attending colleges and universities are no exception.
- ★ The Supreme Court has held that "speech may not be banned on the ground that it expresses ideas that offend."
- ★ Harmful and threatening speech has no place at an institution of higher learning.
- ★ Students and faculty alike should feel as though they are safe to express their ideas, but this does not mean that they are safe from other's ideas, however uncomfortable that may seem.

RECOMMENDATIONS

In Alabama, the current status of free speech on campus is far from perfect. Policymakers should inquire into campus speech policies across the state, and enact legislation that safeguards the First Amendment rights of students at all public institutions of higher education.

ate violence are not protected.⁴ Second, "fighting words" directed at an individual meant to incite violence are also not protected.⁵ Certain, but very few, types of obscene expression or harassment do not fall under protected speech.

Importantly, exceptions to protected free speech are purposefully narrow. The Supreme Court has never used the fighting-words doctrine to censor speech in a judgment, and it has staunchly defended free expression in its opinions.⁶ Most recently, in a 2017 case regarding speech, the



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Court held that “speech may not be banned on the ground that it expresses ideas that offend.”⁷ This opinion has been echoed by the Court throughout history.⁸

The rise of restricted speech on campus is, in part, explained by legal and social events from the 1960s onward. Title IX, first enacted in 1972, prohibits sex discrimination by schools that receive federal funds.⁹ Title IX, plus the civil rights movement that had triumphed not long before, sparked concern among college administrators who worried that new students would face hostile or even violent reception on campus from others.¹⁰ This spawned a more widespread use of speech codes—university policies prohibiting speech that is protected by the First Amendment—with the intention of protecting minorities.¹¹ However, today’s campus speech policies hardly serve as a framework for the inclusion of free thought and new ideas.

Free Speech Today

The constitutionally protected right to free speech has been misunderstood on campuses. While the Supreme Court has not used the fighting-words doctrine to restrict offensive or vulgar speech, college administrators have done exactly that:

It now seems clear that lewd, vulgar, or profane speech doesn’t fall within the fighting words exception. But someone forgot to tell college administrators, who continue to try to use the fighting words doctrine to punish and censor students. . . . Either as a result of confusion or bad faith, many administrators . . . use [a portion of a 1942 decision by the Supreme Court that has been effectively invalidated in the decades since] as a legal justification to censor offensive, vulgar, and profane speech.¹²

The use of speech codes has also grown far beyond the good intention to protect previously discriminated against students. Instead of widening the scope of individual perspectives on campus, the current environment aims to restrict. Laura Kipnis, a film-studies professor at

Northwestern University, faced multiple Title IX investigations after writing a piece in 2015 questioning today’s sexual harassment environment on campus. Her essay, which was published in the *Chronicle of Higher Education*,¹³ led two graduate students to file Title IX complaints against her on the basis that it was sexual misconduct.¹⁴

A faculty training session for University of California administrators, deans, and department chairs in 2014 included a list of “microaggressions” not to be used, including such statements as “America is the land of opportunity” and “I believe the most qualified person should get the job.”¹⁵ These statements were deemed offensive and not to be used on campus.¹⁶

Free Speech on Alabama’s Campuses

Unfortunately, schools in Alabama are also experiencing limits on free speech today. In an annual survey of the free-speech policies of colleges and universities across the country, the Foundation for Individual Rights in Education (FIRE) rates schools based on how restrictive their speech codes are and whether their policies violate First Amendment rights. The rankings, from best to worst, are “green light,” “yellow light,” and “red light.”

Fourteen of Alabama’s college and universities were rated, with the following results:

RED LIGHT: Alabama A&M University, Troy University, University of Alabama at Birmingham, University of West Alabama

YELLOW LIGHT: Alabama State University, Athens State University, Auburn University, Auburn University at Montgomery, Jacksonville State University, University of Alabama, University of Alabama in Huntsville, University of Montevallo, University of North Alabama, University of South Alabama

GREEN LIGHT: No schools

“Red light” schools have policies that “clearly and sub-

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stantially” restrict freedom of speech.¹⁷ “Yellow light” schools have policies that “clearly” restrict freedom of speech, but only restrict “narrow categories of speech.”¹⁸ The difference between “red light” and “yellow light” schools is simply a matter of how much the policies of these schools restrict freedom of speech.¹⁹ “Green light” schools have policies that do not “seriously” threaten freedom of speech.²⁰

A few examples of “red light” policies at Alabama schools include the harassment policy that falls under the University of Alabama at Birmingham’s Non-Academic Student Conduct Policy: Prohibited Conduct.²¹

The policy states that “any unwelcome conduct based on actual or perceived status including: sex, gender identity/ expression, race, color, age, national origin, creed, disability, religion, sexual orientation, pregnancy, or veteran status” is prohibited and to be reported.²²

A policy on cyber harassment at the University of West Alabama prohibits “harsh text messages and emails, rumors sent by email or posted on social networking sites, and embarrassing pictures, videos, websites, or fake profiles.”²³ Similarly, a harassment and discrimination policy at Troy University prohibits sexual harassment, including “name calling, relating stories, gossip, comments, or jokes that may be derogatory toward a particular sex.”²⁴

School	Overall Ranking	Number of Red Light Policies	Number of Yellow Light Policies	Number of Green Light Policies
Alabama A&M University	Red	5	5	0
Alabama State University	Yellow	0	6	2
Athens State University	Yellow	0	3	1
Auburn University	Yellow	0	3	3
Auburn University at Montgomery	Yellow	0	5	1
Jacksonville State University	Yellow	0	9	2
Troy University	Red	4	3	2
University of Alabama	Yellow	0	5	1
University of Alabama at Birmingham	Red	2	7	2
University of Alabama at Huntsville	Yellow	0	7	0
University of Montevallo	Yellow	0	5	0
University of North Alabama	Yellow	0	2	3
University of South Alabama	Yellow	0	7	3
University of West Alabama	Red	1	4	0



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Examples to Follow

In 2014, the University of Chicago founded a Committee on Freedom of Expression to explore and challenge the idea of free speech on campus. In light of student protests over speaker invitations and speech restrictions in certain zones on campuses, the committee set out to establish what the university should ultimately uphold as its speech policy. The committee recognized that, “of course, the ideas of different members of the University community will often and quite naturally conflict.”²⁵ The committee went on to emphasize that college campuses benefit from diversity of thought: “But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.”²⁶

The Chicago Statement, as it has come to be known, has become the gold standard in campus speech policy. Since 2015, twenty schools or faculty groups have either adopted the Chicago Statement or published their own free-speech statements closely resembling it.²⁷

In 2004 and 2005, the University of Alabama Faculty Senate passed a “hate speech” resolution after a comedian invited to campus used offensive and derogatory language in his performance.²⁸ In response, the Student Senate consulted with free-speech advocates and passed a “free speech” resolution to protect the “inalienable human and civil right that is protected by the United States Constitution and the Constitution of Alabama” and prevent the Faculty Senate from regulating student speech.²⁹

Recommendations

Harmful and threatening speech has no place at an institution of higher learning. Students and faculty alike should feel as though they are safe to express their ideas, but this does not mean that they are safe from others’ ideas, however uncomfortable they may seem.

In Alabama, the current status of free speech on campus

is far from perfect. Our campuses need firm commitments to free expression so that our students graduate with well-rounded exposure to the ideas of society.

To achieve this, policymakers can do the following:

- Inquire into campus speech policies across the state. Request written commitments from university administrations that the First Amendment is upheld on campus.
- Work with university administrators to either adopt *The Chicago Statement* principles or adapt current speech policies to no longer violate First Amendment rights.
- Work with student groups to promote the fierce protection of free expression.
- Protect free speech on campuses in Alabama by enacting legislation that safeguards the First Amendment rights of students at all public institutions of higher education.

Conclusion

While speech can be, and often is, highly controversial, the constitutional framework that protects the right to speech is not. Schools have grappled with this idea as pressure from students or faculty has increasingly grown to try to crowd out diverse ideas. The First Amendment, however, is firm in its protection of all to have free expression.



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- ¹ Greg Lukianoff & Jonathan Haidt, "The Coddling of the American Mind," *Atlantic*, Sept. 2015, at 42.
- ² Michael S. Roth, "Should Universities Place Any Limits on Free Speech?," *Washington Post*, Sept. 24, 2017, at B6.
- ³ *Sweezy v. New Hampshire*, 354 U.S. 234,250 (1957); *Keyishian v. Board of Regents, State Univ. of N.Y.*, 385 U.S. 589 (1967); *Healy v. James*, 408 U.S. 169, 180 (1972); *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667 (1973); *Widmar v. Vincent*, 454 U.S. 263 (1981)
- ⁴ *Brandenburg v. Ohio*, 395 U.S. 444,395 (1969).
- ⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).
- ⁶ Sean Clark, "Misconceptions About the Fighting Words Exception," Foundation for Individual Rights in Education (Sept. 20, 2006), <http://www.thefire.org/misconceptions-about-the-fighting-words-exception/> [<http://perma.cc/9LNB-AS2J>].
- ⁷ *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017); see also Editorial, "Free Speech at the Supreme Court," *New York Times*, June 20, 2017, at A26.
- ⁸ *Cohen v. California*, 403 U.S. 15, (1971); *Texas v. Johnson*, 491 U.S. 397 (1989).
- ⁹ Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688. Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance" *Id.* § 1681(a).
- ¹⁰ Foundation for Individual Rights in Education, *Spotlight on Speech Codes 2017: The State of Free Speech on Our Nation's Campuses* 8 (2016), http://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/12/12115009/SCR_2017_Full-Cover_Revised.pdf [<http://perma.cc/E46C-TJVV>].
- ¹¹ "What Are Speech Codes?," Foundation for Individual Rights in Education, <http://www.thefire.org/spotlight/what-are-speech-codes/> [<http://perma.cc/NZ6E-3G6C>] (last visited Oct. 16, 2017).
- ¹² Sean Clark, "Misconceptions About the Fighting Words Exception," Foundation for Individual Rights in Education (Sept. 20, 2006), <http://www.thefire.org/misconceptions-about-the-fighting-words-exception/> [<http://perma.cc/9LNB-AS2J>].
- ¹³ Laura Kipnis, "Sexual Paranoia Strikes Academe," *Chronicle of Higher Education* (Feb. 27, 2015), <http://www.chronicle.com/article/sexual-paranoia-strikes/190351/> [<http://perma.cc/RX3G-UHVR>].
- ¹⁴ Jeannie Suk Gersen, "Laura Kipnis's Endless Trial by Title IX," *New Yorker* (Sept. 20, 2017), <http://www.newyorker.com/news/news-desk/laura-kipniss-endless-trial-by-title-ix> [<http://perma.cc/WMT8-YZAZ>].
- ¹⁵ University of California, *Tool: Recognizing Microaggressions and the Messages They Send* (2014), http://academicaffairs.ucsc.edu/events/documents/Microaggressions_Examples_Arial_2014_11_12.pdf [<http://perma.cc/MFE7-7UAY>]. This document was part of a faculty leadership seminar held at the campuses of the University of California system throughout the 2014–2016 school year. Josh Hedtke, "California Professors Instructed Not to Say 'America Is the Land of Opportunity,'" *College Fix* (June 10, 2015), <http://www.thecollegefix.com/post/22839/> [<http://perma.cc/5RKH-675X>]; see, e.g., "Fostering Inclusive Excellence: Strategies and Tools for Department Chairs and Deans," University of California, Santa Cruz, <http://academicaffairs.ucsc.edu/events/fostering-inclusive-excellence.html> [<http://perma.cc/C4D8-QWRS>].
- ¹⁶ Greg Lukianoff & Jonathan Haidt, "The Coddling of the American Mind," *Atlantic*, Sept. 2015, at 42.
- ¹⁷ Foundation for Individual Rights in Education, *Spotlight on Speech Codes 2017: The State of Free Speech on Our Nation's Campuses* 5 (2016), http://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/12/12115009/SCR_2017_Full-Cover_Revised.pdf [<http://perma.cc/E46C-TJVV>].
- ¹⁸ Foundation for Individual Rights in Education, *Spotlight on Speech Codes 2017: The State of Free Speech on Our Nation's Campuses* 5 (2016), http://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/12/12115009/SCR_2017_Full-Cover_Revised.pdf [<http://perma.cc/E46C-TJVV>].
- ¹⁹ Foundation for Individual Rights in Education, *Spotlight on Speech Codes 2017: The State of Free Speech on Our Nation's Campuses* 5 (2016), http://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/12/12115009/SCR_2017_Full-Cover_Revised.pdf [<http://perma.cc/E46C-TJVV>].
- ²⁰ Foundation for Individual Rights in Education, *Spotlight on Speech Codes 2017: The State of Free Speech on Our Nation's Campuses* 5 (2016), http://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/12/12115009/SCR_2017_Full-Cover_Revised.pdf [<http://perma.cc/E46C-TJVV>].
- ²¹ "Non-Academic Student Conduct Policy: Prohibited Conduct." Foundation for Individual Rights in Education. Last updated: February 14, 2017. https://www.thefire.org/fire_speech-codes/uab-harassment/
- ²² "Non-Academic Student Conduct Policy: Prohibited Conduct." Foundation for Individual Rights in Education. Last updated: February 14, 2017. https://www.thefire.org/fire_speech-codes/uab-harassment/
- ²³ "Student Handbook: Cyber Bullying and Cyber Harassment Policy Statement." Foundation for Individual Rights in Education. Last updated: October 11, 2017. <https://www.thefire.org/schools/university-of-west-alabama/>
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- ²⁵ Committee on Freedom of Expression, University of Chicago, *Report of the Committee on Free Expression* (2015), <http://freeexpression.uchicago.edu/sites/freeexpression.uchicago.edu/files/FOECommitteeReport.pdf> [<http://perma.cc/WB38-KJ69>].
- ²⁶ Committee on Freedom of Expression, University of Chicago, *Report of the Committee on Free Expression* (2015), <http://freeexpression.uchicago.edu/sites/freeexpression.uchicago.edu/files/FOECommitteeReport.pdf> [<http://perma.cc/WB38-KJ69>].
- ²⁷ Foundation for Individual Rights in Education, *Spotlight on Speech Codes 2017: The State of Free Speech on Our Nation's Campuses* 4 (2016), http://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/12/12115009/SCR_2017_Full-Cover_Revised.pdf [<http://perma.cc/E46C-TJVV>].
- ²⁸ University of Alabama Faculty Senate, *Resolution for the Adoption of a University Policy Opposing Unacceptable Behavior Demeaning Individuals or Groups on Campus and Prohibiting the Use of University Funds or Facilities by Those Making Such Statements* (2004), <http://facultysenate.ua.edu/files/2013/05/Resolution-For-University-Policy-Opposing-Unacceptable-Behavior-Demeaning-Individuals-Or-Groups.pdf> [<http://perma.cc/8LAA-GSQP>]. The resolution was adopted on September 21, 2004. *Id.*
- ²⁹ University of Alabama Student Senate, *Resolution #R-98-04* (2005), http://d28htnjz2elwuj.cloudfront.net/pdfs/5363_3730.pdf. The resolution was adopted unanimously on February 24, 2005. See "Students Fight Back: Free Speech Resolution Targets Faculty Push for Speech Code," Foundation for Individual Rights in Education (Feb. 28, 2005), <http://www.thefire.org/students-fight-back-free-speech-resolution-targets-faculty-push-for-speech-code/> [<http://perma.cc/B2B5-M8ZK>].