



# **Protecting Freedom of Expression on Campus In the Face of Rising Intolerance**

**A Conceptual Model for College and University Administrators**



Illustrative photo – Shutdown of a 2017 pro-Israel event by protesters at the University of California, Irvine who entered the event and shouted loudly and continuously, explicitly stating to speakers, “You people...should not be allowed on this f\*\*\*\*\*g campus!” The event was effectively ruined and attendees and speakers had to be escorted safely out by police.

Source Credit: Gary Fouse

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# Introduction

Nothing is more fundamental to an institution of higher education and the welfare of its students than freedom of expression. The right to form and communicate one's beliefs, opinions and identity – a right guaranteed in America by the First Amendment – is not only vital to the educational process, but to the self-affirmation and fulfillment of each and every individual who participates in that process.

However, on college and university campuses today, this fundamental right is being challenged by profoundly intolerant behavior, whose goal is to prevent some individuals and groups from expressing their opinions, beliefs or identity, and from fully participating in campus life. To that end, student-organized events are being disrupted and shut down, and students are being vilified, threatened, bullied, and in some cases even assaulted.

To make matters worse, most college and university harassment policies do not adequately protect all students from such intolerant behavior. Based on state and federal anti-discrimination law, these policies only provide guidance to administrators for addressing harassment that is directed against members of certain identity groups, leaving other students unprotected from intolerant behavior that suppresses their self-expression. For many, this has created a sense of inequality and increased vulnerability, which has led to further suppression of students' willingness to freely express themselves.

This proposal, based on First Amendment principles, encourages the adoption of adequate and equal responses to all forms of intolerant behavior to ensure that every student is afforded the right to self-expression and full participation in campus life, regardless of opinion, belief or identity.

# Key Concepts of the Model

1. **Acknowledging the Importance of Freedom of Expression:** Schools should acknowledge that freedom of expression, guaranteed by the First Amendment, is a central pillar of campus life, and that every student has equal rights to self-expression and full participation in campus activities, regardless of opinion, belief or identity.
2. **Viewing Intolerant Behavior as Speech or Action that Suppresses Expression:** Schools should view intolerant behavior as speech or action intended to suppress students' rights to self-expression, including by portraying students as worthy of harm, or calling for, condoning or inflicting harm upon them.
3. **Ascertaining when Intolerant Behavior Becomes “Harassment”:** Schools should consider intolerant behavior to be actionable when it reaches the behavioral threshold for “harassment” established by the U.S. Supreme Court.

# Key Concepts of the Model (Continued)

4. **Recognizing the Inadequacies of Current Harassment Policies and the Need for New Ones:** Schools should recognize that their current harassment policies do not protect all students' freedom of expression, and that new policies must be established.
5. **Protecting Students' Rights:** Schools must carry out their duty to protect every student's right to self-expression by: a) not restricting student expression that is protected by the First Amendment and doesn't substantially infringe on others' rights of self-expression; and b) prohibiting and punishing speech and action that substantially infringe on any student's rights to freedom of expression and full participation in campus life.
6. **Educating Students:** Schools should educate students to understand the importance of the First Amendment and the centrality of freedom of expression to campus life; to be aware of their rights to freedom of expression and full participation in campus activities; and to recognize their responsibility to avoid exercising those rights in a way that infringes on the rights of others.

# The First Amendment and the Rights of All Students To Self-Expression

*“Freedom of speech is indivisible; unless we protect it for all, we will have it for none.”*

**- Harry Kalven, Jr., American jurist and preeminent legal scholar**

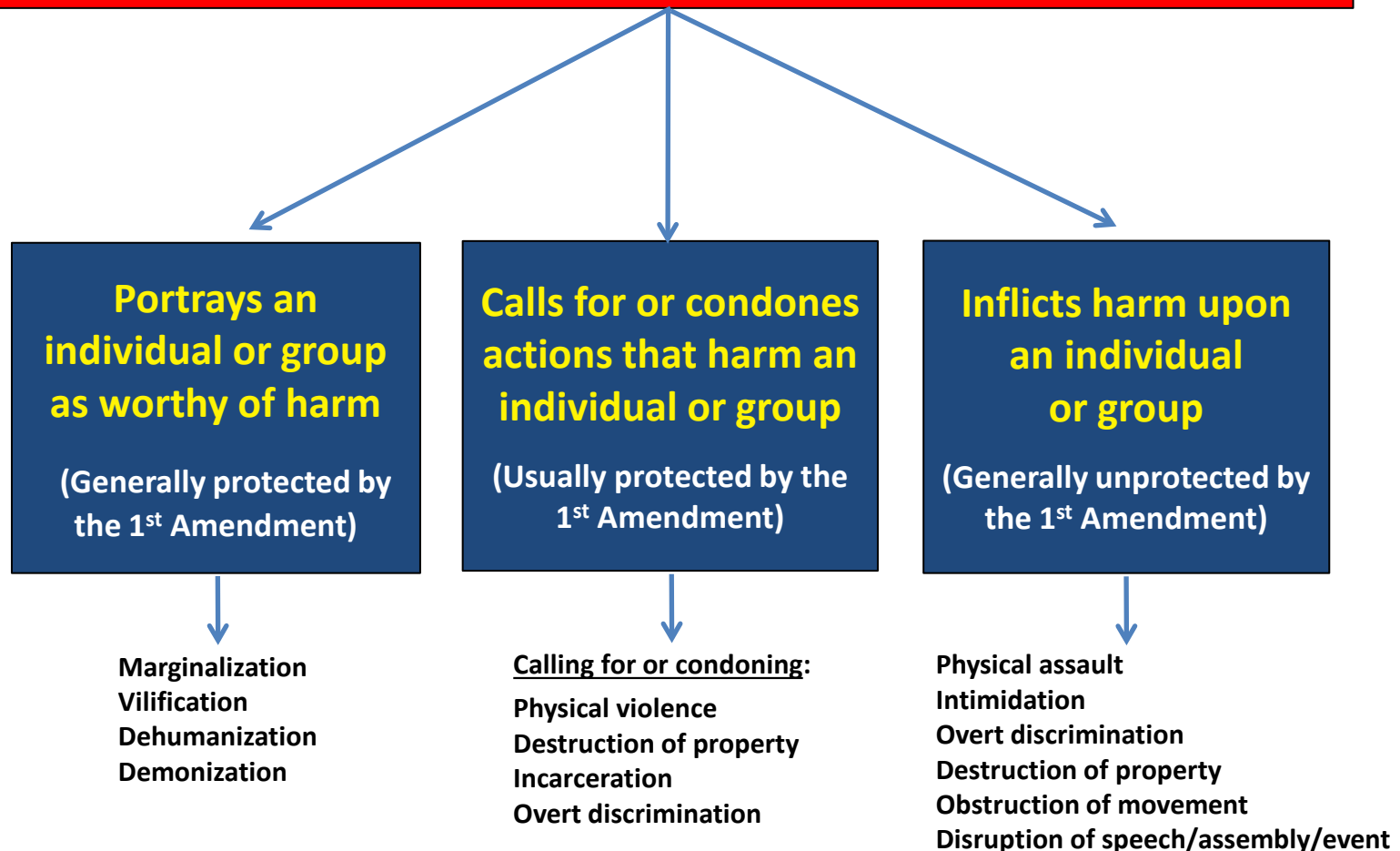
Colleges and universities must acknowledge that freedom of thought, inquiry and expression are not only essential pillars of their institutions, they are fundamental rights of all members of the campus community, protected under the First Amendment of the U.S. Constitution. These rights include the freedom to express opinions; to hear, express and debate various views, no matter how unpopular; and to voice criticism. They also include the rights that are concomitant with the freedom to full participation in campus life more broadly, such as the freedom of association and assembly.

Schools must also acknowledge their responsibility to equally protect the constitutional rights of every student, particularly when others attempt to restrict these rights. Behavior that substantially interferes with the ability of any individual or group to assemble, speak, and share or hear opinions, or otherwise impairs the freedom to fully participate in campus life, must not be tolerated.

While First Amendment protections apply only to public colleges and universities, private schools should also acknowledge and use the First Amendment as the principal standard for determining whether expression ought to be protected or restricted. It is in the interest of safeguarding the freedom of thought, inquiry and expression so vital to the academic endeavor and the welfare of all students that both public and private schools utilize First Amendment protections.

# What is Intolerant Behavior?

**Speech or expressive behavior that seeks to prevent any individual or group from expressing their opinions, beliefs or identity or fully participating in shared society**





# Intolerant Behavior: Portraying Individuals or Groups as Worthy of Harm (Generally protected by the 1<sup>st</sup> Amendment)



# Intolerant Behavior: Calling for or Condoning Actions that Harm Individuals or Groups (Usually protected by the 1<sup>st</sup> Amendment)





# Intolerant Behavior: Inflicting Harm on Individuals or Groups (Generally unprotected by the 1<sup>st</sup> Amendment)



- A homosexual student at Pennsylvania State University was violently assaulted after being told, "You're gay. I hate gays."
- An African American student at San Jose State University was racially bullied by his 3 roommates, who clamped a bicycle lock around his neck and decorated the suite with racist epithets.
- The dorm room door of a conservative student at the University of Michigan was vandalized with angry slurs, an image of the devil, as well as eggs, gum and hot dogs following a conservative article he penned in the campus newspaper.
- An Orthodox Jewish student at CUNY Medgar Evers College was punched in the face and told, "Leave the school, you Jew."



- At UC Berkeley, violent protests resulted in the cancellation of an event with a controversial speaker.
- An Asian USC student was called the racist and homophobic slur "Ching chang chong motherf--- gay" while being pelted with eggs.
- A number of Muslim students at the University of Kansas reported being harassed and assaulted, including by having food thrown at them.
- A pro-Israel student group's event at UC Irvine was disrupted by members of an anti-Zionist student group, who physically and verbally intimidated attendees, loudly chanted "Intifada, Intifada," and threatened a student attempting to enter the event. Police had to escort attendees out of the event for their own safety.

# When Intolerant Behavior Becomes Harassment

Intolerant behavior – including speech and action – is often protected expression under the First Amendment. However, when such behavior substantially infringes on another student's right to freedom of expression or full participation in campus life, it should be prohibited.

In its definition of “harassment,” the United States Supreme Court has provided an objective behavioral threshold for determining what constitutes substantial infringement of another student's right to self-expression. According to the Supreme Court, harassment is behavior that is **“so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities.”**

The Supreme Court's definition of harassment is intended to be used as a tool for evaluating claims of identity-motivated discrimination under civil rights law. However, the definition's singular focus on behavior whose observable effect is to substantially limit a student's self-expression or full participation in campus life also makes it an effective tool for ascertaining when intolerant behavior has crossed the line from permissible expression to speech or action that should be prohibited.

# A New Way to View Peer-on-Peer Harassment to Better Protect All Students' Freedom of Expression

The peer-on-peer harassment policies of most colleges and universities are unable to provide adequate protection to all students from behavior that substantially infringes on their freedom of expression. This is because current policies are based on federal and state anti-discrimination law, which views harassment as an indicator of identity-motivated discrimination rather than behavior that suppresses expression. A victim of harassment who is not a member of a protected identity group specified in school harassment policy, or whose harasser is not determined to be motivated by animus towards the student's identity group, is not afforded protection under current policies.

In order to protect all students' freedom of expression, schools must create new policies that offer a different view of harassment:

## Current View:

### Harassment as Discrimination

- Understood as a form of identity-motivated discrimination
- Considers the identity of the victim and the motivation of the perpetrator
- Is only actionable if the harassment reaches an objective threshold of harm, the victim is a member of a protected group, and the perpetrator is motivated by prejudice against that group



## New View:

### Harassment as Intolerant Behavior

- Understood as intolerant behavior that suppresses another's self-expression
- Does not consider the identity of the victim or the motivation of the perpetrator
- Is actionable when any individual is subject to harassment that reaches an objective threshold of harm, irrespective of the identity of the victim or the motivation of the perpetrator

# Protecting All Students' Rights to Self-Expression and Full Participation in Campus Life

Colleges and Universities should rely on the **First Amendment** and the **U.S. Supreme Court's definition of "harassment"** in carrying out its duty to protect the rights of every student to self-expression and full participation in campus life. This duty must be carried out in two ways:

- 1) Schools must not restrict the expressive behavior or speech of any student, unless:
  - a. The expression is not protected under the First Amendment, including expression that involves behavior which violates criminal law (e.g. assault, vandalism, disturbing the peace); that genuinely threatens an individual or group with real and imminent harm; that meets the legal threshold of defamation; or that violates reasonable restrictions on the time, place or manner of expression (e.g. no amplified events in certain places on campus when classes are in session).
  - a. The expression or accompanying behavior substantially infringes on the self-expression or full participation of any student or student group and that meets the behavioral definition of "harassment" established by the U.S. Supreme Court, regardless of the motivation of the perpetrator(s) or the identity of the victim(s).
- 2) Schools must prohibit and apply prompt and appropriate disciplinary measures in response to behavior (including speech) that substantially infringes on the self-expression or full participation of any student or student group and that meets the Supreme Court's definition of "harassment," regardless of the motivation of the perpetrator(s) or the identity of the victim(s).

# Educating about the Values, Rights and Responsibilities of Freedom of Expression

Educating students, faculty and staff about the critical importance of freedom of expression to campus life and the steps that must be taken to sustain that freedom is essential for fostering a creative, intellectually robust campus community where all members are afforded equal opportunity to realize their full potential.

Educational and training programs should include a focus on the following:

- **Freedom of Expression and the First Amendment:** Developing an appreciation for the fundamental importance of freedom of expression to campus life – both to the production and pursuit of knowledge and the affirmation of self – as well as a recognition of the critical role that the First Amendment plays in protecting the freedom of expression of every member of the community, irrespective of opinion, belief or identity;
- **Rights and Responsibilities:** Ensuring that all members of the campus community are aware of their rights to freedom of expression and full participation in campus life, as well as their responsibilities to exercise their rights consistent with school policy and the law, and without infringing on the basic liberties of others;
- **Common Values:** Fostering the values that unite all members of the campus community, including respect for human dignity and individual difference, the equality of all members of the campus community, and a sense of communal responsibility;
- **Communications Skills:** Teaching skills for effectively communicating and responding to a wide range of opinions, beliefs and identities without infringing on the rights of others.

# Recommendations

## **Part A: Review, Update and Enforce Policies, Procedures and Protocols**

- Review all campus policies and procedures regarding the protection of freedom of expression and the prohibition of intolerant behavior, including policies pertaining to general student behavior, harassment, bias/discrimination, tolerance/respect/civility, bullying, and protest/demonstration. Revise as necessary to ensure that policies:
  - Use state and federal law as the standard of required behavior, but go beyond the letter of the law in the cases where legal protection is limited to specific classes of students, in order to guarantee that all students' freedom of expression and civil rights are equally protected, regardless of identity, opinion or legally protected status;
  - Apply prompt and appropriate disciplinary measures when any individual or group engages in behavior that abrogates the freedom of expression or civil rights of others, up to and including suspension and expulsion for individuals, and the loss of school approval for groups. Disciplinary measures must be applied strictly on the basis of behavioral considerations, without respect to the identity, opinion or legally protected status of perpetrator or victim.
- Develop protocols to handle expression that is intolerant but constitutionally protected. Whether the school decides to handle such expression by loudly condemning it or by taking a more hands-off approach, it should be addressed in an equitable manner for all students, without regard to the identity or legally protected status of those responsible for the objectionable speech, or those who are offended by it.



# Recommendations

## **Part B: Inform and Educate the Campus Community**

- Make public and disseminate widely in the campus community a formal statement from the school's president or chancellor that contains the following:
  - Affirmation of the importance of freedom of expression to the school, and the school's commitment to promoting and not stifling it;
  - Assurance that all students will be equally protected from intolerant behavior that violates their freedom of expression or their right to full participation in campus life;
  - Explanations of the intolerant speech and expressive behavior that violates school policy and the law, and is liable to disciplinary action; and
  - Descriptions of all school policies, procedures and protocols that protect freedom of expression and prohibit intolerant behavior, along with a commitment to their equitable enforcement for all students, regardless of identity, opinion or legally protected status.
- Develop educational and training programs that can:
  - Help members of the campus community to be aware of all campus policies and procedures regarding intolerant behavior;
  - Teach and encourage the expression of a wide range of views in a productive and respectful manner;
  - Instill an appreciation for individual dignity and communal responsibility; and
  - Inculcate an understanding of and appreciation for the First Amendment and its critical role in supporting the academic mission of the college or university.

# Resources

- University of California Regents' - [Statement of Principles Against Intolerance](#)
- University of California, Davis - [Freedom of Expression Working Group Report](#)
- University of California, Davis - [Expressing Disagreement: Scenarios and Civil Disobedience](#)
- University of Chicago - [Report of the Committee on Freedom of Expression](#)
- University of Chicago President Robert J. Zimmer - [Free Expression and Campus Life](#)
- Princeton University - [Statement on Freedom of Expression](#)
- Purdue University - [Statement on Commitment to Freedom of Expression](#)
- Michigan State University - [Statement on Free Speech Rights and Responsibilities](#)
- Erwin Chemerinsky and Howard Gillman, [Free Speech on Campus](#) (Yale University Press: New Haven, 2017)
- Harvard University - [Non-Discrimination & Anti-Bullying Policies](#)



## For More Information

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