The background features a collage of images. On the left, a hand holds a white sign. In the center, a hand holds a megaphone. On the right, a hand holds a red megaphone. The entire scene is overlaid with a semi-transparent grey rectangle containing the title and speaker information.

# Free Speech for Students

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Taylor Brack, Staff Attorney, ACLU of Hawai'i



# **The American Civil Liberties Union**


The ACLU is a non-profit, non-partisan, national organization devoted to the protection of civil liberties that was established in 1920. The ACLU of Hawaii is an affiliate of the national organization, and it began in 1965.



**ACLU National Open Letter to Colleges and University Leaders**


**"We ... strongly oppose efforts to stifle free speech, free association, and academic freedom here at home. In the name of those principles, we urge you to reject calls to investigate, disband, or penalize student groups on the basis of their exercise of free speech rights.**

**...[T]he experience of our country's universities during the McCarthy era demonstrates that ideologically motivated efforts to police speech on campus destroy the foundation on which academic communities are built... Such investigations chill speech, foster an atmosphere of mutual suspicion, and betray the spirit of free inquiry, which is based on the power to persuade rather than the power to punish."**



The content shared in this presentation is only being provided for general informational purposes.

# **DISCLAIMER**



If you are seeking advice for a particular legal matter, consult your attorney.

## First Amendment to the United States Constitution

- **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.

## Article I, Section 4 of the Constitution of the State of Hawai'i

- **No law shall be enacted** 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 University of Hawai'i  
is a public institution

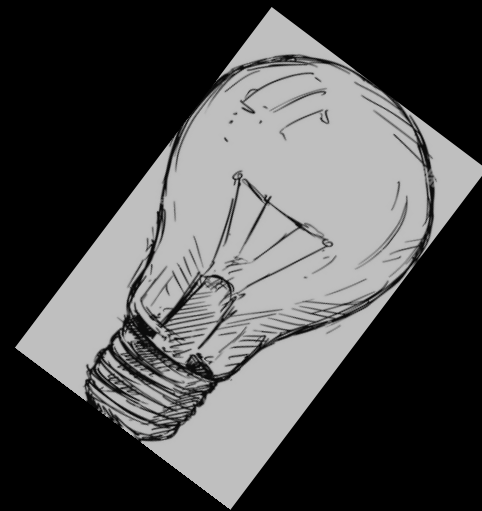
Just like the government, the  
university cannot infringe upon the  
right to free speech.



# **Executive Policy 10.206 Free Expression on University Campuses**



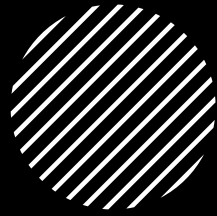
The University of Hawai‘i is committed to the free and open exchange of ideas and affirms the rights of members of the university community to engage in speech and other expressive activity guaranteed by the First Amendment to the U.S. Constitution and by Article I, Section 4 of the Constitution of the State of Hawai‘i.







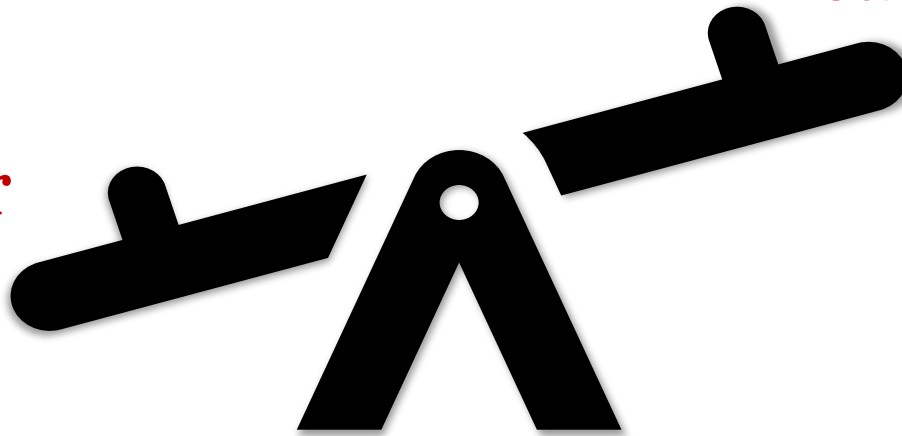
The  
University  
can enforce  
**content-  
neutral**  
**restrictions**  
on speech.



- Such **time, place, and manner** restrictions on expressive speech are supposed to "assure the orderly conduct and least interference with the University responsibilities as a public institution for higher education and scholarly inquiry."

"Campuses will...permit non-commercial student speech and assembly in all areas generally available to students and the community without first having to...obtain permission from the Chancellor. These generally available areas include open areas, sidewalks, walkways or internal streets, or other similar common areas."

"These restrictions must be neutral as to particular viewpoint expressed and applied even handedly to all similarly situated parties. These guidelines must be narrowly tailored and not substantially burden the expressive activity more than reasonably necessary..."



# Public universities can

- Ban loudspeakers in certain areas of campus to prevent classes from being disrupted.
- Prohibit free speech activities that block the flow of traffic and pedestrians on campus.
- Ban free speech activities in areas that are normally not open to the public: offices, maintenance, etc.
- Designate certain areas on campus as public forums where free speech activities can take place: bulletin boards, student lounges, etc.
- Protect students from bullying/harassment/threats.



# Public universities cannot



- Enforce a total ban on free speech activities in public areas.
- Restrict the free speech activities of a specific group or individual while permitting others to have unrestricted freedom.
- Punish/prevent/retaliate against a student for expressing a certain viewpoint during class.

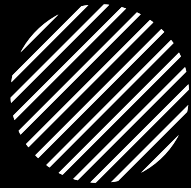
# All speech ain't free

- incitement
- defamation
- fraud
- obscenity
- child pornography
- fighting words
- threats

- Student at Colmesneil
- Allegedly threatened classmates
- Charge: Felony terroristic threat



# A word on hate speech



- Hate speech is not restricted under the first amendment.
- The First Amendment is a broad guarantee of “freedom for the thought that we hate.” - Justice Oliver Wendell Holmes, 1929
- “...the remedy to be applied is more speech.” - Justice Louis Brandeis, 1927

# Speech outside of campus



What is said on the internet doesn't always stay on the internet.

What sort of consequences should you expect?

# It's 2017 at a public high school in Pennsylvania

The student said:

"Fuck school fuck softball fuck cheer fuck everything."





Student was suspended from JV cheerleading for violating the cheerleading code of conduct

- She was required to show respect for their teammates, coaches, the school, teachers, and other schools' cheerleaders; the rule also forbade the use of profanity. Another rule forbade cheerleaders from posting "negative information" about "cheerleading, cheerleaders or coaches" on the Internet.

# The United States Supreme Court narrowly decided

- The high school violated the student's first amendment right to free speech by punishing her expressive conduct on snapchat. Criticism of school officials is "pure speech" and is protected.
- Schools can regulate off-campus speech, but only under certain circumstances.
- The age, independence, and living arrangements of public college and university students means that their speech likely can't be regulated in the way that a high school student would be.

# It's 2016 at the University of Mississippi

The student said:

"I have a tree with enough room for all of them if you want to settle this Wild West style."



# UM Creed

- I believe in respect for the dignity of each person
- I believe in fairness and civility
- I believe in personal and professional integrity
- I believe in academic honesty
- I believe in academic freedom
- I believe in good stewardship of our resources
- I pledge to uphold these values and encourage others to follow my example.

**Ole Miss students occupy Lyceum to protest student's racist comments**



# The student voluntarily withdrew

- “Even though the social media comment he made may have been protected expression, he wanted to take responsibility for the impact of his post on our community,” said vice chancellor for student affairs.
- While the student has withdrawn from the university, he will remain in the campus community this fall and work closely with ... campus entities devoted to working against bias [to] develop a plan that will provide him with learning opportunities and restorative justice activities.

# It's 2024 at the University of Hawai'i

- Does your speech cause substantial disruption to the classroom, invade the rights of others, target specific individuals with threats, or amount to harassment on the basis of sex, race, or other protected category?
- If so, your speech could violate:
  - Executive Policy 7.208, Systemwide Student Conduct Code
  - Executive Policy 1.202, Nondiscrimination, Equal Opportunity, and Affirmative Action
  - Executive Policy 1.204, Sex and Gender Based Misconduct Policy

# Executive Policy 7.208, Systemwide Student Conduct Code

2. Disruption or obstruction of teaching, research, administration, disciplinary proceedings, other UH activities, including its public service functions on or off campus, or of other authorized non-UH activities when the conduct occurs on UH premises. This includes creating noise or other disturbances on campus or in student life areas sufficient to disrupt the normal functioning of campus activities including classroom instruction.
3. Any conduct that threatens or endangers the health or safety of any person including but not limited to, physical abuse, verbal abuse, threats, intimidation, harassment, bullying, coercion, stalking as defined below. (For any conduct that is sexual or romantic in nature and committed by a current or former partner of an intimate, romantic, or sexual relationship, or is related to an individual's actual or perceived sex or gender, sexual orientation, gender identity or gender expression, refer to [EP 1.204](#) for detailed information.)
  - a. Threat is written or verbal conduct that causes a reasonable expectation of injury to the health or safety of any person or damage to any property.
  - b. Intimidation is implied threats or acts that cause a reasonable fear of harm in another.
  - c. Bullying and cyberbullying are repeated and/or severe aggressive behaviors that intimidate or intentionally harm or control another person physically or emotionally, and are not protected by freedom of expression.
  - d. Stalking is two or more acts of unwanted and harassing behavior, directed at a specific person that is sufficiently serious to cause physical, emotional, or psychological fear or to create a hostile, intimidating or abusive environment.
  - e. Physical abuse is intentionally or recklessly causing physical harm or endangering the health or safety of any person.
  - f. Verbal abuse is shouting or yelling in a threatening or hostile manner and/or use of abusive or belligerent language.
  - g. Harassment is sufficiently severe, pervasive (or persistent) and objectively offensive conduct that unreasonably interferes with, limits or denies the ability to participate in or benefit from the University/College's educational program or activities.

# Executive Policy 1.202, Nondiscrimination, Equal Opportunity, and Affirmative Action

- c. When such conduct is unwelcome to the person to whom it is directed or to others directly aware of it and when such conduct is:
  - (1) Severe, persistent, or pervasive; and
  - (2) Has the purpose or effect of either:
    - (a) Unreasonably interfering with the student's academic performance or the employee's work performance, or
    - (b) Creating an intimidating, hostile, or offensive work or educational environment.

The conduct must be both objectively and subjectively offensive. That is, the Complainant must view the conduct as offensive, and a reasonable person must also view the conduct as offensive. "Reasonable person" means a reasonable person under similar circumstances and with similar identities to the Complainant (e.g., age, race, religion).

Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of discriminatory harassment.

Examples of Discriminatory Harassment Based on a Protected Category if unwelcome and persistent, pervasive, or severe<sup>4</sup>:

- Racial slurs, racial epithets, or name-calling
- Insults, put-downs, or mockery of a person's disability
- Unwelcome or inappropriate physical contact
- Offensive remarks about a person's, race, color, age, disability, pregnancy, breastfeeding, national origin, religion or other protected category
- Intimidation, threats of harm, or actual assaults against a person based on their race, national origin, or other protected category
- Displays of offensive objects or pictures, including electronic transmission of derogatory, demeaning, or hostile materials based on race, age, or other protected category



# Executive Policy 1.204, Sex and Gender Based Misconduct Policy

## **C. Standard of Review – Preponderance of the Evidence**

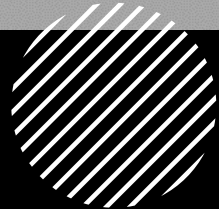
In determining whether alleged behavior violates this Policy, the University will consider the totality of the facts and circumstances involved in the incident, including the nature of the alleged behavior and the context in which it occurred, and determine whether it is more likely than not that the alleged Prohibited Behavior occurred.



# HOMEROOM

THE OFFICIAL BLOG OF THE U.S. DEPARTMENT OF EDUCATION

The Biden-Harris Administration is committed to ensuring all students are guaranteed an educational environment free from discrimination on the basis of sex...The Title IX proposed regulations that the Department released in July 2022 are historic. They would strengthen protections for students who experience sexual harassment and assault at school, and they would help protect LGBTQI+ students from discrimination. The Department received more than 240,000 public comments on the proposed rule – nearly twice as many comments as the Department received during its last rulemaking on Title IX.



What to do if you think your free speech rights are being violated by the University?

- Consult the UH codes of conduct/policy of free speech
- Document everything: pictures, videos, written statements, etc.
- Consult an attorney



# Resources

- <https://palestinelegal.org/resources>
- <https://palestinelegal.org/know-your-rights>
- <https://ncac.org/resource/first-amendment-in-schools>
- <https://www.nyclu.org/en/know-your-rights/know-your-rights-students-higher-education-first-amendment>
- <https://system.suny.edu/sci/news/6-24-21-off-campus-speech/index.html>
- <https://www.hawaii.edu/titleix/policy/faqs-ep1204/>