SPOTLIGHT ON SPEECH CODES 2006: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES

A Report of the Foundation for Individual Rights in Education

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"[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

—U.S. Supreme Court, *West Virginia State Bd. of Ed. v. Barnette* (1943)

INTRODUCTION

The above words, written by Justice Robert Jackson in 1943, encapsulate how central the freedoms of thought and expression are to the American way of life. Nowhere are these freedoms more crucial than at our nation's colleges and universities, which the Supreme Court has described as "vital centers for the Nation's intellectual life."[1] It is particularly tragic, then, that universities today are some of the most likely places to find burdensome restrictions on speech.

This year, the Foundation for Individual Rights in Education (FIRE) conducted an expansive study of just how pervasive and how onerous restrictions on speech are at America's colleges and universities. What we found was not good news for free speech. Between September 2005 and September 2006, FIRE surveyed over 330 schools and found that an overwhelming majority of them explicitly prohibit speech that, outside the borders of campus, is protected by the First Amendment to the U.S. Constitution.

To our knowledge, this is the most comprehensive effort yet to quantify both the number of schools that significantly restrict students' and faculty members' speech and the severity of those restrictions.

Highlights from FIRE's research include:

- Davidson College in North Carolina prohibits "comments or inquiries about dating," "patronizing remarks," "innuendoes," and "dismissive comments."
- At Jacksonville State University in Alabama, students can be punished if they "offend" anyone "on university owned or operated property."
- At the University of Mississippi, "offensive language is not to be used" over the telephone.

This report is intended to serve as a brief guide to the status of the free speech rights of students and faculty at colleges and universities and to the ways in which universities are violating these rights. It is FIRE's hope that by exposing the extent of the problem, we will draw increased public attention to the sad state of free speech on American campuses. Public scrutiny is perhaps the greatest weapon against these abuses. As Justice Louis Brandeis said, "sunlight is the best of disinfectants."

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[1] *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 836 (1995).

METHODOLOGY

FIRE surveyed publicly available policies at the 100 "Best National Universities" and at the 50 "Best Liberal Arts Colleges," as rated in the August 29, 2005 "America's Best Colleges" issue of *U.S. News & World Report*. FIRE surveyed an additional 184 major public universities (FIRE's research focuses in particular on public universities because, as explained in detail later in this report, public universities are *legally* bound to protect students' right to free speech).

FIRE rated these colleges and universities as "red light," "yellow light," or "green light" based on how much, if any, free speech their written policies restricted. FIRE defines those terms as follows:

Red Light: A school is rated as a "red light" if it has at least one policy that both clearly and substantially restricts freedom of speech. A "clear" restriction is one that unambiguously infringes on protected expression. In other words, the threat to free speech at a red-light institution is obvious on the face of the policy and does not depend on how the policy is applied. A "substantial" restriction on free speech is one that is broadly applicable to important categories of campus expression. For example, a ban on "offensive speech" would be a clear violation (in that it is unambiguous) as well as a substantial violation (in that it covers a great deal of what would be protected expression in the larger society). Such a policy would earn a university a red light.

Yellow Light: A "yellow-light" institution has policies that could be interpreted to suppress protected speech, or policies that, while restricting freedom of speech, restrict only narrow categories of speech. For example, a policy banning "verbal abuse" would have broad applicability and would pose a substantial threat to free speech, but it would not be a clear violation because "abuse" might refer to unprotected speech, such as threats of violence or genuine harassment. As another example, while a policy banning "posters promoting alcohol consumption" clearly restricts speech, it is limited in scope. Yellow-light policies may be unconstitutional,[2] and a rating of yellow rather than red in no way means that FIRE condones a university's restrictions on speech. It simply means that those restrictions do not clearly and substantially restrict speech in the manner necessary to earn a red light.

Green Light: If FIRE finds no policies that seriously imperil speech, a college or university receives a "green light." A green light does not indicate that a school actively supports free expression. It simply means that FIRE has not found any publicly available written policies violating students' free speech rights on that campus.

There is one type of school that FIRE does not rate at all: when a private university states clearly and consistently that it holds a certain set of values above a commitment to

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[2] For example, in 2004, the U.S. Court of Appeals for the Third Circuit found that a state law banning advertisers from paying to place advertisements for alcoholic beverages in university newspapers was unconstitutional. *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).

freedom of speech, FIRE does not rate that university.[3] Of the 334 schools surveyed in this report, FIRE rated 328 schools as red, yellow, or green light, and did not rate 6 schools.

FINDINGS

Of the 334 schools reviewed by FIRE, 229 received a red-light rating, 91 received a yellow-light rating, and only 8 received a green-light rating. FIRE did not rate 6 schools (see Figure 1, below).

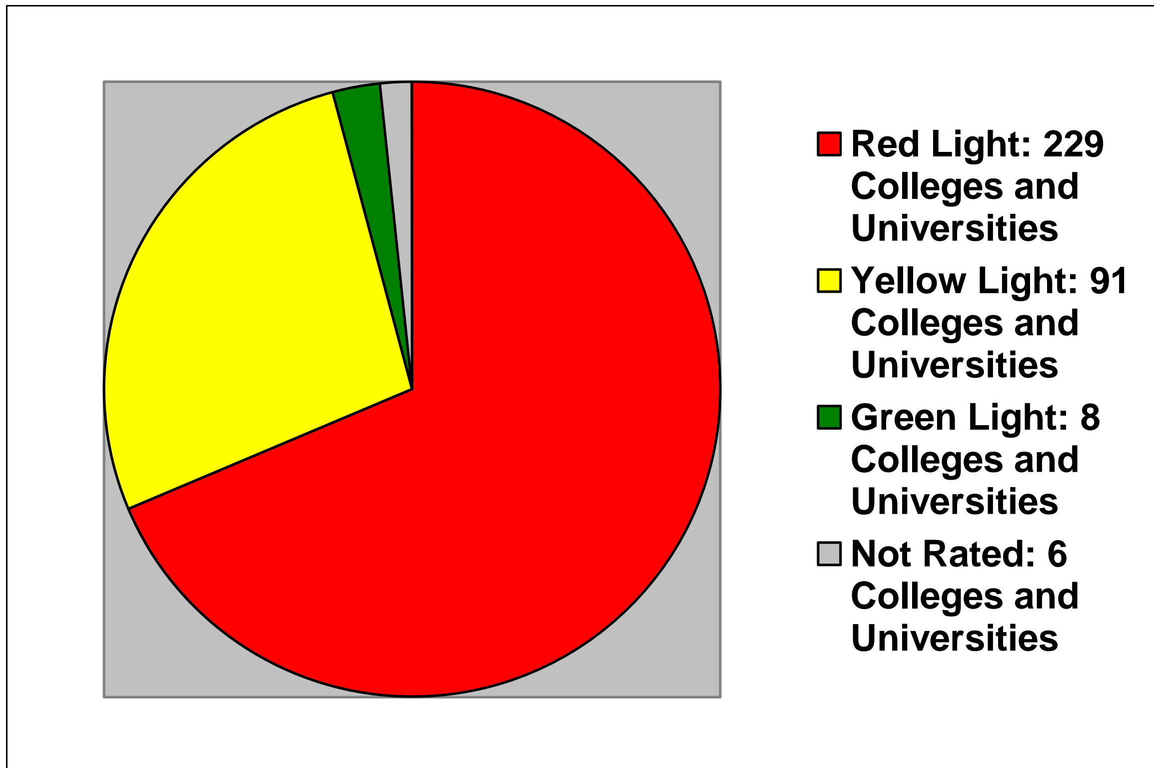


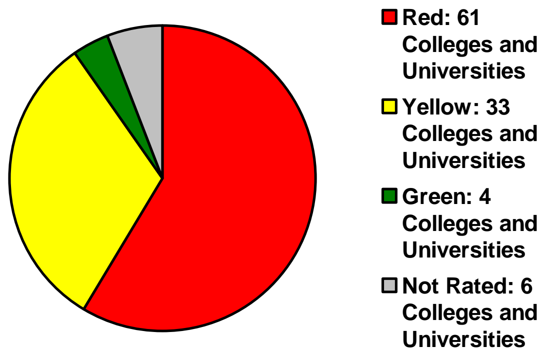
Figure 1: Schools by Rating

The data showed that, despite a legal obligation to uphold the First Amendment rights of students and faculty, public schools were actually *more* restrictive of speech than their private counterparts. Of the schools reviewed by FIRE during the 2005-2006 school year,

[3] For example, Brigham Young University (BYU) is quite clear in its policies that students entering BYU are not guaranteed robust free speech rights. For example, one BYU policy says the following about free expression: "[T]he exercise of individual and institutional academic freedom must be a matter of reasonable limitations. In general, at BYU a limitation is reasonable when the faculty behavior or expression seriously and adversely affects the university mission or the Church. Examples would include expression with students or in public that: 1. contradicts or opposes, rather than analyzes or discusses, fundamental Church doctrine or policy; 2. deliberately attacks or derides the Church or its general leaders; or 3. violates the Honor Code because the expression is dishonest, illegal, unchaste, profane, or unduly disrespectful of others." It would be clear to anyone reading BYU's policies that they were not entitled to unfettered free speech at BYU.

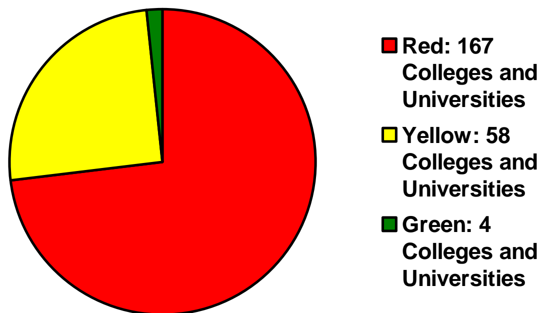
104 were private and 230 were public. Of the private schools reviewed, 58% received a red-light rating, 32% received a yellow-light rating, 4% received a green-light rating, and 6% were not rated. (See Figure 2, below).

Figure 2: Speech Codes at Private Colleges and Universities



In contrast, of the public schools reviewed, a full 73% received a red-light rating, 25% received a yellow-light rating, and only 2% received a green-light rating. (See Figure 3, below).

Figure 3: Speech Codes at Public Colleges and Universities



The data showed a uniformity among geographical regions of the United States when it came to the severity of college and university speech codes, suggesting that the problem is national in scope rather than confined to one area of the country. For the purposes of this report, the United States was divided into four geographical regions: the Northeast, the Midwest, the South, and the West.[4] The percentage of institutions having red-light speech codes varied from 62% in the West to 73% in the Northeast. However, it is worth noting that the West had the highest percentage of yellow-light institutions (36%) and no green-light institutions at all. The Midwest and the South tied for the highest number of green-light institutions, with three each.

[4] See Appendix A for a list of the states contained in each geographical region.

Figure 4: Speech Codes at Northeastern Colleges and Universities

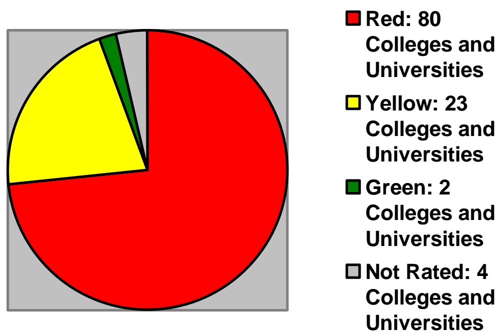


Figure 5: Speech Codes at Midwestern Colleges and Universities

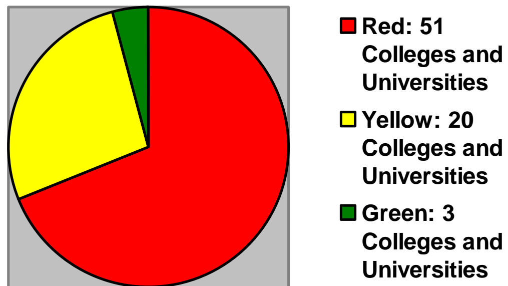


Figure 6: Speech Codes at Southern Colleges and Universities

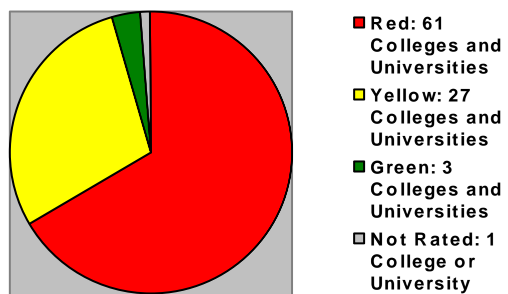
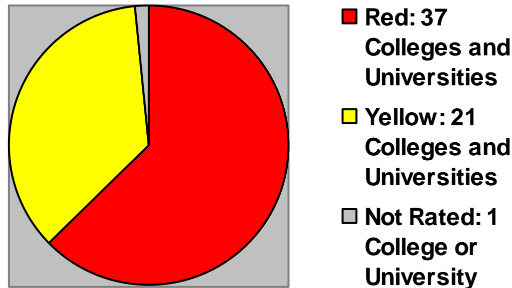


Figure 7: Speech Codes at Western Colleges and Universities



DISCUSSION

THE RISE OF SPEECH CODES

Speech codes (university regulations prohibiting expression that would be constitutionally protected in society at large) gained popularity with college administrators in the 1980s and 1990s. As discriminatory barriers to education declined, institutions of higher education saw an unprecedented increase in female and minority enrollment. College administrators feared that these changes would cause tension, and that students who finally had full educational access would arrive at institutions only to be hurt and offended by other students. In an effort to avoid this friction, administrators enacted policies to restrict potentially offensive speech—in other words, they enacted speech codes.

However, the same administrators that enacted the speech codes often ignored or did not consider the legal and constitutional ramifications of such restrictions, particularly at public universities. As a result, speech codes have been overturned by federal courts at numerous colleges and universities, including the University of Michigan, the University of Wisconsin, and Shippensburg University of Pennsylvania. Despite this, however, the majority of these institutions—including some of those that have been sued—still maintain unconstitutional speech codes.[5]

PUBLIC UNIVERSITIES V. PRIVATE UNIVERSITIES

State-run colleges and universities are a part of the state government, so they cannot lawfully make rules and regulations that prohibit speech protected by the First Amendment. A good rule of thumb is that if a state law would be declared

[5] *See, e.g.*, Jon B. Gould, *The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 Law & Soc'y Rev. 345 (2001) ("[H]ate speech policies not only persist, but they have actually increased in number following a series of court decisions that ostensibly found many to be unconstitutional.")

unconstitutional for violating the First Amendment, a similar regulation at a state college or university would be equally unconstitutional.

The guarantees of the First Amendment generally do not apply to students at private colleges and universities,[6] since the First Amendment regulates only government—not private—conduct. But this does not mean that students and faculty at private schools are not entitled to free expression. In fact, most elite private universities make extensive promises of free speech and academic freedom, presumably to lure the most talented students and faculty (since most people would not want to study and teach where they could not speak and write freely). For example, Princeton University advertises that "free inquiry and free expression within the academic community" are "indispensable" to the achievement of Princeton's goals. Boston University promises the right "to teach and to learn in an atmosphere of unfettered free inquiry and exposition." Yet both of these universities prohibit a great deal of speech that would be protected by the First Amendment in society at large.

WHAT EXACTLY IS 'FREE SPEECH,' AND HOW IS YOUR UNIVERSITY CURTAILING IT?

What does FIRE mean when it says that a university restricts "free speech"? Do people have the right to say absolutely anything, or are only certain types of speech "free"?

Simply put, the overwhelming majority of speech is protected by the First Amendment. Over the years, the U.S. Supreme Court has carved out some very narrow exceptions to the freedom of speech: speech that incites reasonable people to immediate violence; fighting words (one-on-one, face-to-face confrontations that lead to physical altercations); obscenity[7]; and libel. Actual harassment, which is a pattern of severe and discriminatory behavior (as discussed in detail below) is also not protected by the fact

[6]Although the First Amendment does not regulate private universities, this does not mean that all private universities are always legally free to restrict their students' free speech rights. California's "Leonard Law," Cal. Educ. Code § 94367, prohibits secular private colleges and universities in California from restricting speech that would otherwise be constitutionally protected. The Leonard Law provides, in relevant part, that "No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution."

[7] It is important to understand that obscenity, as used here, has a very specific meaning. The Supreme Court has held that obscenity, to fall outside of the protection of the First Amendment, must "depict or describe sexual conduct," and must be "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller v. California* (1973). For all intents and purposes, constitutionally unprotected obscenity means hard-core pornography. Many colleges and universities, by contrast, prohibit such things as "obscene language," by which they mean swear words. But the Supreme Court has explicitly held that most such language is constitutionally protected. In *Cohen v. California* (1971), the defendant was convicted under a California statute for wearing a jacket bearing the words "Fuck the Draft" in a county courthouse. The Court overturned Cohen's conviction, holding that the message on his jacket, however vulgar, was protected speech.

that it may contain an expressive component. If the speech in question does not fall within one of these exceptions, it is in all likelihood protected speech.

Although colleges are endlessly creative in finding ways to restrict student and faculty speech, the most onerous restrictions are generally found in several distinct types of policies.

Harassment Policies

Actual harassment is not protected by the First Amendment. In the educational context, the Supreme Court has defined harassment as conduct "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." This is conduct far beyond the dirty joke or "offensive" op-ed that is often called "harassment" on today's college campuses. Harassment is extreme and usually repetitive behavior—behavior so serious that it would interfere with a reasonable person's ability to get his or her education.

For example, in *Davis v. Monroe County Board of Education*, a U.S. Supreme Court case regarding harassment in the educational context, the conduct found by the Court to be harassment was a months-long pattern of conduct including repeated attempts to touch the victim's breasts and genitals and repeated sexually explicit comments directed at and about the victim.

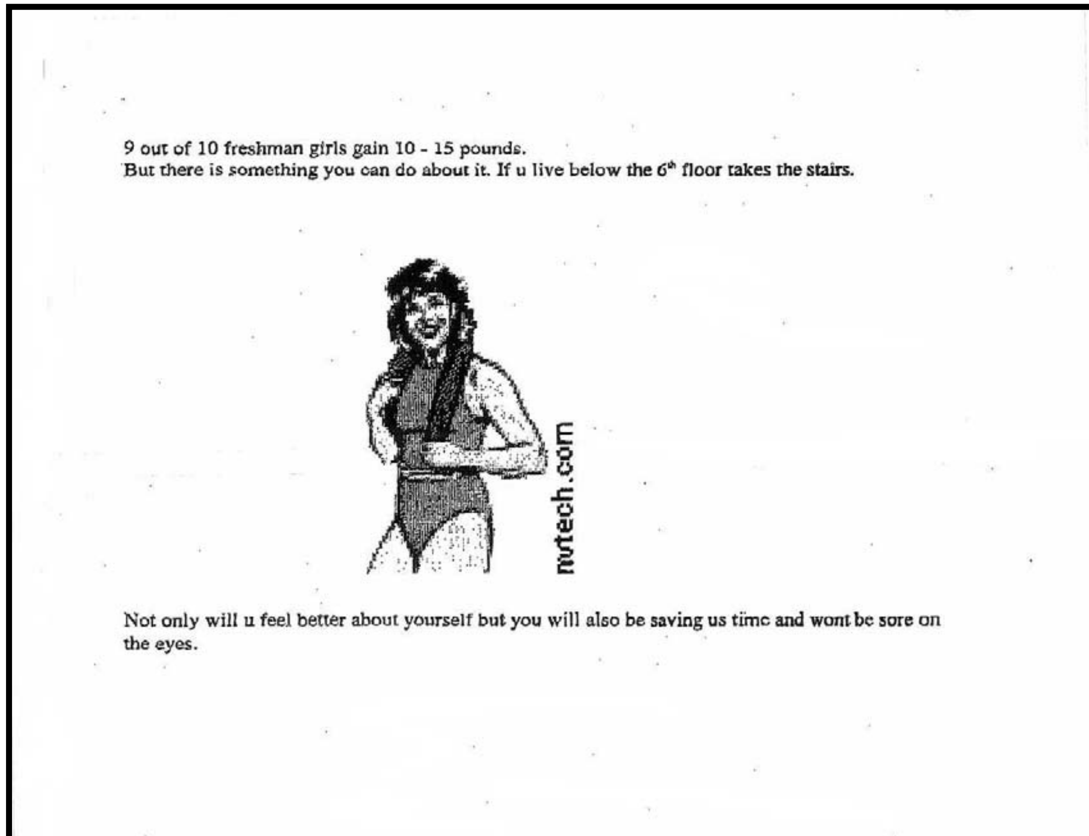
Colleges and universities are obligated by federal law to maintain policies and practices aimed at preventing this type of genuine harassment from happening on their campuses. Unfortunately, they often use this obligation to punish protected speech that is absolutely *not* harassment. This misuse of harassment regulations became so widespread that in 2003, the federal Department of Education's Office for Civil Rights (OCR)—which is responsible for the enforcement of federal harassment regulations in schools—issued a letter of clarification to all of America's colleges and universities. Then-Assistant Secretary Gerald Reynolds wrote, "Some colleges and universities have interpreted OCR's prohibition of 'harassment' as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive." Reynolds wrote that "OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution," and concluded that "[t]here is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment." This letter forecloses any argument that federal anti-harassment law requires colleges to adopt speech codes that violate the First Amendment.

In spite of this letter, however, hundreds of universities persist in maintaining ludicrously broad definitions of harassment and in punishing students for constitutionally protected speech.

Here are just a few of many examples:

In 2004, Tim Garneau, then a sophomore at the University of New Hampshire (UNH), was annoyed with the high wait time for the elevators in his dormitory. He blamed some students' practice of always taking the elevator instead of the stairs—even when they were only going up or down one floor—for slowing down the elevators.

In response, Garneau posted copies of the following flyer in the elevators of his dormitory:



Despite the fact that Garneau apologized profusely for offending anyone after a resident director discovered he had posted the flyer, UNH found Garneau guilty of "harassment" (as well as "disorderly conduct" and violating the "affirmative action policy") for posting this flyer and expelled him from his dormitory. Garneau's speech in this case was unquestionably protected, and the findings against him were gross violations of UNH's First Amendment obligations. FIRE intervened on Garneau's behalf and the university eventually dropped the charges, but not before Garneau spent several weeks living out of his car because of his expulsion from the dorms.

Other universities define harassment to include, more or less, anything that would offend anyone at any time:

- At Cal Tech, harassment includes any speech that "demeans…another because of his or her personal characteristics or beliefs."
- At Macalester College, harassment includes "speech that makes use of inappropriate words or non-verbals." The school does not define what constitutes an inappropriate word, instead leaving students to guess at what might be prohibited.
- Princeton University states that sexual harassment may be "intentional or accidental, subtle or obvious." This sharply contrasts with the definition of real harassment, which is a severe and pervasive pattern of conduct that effectively bars the victim's educational access—there is nothing subtle about that!

These examples, along with many others, demonstrate that many colleges and universities do not limit themselves to the narrow definition of "harassment" that is outside the realm of constitutional protection. Instead, they abuse the term to prohibit broad categories of speech that do not even *approach* actual harassment. And they persist despite the fact that many such policies have been struck down by federal courts.[8] These vague and overly broad harassment policies deprive students and faculty of their free speech rights.

Policies on Tolerance, Respect, and Civility

Many colleges and universities use laudable goals like tolerance and civility to justify policies that violate students' free speech rights. While a university has every right to actively promote a tolerant and respectful atmosphere on campus, a university that claims to respect free speech must not limit speech to only the inoffensive and agreeable.

Here are some examples of policies on tolerance, respect, and civility from the 2005-2006 academic year:

- UNC-Greensboro prohibits "disrespect for persons."
- West Chester University of Pennsylvania prohibits "any actions which demonstrate a lack of respect for the human rights and personal dignity of any individual."
- Saint Cloud State University bans "any derogatory remarks about a student's race, class, age, gender, or physical limitations."
- Rutgers University prohibits "'joking' comments (between friends, roommates, floormates)…which may be racist, sexist, heterosexist (homophobic)," even when "it is believed or discovered that the perpetrator(s) has no specific or general intent to harm an individual or group."

[8] *See, e.g.*, *Doe v. Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (holding that the University of Michigan's discriminatory harassment policy was unconstitutionally broad); *Booher v. Board of Regents, Northern Kentucky University*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. 1998) (holding that Northern Kentucky University's sexual harassment policy was unconstitutionally broad).

Disorderly Conduct Policies

When one hears the term "disorderly conduct," one probably thinks of rowdy, perhaps drunken, behavior—pushing, shoving, throwing, maybe even indecent exposure. This is the type of conduct that a disorderly conduct policy should regulate. Instead, many universities slip burdensome restrictions on speech into their disorderly conduct policies, turning those policies from legitimate behavioral restrictions into speech codes. For example, in the 2005-2006 academic year, "disorderly conduct" included:

- "Using offensive speech or behavior of a biased or prejudiced nature related to one's personal characteristics." (North Carolina School of the Arts)
- "Vulgar language." (Texas Southern University)
- Any "offensive communication not in keeping with community standards." (Furman University)
- "Behavior that annoys." (William Paterson University).

What's more, universities regularly use disorderly conduct policies to punish students for their speech. Tim Garneau, the UNH student who posted a flyer containing a mild "fat joke" in his dorm's elevator, was initially found guilty of disorderly conduct as well as harassment. In 2002, Syracuse University charged a student with disorderly conduct for dressing as Tiger Woods at several graduation costume parties.

Free Speech Zones

Universities have a right to enact reasonable time, place, and manner restrictions that prevent demonstrations and speeches from unduly interfering with the educational process. For example, a university can prohibit students from demonstrating inside an academic building. Public universities cannot, and private universities that promise free speech should not, however, limit free speech to only small or remote areas of campus, or regulate speeches and demonstrations on the basis of viewpoint.

Many universities have regulations creating "free speech zones"—regulations that limit rallies, demonstrations, and speeches to small or out-of-the-way "zones" on campus.

For example, Texas Tech University, a school of 28,000 students, used to limit speeches and demonstrations to a free speech "gazebo" (pictured below) that was approximately twenty feet in diameter:

After FIRE challenged the free speech gazebo, Texas Tech greatly expanded its free speech area, and was forced to expand it even further after students successfully challenged the constitutionality of Texas Tech's speech codes in federal court.

In addition to restricting speech to limited areas of campus, many universities also have policies requiring advanced notice for any demonstration, rally, or speech. Such "prior restraints" on speech are generally inconsistent with the First Amendment. From a practical standpoint, it is easy to understand why such regulations are burdensome. Demonstrations and rallies are often spontaneous responses to unfolding events. Requiring people to wait 24 or even 48 hours to hold such a demonstration detracts from the demonstrators' message by rendering it untimely. Moreover, requiring demonstrators to obtain a permit from the university, without explicitly setting forth viewpoint-neutral criteria by which permit applications will be assessed, is an invitation to administrative abuse.

Numerous universities maintained questionable "free speech zones" and prior-approval policies during the 2005-2006 academic year:

- The University of Georgia limits speeches and demonstrations to two plazas on campus, and requires that "Marches, speeches, planned for campus areas must be approved by the Director of Student Activities at least 48 hours in advance and receive a permit for the gathering."
- Delta State University in Mississippi requires that "Any student parade, serenade, demonstration, rally, and/or other meeting or gathering for any purpose conducted on the campus of Delta State University must be scheduled with the Vice President for Student Affairs at least two days in advance of the event."

- The University of Illinois–Chicago limits demonstrations to four locations on campus and requires 48-hour advance notice.

CONCLUSION: WHAT CAN BE DONE?

The good news for free speech is that the type of restrictions discussed in this report can be defeated. Often, the quickest way to defeat them is through public exposure—universities are frequently unwilling to defend these policies in the face of public criticism. In the past year alone, public exposure has brought down a number of speech codes at both public and private universities. For example:

- Albertson College of Idaho changed its policies last winter after being named FIRE's Speech Code of the Month in July 2005, an "honor" that brought Albertson negative publicity. Albertson completely did away with the offending policy, which prohibited "[a]ny comments or conduct relating to a person's race, gender, religion, disability, age or ethnic background that fail to respect the dignity and feelings of the individual," and in its place inserted a statement supporting students' right to free speech.
- In a report issued in January 2006 (in conjunction with the Pope Center for Higher Education Policy), FIRE publicly chastised Appalachian State University for its policy banning "insults, taunts, or challenges directed toward another person." After reading FIRE's report, a graduate student at Appalachian State began pressuring the administration to change the policy. In March 2006, Appalachian State administrators made FIRE aware that the policy had been repealed and removed from the university's website.
- Last spring, student activists at the University of Nevada at Reno began publicly protesting the university's free speech zones, which limited demonstrations and speeches to four small or remote areas of the university's campus. The students contacted both FIRE and the ACLU of Nevada, who helped draw public attention to the controversy. After several months of pressure, the administration adopted a new policy opening the entire campus to free speech.

At public universities, unconstitutional policies can also be defeated in court. Speech codes have been struck down in federal courts across the country, including in Michigan, Pennsylvania, Texas, and Wisconsin. Any "red-light" policy in this report that is in force at a public university is extremely vulnerable to a constitutional challenge.

The suppression of free speech at American universities is a national scandal. But supporters of liberty should take heart: while many colleges and universities might seem at times to believe that they exist in a vacuum, the truth is that neither our nation's courts nor its people look favorably upon speech codes or other restrictions on basic freedoms.

APPENDIX A: STATES BY GEOGRAPHICAL REGION

Midwest	**Northeast**
Illinois Indiana Iowa Kansas Michigan Minnesota Missouri Nebraska North Dakota Ohio Oklahoma South Dakota Wisconsin	Connecticut Delaware District of Columbia Maine Maryland Massachusetts New Hampshire New Jersey New York Pennsylvania Rhode Island Vermont
South	**West**
Alabama Arkansas Florida Georgia Kentucky Louisiana Mississippi North Carolina South Carolina Tennessee Texas Virginia West Virginia	Alaska Arizona California Colorado Hawaii Idaho Montana New Mexico Nevada Oregon Utah Washington