

Spotlight on Speech Codes

2007



The State of Free Speech on our Nation's Campuses

A REPORT OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION


FIRE

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION

Defending Individual Rights in Higher Education

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For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

- U.S. Supreme Court, *Rosenberger v. Rector and Visitors of the University of Virginia* (1995)

INTRODUCTION

Last year, the Foundation for Individual Rights in Education (FIRE) conducted its first-ever comprehensive study of restrictions on speech at America's colleges and universities, *Spotlight on Speech Codes 2006: The State of Free Speech on our Nation's Campuses*. In light of the essentiality of free expression to a truly liberal education, our findings were deeply disappointing. Between September 2005 and September 2006, FIRE surveyed over 330 schools and found that over 68 percent of those schools explicitly prohibited speech that, outside the borders of campus, is protected by the First Amendment to the U.S. Constitution.

This year, FIRE is proud to present our second annual report on the state of speech codes on America's college campuses. This year's report contains data on additional public universities; we also added enrollment data to the information we collected on colleges and universities to bring you a clearer idea of the sheer number of students affected by restrictive speech codes.

As was the case last year, some of the restrictions on speech FIRE discovered would be laughable if they weren't so serious. Some highlights from this year's research include:

- Northeastern University in Boston prohibits students from using the university's information systems to "[t]ransmit or make accessible material, which in the sole judgment of the University is offensive...."
- Florida Gulf Coast University prohibits "expressions deemed inappropriate."
- At The Ohio State University, students in the residence halls are instructed: "Do not joke about differences related to race, ethnicity, sexual orientation, gender, ability, socioeconomic background, etc."

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 magnitude 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 famously said, "Sunlight is the best of disinfectants."

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 28, 2006 “America’s Best Colleges” issue of *U.S. News & World Report*. FIRE surveyed an additional 196 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, protected 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,¹ 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.

NOT RATED: 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 freedom of speech, FIRE does not rate that university.² Of the 346 schools surveyed in this report, FIRE rated 340 schools as red, yellow, or green light, and did not rate 6 schools.³

¹ 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).

² For example, Worcester Polytechnic Institute (WPI) is quite clear in its policies that students entering WPI are not guaranteed robust free speech rights. For example, WPI’s student code of conduct explicitly states that “[T]he WPI community recognizes that membership in this particular academic community is freely sought and freely granted by and to its members, and that within this membership group certain specific behaviors that may be accepted by society in general cannot be accepted within an academic community without hindering the explicit goals of that academic community.” It would be clear to anyone reading WPI’s policies that they were not entitled to unfettered free speech at WPI.

FINDINGS

Of the 346 schools reviewed by FIRE, 259 received a red-light rating (75%), 73 received a yellow-light rating (21%), and only 8 received a green-light rating (2%). FIRE did not rate 6 schools (2%).⁴ The increase in the percentage of schools given a red-light rating as compared to last year's report is due primarily to improvements in FIRE's research methods over the past year. Universities are adept at concealing restrictions on speech in numerous locations within student materials. With increased resources and more years of research experience, however, FIRE has become equally skilled at uncovering these restrictions, leading to a number of previously yellow light universities being reclassified as red light.

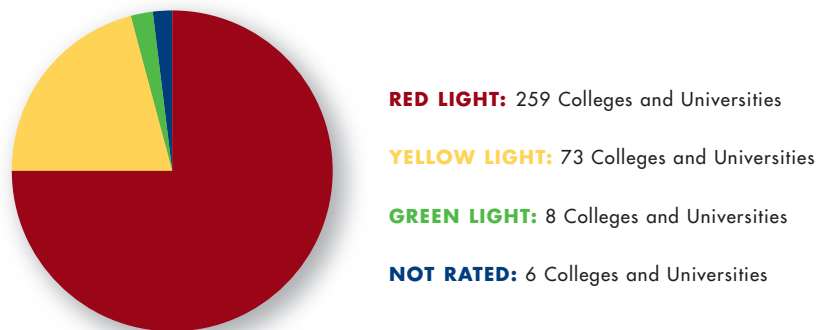


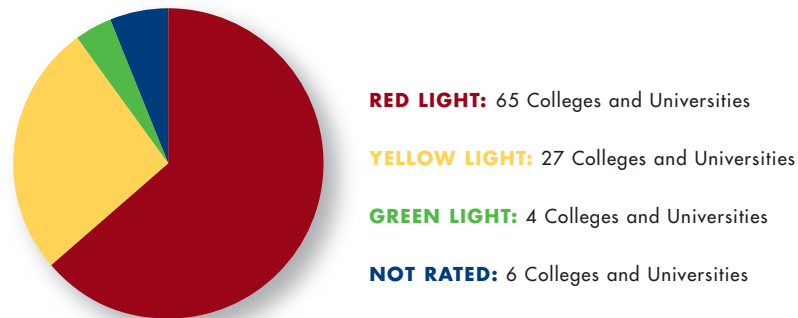
Figure 1: Schools by Rating

Like last year, the data showed that in spite of 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 2006–2007 school year, 102 were private and 244 were public. Of the private schools reviewed, 64% received a red-light rating, 26% received a yellow-light rating, 4% received a green-light rating, and 6% were not rated. (See Figure 2, below).

³ FIRE did not rate the following schools: Bard College, Baylor University, Boston College, Brigham Young University, Worcester Polytechnic Institute, and Yeshiva University.

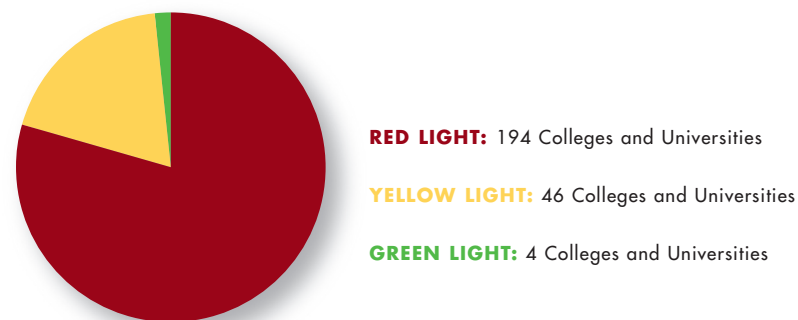
⁴ See Appendix B for a full list of schools by rating.

Figure 2: Speech Codes at Private Colleges and Universities



In contrast, of the public schools reviewed, a full 79% received a red-light rating, 19% 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



As in last year’s report, the data showed uniformity among the geographic regions of the United States with respect 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 geographic regions: the Northeast, the Midwest, the South, and the West.⁵ The percentage of institutions having red-light speech codes varied from 71% in the West to 77% in the Northeast. The West had the highest percentage of yellow-light institutions (27%) and no green-light institutions at all. The Northeast and the South tied for the highest number of green-light institutions, with three each.

⁵ See Appendix A for a list of the states contained in each geographic region.

Figure 4: Speech Codes at Northeastern Colleges and Universities

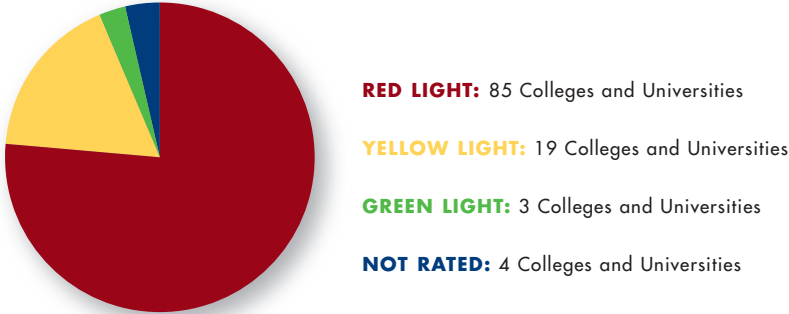


Figure 5: Speech Codes at Midwestern Colleges and Universities

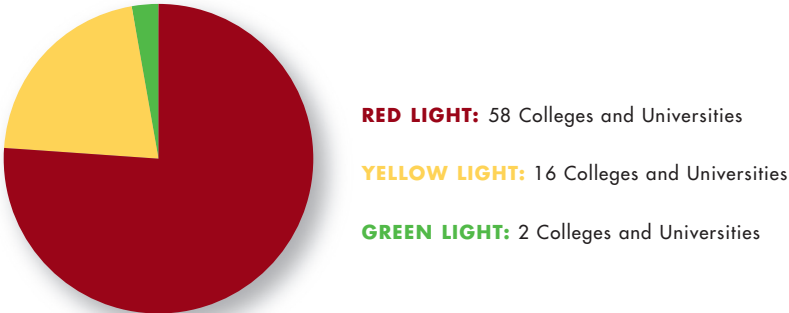


Figure 6: Speech Codes at Southern Colleges and Universities

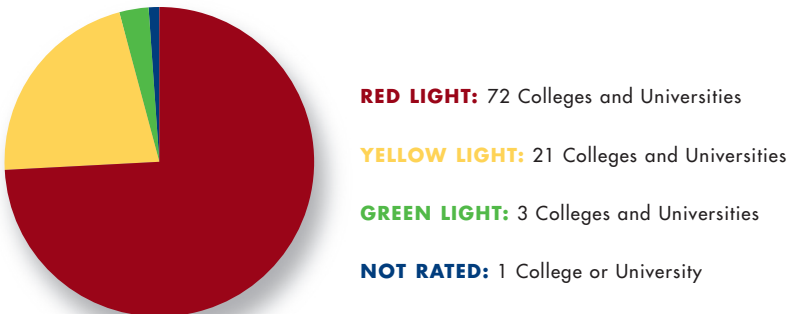
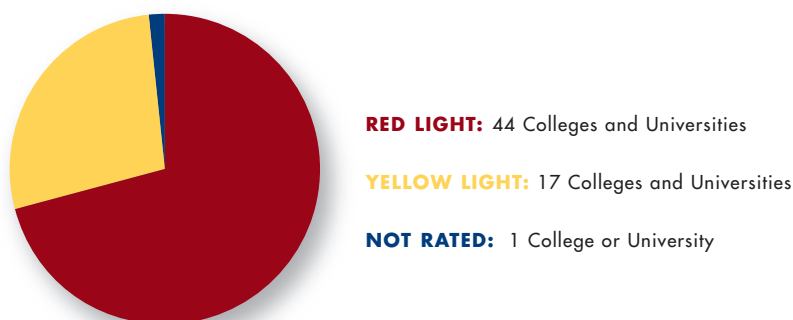
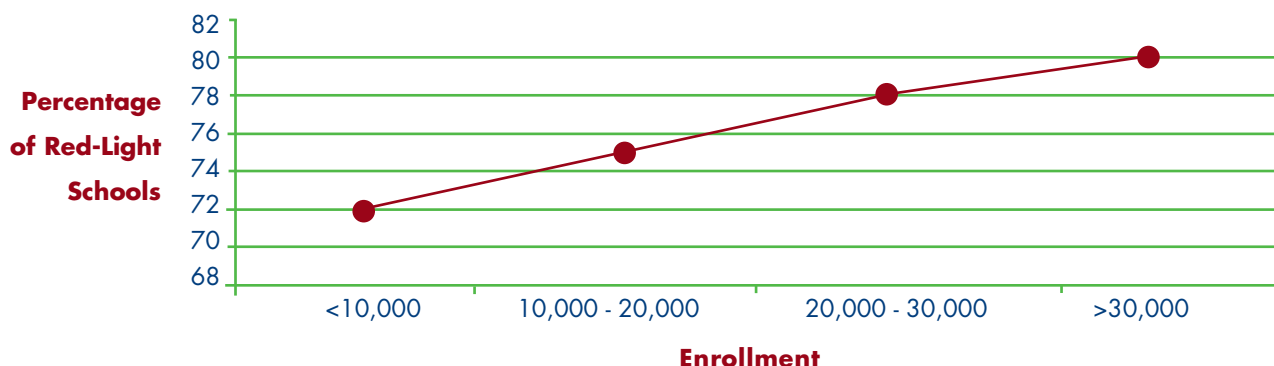


Figure 7: Speech Codes at Western Colleges and Universities



One of FIRE’s most striking findings was the apparent relationship between enrollment levels and restrictions on speech. Among schools with a total enrollment under 10,000 students, 72% were rated red light. Among schools with an enrollment of between 10,000 and 20,000 students, 75% were rated red light. Among schools with an enrollment of between 20,000 and 30,000 students, 78% were rated red light. And among schools with a total enrollment over 30,000 students, a full 80% were rated red light. (See Figure 8, below). This figure—in terms of how many students are affected by unconstitutional speech codes—is striking. FIRE surveyed 35 universities with an enrollment of over 30,000 students, 28 of which were rated red light. The total enrollment at those 28 schools alone is 1,033,080 students. The total number of students enrolled at all red-light institutions is 3,752,906.

Figure 8: Percentage of Red-Light Schools by Enrollment



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, female and minority enrollment increased. College administrators were concerned 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 speech codes.

The administrators who enacted speech codes, however, often ignored or did not consider the legal and constitutional ramifications of placing such restrictions on speech, 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, Shippensburg University of Pennsylvania, and Temple University. Despite clear legal precedent, however, the majority of institutions—including some of those that have been successfully sued—still maintain unconstitutional speech codes.⁶

PUBLIC UNIVERSITIES VS. PRIVATE UNIVERSITIES

The First Amendment prohibits the government—including governmental entities such as state colleges and universities—from interfering with the freedom of speech. A good rule of thumb is that if a state law would be declared unconstitutional for violating the First Amendment, a similar regulation at a state college or university is equally unconstitutional.

The guarantees of the First Amendment generally do not apply to students at private colleges and universities,⁷ because the First Amendment regulates only government—not private—conduct. And although acceptance of federal funding does confer certain obligations upon private colleges, compliance with the First Amendment is not one of them. This does not mean, however, 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, Tufts University proclaims that it is “an open campus committed to the free exchange of ideas,” and tells students that “[w]e should cherish the opportunity to be learning in a place where controversial expression is embraced.” Northwestern University promises the right “to speak freely, and to exercise the civil rights to which any citizen of the United States is entitled.” Yet both of these universities prohibit a great deal of speech that would be protected by the First Amendment in society at large.

⁶ 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.”)

⁷ Although the First Amendment does not regulate private universities, this does not mean that all private universities are legally free to restrict their students' free speech rights. For example, 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.”

“Simply put, the overwhelming majority of speech is protected by the First Amendment.”

WHAT EXACTLY IS ‘FREE SPEECH,’ AND HOW DO UNIVERSITIES CURTAIL 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); harassment; true threats; obscenity; and libel. If the speech in question does not fall within one of these exceptions, it is in all likelihood protected speech.

Some of these categories are frequently misused by universities to punish constitutionally protected speech. These are instances where the written policy at issue may be constitutional—for example, a prohibition on “incitement”—but its application may not be. Therefore, it is important for students, faculty, and the public to understand what these narrow exceptions to free speech actually mean so that they can be aware when they are being misapplied.

In light of the horrific events that occurred earlier this year at Virginia Tech, it is no doubt understandable that many, if not all, university administrations have become more vigilant about preventing acts of violence on their campuses. However, this does not in any way give them the authority to censor or punish protected speech. Since Virginia Tech, FIRE has noticed an increased trend among universities to use otherwise legitimate prohibitions on “threats” to punish constitutionally protected speech.

The Supreme Court has narrowly defined “true threats” to include only “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). The Court also defined “intimidation,” in the constitutionally proscribable sense, as a “type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Id. at 360. Thus, neither term would encompass, for example, a vaguely worded statement which is not directed at any one in particular.

Nevertheless, schools including Valdosta State University (VSU) have increasingly manipulated their policies prohibiting threats and words of intimidation. Earlier this year, a VSU student was placed on “administrative withdrawal” and ordered to undergo psychological treatment as a condition of his readmission for publicly protesting the school’s decision to erect two new parking decks on campus. Student T. Hayden Barnes—concerned with the environmental impact of the construction—met with VSU President Ronald Zaccari to express his opposition to the project. Later, Barnes posted a collage of pictures to his Facebook.com page, including pictures of Zaccari, a parking deck, a bulldozer excavating trees, a flattened globe marked by a tire tread, automobile exhaust, a gas mask, an asthma inhaler, a public bus underneath the “not allowed” symbol, United States currency, and a photocopy of the Climate Change Statement of the American College & University Presidents’ Climate Commitment. The collage was also marked with a variety of captions, including one referring to the proposed parking structure as the “Zaccari Memorial Parking Garage,” a sarcastic reference to concerns Zaccari had apparently expressed about his “legacy” as president of VSU.

Shortly thereafter, Barnes found a notice of administrative withdrawal under his door, informing him that his actions constituted “a specific threat to [Zaccari’s] safety and a general threat to the safety of the campus.” As FIRE stated in a letter to VSU, however:

The caption utterly fails to meet the exacting legal definition of a “true threat” as articulated by the Supreme Court in *Virginia v. Black*, 538 U.S. 343, 359 (2003), in which the Court held that only “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals” are outside the boundaries of First Amendment protection. The idea that a reference to a parking garage named after a university president could constitute a serious threat upon that president’s life strains credibility beyond the breaking point.

Similarly, at Hamline University in Minnesota, student Troy Scheffler was suspended for sending “threatening” messages after he sent e-mails suggesting that the Virginia Tech massacre might have been stopped if students had been allowed to carry concealed weapons on campus. Neither of his e-mails even approached the legal definition of a threat. Like T. Hayden Barnes at VSU, Troy Scheffler was informed that he would have to undergo a mental health evaluation in order to be readmitted to the University.

FIRE has also noticed an increased propensity on the part of university administrations to restrict speech that deeply offends other students on the basis that it constitutes “incitement.” The basic concept, as administrators see it, is that offensive or provocative speech will anger those who disagree with it, perhaps moving them to commit violence. While it is understandable that administrators want to prevent the occurrence of violence on their campuses, this is an impermissible misapplication of the incitement doctrine.

Incitement, in the legal sense, does not refer to speech that may lead to violence on the part of those opposed to it or angered by it, but rather to speech that will lead those who *agree with it* to commit immediate violence. In other words, the danger is that certain speech will convince listeners who agree with it to take immediate unlawful action. To apply the doctrine to an opposing party’s reaction to speech is to essentially convert the doctrine into an impermissible “heckler’s veto.”

The precise standard for “incitement to violence” is laid out in the Supreme Court’s decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). There, the Court held that the state may not “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 and is likely to incite or produce such action.” 395 U.S. at 447 (emphasis in original). This is an exacting standard, as evidenced by its application in subsequent cases. For instance, the Supreme Court held in *Hess v. Indiana*, 414 U.S. 105 (1973), that a man who had loudly stated, “We’ll take the fucking street later” during an anti-war demonstration did not intend to incite or produce immediate lawless action (the Court found that “at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time”), and was therefore not guilty under a state disorderly conduct statute. 414 U.S. at 108-09. The fact that the Court ruled in favor of the speaker in spite of the use of such strong and unequivocal language underscores the narrow construction that has traditionally been given to the doctrine and its requirements of likelihood and immediacy.

Yet college administrations have been all too willing to act in defiance of this jurisprudence. A perfect illustration of the abuse of the “incitement to violence” doctrine comes from San Francisco State University (SFSU). In 2006, the SFSU College Republicans faced an allegation of “attempts to incite violence and create a hostile environment” after holding an anti-terrorism rally at which participants stepped on pieces of paper they had painted to resemble Hamas and Hezbollah flags. The University’s logic behind the charge was not that the students were advocating violence or lawless behavior on the part of those who agreed with them. Rather, their basis for the charge was that offended students might be moved to violence. Clearly, this turns the doctrine on its head, and stands in stark contrast to the types of scenarios where it actually could be applied, such as a speaker exhorting a violent and angry crowd to attack a government building, then and there. It is a flagrant abuse of “incitement to violence” to use that phrase any time one is faced with controversial or provocative speech.

FIRE also frequently sees universities misuse prohibitions on “obscenity” to punish protected speech. Like “incitement,” obscenity—in the constitutionally proscribable sense—has a very specific meaning. The Supreme Court has held that obscene expression, 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*, 413 U.S. 15 (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*, 403 U.S. 15 (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.

Now that we have discussed the ways in which universities misuse legitimate restrictions to prohibit free speech, we will turn to the innumerable university policies that restrict free speech on their face. 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 student-on-student harassment as conduct “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). 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*, 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 two of many examples:

In late 2006, Johns Hopkins University found a student guilty of "harassment" for posting a Halloween party invitation on Facebook.com that, according to the university, "contained offensive racial stereotyping." His punishment for posting the invitation—which was later reduced, but not eliminated, after FIRE intervened—included a yearlong suspension from the university, during which time the student would not be permitted to set foot on campus; completion of 300 hours of community service; an assignment to read 12 books and do a reflection paper on each; and mandatory attendance at a workshop on diversity and race relations.

In May 2007, Tufts University's conservative student publication, *The Primary Source*, was found guilty of violating the school's harassment policy for publishing two satiric articles that offended members of the campus community: a Christmas carol, entitled 'O Come All Ye Black Folk,' which harshly lampooned affirmative action at Tufts, and a satiric advertisement entitled "Islam—Arabic Translation: Submission," which ridiculed Tufts' "Islamic Awareness Week" by highlighting militant Islamic terrorism.

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

- At the University of Iowa, sexual harassment "occurs when somebody says or does something sexually related that you don't want them to say or do, regardless of who it is." Examples include people "talking about their sexual experiences" or "[t]elling sexual jokes, innuendoes, and stories, or comments (about your clothes or body, or someone else's.)"
- At Kansas State University, "gender harassment" includes "generalized sexist statements and behavior that convey insulting or degrading attitudes about women."
- Lewis-Clark State College defines "harassment" as "[a]ny practice by a group or an individual that detains, embarrasses, or degrades a member of the College community, endangers his/her health, jeopardizes his/her safety, or interferes with class attendance or the pursuit of education or work responsibilities and which occurs on College-owned or controlled property or while the violator is attending or participating in a College-sponsored event or activity...."

“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.”

These examples, along with many others, demonstrate that colleges and universities often 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 invoke 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 restrictive policies on tolerance, respect, and civility from the 2006–2007 academic year:

- At Tulane University, “[a]ll individuals and/or groups of the Tulane University community are expected to speak and act with scrupulous respect for the human dignity of others, both within the classroom and outside it, in social and recreational as well as academic activities.”
- Johns Hopkins University prohibits “[r]ude, disrespectful behavior.”

Disorderly Conduct Policies

When one hears the term “disorderly conduct,” one probably thinks of rowdy, perhaps drunken, behavior—pushing, shoving, or 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 2006–2007 academic year, “disorderly conduct” included:

- “Actions or attempted actions that annoy or disturb others regardless of their intent.” (Georgetown University)
- “[C]onduct which is offensive or annoying to others.” (Jackson State University)
- “Exhibiting behavior that is considered to be disruptive, contemptuous or disrespectful of students, administrators, faculty, staff members, University guests, local authorities, or local community members.” (Morehead State University)

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); *Boober v. Board of Regents, Northern Kentucky University*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (holding that Northern Kentucky University’s sexual harassment policy was unconstitutionally broad). See also *DeJohn v. Temple University*, No. 06-778 (E.D. Pa. Mar. 21, 2007) (issuing a permanent injunction against Temple University’s sexual harassment policy).

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. In addition, 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 very recent or still-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.

To take one example, McNeese State University in Louisiana limits students’ right to speak and demonstrate to just two “zones” on campus, and puts onerous restrictions on the use of even those zones. The regulations provide that students may only speak in the zones once per week, for a maximum of two hours; that student groups may only demonstrate “once during each Fall, Spring, and summer session in the assigned demonstration zone only”; that applications to use the zones must be received at least 72 hours in advance; and that the zones may only be used from dawn to dusk, Monday through Friday.

Free speech zones are a frequent target of student opposition, and students’ efforts to fight them have met with great success. This past spring, students at Colorado State University (CSU), with support from FIRE, contested a “Peaceful Assembly” policy that designated just one area of campus—the Lory Student Center Plaza—as the “Public Forum” space” at the university and required students to reserve the space two weeks in advance of any planned event. The university responded to the opposition by clarifying that the Lory Student Center Plaza is only a recommended location for gatherings because of its central location, but that free expression is allowed at numerous locations across the campus. The university also clarified that while reservation of space is recommended, it is not required, and that spontaneous assembly is indeed permissible. To celebrate their right to free speech, students held a spontaneous rally on an area of campus outside the designated public forum area.

“Neither our nation’s courts nor its people look favorably upon speech codes or other restrictions on basic freedoms.”

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. For example:

- Fayetteville State University in North Carolina revised its policies for the 2007–2008 academic year after being named FIRE’s Speech Code of the Month in January 2007. Fayetteville State completely revised a policy that was identical to one declared unconstitutional by a federal court. The revised policy is in line with the First Amendment.
- Colorado State University revised several unconstitutional speech codes—including the aforementioned public forum policy—under pressure from FIRE and student activists.

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. This year brought two additional legal victories over unconstitutional speech codes. In March, a federal court in Pennsylvania permanently enjoined Temple University from enforcing an unconstitutional speech code. And in October, a federal court in California temporarily enjoined both San Francisco State University and the California State University system as a whole from enforcing several unconstitutional speech codes (an injunction that will hopefully be made permanent later in the litigation). Any “red-light” policy 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 GEOGRAPHIC REGION

MIDWEST

Illinois
Indiana
Iowa
Kansas
Michigan
Minnesota
Missouri
Nebraska
North Dakota
Ohio
Oklahoma
South Dakota
Wisconsin

NORTHEAST

Connecticut
Delaware
District of Columbia
Maine
Maryland
Massachusetts
New Hampshire
New Jersey
New York
Pennsylvania
Rhode Island
Vermont

SOUTH

Alabama
Arkansas
Florida
Georgia
Kentucky
Louisiana
Mississippi
North Carolina
South Carolina
Tennessee
Texas
Virginia
West Virginia

WEST

Alaska
Arizona
California
Colorado
Hawaii
Idaho
Montana
New Mexico
Nevada
Oregon
Utah
Washington
Wyoming

APPENDIX B: SCHOOLS BY RATING

RED LIGHT

Adams State College	East Stroudsburg University of Pennsylvania
American University	Eastern Kentucky University
Appalachian State University	Eastern Michigan University
Athens State University	Edinboro University of Pennsylvania
Auburn University	Emory University
Auburn University Montgomery	Fitchburg State College
Barnard College	Florida Atlantic University
Bemidji State University	Florida Gulf Coast University
Black Hills State University	Florida International University
Boston University	Florida State University
Bowdoin College	Fordham University
Brandeis University	Fort Lewis College
Brooklyn College, City University of New York	Franklin & Marshall College
Brown University	Frostburg State University
Bryn Mawr College	Furman University
Bucknell University	George Mason University
California Institute of Technology	Georgetown University
California Polytechnic State University	Gettysburg College
California State University - Bakersfield	Governors State University
California State University - Fullerton	Grand Valley State University
California State University - Monterey Bay	Hamilton College
California State University - Northridge	Harvard University
California State University - Sacramento	Harvey Mudd College
California State University - San Bernardino	Haverford College
California University of Pennsylvania	Howard University
Carleton College	Idaho State University
Central Connecticut State University	Illinois State University
Centre College	Indiana State University
Cheyney University of Pennsylvania	Indiana University - Bloomington
Clarion University of Pennsylvania	Indiana University - Purdue University
Colby College	Indianapolis
Colgate University	Indiana University of Pennsylvania
College of the Holy Cross	Indiana University South Bend
Colorado State University	Indiana University, East
Columbia University	Indiana University, Southeast
Connecticut College	Iowa State University
Cornell University	Jackson State University
Dakota State University	Jacksonville State University
Davidson College	Johns Hopkins University
Delta State University	Kansas State University
DePauw University	Kenyon College
Dickinson College	Kutztown University of Pennsylvania
East Carolina University	Lake Superior State University
	Lehigh University

RED LIGHT (Continued)

Lewis-Clark State College
Lincoln University
Lock Haven University of Pennsylvania
Louisiana State University - Baton Rouge
Macalester College
Marquette University
Marshall University
Massachusetts College of Liberal Arts
Massachusetts Institute of Technology
McNeese State University
Mesa State College
Metropolitan State University
Michigan State University
Michigan Technological University
Middle Tennessee State University
Middlebury College
Millersville University of Pennsylvania
Mississippi State University
Missouri State University
Montana State University - Bozeman
Montclair State University
Morehead State University
Mount Holyoke College
Murray State University
New Jersey Institute of Technology
New York University
Nicholls State University
North Carolina A&T State University
North Carolina Central University
North Carolina School of the Arts
North Dakota State University
Northeastern University
Northern Arizona University
Northern Illinois University
Northern Kentucky University
Northwestern University
Oberlin College
Ohio University
Oklahoma State University - Stillwater
Oregon State University
Pennsylvania State University - University Park
Pepperdine University
Princeton University
Purdue University
Rensselaer Polytechnic Institute
Rhode Island College
Rhodes College
Rice University
Richard Stockton College of New Jersey
Rutgers University - New Brunswick
Saginaw Valley State University
Saint Cloud State University
Saint Louis University
San Diego State University
San Francisco State University
San Jose State University
Shippensburg University of Pennsylvania
Skidmore College
Slippery Rock University of Pennsylvania
South Dakota State University
Southern Illinois University at Carbondale
Stanford University
State University of New York - Albany
State University of New York - Brockport
State University of New York - Fredonia
State University Of New York - University at Buffalo
State University of New York College of Environmental Science and Forestry
Stevens Institute of Technology
Syracuse University
Tennessee State University
Texas A&M University - College Station
Texas Southern University
Texas Tech University
Texas Woman's University
The College of New Jersey
The College of William and Mary
The Ohio State University
Troy University
Troy University - Dothan
Tufts University
Tulane University
University of Alabama
University of Alabama at Birmingham
University of Alaska Anchorage
University of Alaska Fairbanks
University of Alaska Southeast
University of Arizona
University of Arkansas - Fayetteville
University of California - Riverside
University of California, Davis
University of California, Los Angeles
University of California, San Diego
University of California, Santa Barbara

RED LIGHT (Continued)

University of California, Santa Cruz
 University of Central Arkansas
 University of Connecticut
 University of Delaware
 University of Florida
 University of Georgia
 University of Houston
 University of Idaho
 University of Illinois at Chicago
 University of Illinois at Springfield
 University of Illinois at Urbana-Champaign
 University of Iowa
 University of Kansas
 University of Louisville
 University of Maine
 University of Maine - Presque Isle
 University of Maryland - College Park
 University of Massachusetts - Amherst
 University of Massachusetts at Lowell
 University of Miami
 University of Michigan - Ann Arbor
 University of Minnesota - Morris
 University of Minnesota - Twin Cities
 University of Mississippi
 University of Missouri at St. Louis
 University of Missouri-Rolla
 University of Montana
 University of Montevallo
 University of Nevada, Las Vegas
 University of New Hampshire
 University of New Mexico
 University of North Alabama
 University of North Carolina - Asheville
 University of North Carolina - Chapel Hill
 University of North Carolina - Charlotte
 University of North Carolina - Greensboro
 University of North Carolina - Pembroke
 University of North Carolina - Wilmington
 University of Northern Colorado
 University of Notre Dame
 University of Oklahoma
 University of Oregon
 University of Pittsburgh
 University of Rhode Island
 University of Rochester
 University of South Alabama
 University of South Carolina Columbia
 University of South Florida

University of Southern California
 University of Southern Mississippi
 University of Texas at Arlington
 University of Texas at Austin
 University of Texas at El Paso
 University of Tulsa
 University of Utah
 University of Vermont
 University of Virginia
 University of West Alabama
 University of Wisconsin - Green Bay
 University of Wisconsin - La Crosse
 University of Wisconsin - Madison
 University of Wisconsin - Oshkosh
 Utah State University
 Utah Valley State College
 Vassar College
 Wake Forest University
 Washington University in St. Louis
 Wellesley College
 Wesleyan University
 West Chester University of Pennsylvania
 West Virginia University
 Western Carolina University
 Western Michigan University
 Western State College of Colorado
 Westfield State College
 William Paterson University
 Winston Salem State University
 Worcester State College
 Youngstown State University

YELLOW LIGHT

Bloomsburg University of Pennsylvania
 Case Western Reserve University
 Central Michigan University
 Claremont McKenna College
 Clark University
 Clemson University
 Colorado College
 Evergreen State College
 Fayetteville State University
 Framingham State College
 George Washington University
 Georgia Institute of Technology
 Georgia State University

YELLOW LIGHT (Continued)

Grinnell College
Henderson State University
Kentucky State University
Lafayette College
Mansfield University of Pennsylvania
Miami University of Ohio
Montana Tech of the University of Montana
North Carolina State University - Raleigh
Northeastern Illinois University
Northwestern State University
Occidental College
Pomona College
Sarah Lawrence College
Scripps College
Sewanee, The University of the South
Shawnee State University
Smith College
Southern Methodist University
Stony Brook University
Swarthmore College
Trinity College
Union College
University of Alabama in Huntsville
University of California, Berkeley
University of California, Irvine
University of Central Florida
University of Chicago
University of Cincinnati
University of Colorado at Boulder
University of Denver
University of Hawaii at Hilo
University of Kentucky
University of Massachusetts at Dartmouth
University of Missouri - Columbia
University of Nevada, Reno
University of North Dakota
University of Northern Iowa
University of Richmond
University of South Dakota
University of Southern Maine

University of Washington
University of Wisconsin - Eau Claire
Vanderbilt University
Virginia Polytechnic Institute and State University
Washington & Lee University
Washington State University
Wayne State University
Whitman College
Wichita State University
Williams College
Yale University

GREEN LIGHT

Carnegie Mellon University
Cleveland State University
Dartmouth College
Duke University
Elizabeth City State University
University of Nebraska - Lincoln
University of Pennsylvania
University of Tennessee – Knoxville

NOT RATED

Bard College
Baylor University
Boston College
Brigham Young University
Worcester Polytechnic Institute
Yeshiva University



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