

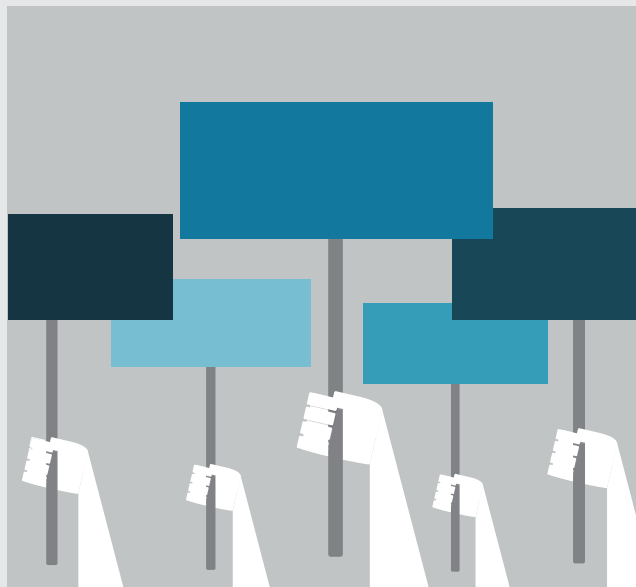
THE STATE OF FREE SPEECH ON
OUR NATION'S CAMPUSES

SPOTLIGHT ON SPEECH CODES 2017



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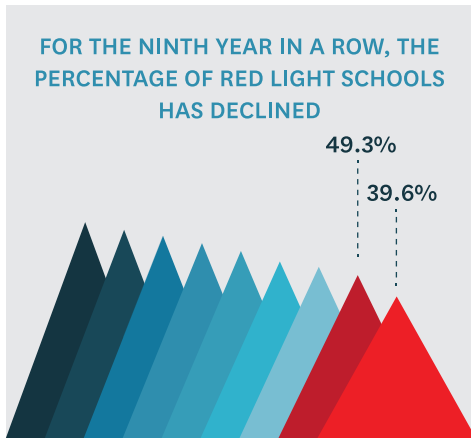
EXECUTIVE SUMMARY

Despite the critical importance of free speech on campus, too many universities—in policy and in practice—censor and punish students’ and faculty members’ expressive activity. One

protected speech. And an unacceptable number of universities continue to punish students and faculty members for constitutionally protected speech and expression.

way that universities do so is through the use of speech codes: policies prohibiting speech that, outside the bounds of campus, would be protected by the First Amendment.

It is imperative, therefore, that those who care about free speech on campus continue to stay vigilant. The decrease in speech codes and the proliferation of free speech policy statements are the result of the relentless work of free speech advocates at FIRE and elsewhere. We must keep up that work to avoid losing ground amid the current of hostility towards free speech that is very much alive on campus and elsewhere.



FIRE surveyed 449 schools for this report and found that 39.6 percent maintain severely restrictive, “red light” speech codes that clearly and substantially prohibit constitutionally protected speech.

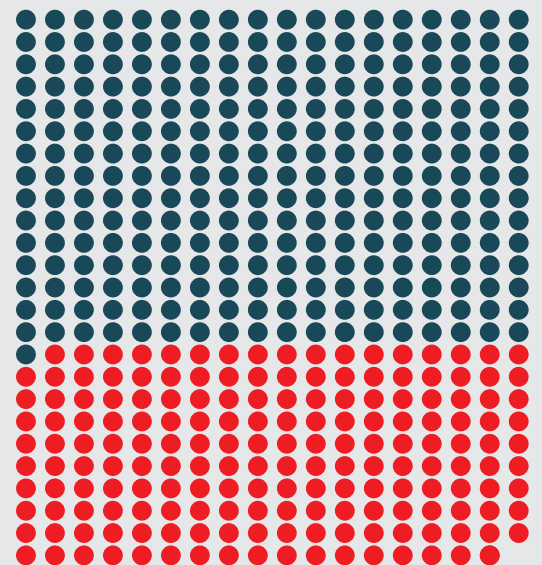
This is the ninth year in a row that the percentage of schools maintaining such policies has declined, and this year’s drop was nearly ten percentage points. (Last year, 49.3 percent of schools earned a red light rating.)

While there have been positive developments, the climate for free speech on campus is in many ways more precarious than ever.

In addition, an unprecedented number of schools have eliminated all of their speech codes to earn FIRE’s highest, “green light” rating: **As of September 2016, 27 schools received a green light rating from FIRE.** This number is up from 22 schools as of last year’s report. In another heartening trend, a growing number of schools are adopting statements in support of free speech modeled after the one adopted by the University of Chicago in January 2015. As of this writing, 20 schools or faculty bodies in FIRE’s Spotlight database had endorsed a version of the “Chicago Statement.”

While there have been positive developments, the climate for free speech on campus is in many ways more precarious than ever. As this report will explore in greater depth, bias reporting systems—Orwellian programs under which students are asked to report on one another for offensive speech—are proliferating at campuses nationwide. Student demands for censorship are increasingly common. The federal government continues to press a definition of sexual harassment that encompasses not only actual harassment but also constitutionally

FIRE SURVEYED 449 SCHOOLS AND FOUND 39.6% MAINTAIN RED LIGHT POLICIES



Public universities are legally bound to protect students' right to free speech.

METHODOLOGY

FIRE surveyed publicly available policies at 345 four-year public institutions and 104 of the nation's largest and/or most prestigious private institutions. Our research focuses in particular on public universities because, as explained in detail below, public universities are *legally* bound to protect students' right to free speech.

FIRE rates colleges and universities as “red light,” “yellow light,” or “green light” based on how much, if any, protected speech their written policies restrict. FIRE defines these terms as follows:



RED LIGHT: A red light institution is one that has at least one policy both clearly and substantially restricting freedom of speech, or that bars public access to its speech-related policies by requiring a university login and password for access.

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 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.

When a university restricts access to its speech-related policies by requiring a login and password, it denies prospective students and their parents the ability to weigh this crucial information prior to matriculation. At FIRE, we consider this denial to be so deceptive and serious that it alone warrants a red light rating.



YELLOW LIGHT: A yellow light institution maintains policies that could be interpreted to suppress protected speech or policies that, while clearly restricting freedom of speech, restrict only narrow categories of speech. For example, a policy banning “verbal abuse” has broad applicability

and poses a substantial threat to free speech, but it is not a clear violation because “abuse” might refer to unprotected speech, such as threats of violence or genuine harassment. Similarly, while a policy banning “posters promoting alcohol consumption” clearly restricts speech, it is relatively limited in scope. Yellow light policies are typically unconstitutional,¹ and a rating of yellow light rather than red light in no way means that FIRE condones a university's restrictions on speech. Rather, it means that in FIRE's judgment, those restrictions do not clearly and substantially restrict speech in the manner necessary to warrant a red light rating.



GREEN LIGHT: If FIRE finds that a university's policies do not seriously threaten campus expression, that college or university receives a green light rating. A green light rating

does not necessarily indicate that a school actively supports free expression in practice; it simply means that the school's *written* policies do not pose a serious threat to free speech.



WARNING: DOES NOT PROMISE FREE SPEECH: FIRE believes that free speech is not only a moral imperative, but also an essential element of a college education. However, private

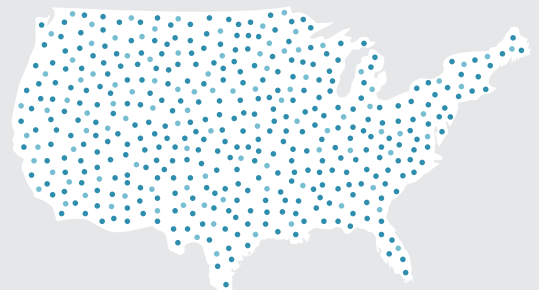
universities are just that—private associations—and as such, they possess their own right to free association, which allows them to prioritize other values above the right to free speech if they wish to do so. Therefore, when a private university *clearly and consistently* states that it holds a certain set of values above a commitment to freedom of speech, FIRE warns prospective students and faculty members of this fact.² Seven surveyed schools meet these criteria.³

¹See, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972) (holding that a Georgia statute prohibiting “opprobrious words or abusive language” was unconstitutional because those terms, as commonly understood, encompassed speech protected by the First Amendment).

²For example, Saint Louis University (SLU) explicitly provides that “speech and expression are not absolute rights at a private institution and must be examined in light of both particular circumstances and the broader values and aspirations of Saint Louis University as a Catholic, Jesuit institution. While restrictions on expression must be reluctant and limited, in some situations they may be deemed appropriate.” *Performance, Presentation, and Speaker (Program) Policy*, SAINT LOUIS UNIVERSITY STUDENT HANDBOOK, at 114, available at <http://www.slu.edu/office-of-student-responsibility-and-community-standards/2016-2017-student-handbook>. Such situations include, according to the Handbook, activities that “will deride, mock or ridicule the Roman Catholic Church or the University's mission and values.” *Id.* at 115. It would be clear to any reasonable person reading this policy that students are not entitled to unfettered free speech at SLU.

³FIRE has designated the following schools as “Warning” schools: Baylor University, Brigham Young University, Pepperdine University, Saint Louis University, Vassar College, Worcester Polytechnic Institute, and Yeshiva University.

FIRE SURVEYED 345 PUBLIC SCHOOLS AND 104 PRIVATE SCHOOLS



FINDINGS

This is the ninth year in a row that the percentage of schools maintaining red light speech codes has fallen.

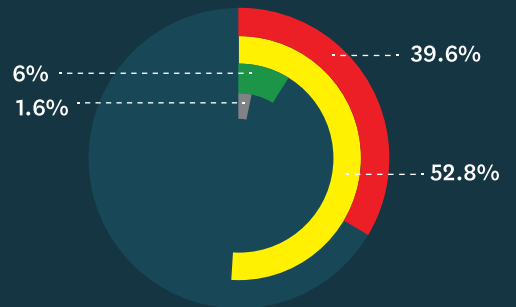
Of the 449 schools reviewed by FIRE, 178—or 39.6 percent—received a red light rating. 237 schools received a yellow light rating (52.8%), and 27 received a green light rating (6%). FIRE did not rate 7 schools (1.6%).⁴

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

⁵Duke University, Indiana University–Purdue University Fort Wayne, the State University of New York–Brockport, the University of Chicago, and the University of Maryland all joined the ranks of green light schools this year.

These are significant findings. This is the ninth year in a row that the percentage of schools maintaining red light speech codes has fallen, and the findings represent a drop of nearly ten percentage points from last year, when 49.3% of schools received a red light rating. Additionally, the number of green light institutions has more than tripled, from 8 institutions nine years ago (2%) to 27 this year (6%).⁵

OF 449 SCHOOLS REVIEWED BY FIRE, 39.6% RECEIVED A RED LIGHT RATING; 52.8%, A YELLOW LIGHT RATING; AND 6%, A GREEN LIGHT RATING. FIRE DID NOT RATE 1.6% OF SCHOOLS IN OUR DATABASE.



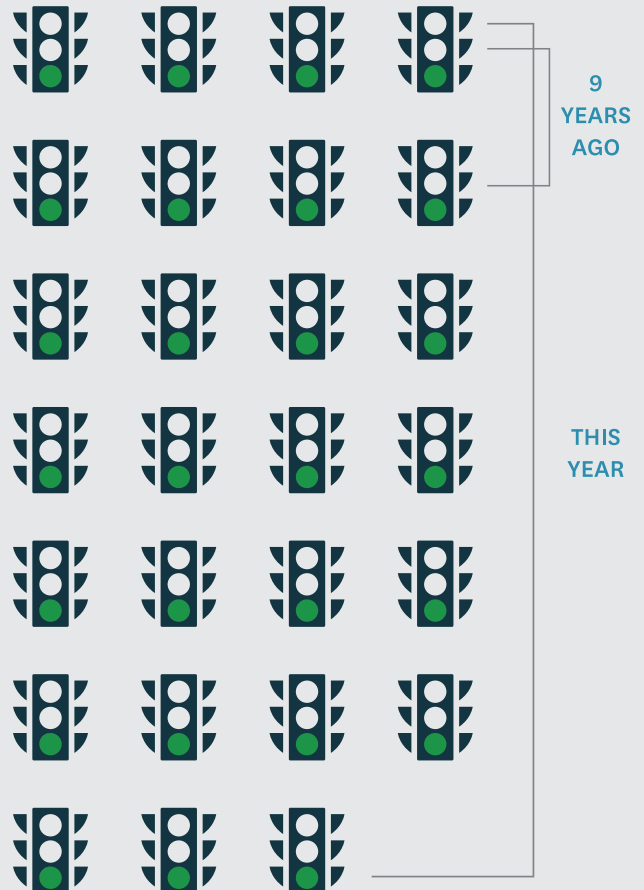
PERCENTAGE OF SCHOOLS BY RATING 2017

OF 449 SCHOOLS REVIEWED BY FIRE, 178 RECEIVED A RED LIGHT RATING, 237 RECEIVED A YELLOW LIGHT RATING, AND 27 RECEIVED A GREEN LIGHT RATING. FIRE DID NOT RATE 7 SCHOOLS.



NUMBER OF SCHOOLS BY RATING 2017

THE NUMBER OF GREEN LIGHT INSTITUTIONS HAS MORE THAN TRIPLED, FROM 8 INSTITUTIONS IN 2008 (2%) TO 27 (6%) THIS YEAR.



GREEN LIGHT SCHOOLS 2008 vs. 2017

PUBLIC COLLEGES AND UNIVERSITIES

The percentage of *public* schools with a red light rating fell dramatically. Nine years ago, 79 percent of public schools received a red light rating. Last year, the figure stood at 45.8 percent. This year, **33.9 percent of public schools received a red light rating.** This dramatic change owes in significant part to the fact that in August 2015, the Chairman of the U.S. House Judiciary Committee, Representative Bob Goodlatte, sent letters to the presidents of red light public schools, demanding answers about those universities' unconstitutional policies.⁶ The letters followed FIRE President and CEO Greg Lukianoff's testimony about speech codes before members of the judiciary committee in the summer of 2015. In his letter, Rep. Goodlatte wrote⁷:

In FIRE's Spotlight on Speech Codes 2015, your institution received a "red light" rating. ... We write to ask what steps your institution plans to take to promote free and open expression on its campus(es), including any steps toward bringing your speech policies in accordance with the First Amendment.

Since public colleges and universities are legally bound to protect their students' First Amendment rights, any percentage above zero is unacceptable, so much work remains to be done. This ongoing positive trend, however, is encouraging. With continued efforts by free speech advocates on and off campus, we expect this percentage will continue to drop.

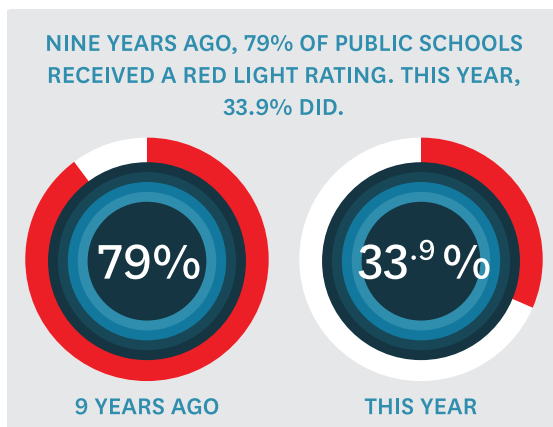
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PRIVATE COLLEGES AND UNIVERSITIES

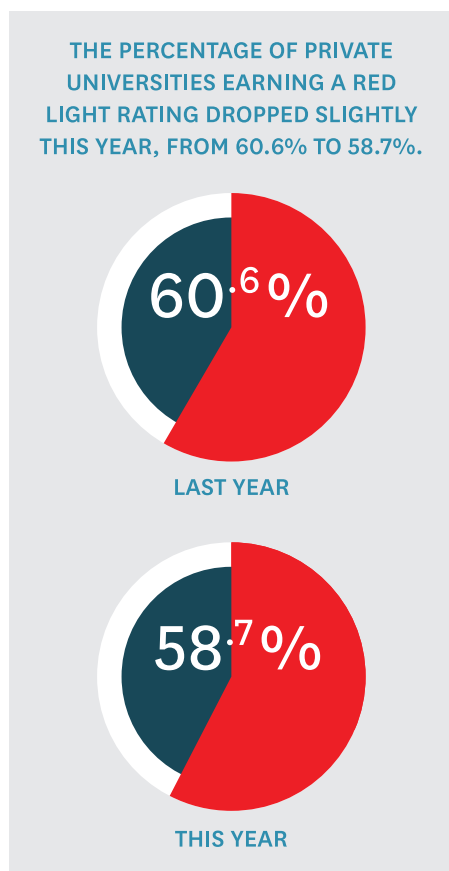
The percentage of private universities earning a red light rating, which stood at 60.6 percent last year, fell slightly to 58.7 percent. While private universities are generally not legally bound by the First Amendment, most make extensive promises of free speech to their students and faculty. Where such promises are made, speech codes impermissibly violate them.

Of the 104 private colleges and universities

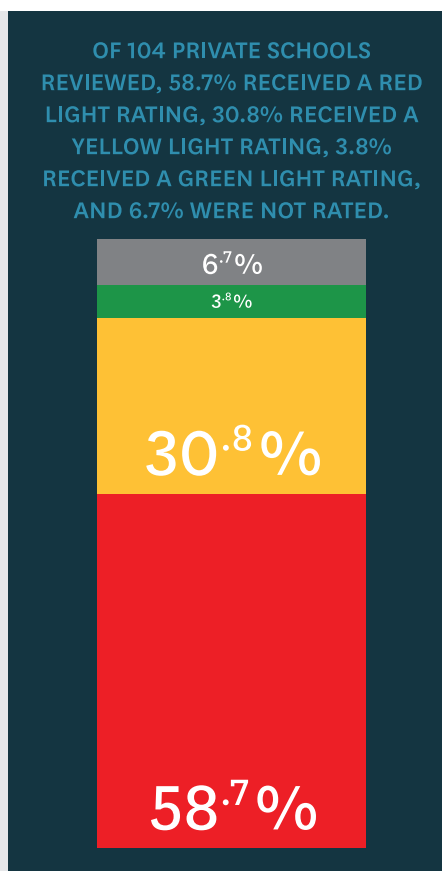
reviewed, 61 (58.7%) received a red light rating, 32 (30.8%) received a yellow light rating, 4 (3.8%) received a green light rating, and 7 (6.7%) were not rated.



COMPARISON OF PUBLIC SCHOOLS 2008 and 2017



COMPARISON OF PRIVATE SCHOOLS 2016 and 2017



PRIVATE SCHOOL RATINGS 2017

⁶Press Release, House of Representatives Judiciary Committee, Chairman Goodlatte Urges Public Colleges and Universities to Update Free Speech Codes (Aug. 25, 2015), available at <http://https://judiciary.house.gov/press-release/chairman-goodlatte-urges-public-colleges-and-universities-to-update-free-speech-codes>.

⁷*Id.*

⁸Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, provides: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

⁹Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROB. 299 (2000).

¹⁰*Id.* at 315.

¹¹Anthony Lewis, *Abroad at Home; Living in a Cocoon*, N.Y. TIMES, Nov. 27, 1995, <http://www.nytimes.com/1995/11/27/opinion/abroad-at-home-living-in-a-cocoon.html>.

¹²*McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *Univ. of Cincinnati Chapter of Young Am. for Liberty v. Williams*, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio Jun. 12, 2012); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *Coll. Republicans at S.F. St. Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. N. Ky. Univ. Bd. of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989). In addition, numerous institutions have voluntarily modified their speech codes as part of settlement agreements. See, e.g., Press Release, Found. for Individual Rights in Educ., *Victory: Texas College Settles Free Speech Lawsuit After Telling Student that Gun Rights Sign Needs ‘Special Permission’* (May 4, 2016), <https://www.thefire.org/victory-texas-college-settles-free-speech-lawsuit-after-telling-student-that-gun-rights-sign-needs-special-permission>; Press Release, Found. for Individual Rights in Educ., *Victory: Lawsuit Settlement Restores Free Speech Rights at Dixie State U. After Censorship of Bush, Obama, Che Flyers* (Sept. 17, 2015), <https://www.thefire.org/victory-lawsuit-settlement-restores-free-speech-rights-at-dixie-state-u-after-censorship-of-bush-obama-che-flyers>.

¹³Several universities that have been the target of successful speech code lawsuits—such as the University of Cincinnati and the University of Michigan—have revised the unconstitutional policies challenged in court but still maintain other, equally unconstitutional policies.

¹⁴California maintains a law that applies the protections of the First Amendment to private, nonsectarian institutions of higher education. Section 94367 of the California Education Code—the so-called “Leonard Law”—provides: “No private postsecondary educational institution shall make or enforce a rule subjecting a 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 I of the California Constitution.” The code further provides: “This section does not apply to a private postsecondary educational institution that is controlled by a religious organization, to the extent that the application of this section would not be consistent with the religious tenets of the organization.”

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. Concerned that these changes would cause tension and that students who finally had full educational access would arrive at institutions only to be offended by other students, college administrators enacted speech codes.

In the mid-1990s, the phenomenon of campus speech codes converged with the expansion of Title IX, the federal law prohibiting sex discrimination in educational institutions receiving federal funds.⁸

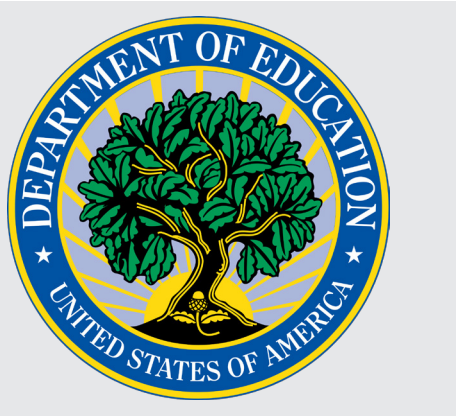
In 1994, the Department of Education’s Office for Civil Rights (OCR)—the federal agency that oversees the implementation and enforcement of Title IX—investigated Santa Rosa Junior College after two women complained about comments made about them on an online college bulletin board that included “anatomically explicit and sexually derogatory terms.”⁹ In a letter to the college, OCR concluded that the offensive speech had created a “hostile educational environment” for the complainants and directed the college to adopt a policy banning, among other things, online

speech that “has the purpose or effect of creating a hostile, intimidating or offensive educational environment.”¹⁰ Soon thereafter, when the University of Massachusetts faced criticism over a broad new proposed harassment policy in 1995, then-chancellor David K. Scott “responded to criticism by suggesting that a code was required by Federal Department of Education regulations.”¹¹

In enacting speech codes, administrators ignored or did not fully consider the philosophical, social, and legal ramifications of placing restrictions on speech, particularly at public universities. As a result, federal courts have overturned speech codes at numerous colleges and universities over the past two decades.¹²

Despite the overwhelming weight of legal authority against speech codes, a large number of institutions—including some of those that have been successfully sued on First Amendment grounds—still maintain unconstitutional speech codes.¹³ It is with this unfortunate fact in mind that we turn to a more detailed discussion of

the ways in which campus speech codes violate individual rights and what can be done to challenge them.



PUBLIC UNIVERSITIES VS. PRIVATE UNIVERSITIES

With limited, narrowly defined exceptions, the First Amendment prohibits the government—including governmental entities such as state universities—from restricting 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 likewise unconstitutional.

The guarantees of the First Amendment generally do not apply to students at private colleges because the First Amendment regulates only government—not private—conduct.¹⁴ Moreover, although acceptance of federal funding does confer some obligations upon private colleges (such as compliance with federal anti-discrimination laws), compliance with the First Amendment is not one of them.

Most private universities explicitly promise freedom of speech and academic freedom.

DISCUSSION

This does not mean, however, that students and faculty at all private schools are not entitled to free expression. In fact, most private universities explicitly promise freedom of speech and academic freedom. Colby College, for example, provides that “[t]he right of free speech and the open exchange of views are essential, especially in a learning environment, and Colby College upholds these freedoms vigorously.”¹⁵ Similarly, according to Furman University’s student handbook, “Students are guaranteed freedom of inquiry and expression.”¹⁶ Yet both of these institutions—along with many other private colleges and universities—maintain policies that prohibit the very speech they promise to protect.

A number of private schools have recently chosen to adopt particularly strong commitments to freedom of speech and expression. In January 2015, the Committee on Freedom of Expression at the University of Chicago produced a free speech policy statement (the “Chicago Statement”) affirming the centrality of unfettered debate to the university’s mission¹⁷:

Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. ... In a word, the University’s fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose. Indeed, fostering the ability of members of the University community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University’s educational mission.

Acting in furtherance of this strengthened commitment to free speech, the University of Chicago subsequently revised all of its speech codes and earned a green light rating from FIRE.¹⁸

A number of other schools and faculty bodies have since adopted some version of the Chicago Statement.¹⁹ Princeton University adopted the core of the Chicago Statement into its own policies in April 2015.²⁰ In September 2015, Johns Hopkins University adopted its own statement on academic freedom, identifying “free and independent inquiry” as one of the university’s “core principles,” and stating²¹:

[t]he torch of free inquiry is a critical part of our heritage and our mission. Each of us, in our time as members of this community of scholars, bears a responsibility for nurturing its flame, and passing it on to those who will follow.

In December 2015, the University of Wisconsin System’s Board of Regents passed a policy statement similar to the Chicago Statement, affirming the university system’s commitment to free speech.²² Columbia University added an “Affirmative Statement” supporting free speech to its Rules of University Conduct, stating that—among other things—“the University cannot and will not rule any subject or form of expression out of order on the ground that it is objectionable, offensive, immoral, or untrue.”²³

At other institutions, faculty bodies have adopted versions of the Chicago Statement. In recent years, FIRE has seen a dramatic increase in cases involving investigation or punishment of faculty members’ classroom expression, and these faculty-led initiatives may be a response to this trend.

¹⁵Colby College Harassment and Sexual Harassment Policy and Complaint Procedures, COLBY COLLEGE STUDENT HANDBOOK, at 41, available at <https://www.colby.edu/wp-content/uploads/2016/08/Colby-College-Student-Handbook-2-16.pdf>.

¹⁶Student Conduct Procedures, FURMAN UNIV. CATALOG, available at <http://catalog.furman.edu/content.php?catoid=3&navoid=142>.

¹⁷Committee on Freedom of Expression at the University of Chicago, Report on the Committee of Freedom of Expression, available at <http://provost.uchicago.edu/FOECommitteeReport.pdf>.

¹⁸Press Release, Found. for Individual Rights in Educ., University of Chicago Reforms All Speech Codes, Earns FIRE’s Highest Free Speech Rating (Apr. 26, 2016), <https://www.thefire.org/university-of-chicago-reforms-all-speech-codes-earns-fires-highest-free-speech-rating>.

¹⁹A full list of schools at which administrative or faculty bodies have adopted some version of the Chicago Statement is available at Appendix C.

²⁰Statement on Freedom of Expression, PRINCETON U. RTS., RULES, RESP. (2016 edition), available at <http://www.princeton.edu/pub/rrr/part1/index.xml>.

²¹Academic Freedom at Johns Hopkins, available at <http://web.jhu.edu/administration/provost/initiatives/academicfreedom/AcademicFreedomatJohnsHopkins.pdf>.

²²Alex Morey, University of Wisconsin’s Board of Regents Passes Free Speech Statement, FIRE NEWSDESK (Dec. 11, 2015), <https://www.thefire.org/university-of-wisconsin-board-of-regents-passes-free-speech-statement>.

²³Rules of University Conduct, ESSENTIAL POLICIES FOR THE COLUMBIA COMMUNITY, available at <http://www.essential-policies.columbia.edu/university-regulations-including-rules-conduct>.

THESE AND OTHER SCHOOLS HAVE ADOPTED A VERSION OF THE CHICAGO STATEMENT



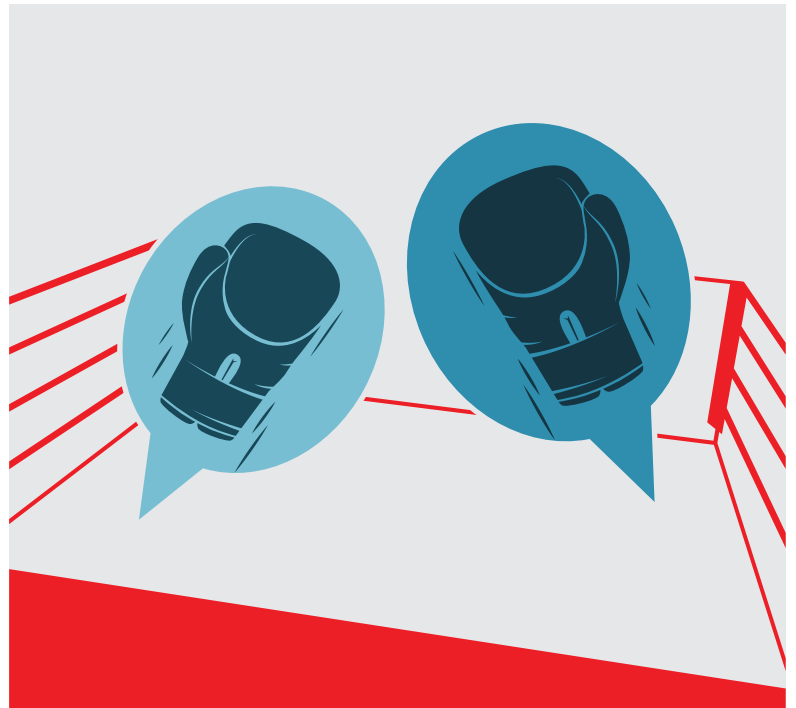
DISCUSSION

WHAT EXACTLY IS “FREE SPEECH,” AND HOW DO UNIVERSITIES CURTAIL IT?

What does FIRE mean when we say that a university restricts “free speech”? Do people have the right to say absolutely anything, or are certain types of expression unprotected?

Simply put, the overwhelming majority of speech is protected by the First Amendment. Over the years, the Supreme Court has carved out a limited number of narrow exceptions to the First Amendment: speech that incites reasonable people to immediate violence; so-called “fighting words” (face-to-face confrontations that lead to physical altercations); harassment; true threats and intimidation; obscenity; and defamation. If the speech in question does not fall within one of these exceptions, it most likely is protected speech.

The exceptions are often misapplied and abused by universities to punish constitutionally protected speech. There are instances where the written policy at issue may be constitutional—for example, a prohibition on “incitement”—but its application may not be. In other instances, a written policy will purport to be a legitimate ban on a category of unprotected speech like harassment or true threats, but (either deliberately or through poor drafting) will encompass protected speech as well. Therefore, it is important to understand what these narrow exceptions to free speech actually mean in order to recognize when they are being misapplied.



The Supreme Court has carved out a limited number of narrow exceptions to the First Amendment.... If the speech in question does not fall within one of these exceptions, it is most likely protected speech.

THREATS & INTIMIDATION

The Supreme Court has defined “true threats” as 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 has defined “intimidation,” of the type not protected by the First Amendment, 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. Neither term would encompass, for example, a vaguely worded statement that is not directed at anyone in particular.

Nevertheless, universities frequently misapply policies prohibiting threats and intimidation so as to infringe on protected speech, citing generalized concerns about safety without regard to the actual boundaries of unprotected speech.

In November 2015, for example, the University of Oregon’s (UO’s) student government denied funding to a poker tournament hosted by UO’s chapter of YoungAmericansforLiberty because the tournament’s prizes included several firearms donated by local gun dealers. (The firearms were not going to be brought on campus, but rather transferred to their new owners in accordance with federal and state laws.) Among other things, the student senators expressed concern that funding should not go to an event that “makes students feel unsafe.” Because UO’s student government uses mandatory activity fees collected by the university, it is an agent of the university that

must, like the university itself, respect students’ First Amendment rights. FIRE wrote to UO about the controversy, explaining²⁴:

There is simply no credible fear for the physical safety of UO students posed by Liberty Poker Night. ... Rather than any legitimate fears for the immediate safety of UO students, underlying these objections based on “discomfort” and “safety” appears to be the pernicious idea that students have a right to be protected from encountering ideas with which they disagree—an argument that our national commitment to freedom of expression utterly rejects.

²⁴Letter from Ari Cohn, Senior Program Officer, Found. for Individual Rights in Educ. to Michael Schill, President, Univ. of Or. (Nov. 18, 2015), available at <https://www.thefire.org/fire-letter-to-university-of-oregon-president>.



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DISCUSSION

INCITEMENT

There is also a propensity among universities to restrict speech that offends other students on the basis that it constitutes “incitement.” The basic concept, as administrators too often see it, is that offensive or provocative speech will anger those who disagree with it, perhaps so much that it moves them to violence. While preventing violence is an admirable goal, 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 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 receptive, willing listeners to take immediate unlawful action. The paradigmatic example of incitement is a person standing on the steps of a courthouse in front of a torch-wielding mob and urging that mob to burn down the courthouse immediately. To misapply the doctrine to encompass an opposing party’s reaction to speech they dislike is to convert the doctrine into an impermissible “heckler’s veto,”

where violence threatened by those angry about particular speech is used as a reason to censor that speech. As the Supreme Court has said, speech cannot be prohibited because it “might offend a hostile mob” or because it may prove “unpopular with bottle throwers.”²⁵

The standard for incitement was announced in the



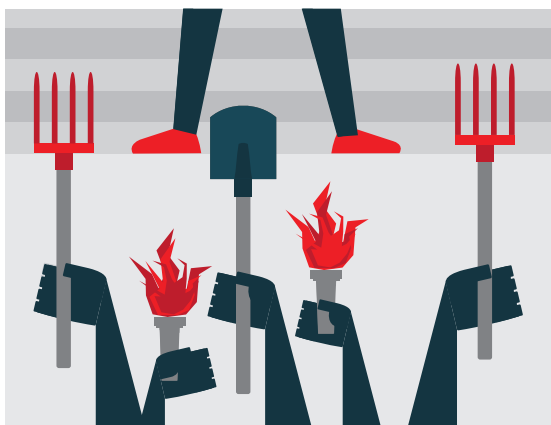
Supreme Court’s decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). There, the Court held that the state may not “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Id.* at 447. This is an

exacting standard, as evidenced by its application in subsequent cases.

For instance, in *Hess v. Indiana*, 414 U.S. 105 (1973), the Supreme Court held 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 that the man was therefore not guilty under a state disorderly conduct statute. *Id.* at 108–09. The fact that the Court ruled in favor of the speaker despite the use of such strong and unequivocal language underscores the narrow construction that has traditionally been given to the incitement doctrine and its requirements of likelihood and immediacy. Nonetheless, college administrations have been all too willing to abuse or ignore this jurisprudence.

Incitement ... does not refer to speech that may lead to violence on the part of those opposed to or angered by it, but rather to speech that will lead those who *agree with it* to commit immediate violence.

²⁵Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134–35 (1992).



The Supreme Court has explicitly held that profanity is constitutionally protected.

DISCUSSION

OBSCENITY

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, 24 (1973).

This is a narrow definition applicable only to some highly graphic sexual material. It does not encompass curse words, even though these are often colloquially referred to as “obscenities.” In fact, the Supreme Court has explicitly held that profanity is constitutionally protected. In *Cohen v. California*, 403 U.S. 15 (1971), the defendant, Paul Robert Cohen, was convicted in California for wearing a jacket bearing the words “Fuck the Draft” in a courthouse. The Supreme Court overturned Cohen’s conviction, holding that the message on his jacket, however vulgar, was protected speech. In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), the Court determined that a student newspaper article entitled “Motherfucker Acquitted” was constitutionally protected speech. The Court wrote that “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” *Id.* at 670. Nonetheless, many colleges erroneously believe that they may legitimately prohibit profanity and vulgar expression.

Here are two examples of such policies from the 2015–16 academic year:

- Boise State University prohibits “[c]onduct that a reasonable person would find offensive such as lewd, indecent, obscene, or profane actions.”²⁶
- At Delaware State University, “Students are expected to refrain from using four-letter words, obscenities and non-verbal behavior that is not acceptable under Delaware State University’s standard of decency, when communicating (verbally, nonverbally or in writing) with parents, students, visitors, professional staff, and others on University Premises or during University Activities.”²⁷

²⁶Boise State University Student Code of Conduct, available at <https://deanofstudents.boisestate.edu/scp-codeofconduct/scp-codeofconduct-section4>.

²⁷General Standards of Conduct, DELAWARE STATE UNIVERSITY STUDENT HANDBOOK, available at <http://www.desu.edu/student-handbook.pdf>.



HARASSMENT

Harassment, properly defined, is not protected by the First Amendment. In the educational context, the Supreme Court has defined student-on-student harassment as discriminatory, unwelcome 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, 633 (1999). This is not simply expression; it is *conduct* far beyond the dirty joke or “offensive” student newspaper op-ed that is too often deemed “harassment” on today’s college campus. Harassment is extreme and usually repetitive behavior—behavior so serious that it would interfere with a reasonable person’s ability to receive 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 together with repeated sexually explicit comments directed at and about the victim.

For decades now, however, too many colleges and universities have maintained policies defining harassment too broadly and prohibiting constitutionally protected speech. Recent guidance from the Department of Education’s Office for Civil Rights (OCR), combined with that agency’s increasingly aggressive enforcement of Title IX, has exacerbated the problem by leading numerous colleges and universities to enact more restrictive policies in an effort to avoid an OCR investigation.

In May 2013, OCR issued a findings letter to the University of Montana, following investigation of the university’s policies and practices, that proclaimed itself to be a “blueprint” for colleges and universities around the country.²⁸ In that letter,

OCR stated that “sexual harassment should be more broadly defined as ‘any unwelcome conduct of a sexual nature’” including “verbal conduct” (that is, speech). Although OCR backed away from its use of the term “blueprint” in a letter to FIRE (stating that “the agreement in the Montana case represents the resolution of that particular case and not OCR or [Department of Justice] policy”),²⁹ it never communicated this clarification directly to the many colleges and universities within its jurisdiction.

Moreover, an April 2016 findings letter stemming from a Department of Justice (DOJ) investigation into the University of New Mexico’s (UNM’s) handling of sexual misconduct claims *explicitly reiterated* that in the view of the federal government, sexual harassment is not limited to quid pro quo and hostile environment harassment.³⁰ Specifically, it found fault with UNM’s policies on the grounds that

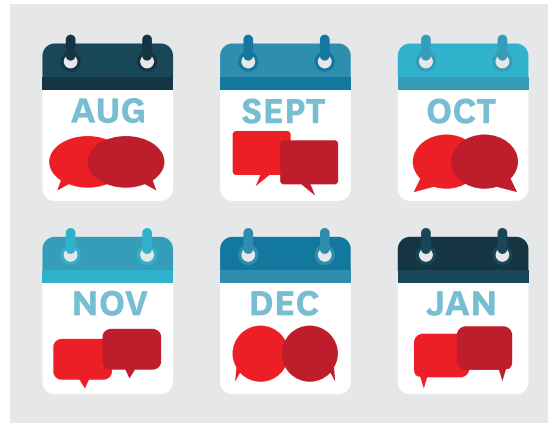
each of these policies mistakenly indicates that unwelcome conduct of a sexual nature does not constitute sexual harassment until it causes a hostile environment or unless it is quid pro quo. Unwelcome conduct of a sexual nature, however, constitutes sexual harassment regardless of whether it causes a hostile environment or is quid pro quo. Indeed, federal guidance defines sexual harassment as “unwelcome conduct of a sexual nature.”

This definition is deeply problematic. Unlike the definition set forth by the Supreme Court in *Davis*, defining sexual harassment as “unwelcome conduct of a sexual nature” conditions the permissibility of speech entirely on the subjective reaction of the listener—something courts have repeatedly held violates the First Amendment. *See DeJohn v. Temple*

²⁸Letter from Anurima Bhargava, Chief, Civil Rights Div., U.S. Dep’t of Justice, and Gary Jackson, Reg’l Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Royce Engstrom, President, Univ. of Mont. and Lucy France, Univ. Counsel, Univ. of Mont. (May 9, 2013), available at <http://www.justice.gov/opa/documents/um-ltr-findings.pdf>.

²⁹Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to Greg Lukianoff, President, Found. for Individual Rights in Educ. (Nov. 14, 2013), available at <http://www.thefire.org/letter-from-department-of-education-office-for-civil-rights-assistant-secretary-catherine-e-lhamon-to-fire>.

³⁰Letter from Shaheena Simons and Damon Martinez, U.S. Dep’t of Justice to Robert G. Frank, President, Univ. of N.M. (Apr. 22, 2016), available at <https://www.justice.gov/opa/file/843901/download>.



Defining sexual harassment as “unwelcome conduct of a sexual nature” conditions the permissibility of speech entirely on the subjective reaction of the listener.

DISCUSSION

University, 537 F.3d 301, 318 (3d Cir. 2008) (holding that because university policy failed to require that the speech in question “objectively” create a hostile environment, it provided “no shelter for core protected speech”). See also *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (“[R]egulations that prohibit speech on the basis of listener reaction alone are unconstitutional both in the public high school and university settings.”). Moreover, even speech that is objectively offensive may still be constitutionally protected unless it “effectively bars the victim’s access to an educational opportunity or benefit,” whereas the definition put forth by OCR and DOJ includes all “unwelcome” verbal conduct of a sexual nature, no matter how minor.

As a result, many colleges and universities have revised their sexual harassment policies to include the broad definition prescribed by OCR and DOJ. For example:

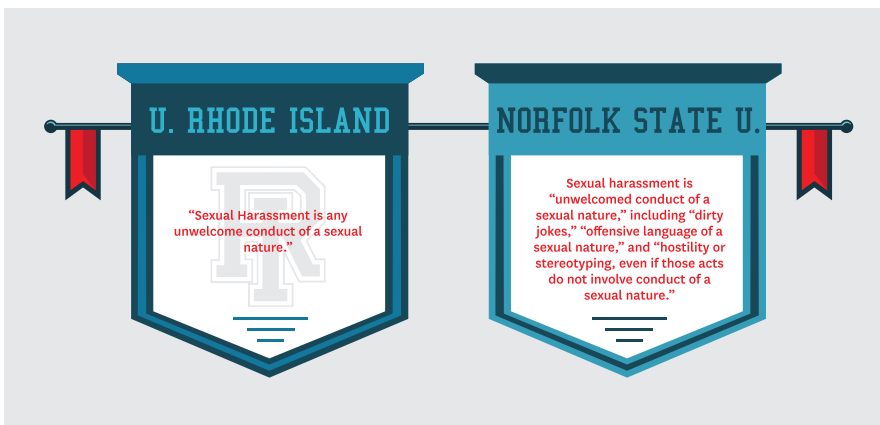
- At the University of Rhode Island, “Sexual Harassment is any unwelcome conduct of a sexual nature.”³¹
- Norfolk State University defines sexual harassment as “unwelcomed conduct of a sexual nature,” including “dirty jokes,” “offensive language of a sexual nature,” and “hostility or stereotyping, even if those acts do not involve conduct of a sexual nature.”³²

These examples, along with far too many others, demonstrate that colleges and universities often fail to limit themselves to the narrow definition of harassment that is outside the realm of constitutional protection. Instead, they expand the term to prohibit broad categories of speech that do not even approach

actual harassment, despite similar policies having been struck down by federal courts years earlier.³³

These vague and overly broad harassment policies deprive students and faculty of their free speech rights. In June 2015, for example, tenured Louisiana State University (LSU) Professor Teresa Buchanan was fired for alleged sexual harassment over her occasional use of profanity and sexual humor in the classroom.³⁴ While her speech did not constitute sexual harassment in the legal sense, LSU policy defines sexual harassment as “unwelcome verbal, visual, or physical behavior of a sexual nature.”³⁵ Both the American Association of University Professors and the LSU faculty senate have censured the LSU administration over Buchanan’s firing, and in January 2016, Buchanan filed a federal lawsuit—as part of FIRE’s Stand Up For Speech Litigation Project—alleging that LSU’s sexual harassment policy violates the First Amendment.³⁶ Her suit is ongoing as of this writing.

Having discussed the most common ways in which universities misuse the narrow exceptions to free speech to prohibit protected expression, we now turn to the innumerable other types of university regulations that restrict free speech and expression on their face. Such restrictions are generally found in several distinct types of policies.



³¹Student Code of Conduct, THE UNIV. OF R.I. STUDENT HANDBOOK 2015–2017, available at <http://web.uri.edu/studentconduct/files/2015-2017-Student-Handbook.pdf>.

³²Norfolk State University Board of Visitors Policy #05: Sexual Misconduct, available at <https://www.nsu.edu/Assets/websites/policy-library/policies/01/BOV-Policy-05-Sexual-Misconduct.pdf>.

³³See, e.g., *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (holding that Temple University’s sexual harassment policy was unconstitutionally broad); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (holding that University of Michigan’s discriminatory harassment policy was unconstitutionally broad); *Booher v. N. Ky. Univ. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (holding that Northern Kentucky University’s sexual harassment policy was unconstitutionally broad).

³⁴Colleen Flaherty, *Fired for Being Profane*, INSIDE HIGHER ED (Sep. 2, 2015), available at <https://www.insidehighered.com/news/2015/09/02/aaup-report-alleges-violations-academic-freedom-due-process-new-report-professors>.

³⁵Louisiana State University Policy 95.02, *Sexual Harassment of Students*, available at <https://sites01.lsu.edu/wp/policies/procedures/files/2014/09/PS-95.02.pdf>.

³⁶Complaint & Demand for Jury Trial, *Buchanan v. Alexander*, No. 3:16-cv-00041 (M.D. La. Jan. 20, 2016), ECF No. 1.

DISCUSSION

ANTI-BULLYING POLICIES

In recent years, “bullying” has garnered a great deal of media attention, bringing pressure on legislators and school administrators at both the K–12 and college levels to crack down on speech that causes emotional harm to other students. On October 26, 2010, OCR issued a letter on the topic of bullying, reminding educational institutions that they must address actionable harassment, but also acknowledging that “[s]ome conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression.”³⁷ For such situations, OCR’s letter refers readers back to the 2003 “Dear Colleague” letter stating that harassment is conduct that goes far beyond merely offensive speech and expression. However, because it is primarily focused on bullying in the K–12 setting, the letter also urges an *in loco parentis*³⁸ approach that is inappropriate in the college setting, where students are overwhelmingly adults.

FIRE has seen a dramatic increase in the number of university policies prohibiting bullying. Many universities have addressed the issue by simply adding the term “bullying,” without definition, to their existing speech codes—giving students

no notice of what is actually prohibited, and potentially threatening protected expression. Central Michigan University, for example, maintains a policy providing simply that a “student shall not bully, haze or harass any person or group of persons.”³⁹

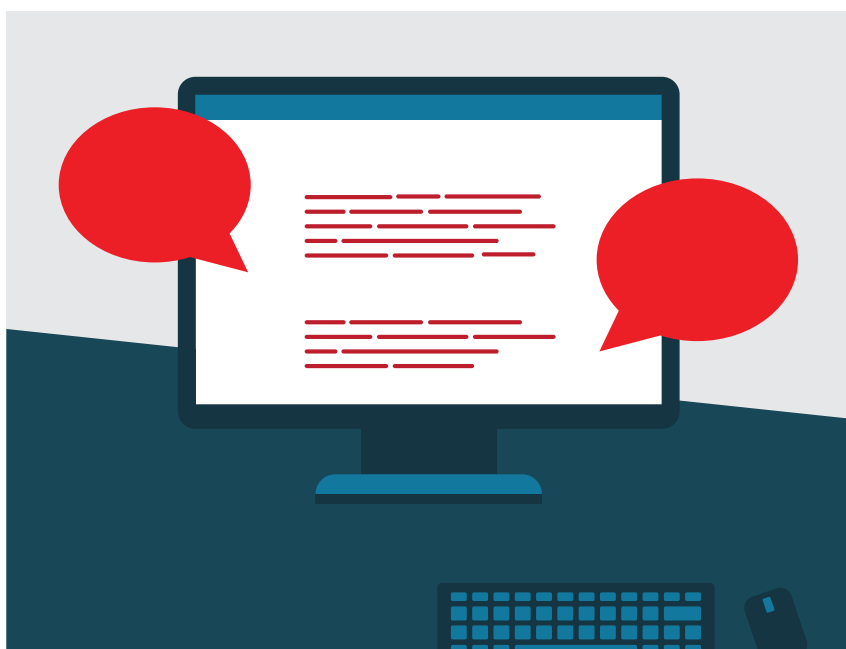
Yet other policies explicitly restrict protected speech by calling it “bullying” or “cyber-bullying.” At McNeese State University, for example, bullying is defined as “engaging in actions which cause another person to experience a reasonable fear that he or she will experience unauthorized social exclusion, humiliation, intimidation, or the unlawful use of physical force.” In determining if bullying has occurred, “the intention of the alleged bully is irrelevant.”⁴⁰

³⁷“Dear Colleague” Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

³⁸“In the place of parents.”

³⁹*Responsibilities of Students, CODE OF STUDENT RIGHTS, RESPONSIBILITIES AND DISCIPLINARY PROCEDURES*, available at <https://www.cmich.edu/ess/studentaffairs/Pages/Responsibilities-of-Students.aspx>.

⁴⁰*McNeese State University Anti-Bullying Policy*, available at https://www.mcneese.edu/policy/anti-bullying_policy.



POLICIES ON TOLERANCE, RESPECT, AND CIVILITY

Many schools invoke laudable goals like respect and civility to justify policies that violate students' and faculty members' free speech rights. While a university has every right to 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 respectful. And although pleas for civility and respect are often initially framed as requests, many schools have speech codes that effectively turn those requests into requirements.

In April 2016, the University of Wisconsin–Superior (UWS) announced that it was investigating the student newspaper, the *Promethean*, in response to student complaints about the paper's satirical April Fools' edition. In a Facebook post addressing the controversy, UWS announced that it was “actively investigating the grievance” and would “not tolerate any form of disrespect - not on April Fools Day or any other day.”⁴¹ Fortunately, UWS closed the investigation shortly after FIRE wrote a letter reminding the university of its obligations under the First Amendment and demanding that the investigation be dropped.⁴²

Many universities also have civility requirements codified in university policy. Here are two examples of such policies from the 2015–16 academic year:

- Under Colorado College policy, “standards of civility, consideration, and tolerance must shape our interactions with each other.”⁴³
- Governors State University's Civility Policy requires that “[a]ll members of the community must treat other members with civility and respect.”⁴⁴

While respect and civility may seem uncontroversial, most uncivil or disrespectful speech is protected by the First Amendment,⁴⁵ and is indeed sometimes of great political and social significance. Some of the expression employed in the civil rights movement of the 1950s and 60s, for example, would violate campus civility codes today. Colleges and universities may *encourage* civility, but public universities—and those private universities that purport to respect students' fundamental free speech rights—may not require it or threaten mere incivility with disciplinary action.



While a university has every right to 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 respectful.

⁴¹Adam Steinbaugh, *University of Wisconsin – Superior Conducting ‘Investigation’ Into Student Newspaper’s April Fools’ Edition*, FIRE NEWSDESK (Apr. 21, 2016), <https://www.thefire.org/university-of-wisconsin-superior-conducting-investigation-into-student-newspapers-april-fools-edition>.

⁴²Adam Steinbaugh, *University of Wisconsin – Superior Abandons Investigation of Newspaper’s April Fools’ Edition*, FIRE NEWSDESK (Apr. 27, 2016), <https://www.thefire.org/university-of-wisconsin-superior-abandons-investigation-of-newspapers-april-fools-edition>.

⁴³*Freedom of Expression*, COLLEGE-WIDE POLICIES, available at <https://www.coloradocollege.edu/basics/welcome/leadership/policies/freedom-of-expression>.

⁴⁴Memorandum from President Stuart I. Fagan to the University Community (July 18, 2005), available at <https://www.govst.edu/WorkArea/DownloadAsset.aspx?id=19044>.

⁴⁵See, e.g., *Coll. Republicans at S.F. St. Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy because “there is a substantial risk that the civility requirement will inhibit or deter use of the forms and means of communication that, to many speakers in circumstances of the greatest First Amendment sensitivity, will be the most valued and the most effective”).

SPOTLIGHT ON: BIAS REPORTING SYSTEMS

¹*Bias & Hate Incidents*, Longwood University, available at <http://www.longwood.edu/diversity/experiencing-bias/bias--hate-incidents>.

²*What is Bias?*, Longwood University, available at <http://www.longwood.edu/diversity/experiencing-bias/what-is-bias>.

³*Id.*

⁴Adam Steinbaugh, *University of Northern Colorado Defends, Modifies 'Bias Response Team' as Criticism Mounts and Recording Emerges*, FIRE NEWSDESK (July 7, 2016), <https://www.thefire.org/university-of-northern-colorado-bias-response-team-recording-emerges>.

Although many colleges and universities have shifted away from imposing the most restrictive speech codes, many have begun to implement bias reporting systems encouraging students to report on one another—and on faculty members—whenever they subjectively perceive that someone’s speech or expression is biased. These systems often subject students and faculty members to intervention by conflict-wary administrators providing “education,” if not punishment, for engaging in vaguely defined acts of “bias.” Although bias reporting systems are not new (indeed, FIRE reported on them in this section of our 2009 speech code report), they have proliferated in recent years.

These bias response systems, adopted by hundreds of institutions across the country, solicit reports of bias, which most universities explicitly define to encompass speech protected by the First Amendment. In some cases, the university realizes that it cannot impose speech codes, yet does so under the guise of providing “education”

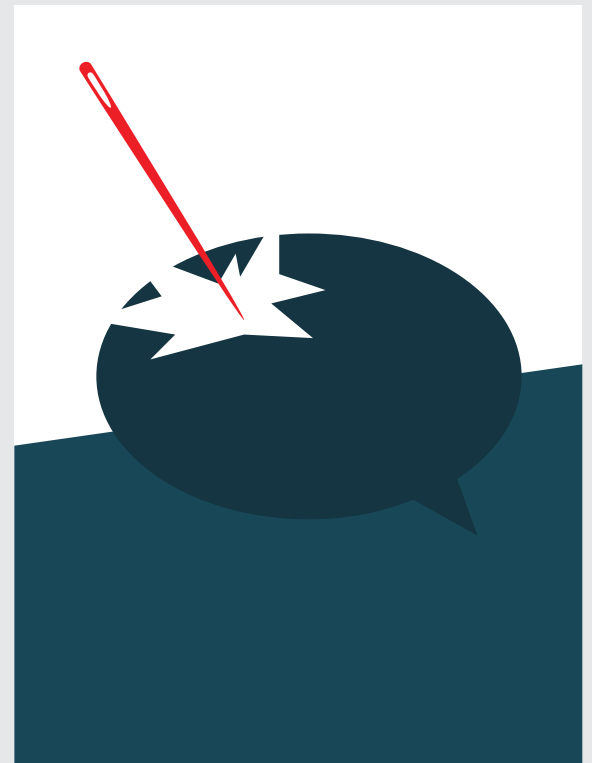
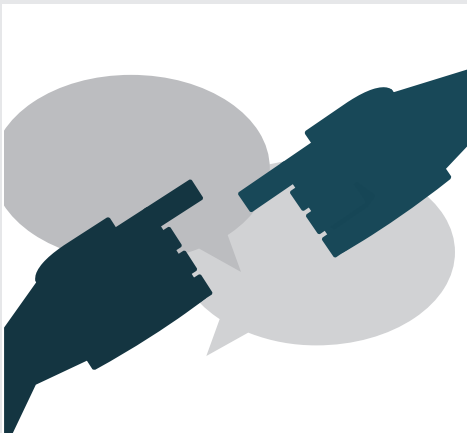
to offending speakers—through administrators. Longwood University in Virginia, for example, recognized that “courts have not upheld ... overly broad” speech codes.¹ Instead, Longwood created a bias response system with a broad definition of bias: “a tendency or inclination; irrational preference or behavior that prevents unprejudiced consideration of people, events, or situations”—including “political

or social affiliation.”² In an attempt to avoid the problem of unconstitutionality that Longwood recognizes, the policy provides that while “specific prohibitions” related to bias may be constitutionally problematic, the university will “include appropriate education sanctions when a student is found responsible.” Moreover, the policy leaves open the possibility that bias incidents could be subject to more severe sanctions under the university’s conduct policies, noting that bias incidents “may fall under the ‘Abuse to Persons’ violation” of Longwood’s conduct code.³

The exceedingly predictable result of these types of broad definitions and “educational” sanctions is that political and academic speech becomes monitored by administrators eager to avoid controversy and controversial speech. In turn, administrators encourage faculty members and students to avoid controversial subjects, under the guise of “educating” them. The result is an impermissible chilling effect on free speech.

For example, the University of Northern Colorado (UNC) abolished its controversial Bias Response Team after faculty members were told to avoid controversial subjects. One faculty member who was reported to the UNC Bias Response Team—after encouraging his students to consider countering views—recorded an administrator warning him away from discussing controversial subjects, lest he be summoned by more aggressive investigators.⁴

It’s not just faculty members who are targeted by bias response teams. At the University of Oregon (UO), where the Bias Response Team solicits reports of bias against “political or religious ideology,” a “Case



SPOTLIGHT ON: BIAS REPORTING SYSTEMS

Manager” intervened with a student newspaper’s reporter and editor after a student complained that the paper “gave less press coverage to trans students and students of color.” Other complaints alleged that a faculty member “belittled” a student’s “request for trigger warnings” and that students expressed “anger” over “oppression.” Based on these vague reports published by UO, FIRE issued a public records request for documents showing the complaints and how UO’s Bias Response Team intervened. UO went to great lengths to resist this request, arguing that it was not in the public interest to share information on how its team operates.⁵

In asking students to report—often anonymously—protected speech that offends them, bias response teams risk becoming referees of political and academic speech. As universities are often loath to share information about how their teams operate, FIRE has been using public records requests to shed light on these teams, their policies, and their actions, and will continue to report our findings in the coming year.

Political and academic speech becomes monitored by administrators eager to avoid controversy and controversial speech.

⁵Adam Steinbaugh, *University of Oregon on 'Bias Response Team': Nothing to See Here*, FIRE NEWSDESK (May 27, 2016), <https://www.thefire.org/university-of-oregon-on-bias-response-team-nothing-to-see-here>.



DISCUSSION

University policies regulating online expression, while perhaps appearing to be narrow, can actually have a significant impact on students' and faculty members' free speech rights.

INTERNET USAGE POLICIES

A great deal of expression now takes place online, whether over email or on sites like Facebook and Twitter. Therefore, university policies regulating online expression, while perhaps appearing to be narrow, can actually have a significant impact on students' and faculty members' free speech rights.

Examples of impermissibly restrictive internet usage policies from the 2015–2016 academic year include the following:

- Lincoln University in Pennsylvania prohibits the use of IT resources in ways that are “offensive to others” or “harmful to morale.” This includes “off-color jokes” as well as “anything that may be construed as ... showing disrespect for others.”⁴⁶
- According to Tulane University’s computing policy, “You agree to communicate only in ways that are kind and respectful,” and to refrain from “creating or disseminating inappropriate or offensive messages.”⁴⁷

(harassment, threats, and so forth). The fact that the speaker may be motivated by hate has no bearing on whether the speech is protected.

The protocols often also infringe on students’ right to due process, allowing for anonymous reporting that denies students the right to confront their accusers. Moreover, universities are often heavily invested in these bias incident policies, having set up entire regulatory frameworks and response protocols devoted solely to addressing them.

While many bias incident protocols do not include a separate enforcement mechanism, the reality is that the mere threat of a bias investigation will likely be sufficient to chill protected speech on controversial issues. And when the only conduct at issue is constitutionally protected speech, even investigation is inappropriate.

For more detailed information on bias reporting systems, see “Spotlight On: Bias Reporting Systems,” pp. 22–23.

POLICIES ON BIAS AND HATE SPEECH

In recent years, colleges and universities around the country have instituted policies and procedures specifically aimed at eliminating “bias” and “hate speech” on campus. These sets of policies and procedures, frequently termed “Bias Reporting Protocols” or “Bias Incident Protocols,” often include speech codes prohibiting extensive amounts of protected expression. While speech or expression that is based on a speaker’s prejudice may be offensive, it is entirely protected unless it rises to the level of unprotected speech



⁴⁶Internet Usage, HR General Administrative and University Policies, available at http://www.lincoln.edu/hr-general-administrative-and-university-policies#Internet_Usage.

⁴⁷Computing Information & Dissemination, TULANE UNIVERSITY STUDENT GUIDE, available at <http://www2.tulane.edu/studentaffairs/upload/15-16-Computing-Information-Dissemination.pdf>.

POLICIES GOVERNING SPEAKERS, DEMONSTRATIONS, AND RALLIES

Universities have a right to enact reasonable, narrowly tailored “time, place, and manner” restrictions that prevent demonstrations and other expressive activities from unduly interfering with the educational process. They may not, however, regulate speakers and demonstrations on the basis of content or viewpoint, nor may they maintain regulations that burden substantially more speech than is necessary to maintain an environment conducive to education.

SECURITY FEE POLICIES

In recent years, FIRE has seen a number of colleges and universities hamper—whether intentionally or just through a misunderstanding of the law—the invitation of controversial speakers by levying additional security costs on the sponsoring student organizations.

The Supreme Court addressed exactly this issue in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), where it struck down an ordinance in Georgia that permitted the local government to set varying fees for events based upon how much police protection the event would need. Invalidating the ordinance, the Court wrote that “[t]he fee assessed will depend on the administrator’s measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.” *Id.* at 134. Deciding that such a determination required county administrators to “examine the content of the message that is conveyed,” the Court wrote that “[l]isteners’ reaction to speech is not a content-neutral basis for regulation. ... **Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.**” *Id.* at 134–35 (emphasis added).

Despite the clarity of the law on this issue, the impermissible use of security fees to burden controversial speech is all too common on university

campuses. DePaul University used this tactic twice over the past year in an attempt to limit student expression from across the political spectrum. In May 2016, the university attempted to charge the College Republicans an extra \$1000 in security costs to host controversial activist Milo Yiannopoulos on campus.⁴⁸ And in September 2016, the DePaul Socialists student group was informed that it would have to pay for extra security at its informational meeting because DePaul administrators deemed the event “potentially controversial.”⁴⁹

⁴⁸See Letter from Ari Cohn, Senior Program Officer, Found. for Individual Rights in Educ., to Rev. Dennis Holtschneider, President, DePaul Univ. (Sep. 8, 2016), available at <https://www.thefire.org/fire-letter-to-depaul-university-september-8-2016>.

⁴⁹See Letter from Ari Cohn, Senior Program Officer, Found. for Individual Rights in Educ., to Rev. Dennis Holtschneider, President, DePaul Univ. (Sep. 23, 2016), available at <https://www.thefire.org/letter-from-fire-to-depaul-university-september-23-2016-pdf>.

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DISCUSSION

PRIOR RESTRAINTS

The Supreme Court has held that “[i]t is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.” *Watchtower Bible and Tract Society of NY, Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002). Yet many colleges and universities do just that, requiring students and student organizations to register their expressive activities well in advance and, often, to obtain administrative approval for those activities.

For example:

- At Fort Hays State University, “Individuals wishing to express their concerns should confer with the Vice President of Student Affairs regarding procedural policy and appropriateness of their proposed actions.”⁵⁰
- Lake Superior State University requires that “prior to sponsoring a rally, demonstration, march or other event, a group or organization representative must complete and submit an event application (see below) at least 72 hours in advance of any activity to the Public Safety Office.”⁵¹

FREE SPEECH ZONE POLICIES

Of the schools surveyed for this report, roughly 1 in 10 have “free speech zone” policies—policies limiting student demonstrations and other expressive activities to small and/or out-of-the-way areas on campus.⁵² Such policies are generally inconsistent with the First Amendment, and have repeatedly been struck down by courts or voluntarily revised as part of lawsuit settlements. FIRE’s Stand Up For Speech Litigation Project has included successful challenges to free speech zone policies at Modesto Junior College, the University of Hawaii at Hilo, Citrus College, California State Polytechnic University–

Pomona, Dixie State University and, most recently, Blinn College.

Despite the possibility of successful litigation, many universities still maintain free speech zones. For example:

- Middle Georgia State University “has designated ‘Free Expression Areas’ on each campus, and these are the only areas that may be used for expression.” The policy lists just one Free Expression Area for each of the university’s five campuses.⁵³
- At the University of Hawaii at Manoa, “The Campus Center Courtyard Area is designated as the public forum area for the University ... where individuals may assemble and engage in public speech activities.”⁵⁴

Of the schools surveyed for this report, roughly 1 in 10 have “free speech zone” policies.

ROUGHLY 1 IN 10 SCHOOLS SURVEYED HAVE “FREE SPEECH ZONE” POLICIES



⁵⁰*Dissent and Protest*, FORT HAYS UNIVERSITY STUDENT ORGANIZATION HANDBOOK, at 3, available at <https://www.fhsu.edu/csi/stuorg/stuorghandbook>.

⁵¹*Campus Right to Assemble/Demonstration Policy*, available at <http://www.lssu.edu/procedures/1-15.php>.

⁵²See Appendix D for a full list of schools with free speech zone policies.

⁵³*Freedom of Expression Policy*, MIDDLE GEORGIA STATE UNIVERSITY STUDENT HANDBOOK, at 78–80, available at http://www.mga.edu/student-affairs/docs/MGA_Student_Handbook.pdf.

⁵⁴*University of Hawaii – Manoa Facilities Use Practices and Procedures*, available at <https://www.hawaii.edu/policy/archives/apm/a1200p/a1200.pdf>.

A student can be a tremendously effective advocate for change when he or she is aware of First Amendment rights and is willing to engage administrators in defense of them.

WHAT CAN BE DONE?

The good news is that the types of restrictions discussed in this report can be defeated. A student can be a tremendously effective advocate for change when he or she is aware of First Amendment rights and is willing to engage administrators in defense of them. Public exposure is also critical to defeating speech codes, since universities are often unwilling to defend their speech codes in the face of public criticism.

Unconstitutional policies also can be defeated in court, especially at public universities, where speech codes have been struck down in federal courts across the country. Many more policies have been revised in favor of free speech as the result of legal settlements.

Any speech code in force at a public university is vulnerable to a constitutional challenge. Moreover, as speech codes are consistently defeated in court, administrators are losing virtually any chance of credibly arguing that they are unaware of the law, which means that they may be held personally liable when they are responsible for their schools' violations of constitutional rights.⁵⁵

The suppression of free speech at American universities is a matter of great national concern. 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 citizens look favorably upon speech codes or other restrictions on basic freedoms.

⁵⁵Azhar Majeed, *Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators for Violating Students' Speech Rights*, 8 CARDOZO PUB. L., POL'Y & ETHICS J. 3, 515 (2010).



APPENDIX A: SCHOOLS BY RATING



RED LIGHT

Adams State University
Alabama A&M University
American University
Armstrong State University
Athens State University
Barnard College
Bates College
Boise State University
Boston College
Boston University
Bryn Mawr College
California State Polytechnic University, Pomona
California State University, Channel Islands
California State University, Dominguez Hills
California State University, Fresno
California State University, Long Beach
California State University, Monterey Bay
California State University, Sacramento
California University of Pennsylvania
Carleton College
Case Western Reserve University
Central Michigan University
Cheyney University of Pennsylvania
Chicago State University
Clark University
Clemson University
Coastal Carolina University
Colby College
Colgate University
College of the Holy Cross
Colorado College
Columbia University
Connecticut College
Cornell University
Davidson College
Delaware State University
Delta State University
DePauw University
Dickinson College
Drexel University
Eastern Illinois University
Eastern Michigan University
Emory University
Evergreen State College
Florida State University



RED LIGHT

Fordham University
Framingham State University
Franklin & Marshall College
Furman University
George Washington University
Georgetown University
Georgia Southern University
Gettysburg College
Governors State University
Grambling State University
Grinnell College
Harvard University
Howard University
Idaho State University
Iowa State University
Jackson State University
Jacksonville State University
Johns Hopkins University
Kean University
Keene State College
Kenyon College
Lafayette College
Lake Superior State University
Lehigh University
Lincoln University
Louisiana State University
Lyndon State College
Macalester College
Mansfield University of Pennsylvania
Marquette University
McNeese State University
Middle Georgia State University
Middle Tennessee State University
Middlebury College
Missouri State University
Morehead State University
Mount Holyoke College
Murray State University
New Jersey Institute of Technology
New York University
Norfolk State University
North Carolina Central University
Northeastern University
Northern Arizona University
Northern Illinois University

APPENDIX A: SCHOOLS BY RATING



RED LIGHT

Northern Kentucky University
Northwestern Oklahoma State University
Oakland University
Oklahoma State University–Stillwater
Pennsylvania State University
Princeton University
Reed College
Rensselaer Polytechnic Institute
Rice University
Salem State University
Sam Houston State University
Shawnee State University
Smith College
Southeastern Louisiana University
Southern Illinois University at Carbondale
Southern Illinois University at Edwardsville
St. Olaf College
State University of New York–Fredonia
State University of New York–New Paltz
State University of New York–Plattsburgh
Stevens Institute of Technology
Swarthmore College
Syracuse University
Tennessee State University
Texas Woman’s University
The College of New Jersey
Troy University
Tufts University
Tulane University
Union College
University at Albany, State University of New York
University at Buffalo, State University of New York
University of Alabama at Birmingham
University of Alaska Anchorage
University of California, Riverside
University of California, Merced
University of Central Arkansas
University of Central Florida
University of Georgia
University of Hawaii at Manoa
University of Houston
University of Idaho
University of Illinois at Chicago
University of Kansas
University of Louisiana at Lafayette



RED LIGHT

University of Maine at Presque Isle
University of Massachusetts Dartmouth
University of Massachusetts Lowell
University of Miami
University of Michigan
University of Michigan–Dearborn
University of Minnesota, Morris
University of Missouri–St. Louis
University of Montana
University of New Mexico
University of New Orleans
University of North Carolina at Greensboro
University of North Carolina School of the Arts
University of North Texas
University of Notre Dame
University of Oregon
University of Rhode Island
University of Richmond
University of South Carolina
University of South Dakota
University of Southern Indiana
University of Texas at Arlington
University of Texas at Austin
University of Tulsa
University of West Alabama
University of West Florida
University of Wisconsin–Oshkosh
University of Wyoming
Utah State University
Utah Valley University
Valdosta State University
Wake Forest University
Wayne State University
Wellesley College
Wesleyan University
West Chester University of Pennsylvania
Western Illinois University
Western Michigan University
Whitman College
William Paterson University
Williams College
Winona State University
Winston Salem State University

APPENDIX A: SCHOOLS BY RATING



**YELLOW
LIGHT**

Alabama State University
Alcorn State University
Amherst College
Angelo State University
Appalachian State University
Arkansas State University
Auburn University
Auburn University Montgomery
Ball State University
Bard College
Bemidji State University
Binghamton University, State University of New York
Bloomsburg University of Pennsylvania
Bowdoin College
Bowling Green State University
Brandeis University
Bridgewater State University
Brooklyn College, City University of New York
Brown University
Bucknell University
California Institute of Technology
California Maritime Academy
California Polytechnic State University
California State University, Bakersfield
California State University, Chico
California State University, East Bay
California State University, Fullerton
California State University, Los Angeles
California State University, Northridge
California State University, San Bernardino
California State University, San Marcos
California State University, Stanislaus
Cameron University
Central Connecticut State University
Central Washington University
Centre College
Christopher Newport University
Claremont McKenna College
Clarion University of Pennsylvania
Colorado Mesa University
Colorado School of Mines
Colorado State University
Colorado State University–Pueblo
Dakota State University



**YELLOW
LIGHT**

Dartmouth College
East Carolina University
East Stroudsburg University of Pennsylvania
East Tennessee State University
Eastern New Mexico University
Edinboro University of Pennsylvania
Elizabeth City State University
Fayetteville State University
Fitchburg State University
Florida A&M University
Florida Atlantic University
Florida Gulf Coast University
Florida International University
Fort Hays State University
Fort Lewis College
Frostburg State University
Georgia Institute of Technology
Georgia State University
Grand Valley State University
Hamilton College
Harvey Mudd College
Haverford College
Henderson State University
Humboldt State University
Illinois State University
Indiana State University
Indiana University Bloomington
Indiana University Kokomo
Indiana University–Purdue University Columbus
Indiana University–Purdue University Indianapolis
Indiana University of Pennsylvania
Indiana University South Bend
Indiana University East
Indiana University Northwest
Indiana University Southeast
James Madison University
Kansas State University
Kennesaw State University
Kent State University
Kentucky State University
Kutztown University of Pennsylvania
Lewis-Clark State College
Lock Haven University of Pennsylvania
Longwood University
Louisiana Tech University

APPENDIX A: SCHOOLS BY RATING



**YELLOW
LIGHT**

Marshall University
Massachusetts College of Liberal Arts
Massachusetts Institute of Technology
Metropolitan State University
Miami University of Ohio
Michigan State University
Michigan Technological University
Millersville University of Pennsylvania
Missouri University of Science and Technology
Montana State University
Montana Tech of the University of Montana
Montclair State University
New College of Florida
New Mexico State University
Nicholls State University
North Carolina A&T State University
North Carolina State University
North Dakota State University
Northeastern Illinois University
Northern Michigan University
Northwestern State University
Northwestern University
Oberlin College
Occidental College
Ohio University
Old Dominion University
Pittsburg State University
Pitzer College
Pomona College
Radford University
Rhode Island College
Richard Stockton College of New Jersey
Rogers State University
Rowan University
Rutgers University–New Brunswick
Saginaw Valley State University
Saint Cloud State University
San Diego State University
San Francisco State University
San Jose State University
Scripps College
Sewanee, The University of the South
Skidmore College
Slippery Rock University of Pennsylvania
Sonoma State University



**YELLOW
LIGHT**

South Dakota State University
Southern Connecticut State University
Southern Methodist University
Southwest Minnesota State University
Stanford University
State University of New York–Oswego
State University of New York College of Environmental Science and Forestry
Stony Brook University
Tarleton State University
Temple University
Texas A&M University
Texas Southern University
Texas State University
Texas Tech University
The City College of New York
The Ohio State University
The University of Virginia's College at Wise
Towson University
Trinity College
University of Akron
University of Alabama
University of Alabama in Huntsville
University of Alaska Fairbanks
University of Alaska Southeast
University of Arizona
University of Arkansas
University of California, Berkeley
University of California, Davis
University of California, Irvine
University of California, Los Angeles
University of California, San Diego
University of California, Santa Barbara
University of California, Santa Cruz
University of Central Missouri
University of Cincinnati
University of Colorado Boulder
University of Connecticut
University of Delaware
University of Denver
University of Hawaii at Hilo
University of Illinois at Springfield
University of Illinois at Urbana-Champaign
University of Iowa
University of Kentucky

APPENDIX A: SCHOOLS BY RATING



**YELLOW
LIGHT**

University of Louisville
University of Maine
University of Maine at Fort Kent
University of Mary Washington
University of Massachusetts Amherst
University of Memphis
University of Minnesota Twin Cities
University of Missouri
University of Montana Western
University of Montevallo
University of Nebraska
University of Nevada, Las Vegas
University of Nevada, Reno
University of New Hampshire
University of North Alabama
University of North Carolina at Asheville
University of North Carolina at Charlotte
University of North Carolina at Pembroke
University of North Carolina at Wilmington
University of North Dakota
University of Northern Colorado
University of Northern Iowa
University of Oklahoma
University of Pittsburgh
University of Rochester
University of South Alabama
University of South Florida
University of South Florida at Saint Petersburg
University of Southern California
University of Southern Maine
University of Southern Mississippi
University of Texas at El Paso
University of Texas at San Antonio
University of Toledo
University of Vermont
University of Washington
University of West Georgia
University of Wisconsin–Eau Claire
University of Wisconsin–Green Bay
University of Wisconsin–La Crosse
University of Wisconsin–Madison
University of Wisconsin–Stout
Vanderbilt University
Virginia Commonwealth University
Virginia Polytechnic Institute and State University



**YELLOW
LIGHT**

Virginia State University
Washington & Lee University
Washington State University
Washington University in St. Louis
West Virginia University
Western Carolina University
Western Kentucky University
Western Oregon University
Westfield State University
Wichita State University
Worcester State University
Wright State University
Yale University
Youngstown State University

APPENDIX A: SCHOOLS BY RATING



**GREEN
LIGHT**

Arizona State University
Black Hills State University
Carnegie Mellon University
Cleveland State University
Duke University
Eastern Kentucky University
George Mason University
Indiana University–Purdue University Fort Wayne
Mississippi State University
Oregon State University
Plymouth State University
Purdue University
Purdue University Northwest: Calumet Campus
Shippensburg University of Pennsylvania
State University of New York–Brockport
The College of William and Mary
University of Chicago
University of Florida
University of Maryland
University of Mississippi
University of North Carolina at Chapel Hill
University of North Florida
University of Pennsylvania
University of Tennessee
University of Utah
University of Virginia
Western State Colorado University





















































**WARNING
SCHOOLS**

Baylor University
Brigham Young University
Pepperdine University
Saint Louis University
Vassar College
Worcester Polytechnic Institute
Yeshiva University



































APPENDIX B: RATING CHANGES, 2015–2016 ACADEMIC YEAR

| SCHOOL NAME | 2014–2015 RATING | | 2015–2016 RATING | |
|--|------------------|--------|------------------|--------|
| Alabama State University | ● | Red | ● | Yellow |
| Alcorn State University | ● | Red | ● | Yellow |
| Brooklyn College | ● | Red | ● | Yellow |
| Brown University | ● | Red | ● | Yellow |
| California State University, Chico | ● | Red | ● | Yellow |
| California State University, Fullerton | ● | Red | ● | Yellow |
| California State University, Los Angeles | ● | Red | ● | Yellow |
| California Institute of Technology | ● | Red | ● | Yellow |
| Case Western Reserve University | ● | Red | ● | Yellow |
| Central Washington University | ● | Red | ● | Yellow |
| Colorado Mesa University | ● | Red | ● | Yellow |
| Colorado School of Mines | ● | Red | ● | Yellow |
| Drexel University | ● | Yellow | ● | Red |
| Duke University | ● | Yellow | ● | Green |
| East Carolina University | ● | Red | ● | Yellow |
| East Tennessee State University | ● | Red | ● | Yellow |
| Edinboro University of Pennsylvania | ● | Red | ● | Yellow |
| Florida Gulf Coast University | ● | Red | ● | Yellow |
| Fort Lewis College | ● | Red | ● | Yellow |
| Framingham State University | ● | Yellow | ● | Red |
| Frostburg State University | ● | Red | ● | Yellow |
| George Washington University | ● | Yellow | ● | Red |
| Georgia Institute of Technology | ● | Red | ● | Yellow |
| Georgia State University | ● | Red | ● | Yellow |
| Grand Valley State University | ● | Red | ● | Yellow |

APPENDIX B: RATING CHANGES, 2015–2016 ACADEMIC YEAR

| SCHOOL NAME | 2014–2015 RATING | | 2015–2016 RATING | |
|--|---|--------|---|--------|
| Grinnell College |  | Yellow |  | Red |
| Illinois State University |  | Red |  | Yellow |
| Indiana University-Purdue University Fort Wayne |  | Yellow |  | Green |
| Mansfield University of Pennsylvania |  | Yellow |  | Red |
| Michigan Technological University |  | Red |  | Yellow |
| New College of Florida |  | Red |  | Yellow |
| New Jersey Institute of Technology |  | Yellow |  | Red |
| Northeastern Illinois University |  | Red |  | Yellow |
| Ohio State University |  | Red |  | Yellow |
| Ohio University |  | Red |  | Yellow |
| Southwest Minnesota State University |  | Red |  | Yellow |
| State University of New York at Brockport |  | Yellow |  | Green |
| State University of New York College of Environmental Science and Forestry |  | Red |  | Yellow |
| Texas Southern University |  | Red |  | Yellow |
| University of Akron |  | Red |  | Yellow |
| University of Alabama |  | Red |  | Yellow |
| University of California, Riverside |  | Yellow |  | Red |
| University of California, Santa Barbara |  | Red |  | Yellow |
| University of California, Santa Cruz |  | Red |  | Yellow |
| University of Central Missouri |  | Red |  | Yellow |
| University of Chicago |  | Yellow |  | Green |
| University of Cincinnati |  | Red |  | Yellow |
| University of Connecticut |  | Red |  | Yellow |
| University of Denver |  | Red |  | Yellow |
| University of Illinois at Springfield |  | Red |  | Yellow |

APPENDIX B: RATING CHANGES, 2015–2016 ACADEMIC YEAR

| SCHOOL NAME | 2014–2015 RATING | | 2015–2016 RATING | |
|-------------------------------------|---|--------|---|--------|
| University of Maryland |  | Yellow |  | Green |
| University of Massachusetts Amherst |  | Red |  | Yellow |
| University of Missouri |  | Red |  | Yellow |
| University of New Hampshire |  | Red |  | Yellow |
| University of Rhode Island |  | Yellow |  | Red |
| University of South Alabama |  | Red |  | Yellow |
| University of Southern California |  | Red |  | Yellow |
| University of Toledo |  | Red |  | Yellow |
| University of Wisconsin–Green Bay |  | Red |  | Yellow |
| University of Wisconsin–La Crosse |  | Red |  | Yellow |
| University of Wisconsin–Stout |  | Red |  | Yellow |
| Washington State University |  | Red |  | Yellow |
| Washington University in St. Louis |  | Red |  | Yellow |
| Westfield State University |  | Red |  | Yellow |
| Worcester State University |  | Red |  | Yellow |
| Wright State University |  | Red |  | Yellow |
| Youngstown State University |  | Red |  | Yellow |

APPENDIX C: SCHOOLS AT WHICH A FACULTY OR ADMINISTRATIVE BODY HAS ADOPTED A VERSION OF THE CHICAGO STATEMENT

American University
City University of New York
Columbia University
Franklin & Marshall College
Johns Hopkins University
Louisiana State University
Princeton University
Purdue University
University of Minnesota
University of Southern Indiana
University of Virginia College at Wise
University of Wisconsin System
Vanderbilt University
Washington University in St. Louis
Winston-Salem State University



APPENDIX D: SCHOOLS WITH ‘FREE SPEECH ZONES’

Appalachian State University
Arkansas State University
Auburn University
Auburn University Montgomery
Ball State University
Bemidji State University
California State University, Channel Islands
California State University, Dominguez Hills
California State University, Los Angeles
California State University, San Marcos
Cameron University
Cornell University
East Carolina University
East Tennessee State University
Elizabeth City State University
Florida State University
Frostburg State University
Keene State College
Middle Georgia State University
Montclair State University
Morehead State University
Murray State University
Northern Illinois University
Rutgers University
Salem State University
Southeastern Louisiana University
Southern Illinois University at Carbondale
Southern Illinois University at Edwardsville
Stanford University
Texas Woman’s University
The College of New Jersey
Troy University
University at Buffalo, State University of New York
University of Central Arkansas
University of Hawaii at Manoa
University of Illinois at Chicago
University of Kentucky
University of Massachusetts Amherst
University of Massachusetts Dartmouth
University of Montana
University of Nevada, Las Vegas
University of North Carolina at Pembroke
University of North Carolina School of the Arts
University of South Dakota
University of West Alabama

University of West Florida
University of West Georgia
Valdosta State University
Western Illinois University





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