



# SPOTLIGHT ON SPEECH CODES 2019:



THE STATE OF FREE SPEECH  
ON OUR NATION'S CAMPUSES



# Table of Contents

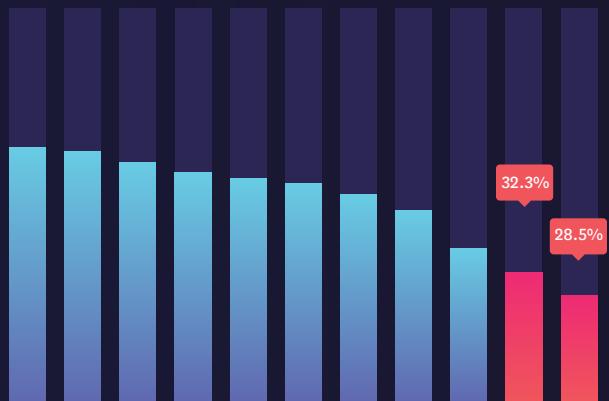


1	Executive Summary
3	Methodology
5	Findings
9	Discussion
17	Spotlight On: The Chicago Statement
25	What Can be Done
27	Appendices

# Executive Summary



For the eleventh year in a row, the percentage of red light schools has declined.



Most college students in the United States should be able to expect that freedom of expression will be upheld on their campuses. After all, public institutions are legally bound by the First Amendment, and the vast majority of private colleges and universities promise their students commensurate free speech rights.

In spite of this legal landscape, far too many colleges across the country fail to live up to their free speech obligations in policy and in practice. Often, this occurs through the implementation of speech codes: university policies that restrict expression that is protected under First Amendment standards.

**FIRE surveyed 466 schools and found 28.5% maintain red light policies.**



For this report, FIRE surveyed the written policies of 466 colleges and universities, evaluating their compliance with First Amendment standards. Overall, 28.5% of surveyed colleges maintain at least one severely restrictive policy that earns FIRE's worst, "red light" rating, meaning that it both clearly and substantially restricts protected speech. This is the eleventh year in a row that the percentage of schools earning a red

light has gone down; last year, 32.3% of schools earned a red light rating.

The majority of institutions surveyed (61.2%) earn an overall "yellow light" rating, meaning they maintain at least one yellow light rated policy. Yellow light policies are either clear restrictions on a more narrow area of expression, or policies that, by virtue of vague wording, could too easily be applied to restrict protected expression. While the continued decline in red light institutions is cause for optimism, we will continue to work with colleges and universities to ensure that yellow light institutions improve all the way to earn FIRE's highest, "green light" rating, meaning that none of their written policies seriously imperil protected expression. A total of 42 colleges and universities (9% of those surveyed) now earn an overall green light rating, up from 35 schools as of last year's report.

In further good news, more and more colleges and universities continue to adopt policy statements in support of free speech modeled after the one adopted by the University of Chicago in January 2015. As of this writing, 50 schools or faculty bodies have endorsed a version of the free speech policy statement known as the "Chicago Statement," with 14 adoptions in 2018 alone.

Though these improvements in policy are heartening, free speech on campus remains under threat. Demands for censorship of student and faculty speech—whether originating on or off campus—are common, and universities continue to investigate and punish students and faculty over protected expression.

It is imperative, therefore, that those who care about free speech on campus continue to stay vigilant. The decrease in restrictive speech codes and the proliferation of free speech policy statements are the result of the tireless work of free speech advocates at FIRE and elsewhere. We must continue that work to ensure that students have the opportunity to pursue higher education, and that faculty are able to teach, with the greatest possible foundation for free expression in place.



# Methodology



FIRE surveyed publicly available policies at 362 four-year public institutions and 104 of the nation's 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 and can be successfully sued in court when they do not.

FIRE rates colleges and universities as "red light," "yellow light," or "green light" institutions based on how much, if any, protected expression 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 is protected under First Amendment standards). 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 an overall 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 relatively narrow categories of speech.

## It is imperative, therefore, that those who care about free speech on campus continue to stay vigilant.

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 and conduct, such as threats of violence or unlawful harassment. Similarly, while a policy banning "profanity on residence hall door whiteboards" clearly restricts speech, it is relatively limited in scope. Yellow light policies are typically unconstitutional,<sup>1</sup> 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.



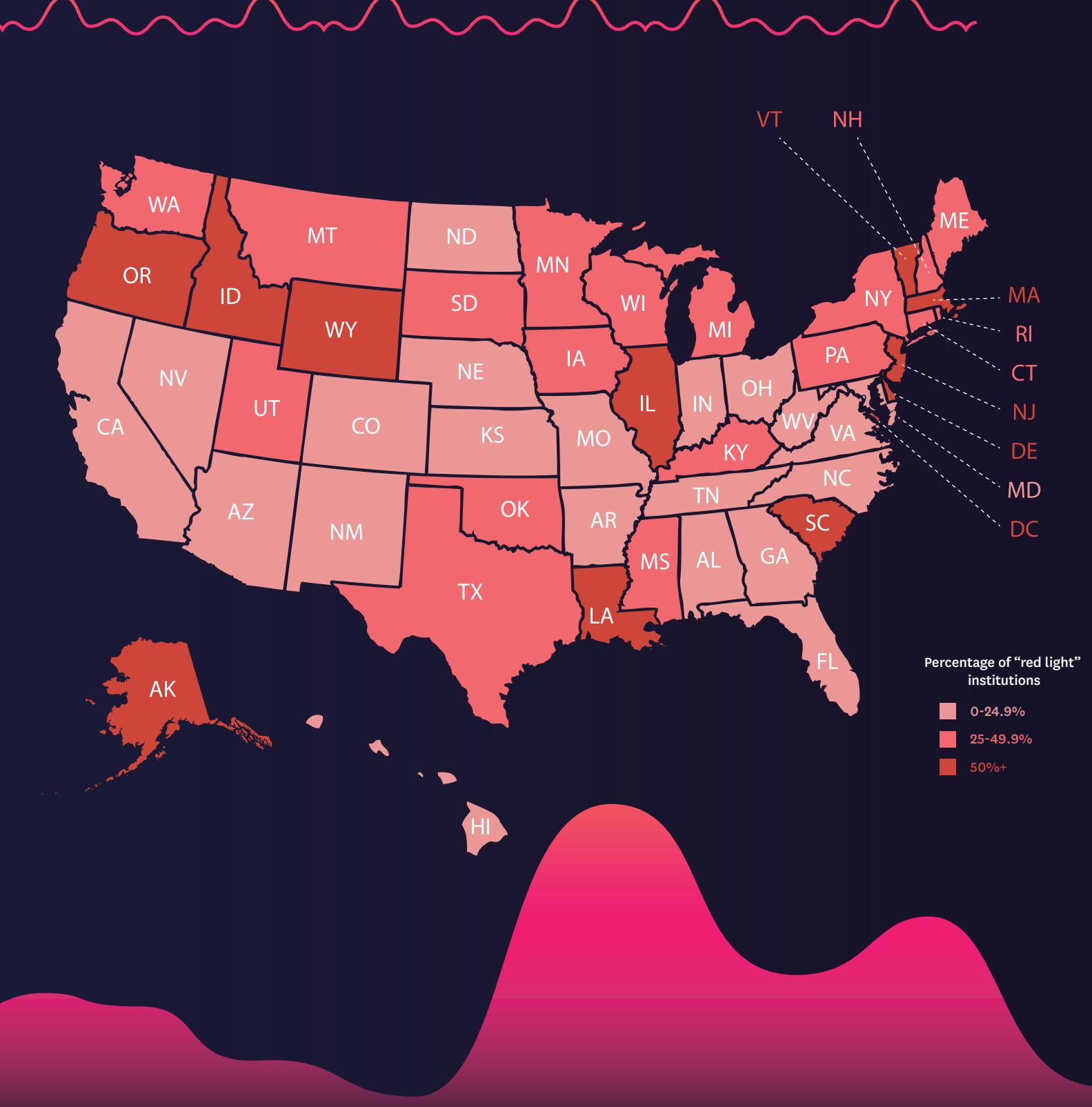
**Warning:** FIRE believes that free speech is not only a moral imperative, but also an essential element of a college education. However, private universities, as private associations, possess their own right to free association, which allows them to prioritize other values above the right to free speech 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.<sup>2</sup> Six schools surveyed for this report meet these criteria.<sup>3</sup>

<sup>1</sup> See, 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, encompass speech protected by the First Amendment).

<sup>2</sup> For example, Pepperdine University's Student Code of Conduct provides: "In keeping with Pepperdine University's Christian mission and its heritage in Churches of Christ, all members of the University community are encouraged to respect the teachings of Jesus and historic, biblical Christianity. It is expected that all students will adhere to biblical teaching regarding moral and ethical practices. Engaging in or promoting conduct or lifestyles inconsistent with biblical teaching is not permitted." *General Conduct Expectations, PEPPERDINE UNIVERSITY STUDENT CODE OF CONDUCT*, available at [www.pepperdine.edu/admission/student-life/student-code-of-conduct](http://www.pepperdine.edu/admission/student-life/student-code-of-conduct). It would be clear to any reasonable person reading this policy that students are not entitled to unfettered free speech at Pepperdine.

<sup>3</sup> FIRE has designated the following colleges and universities as "Warning" schools: Baylor University, Brigham Young University, Pepperdine University, Saint Louis University, Vassar College, and Yeshiva University.

# Findings



Of the 466 schools reviewed by FIRE, 133, or 28.5%, received a red light rating. 285 schools received a yellow light rating (61.2%), and 42 received a green light rating (9%). Six schools earned a Warning rating (1.5%).<sup>4</sup>

This marks the eleventh year in a row that the percentage of universities with an overall red light rating has fallen, this year from 32.3% to 28.5%. The continued reduction in red light institutions is encouraging: **In the ten years since our 2009 report, red light schools have declined by nearly fifty percentage points.**<sup>5</sup>

However, this year's numbers also reveal an increase in yellow light institutions, as 58.6% of public schools

earned an overall yellow light last year. While yellow light policies do not impose the sort of clear and substantial restrictions that red light policies present, they are nonetheless impermissible restrictions on expression. Yellow light institutions must not allow their place among the majority of schools to breed complacency; throughout the past few decades, courts have routinely struck down university policies that would earn a yellow light rating. Instead, these policies must be revised to meet First Amendment standards and to earn a green light rating.

The number of green light institutions has continued to increase this year, going from 35 institutions last year to 42.<sup>6</sup> In total, 29 schools improved their overall ratings this year.<sup>7</sup>



<sup>4</sup> See Appendix A for a full list of schools by rating.

<sup>5</sup> The 2009 report and all other past Spotlight on Speech Codes reports are available at <https://www.thefire.org/spotlight/reports>.

<sup>6</sup> Auburn University, Claremont McKenna College, Emory University, Keene State College, University of California, Los Angeles, University of New Hampshire, and University of North Dakota all joined the ranks of green light schools since last year's report.

<sup>7</sup> See Appendix B for a full list of rating changes over the 2017-18 academic year.

## Public Colleges and Universities

The percentage of public schools with a red light rating dropped again this year, from 26% last year to 23.2% this year. Overall, of the 362 public universities reviewed for this report, 84 received a red light rating (23.2%), 242 received a yellow light rating (66.9%), and 36 received a green light rating (9.9%).

This year, FIRE was pleased to welcome the University of California, Los Angeles to the list of green light institutions. UCLA is the first public school in California, as well as the first member institution of the University of California system, to earn an overall green light rating. In the past, the presence of one green light institution in a state system of colleges has been helpful in encouraging policy reform on the part of other member institutions; for example, the Purdue University system boasts three green light schools, the University of North Carolina System includes seven green light schools, and, as of this year, the University System of New Hampshire now has three institutions on the green light list. It is our hope that University of California system schools may similarly be encouraged to follow in the footsteps of UCLA to a green light rating.

With continued efforts by free speech advocates on and off campus, we expect the numbers of both red light and yellow light institutions to decrease, and for more schools across the country to earn FIRE's green light rating in the coming year.

**Red light ratings of public schools dropped from 26% to 23.2% this year.**



LAST YEAR

THIS YEAR

## Private Colleges and Universities

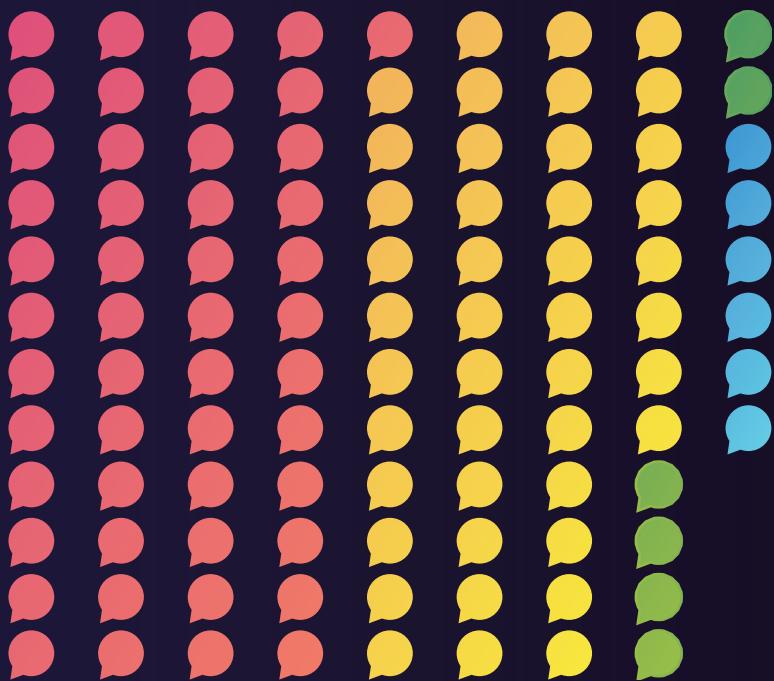
Of the 104 private colleges and universities reviewed, 49 (47.1%) received a red light rating. 43 (41.3%) received a yellow light rating, 6 (5.8%) received a green light rating, and 6 (5.8%) earned a Warning rating.

The percentage of private universities earning a red light rating, which stood at 53.9% last year, went below 50% for the first time ever this year, coming in at 47.1%. This progress is significant, given that private universities are not legally bound by the First Amendment, which regulates government actors. For this reason, it is gratifying that these colleges are closer to fulfilling their institutional commitments to free expression. Moreover, two private institutions—Emory University and Claremont McKenna College—earned overall green light ratings this past year.

FIRE will continue to work with private colleges and universities to improve policies so that they better meet institutional commitments to protecting students' free speech rights.

**The percentage of private universities earning a red light rating went below 50% for the first time ever this year.**

Of the 104 private schools reviewed by FIRE, 49 received a red light rating, 43 received a yellow light rating, 6 received a green light rating, and 6 earned a warning rating.



# Discussion



## SPEECH CODES ON CAMPUS: Background and Legal Challenges

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.

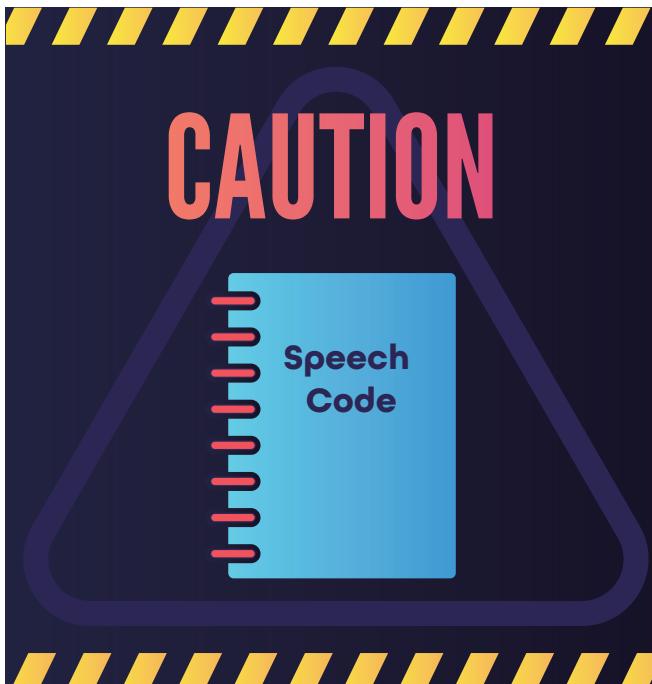
In the mid-1990s, the phenomenon of campus speech codes converged with the expansion of Title IX, the federal law prohibiting sex discrimination in educational institutions receiving federal funds.<sup>8</sup> Under the guise of the obligation to prohibit discriminatory harassment, unconstitutionally overbroad harassment policies banning subjectively offensive conduct proliferated.

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 three decades.<sup>9</sup>

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. 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.

**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.**



<sup>8</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, provides that: “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.” See generally Jacob E. Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. (2016) (discussing evolution of Title IX requirements).

<sup>9</sup> 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. Wisc. 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: Student detained for passing out political flyers settles lawsuit with Illinois College (April 18, 2018), <https://www.thefire.org/victory-student-detained-for-passing-out-political-flyers-settles-lawsuit-with-illinois-college>; 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), available at <https://www.thefire.org/victory-lawsuit-settlement-restores-free-speech-rights-at-dixie-state-u-after-censorship-of-bush-obama-che-flyers>.

## Public Universities vs. Private Universities

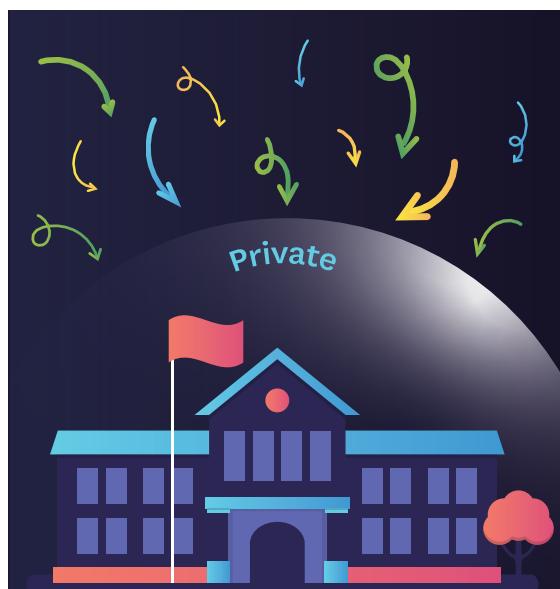
With limited, narrowly defined exceptions, the First Amendment prohibits the government—including governmental entities such as state universities—from restricting freedom of speech. A good rule of thumb is that if a state law would be declared unconstitutional for violating the First Amendment, a similar 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 conduct.<sup>10</sup> 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.

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 in their official policy materials. Lehigh University, for example, promises students “[f]ree inquiry and free speech and expression, including the right to open dissent.”<sup>11</sup> Similarly, according to Middlebury College’s student handbook, students “are free to examine and discuss all questions of interest to them and to express opinions publicly and privately.”<sup>12</sup> Yet both of these institutions, along with most other private colleges and universities, maintain policies that prohibit the very speech they promise to protect.

**most private universities explicitly promise freedom of speech and academic freedom in their official policy materials.**

This year, more colleges than ever before, including private institutions, have adopted policy statements in support of free speech modeled after the one produced in January 2015 by the Committee on Freedom of Expression at the University of Chicago.<sup>13</sup> This trend is explored in further detail in this report’s “Spotlight On: The Chicago Statement” feature.



<sup>10</sup> California maintains a law that applies the protections of the First Amendment to private, nonsectarian institutions of higher education in the state. Section 94367 of the California Education Code—the so-called “Leonard Law”—provides that “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 that the law “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.”

<sup>11</sup> *Policy on Freedom of Thought, Inquiry and Expression, and Dissent by Students*, LEHIGH UNIVERSITY HANDBOOK, available at [https://studentaffairs.lehigh.edu/sites/studentaffairs.lehigh.edu/files/offices/conduct/docs/Handbook/Lehigh\\_Student%20Conduct%20Handbook2017Final882018.pdf](https://studentaffairs.lehigh.edu/sites/studentaffairs.lehigh.edu/files/offices/conduct/docs/Handbook/Lehigh_Student%20Conduct%20Handbook2017Final882018.pdf).

<sup>12</sup> *Demonstrations & Protests Policy*, MIDDLEBURY HANDBOOK, available at <http://www.middlebury.edu/about/handbook/policies-for-all/health-safety/demonstr-protests>.

<sup>13</sup> Committee on Freedom of Expression at the University of Chicago, *Report of the Committee on Freedom of Expression*, available at <http://provost.uchicago.edu/FOECommitteeReport.pdf>. For a complete list of institutions that have adopted a version of the Chicago Statement, see <https://www.thefire.org/chicago-statement-university-and-faculty-body-support>.

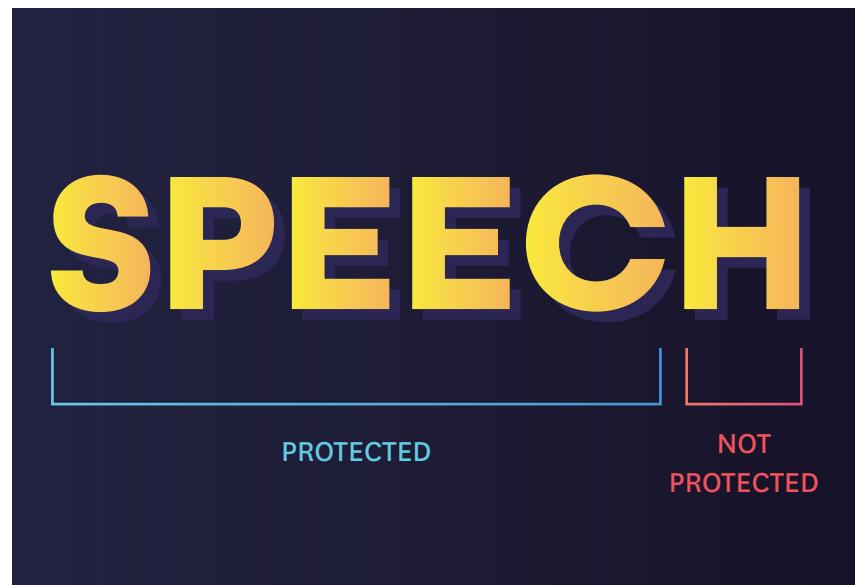
## What Exactly is “Free Speech,” and How do Universities Curtail it?

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, including 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.

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## Threats and Intimidation

The Supreme Court has defined “true threats” as “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.

In August 2018, for example, Long Island University Post administrators called a student to a mandatory meeting to question him about “concerns” they had over his criticism of the Greek life system, a paper he had written the previous year about terrorism, and photos on his personal Facebook account showing his participation in a recreational firearms event hosted by a sporting goods store.

In a letter to the university, FIRE reviewed the definition of a true threat and wrote:

If LIU Post considers academic writings about the morality of violence against government actors and a photo of a person holding a gun to be “threats,” it will have abandoned any understanding of the term.

...

LIU Post’s insistence on a formal meeting to question [student Anand] Venigalla about the purpose and meaning of tepid expression utterly devoid of threats not only has a chilling effect on Venigalla in particular, but sends a message to all students that their expression, if it offends others, could subject them to official investigation and questioning. As a result, students will likely refrain from speaking rather than risk investigation or discipline—the very definition of the impermissible chilling effect on protected speech. Indeed, Venigalla has expressed to FIRE that the meeting gave him the impression that, going forward, he must be careful about what he says.

### Universities frequently misapply policies prohibiting threats and intimidation so as to infringe on protected speech.

We do not mean to suggest that LIU Post must ignore true threats or statements implying the possibility of harm. However, without more, students cannot be summoned

for questioning every time they post a photo of themselves engaging in recreational firearm use.<sup>14</sup>

The controversy at LIU Post is just one example of a common misapplication of the legal standards for threats and intimidation, in which universities cite generalized concerns about safety with no regard to the boundaries of protected speech. Instead, universities must revise policies so that they track these legal standards, and enforce the policies accordingly.

## 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 so that it moves them to violence. While preventing violence is necessary, 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 sympathetic, 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.”<sup>15</sup>

The legal 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 (emphasis in original). 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 dual requirements of likelihood and immediacy. Nonetheless, college administrations have been all too willing to abuse or ignore this jurisprudence.

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**The danger is that certain speech will convince sympathetic, willing listeners to take immediate unlawful action.**

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<sup>15</sup> *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992).

## Obscenity

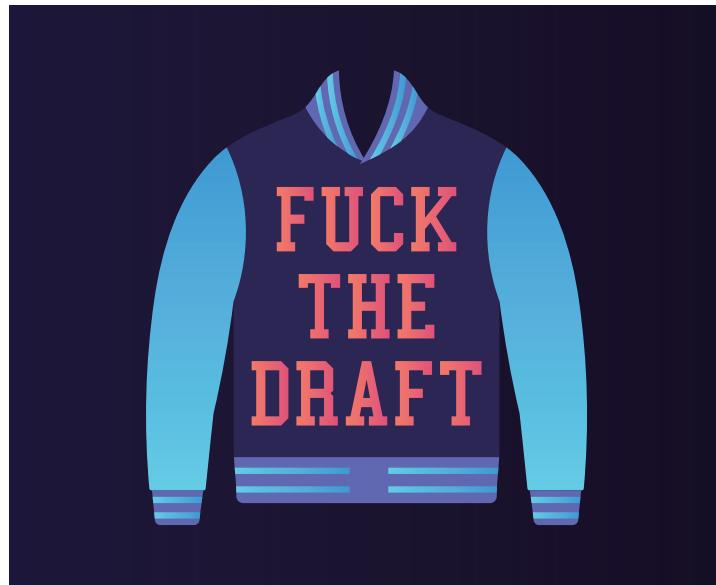
The Supreme Court has held that obscene expression, to fall outside of the protection of the First Amendment, must “depict or describe sexual conduct” and must be “limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, 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 profanity, even though profane words 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.

Similarly, 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 lawfully prohibit profanity and vulgar expression. For example:

- Lake Superior State University states in its student handbook that materials deemed “vulgar” will not be approved for posting on campus.<sup>16</sup>
- Alabama A&M University prohibits students from “[h]arassing” others by sending “profane” messages while using university computing resources.<sup>17</sup>
- Texas Tech University bans the use of “obscenities” while engaged in expressive activities.<sup>18</sup>



<sup>16</sup> *Posting Policy, STUDENT HANDBOOK (CODE OF CONDUCT)*, available at <https://www.lssu.edu/campus-life/stay-informed/student-handbook/#toggle-id-5>.

<sup>17</sup> *Acceptable Use Policy*, available at <http://www.aamu.edu/administrativeoffices/information-technology/ITpolicies/Pages/Acceptable-Use-Policy.aspx>.

<sup>18</sup> *Freedom of Expression Activities and Forum Areas, TEXAS TECH UNIVERSITY STUDENT HANDBOOK*, available at <http://www.depts.ttu.edu/dos/docs/819Handbook.pdf>.

## Harassment

Hostile environment 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 that is “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 protected expressive activities that are 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, many colleges and universities have maintained policies defining harassment too

broadly and prohibiting constitutionally protected speech. And years of Title IX enforcement by the Department of Education’s Office for Civil Rights (OCR) that neglected to fully protect First Amendment rights, including an unconstitutionally broad definition of sexual harassment promulgated by OCR,<sup>19</sup> led numerous colleges and universities to enact overly restrictive harassment policies in an effort to avoid an OCR investigation. It will likely take a great deal of time and effort by free speech advocates to undo this damage.

Here are just a few examples of overly broad sexual harassment policies based on OCR’s definition:

- The University of Texas at Austin defines sexual harassment as “[u]nwelcome conduct of a sexual nature.”<sup>20</sup>
- At the University of Rhode Island, “Sexual Harassment is any unwelcome conduct of a sexual nature.”<sup>21</sup>
- Pennsylvania State University’s policy states: “Sexual Harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwanted, inappropriate, or unconsented to.”<sup>22</sup>

These examples, along with 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 actionable harassment, despite similar policies having been struck down by federal courts years earlier.<sup>23</sup>

### For decades now, many colleges and universities have maintained policies defining harassment too broadly and prohibiting constitutionally protected speech.

Having discussed the most common ways in which universities misuse the narrow

exceptions to the First Amendment to prohibit protected expression, we now turn to the innumerable other types of university regulations that restrict free speech on their face. Such restrictions are generally found in several distinct types of policies.

<sup>19</sup> See Letter 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>; Letter 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>.

<sup>20</sup> Appendix D: Policy on Sex Discrimination, Sexual Harassment, Sexual Assault, Sexual Misconduct, Interpersonal Violence, and Stalking, GENERAL INFORMATION 2018-2019, available at <http://catalog.utexas.edu/general-information/appendices/appendix-d>.

<sup>21</sup> Student Code of Conduct, THE UNIVERSITY OF RHODE ISLAND STUDENT HANDBOOK, available at <https://web.uri.edu/studentconduct/files/2015-2017-Student-Handbook.pdf>.

<sup>22</sup> AD85 Sexual And/or Gender-Based Harassment and Misconduct, available at <https://policy.psu.edu/policies/ad85>.

<sup>23</sup> See, e.g., DeJohn, 537 F.3d 301 (holding that Temple University’s sexual harassment policy was unconstitutionally broad); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (holding that University of Michigan’s discriminatory harassment policy was unconstitutionally broad); *Booher*, 1998 U.S. Dist. LEXIS 11404 (holding that Northern Kentucky University’s sexual harassment policy was unconstitutionally broad).

# Spotlight On: The Chicago Statement

Since last year's report, FIRE has observed an increase in the adoption of free speech statements at colleges and universities inspired by the "Report of the Committee on Freedom of Expression" at the University of Chicago (better known as the "Chicago Statement"). In fact, 14 institutions or faculty bodies have endorsed this policy statement in 2018 alone.

As tracked by FIRE, endorsement of the Chicago Statement may take three different forms: official adoption by a university, approval by a governing board, or endorsement by a faculty body.<sup>1</sup> Additionally, to ensure campus-wide engagement with the free speech issues raised by the Chicago Statement, many institutions choose to include several other stakeholders in the process, such as the student government and other campus community members.

The statements on our list of Chicago Statement schools are, in FIRE's estimation, consistent with the principles of free expression outlined by the Committee on Freedom of Expression at the University of Chicago,

and represent an institution's principled commitment to robust and free inquiry. These statements don't merely echo First Amendment principles; they provide a roadmap for creating a campus climate that values free expression as the lifeblood of the university.

“

**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. – *The Chicago Statement***

”

Among the more than 50 university administrations and faculty bodies that have endorsed a version of the Chicago Statement, we have observed several positive trends, including adoption by a number of "green light" institutions, as well as adoption by non-administrative units, such as a faculty senate. Increasingly, more green light institutions have endorsed principled statements of free expression. This elite group of colleges and universities may boast not only that they do not maintain any speech codes that restrict the free speech rights of their students, but also that they have actively committed themselves to embracing and encouraging the free exchange of ideas on their campuses.<sup>2</sup>

Likewise, faculty members at several schools earning FIRE's green light rating have endorsed the Chicago Statement to bolster free speech and academic freedom through their faculty governing bodies. For example, in the spring of 2018, the



<sup>1</sup>See Appendix C for a full list of institutions that have adopted a version of the Chicago Statement.

<sup>2</sup>These institutions are Arizona State University, Claremont McKenna College, Kansas State University, Purdue University, and the University of Maryland.

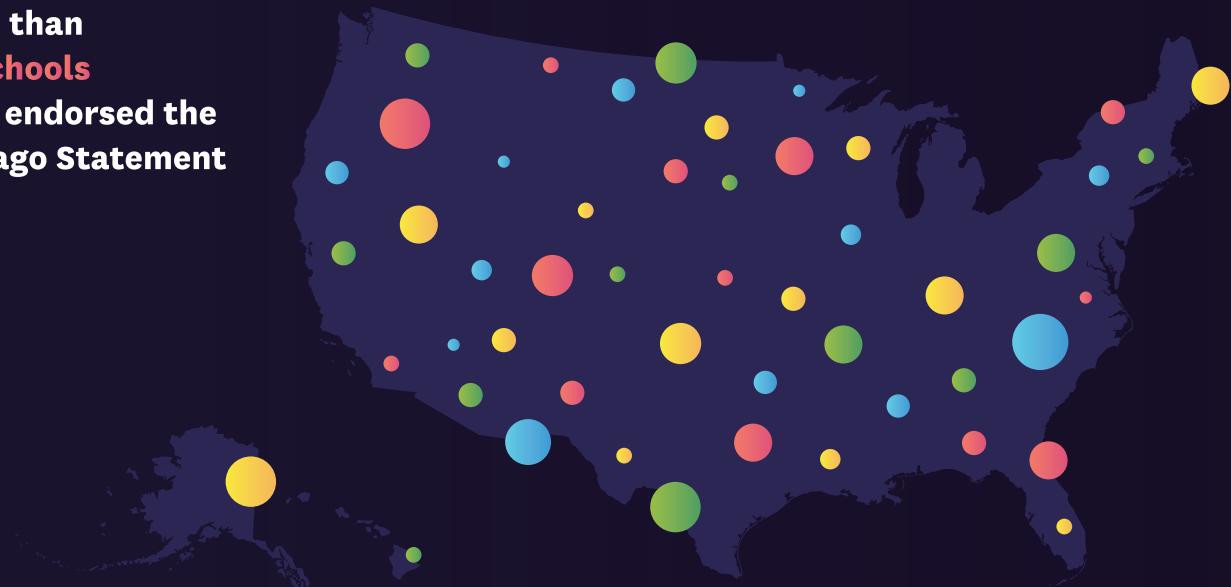


University of North Carolina at Chapel Hill's faculty council adopted a resolution aimed at promoting and protecting free speech. This trend demonstrates the high value that faculty members and students—not just institutions—place on freedom of expression.

It is important to note, however, that adoption of a free speech policy statement in the model of the Chicago Statement is not just for institutions that earn FIRE's highest speech code rating. Endorsement of the Chicago Statement is often an important step toward securing students' and faculty members' free speech rights and achieving a green light rating for that school's speech codes. When non-administrative groups such as a faculty senate, a university-wide committee, or a student government endorse the Chicago Statement, it sends a strong message to college leadership that students and faculty members want their speech to be unambiguously affirmed and protected.

All colleges that are seriously committed to free inquiry and robust debate should consider adopting a version of the Chicago Statement. In doing so, the college not only reaffirms its core purpose as a place for discourse and debate, but also encourages the campus community to engage in such expression. By actively prioritizing free speech in this manner, universities can outline a set of principles that will become the hallmark of the community they aspire to build. As eloquently described in the Chicago Statement, "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." That is the type of campus community FIRE hopes all colleges aim to cultivate.

**More than  
50 schools  
have endorsed the  
Chicago Statement**



## Anti-Bullying Policies

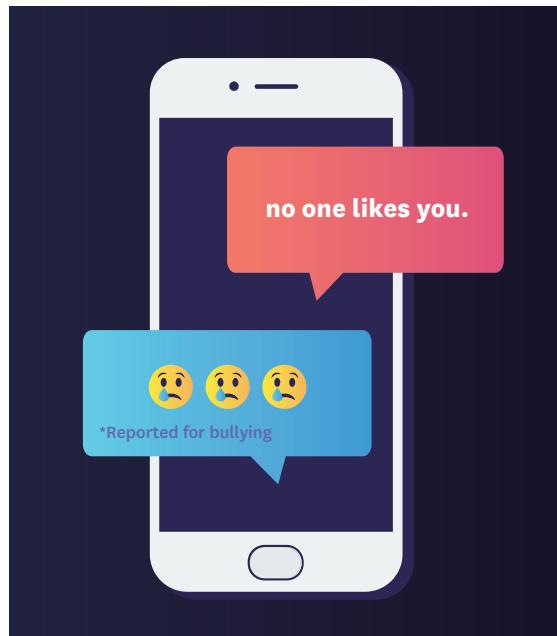
Over the past decade, FIRE has found that more and more colleges and universities have adopted policies on “bullying” and “cyberbullying.” On October 26, 2010, OCR issued a letter on the topic of bullying, reminding educational institutions that they must address actionable harassment, but also acknowledging that “[s]ome conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression.”<sup>24</sup> 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*<sup>25</sup> approach that is inappropriate in the college setting, where students are overwhelmingly adults.<sup>26</sup>

Court decisions and other guidance regarding K-12 speech have a way of “trickling up” to the collegiate setting, and indeed, FIRE has come across numerous university policies prohibiting bullying in a problematic manner. For example:

- Union College defines bullying as: “The aggressive and hostile acts of an individual or group of individuals which are intended to humiliate, mentally, or physically injure or intimidate, and/or control another individual or group of individuals.”<sup>27</sup>
- Idaho State University’s policy states that bullying includes “insults, offensive remarks,” and “harsh practical jokes.”<sup>28</sup>
- At Kentucky State University, “[t]exting or emailing insults or rumors” and “[p]osting derogatory comments” are considered cyberbullying.<sup>29</sup>

### Some conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression.

But as courts have held in rulings spanning decades, speech cannot be prohibited simply because someone else finds it offensive, even deeply so.<sup>30</sup> Offensive speech, if it does not rise to the level of harassment or one of the other narrow categories of unprotected speech and conduct, is entitled to constitutional protection (and, accordingly, to protection at private institutions that claim to uphold the right to free speech).



<sup>24</sup> “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>.

<sup>25</sup> “In the place of parents.”

<sup>26</sup> See generally McCauley, 618 F.3d at 243-44 (“[T]he pedagogical missions of public universities and public elementary and high schools are undeniably different. While both seek to impart knowledge, the former encourages inquiry and challenging priori assumptions whereas the latter prioritizes the inculcation of societal values. . . . The idea that public universities exercise strict control over students via an *in loco parentis* relationship has decayed to the point of irrelevance.”).

<sup>27</sup> *Student Conduct Code, UNION COLLEGE STUDENT HANDBOOK*, available at <https://www.union.edu/files/dean-students/201809/student-handbook-2018-2019.pdf>.

<sup>28</sup> *Bullying, STUDENT CODE POLICY #5000*, available at <https://isu.edu/media/libraries/isu-policies-and-procedures/student-affairs/5000-Student-Conduct-System.pdf>.

<sup>29</sup> *Cyberbullying Policy, KENTUCKY STATE UNIVERSITY STUDENT CODE OF CONDUCT*, available at <http://kysu.edu/wp-content/uploads/2014/04/Code-of-Conduct-.pdf>.

<sup>30</sup> See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); see also *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (holding that there is “no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive...”); *Bair v. Shippensburg Univ.*, 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”); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (“Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people”).

## 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 discourse 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.

For example:

- Students at Evergreen State College are informed: “Civility is not just a word; it must be present in all our interactions.”<sup>31</sup>
- Georgetown University prohibits “[e]ngaging in behavior, either through language or actions, which disrespects another individual.”<sup>32</sup>
- Johns Hopkins University states that “[r]ude, disrespectful behavior is unwelcome and will not be tolerated.”<sup>33</sup>

While respect and civility may seem uncontroversial, most uncivil or disrespectful speech is protected by the First Amendment,<sup>34</sup> 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.

## Internet Usage Policies

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

Examples of impermissibly restrictive Internet usage policies include the following:

- At Macalester College, students are told to refrain from posting material that is deemed to be “racially, sexually, ethnically or religiously objectionable.”<sup>35</sup>
- Boston University students are prohibited from sending “offensive” or “annoying” materials via university networks.<sup>36</sup>
- Tulane University forces students to agree to communicate only in ways that are “kind and respectful,” and bans messages that are “rude.”<sup>37</sup>



<sup>31</sup> Evergreen's Social Contract, available at <https://www-evergreen-edu-about-social>.

<sup>32</sup> Code of Student Conduct, available at <https://studentconduct.georgetown.edu/code-of-student-conduct>.

<sup>33</sup> Principles for Ensuring Equity, Civility and Respect for All, available at [https://www.jhu.edu/assets/uploads/2014/09/equity\\_civility\\_respect.pdf](https://www.jhu.edu/assets/uploads/2014/09/equity_civility_respect.pdf).

<sup>34</sup> See, e.g., Reed, 533 F. Supp. 2d 1005 (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.”).

<sup>35</sup> 5.12 Social Networking/Social Media, STUDENT HANDBOOK, available at <https://www.macalester.edu/documents/studenthandbook/05campuspolicies/05-12socialnetworking.html>.

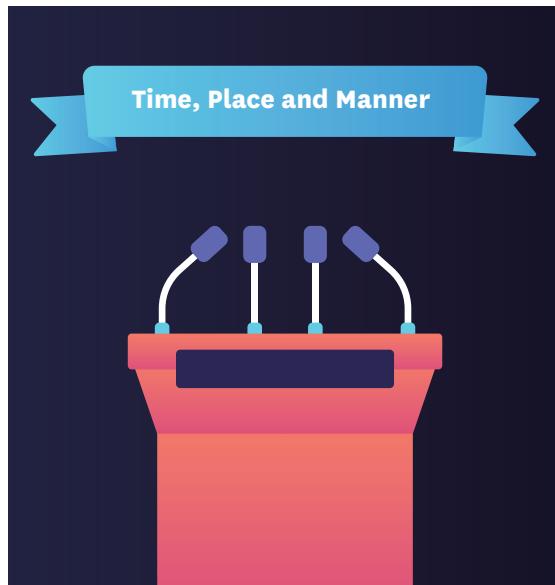
<sup>36</sup> University Conditions of Use & Policy on Computing Ethics, available at <http://www.bu.edu/dos/policies/lifebook/computing-ethics>.

<sup>37</sup> Acceptable Use Policy, available at <https://ts.tulane.edu/acceptable-use-policy>.

## 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.<sup>38</sup> These sets of policies and procedures, frequently termed “Bias Reporting Protocols” or “Bias Incident Protocols,” often include bans on protected expression. For example:

- At Bates College, a bias incident is defined as “any event of intolerance or prejudice” intended to “offend . . . another because of the other’s race, ethnicity, national origin, religion, sex, sexual orientation, gender identity or expression, age or physical or mental disability.”<sup>39</sup>
- Clark University’s student handbook explains that bias incidents involve “treating someone negatively” based on a particular characteristic, including “telling jokes based on a stereotype” and “name-calling.”<sup>40</sup>
- At Grinnell College, a bias-motivated incident is merely “an expression of hostility” toward a person of a particular characteristic.<sup>41</sup>



While speech or expression that is based on a speaker’s prejudice may be subjectively offensive, it is nonetheless protected unless it rises to the level of harassment, true threats, or other unprotected speech.

Bias incident 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 extensive regulatory frameworks and response protocols devoted solely to addressing them.

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

## 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.<sup>42</sup> 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. Such regulations can take several forms, as discussed in the sections below.

<sup>38</sup> See generally Bias Response Team Report 2017, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., available at <https://www.thefire.org/first-amendment-library/special-collections/fire-guides/report-on-bias-reporting-systems-2017>.

<sup>39</sup> Bias Incidents & Hate Crimes, available at <http://www.bates.edu/diversity-inclusion/bias-incidents-hate-crimes/#definitions>.

<sup>40</sup> Code of Student Conduct, STUDENT HANDBOOK, available at [https://www.clarku.edu/offices/dean-of-students/wp-content/blogs.dir/3/files/sites/19/2018/08/Student\\_Handbook\\_2018\\_2019.pdf](https://www.clarku.edu/offices/dean-of-students/wp-content/blogs.dir/3/files/sites/19/2018/08/Student_Handbook_2018_2019.pdf).

<sup>41</sup> Hate Crimes and Bias-Motivated Incidents Policy, STUDENT HANDBOOK, available at [https://catalog.grinnell.edu/content.php?catoid=12&navoid=2536#Hate\\_Crimes\\_and\\_Bias-Motivated\\_Incidents\\_Policy](https://catalog.grinnell.edu/content.php?catoid=12&navoid=2536#Hate_Crimes_and_Bias-Motivated_Incidents_Policy).

<sup>42</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

## Security Fee Policies

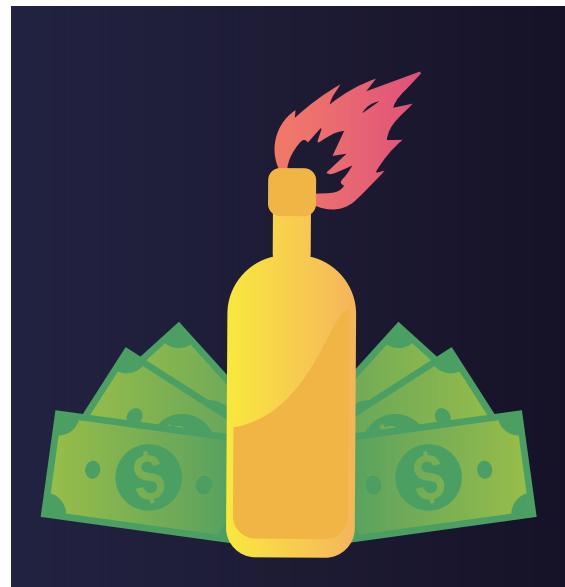
In recent years, FIRE has seen a number of colleges and universities hamper—whether intentionally or just through a misunderstanding of the law—the invitation of controversial campus speakers by levying additional security costs on the sponsoring student organizations.

The Supreme Court addressed a very similar 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 this precedent, the impermissible use of security fees to burden controversial speech is all too common on university campuses:

- A SUNY New Paltz policy considers “various elements/controversial factors to your event” in determining how much security will need to be hired.<sup>43</sup>
- Binghamton University notes that campus organizations sponsor events “which tend to generate a great deal of controversy in the community” from time to time, and that the sponsor of the event is responsible for the cost of officers and any special equipment as “determined by the University Police.”<sup>44</sup>

- At Georgia State University, events are subject to a host of requirements (including a minimum notice of 15 days) whenever the university determines the event poses a security concern “in the sole discretion of the university.” Under the policy, the sponsoring organization is “responsible for all costs related to security.”<sup>45</sup>



**Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.**

<sup>43</sup> Event Security, OFFICE OF STUDENT ACTIVITIES AND UNION SERVICES POLICY MANUAL, available at <https://www.newpaltz.edu/media/student-activities-and-union-services/saus/SAUS%20POLICIES%202017-2018.pdf>.

<sup>44</sup> Guidelines for Sponsoring Campus Events that Require Extra-ordinary Security Arrangements, available at <https://www.binghamton.edu/campus-activities/docs/Extra-Ordinary%20Security%20FINAL.pdf>.

<sup>45</sup> Special Event/Late Night Event Policy, CODE OF CONDUCT, available at [https://codeofconduct.gsu.edu/files/2018/10/2018\\_10\\_2\\_codeOfConduct.pdf](https://codeofconduct.gsu.edu/files/2018/10/2018_10_2_codeOfConduct.pdf).

## 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 enforce prior restraints, requiring students and student organizations to register their expressive activities well in advance and, often, to obtain administrative approval for those activities. For example:

- Virginia State University requires student organizations to request permission from the administration to conduct expressive activities “at least 10 days in advance.”<sup>46</sup>
- At Marquette University, “[a]ll publicity, literature, handouts, fliers, etc.” must be approved by the administration at least two weeks in advance.<sup>47</sup>
- Northeastern University forces students to fill out a “Demonstration Permit” at least seven days before their organization intends to demonstrate on campus property.<sup>48</sup>

**Many colleges and universities enforce prior restraints, requiring students and student organizations to register their expressive activities well in advance**



<sup>46</sup> *Rallies, Public Assemblies and Demonstrations*, STUDENT ORGANIZATION HANDBOOK, available at <http://vsu.edu/files/docs/student-activities/handbook-for-student-organizations.pdf>.

<sup>47</sup> *Participation in Student Organization Sponsored Events*, STUDENT ORGANIZATION POLICY HANDBOOK, available at <http://www.marquette.edu/student-development/organizations/documents/student-organization-handbook-2017-2018.pdf>.

<sup>48</sup> *Demonstrations*, STUDENT ORGANIZATION RESOURCE GUIDE, available at [http://www.northeastern.edu/csi/wp-content/uploads/2013/10/ResourceGuide\\_2016\\_Final.pdf](http://www.northeastern.edu/csi/wp-content/uploads/2013/10/ResourceGuide_2016_Final.pdf).

## Free Speech Zone Policies

Of the 466 schools surveyed for this report, 49 institutions (10.5%) have “free speech zone” policies—policies limiting student demonstrations and other expressive activities to small and out-of-the-way areas on campus.<sup>49</sup> Despite being inconsistent with the First Amendment, free speech zones are more common at public universities than at private universities: 12.7% of public universities surveyed maintain free speech zones, while just 2.9% of private universities do.

Free speech zones have repeatedly been struck down by courts or voluntarily revised by colleges as part of settlements to lawsuits brought by students. FIRE’s Stand Up For Speech Litigation Project has included successful challenges to free speech zone policies at eight colleges and universities and includes an ongoing challenge to a free speech zone policy at Pierce College in Los Angeles.<sup>50</sup>

Additionally, state legislatures have continued this year to take action to prohibit public colleges and universities from maintaining free speech zones. Currently, eleven states have enacted laws prohibiting these restrictive policies: Virginia, Missouri, Arizona, Kentucky, Colorado, Utah, North Carolina, Tennessee, Florida, Georgia, and Louisiana.

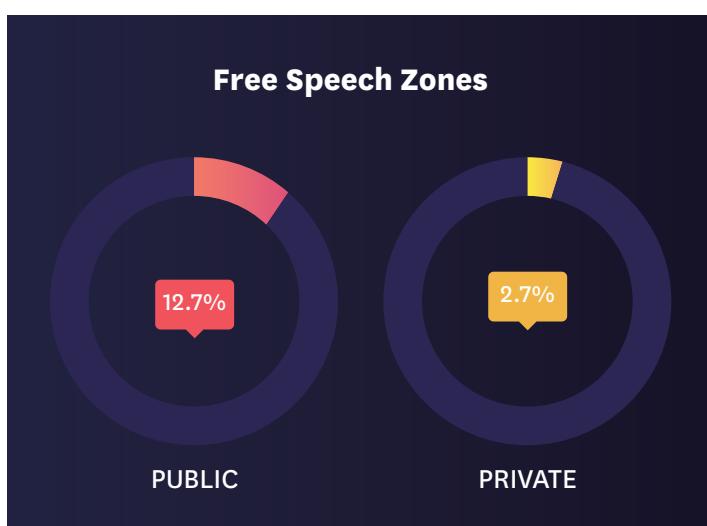
Based on the Campus Free Expression (CAFE) Act model legislation from FIRE,<sup>51</sup> Florida’s bill, which was signed into law in March 2018, states:

A person who wishes to engage in an expressive activity in outdoor areas of campus may do so freely, spontaneously, and contemporaneously as long as the person’s conduct is lawful and does not materially and substantially disrupt the functioning of the public institution of higher education or infringe upon the rights of other individuals or organizations to engage in expressive activities. . . . A public institution of higher education may not designate any area of campus as a free-speech zone or otherwise create policies restricting expressive activities to a particular area of campus . . .<sup>52</sup>

The law also provides a right to sue a public institution of higher education in Florida if the institution violates the expressive rights guaranteed by the law.<sup>53</sup>

Despite the unpopularity of free speech zones with judges and lawmakers, too many universities still maintain them, such as the following:

- Old Dominion University forces students to reserve certain designated areas for “[f]ree speech events or forums.”<sup>54</sup>
- At Kean University, students need to use “sites designated for the sale or distribution of literature including leaflets, handbills, handouts, newspapers and other written material when not in connection with a scheduled University event.”<sup>55</sup>
- Cornell University sets aside just one “rally space” for all of its students to conduct expressive activities in.<sup>56</sup>



<sup>49</sup> See Appendix D for a full list of schools with free speech zone policies.

<sup>50</sup> For more information about FIRE’s Stand Up for Speech Litigation Project and Million Voices campaign, see <http://www.standupforspeech.com>.

<sup>51</sup> For more detailed information about the CAFE Act, see <https://www.thefire.org/frequently-asked-questions-the-campus-free-expression-cafe-act>.

<sup>52</sup> Senate Bill 4, the Florida Excellence in Higher Education Act of 2018, available at [http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=\\_s0004er.DOCX&DocumentType=Bill&BillNumber=0004&Session=2018](http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_s0004er.DOCX&DocumentType=Bill&BillNumber=0004&Session=2018).

<sup>53</sup> Press Release, Found, for Individual Rights in Educ., Florida becomes ninth state to ban restrictive campus free speech zones (March 12, 2018), available at <https://www.thefire.org/florida-becomes-ninth-state-to-ban-restrictive-campus-free-speech-zones>.

<sup>54</sup> Webb Center & Outdoor Space Scheduling Policy, STUDENT ORGANIZATION HANDBOOK, available at <https://www.odu.edu/content/dam/odu/offices/student-activities-leadership/docs/student-organization-handbook-2016-2017.pdf>.

<sup>55</sup> Distribution of Literature Policy, available at <https://www.kean.edu/offices/policies/distribution-literature-policy>.

<sup>56</sup> General policies for student organizations, STUDENT ORGANIZATION HANDBOOK, available at [http://orgsync.rso.cornell.edu/Handbook\\_Pol](http://orgsync.rso.cornell.edu/Handbook_Pol).

# What Can be Done?



The good news is that the types of restrictions discussed in this report can be reformed. A student or faculty member can be a tremendously effective advocate for change when he or she is aware of expressive 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 such 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 cannot credibly argue 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.<sup>57</sup>

The suppression of free speech at institutions of higher education is a matter of great national concern. But, by working together with universities to revise restrictive speech codes and to reaffirm commitments to free expression, we can continue to stride toward campuses that truly embody the "marketplace of ideas" that such institutions must be in our society.

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



<sup>57</sup> Azhar Majeed, *Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators for Violating Students' Speech Rights*, 8 CARDENZO PUB. L., POL'Y & ETHICS J. 3, 515 (2010).

# Appendices



## APPENDIX A: Schools by Rating



RED LIGHT

Adams State University

Alabama A&M University

Barnard College

Bates College

Black Hills State University

Boise State University

Boston College

Boston University

Bryn Mawr College

California State University - Channel Islands

California State University - Dominguez Hills

California State University - Fresno

California State University - Monterey Bay

Carleton College

Case Western Reserve University

Cheyney University of Pennsylvania

Chicago State University

Clark University

Clemson University

Coastal Carolina University

Colby College

Colgate University

College of Charleston

College of the Holy Cross

Connecticut College

Dartmouth College

Davidson College

Delaware State University

Delta State University

DePauw University

Dickinson College

Drexel University

Eastern Illinois University

Eastern Washington University

Evergreen State College

Florida State University

Fordham University

Framingham State University

Furman University

George Washington University

Georgetown University

Georgia Southern University

Governors State University

Grambling State University

Grinnell College

Harvard University



RED LIGHT

Howard University

Idaho State University

Jackson State University

Johns Hopkins University

Kean University

Kentucky State University

Lafayette College

Lake Superior State University

Lehigh University

Lewis-Clark State College

Lincoln University

Louisiana State University - Baton Rouge

Lyndon State College

Macalester College

Mansfield University of Pennsylvania

Marquette University

McNeese State University

Middle Georgia State University

Middlebury College

Missouri State University

Morehead State University

Mount Holyoke College

Murray State University

New Jersey Institute of Technology

New York University

Northeastern University

Northern Illinois University

Northern Kentucky University

Oklahoma State University - Stillwater

Pennsylvania State University - University Park

Portland State University

Princeton University

Reed College

Rensselaer Polytechnic Institute

Salem State University

Sam Houston State University

Southeastern Louisiana University

Southern Illinois University at Carbondale

Southern Illinois University at Edwardsville

Southern Oregon University

St. Olaf College

State University of New York - Albany

State University of New York - Fredonia

State University of New York - New Paltz

Stevens Institute of Technology

Syracuse University

Tennessee State University

The College of New Jersey

Troy University

Tufts University

Tulane University



**YELLOW  
LIGHT**

Alabama State University  
Alcorn State University  
American University  
Amherst College  
Angelo State University  
Arkansas State University  
Athens State University  
Auburn University Montgomery  
Ball State University  
Bard College  
Bemidji State University  
Binghamton University, State University of New York  
Bloomsburg University of Pennsylvania



**RED LIGHT**

Union College  
University of Alabama at Birmingham  
University of Alaska Anchorage  
University of Alaska Fairbanks  
University of Central Missouri  
University of Central Oklahoma  
University of Houston  
University of Illinois at Chicago  
University of Louisiana at Lafayette  
University of Massachusetts at Dartmouth  
University of Massachusetts at Lowell  
University of Miami  
University of Michigan - Ann Arbor  
University of Michigan - Dearborn  
University of Michigan - Flint  
University of Montana  
University of New Orleans  
University of North Texas  
University of Notre Dame  
University of Rhode Island  
University of South Carolina Columbia  
University of Texas at Austin  
University of Texas at Dallas  
University of Tulsa  
University of West Alabama  
University of Wisconsin - Oshkosh  
University of Wyoming  
Utah State University  
Utah Valley University  
Virginia State University  
Wake Forest University  
Wesleyan University  
Western Illinois University  
Whitman College  
William Paterson University  
Worcester Polytechnic Institute



**YELLOW  
LIGHT**

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 Polytechnic University - Pomona  
California State University - Bakersfield  
California State University - Chico  
California State University - East Bay  
California State University - Fullerton  
California State University - Long Beach  
California State University - Los Angeles  
California State University - Northridge  
California State University - Sacramento  
California State University - San Bernardino  
California State University - San Marcos  
California State University - Stanislaus  
California University of Pennsylvania  
Cameron University  
Central Connecticut State University  
Central Michigan University  
Central Washington University  
Centre College  
Christopher Newport University  
Clarion University of Pennsylvania  
Colorado College  
Colorado Mesa University  
Colorado School of Mines  
Colorado State University  
Colorado State University - Pueblo  
Columbia University  
Cornell University  
Dakota State University  
East Stroudsburg University of Pennsylvania  
East Tennessee State University  
Eastern Michigan University  
Eastern New Mexico University  
Elizabeth City State University  
Fayetteville State University  
Ferris State University  
Fitchburg State University  
Florida A&M University  
Florida Atlantic University  
Florida Gulf Coast University  
Florida International University  
Fort Hays State University



YELLOW  
LIGHT

Fort Lewis College  
Franklin & Marshall College  
Frostburg State University  
Georgia Institute of Technology  
Georgia State University  
Gettysburg College  
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  
Iowa State University  
Jacksonville State University  
James Madison University  
Kennesaw State University  
Kent State University  
Kenyon College  
Kutztown University of Pennsylvania  
Lock Haven University of Pennsylvania  
Longwood University  
Louisiana Tech University  
Marshall University  
Massachusetts College of Liberal Arts  
Massachusetts Institute of Technology  
Metropolitan State University  
Metropolitan State University of Denver  
Miami University of Ohio  
Michigan State University  
Middle Tennessee State 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  
Norfolk State University  
North Carolina A&T State University



YELLOW  
LIGHT

North Carolina State University - Raleigh  
North Dakota State University  
Northeastern Illinois University  
Northern Arizona University  
Northern Michigan University  
Northwestern Oklahoma State University  
Northwestern State University  
Northwestern University  
Oakland University  
Oberlin College  
Occidental College  
Ohio University  
Old Dominion University  
Pittsburg State University  
Pitzer College  
Pomona College  
Radford University  
Rhode Island College  
Rice University  
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  
Shawnee State University  
Skidmore College  
Slippery Rock University of Pennsylvania  
Smith College  
Sonoma State University  
South Dakota State University  
Southeast Missouri 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 - University at Buffalo  
State University of New York College of Environmental  
Science and Forestry  
Stockton University  
Stony Brook University  
Swarthmore College  
Tarleton State University  
Temple University  
Tennessee Technological University  
Texas A&M University - College Station



Texas Southern University  
 Texas State University - San Marcos  
 Texas Tech University  
 Texas Woman's 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 Southeast  
 University of Arizona  
 University of Arkansas - Fayetteville  
 University of California - Riverside  
 University of California-Merced  
 University of California, Berkeley  
 University of California, Davis  
 University of California, Irvine  
 University of California, San Diego  
 University of California, Santa Barbara  
 University of California, Santa Cruz  
 University of Central Arkansas  
 University of Central Florida  
 University of Cincinnati  
 University of Colorado at Boulder  
 University of Connecticut  
 University of Delaware  
 University of Denver  
 University of Georgia  
 University of Hawaii at Hilo  
 University of Hawaii at Manoa  
 University of Idaho  
 University of Illinois at Springfield  
 University of Illinois at Urbana-Champaign  
 University of Iowa  
 University of Kansas  
 University of Kentucky  
 University of Louisville  
 University of Maine  
 University of Maine at Fort Kent  
 University of Maine at Presque Isle  
 University of Mary Washington  
 University of Massachusetts - Amherst  
 University of Massachusetts - Boston  
 University of Memphis  
 University of Minnesota - Morris  
 University of Minnesota - Twin Cities  
 University of Missouri - Columbia  
 University of Missouri-Kansas City



University of Missouri-St. Louis  
 University of Montana Western  
 University of Montevallo  
 University of Nebraska - Lincoln  
 University of Nevada, Las Vegas  
 University of Nevada, Reno  
 University of New Mexico  
 University of North Alabama  
 University of North Carolina - Asheville  
 University of North Carolina - Pembroke  
 University of North Carolina School of the Arts  
 University of North Georgia  
 University of Northern Colorado  
 University of Northern Iowa  
 University of Oklahoma  
 University of Oregon  
 University of Pittsburgh  
 University of Richmond  
 University of Rochester  
 University of South Alabama  
 University of South Dakota  
 University of South Florida  
 University of South Florida at Saint Petersburg  
 University of Southern California  
 University of Southern Indiana  
 University of Southern Maine  
 University of Southern Mississippi  
 University of Texas at Arlington  
 University of Texas at El Paso  
 University of Texas at San Antonio  
 University of Texas at Tyler  
 University of Toledo  
 University of Utah  
 University of Vermont  
 University of Washington  
 University of West Florida  
 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 - Milwaukee  
 University of Wisconsin - Stout  
 Valdosta State University  
 Vanderbilt University  
 Virginia Commonwealth University  
 Virginia Polytechnic Institute and State University  
 Washington & Lee University  
 Washington State University  
 Washington University in St. Louis  
 Wayne State University



**YELLOW  
LIGHT**

Weber State University  
Wellesley College  
West Chester University of Pennsylvania  
West Virginia University  
Western Carolina University  
Western Kentucky University  
Western Michigan University  
Western Oregon University  
Western Washington University  
Westfield State University  
Wichita State University  
Williams College  
Winona State University  
Winston-Salem State University  
Worcester State University  
Wright State University  
Yale University  
Youngstown State University



**GREEN  
LIGHT**

University of New Hampshire  
University of North Carolina - Chapel Hill  
University of North Carolina - Charlotte  
University of North Carolina - Greensboro  
University of North Carolina - Wilmington  
University of North Dakota  
University of North Florida  
University of Pennsylvania  
University of Tennessee - Knoxville  
University of Virginia  
Western Colorado University



**WARNING  
SCHOOLS**

Baylor University  
Brigham Young University  
Pepperdine University  
Saint Louis University  
Vassar College  
Yeshiva University



**GREEN  
LIGHT**

Appalachian State University  
Arizona State University  
Auburn University  
Carnegie Mellon University  
Claremont McKenna College  
Cleveland State University  
Duke University  
East Carolina University  
Eastern Kentucky University  
Edinboro University of Pennsylvania  
Emory University  
George Mason University  
Kansas State University  
Keene State College  
Michigan Technological University  
Mississippi State University  
North Carolina Central University  
Oregon State University  
Plymouth State University  
Purdue University  
Purdue University Fort Wayne  
Purdue University Northwest  
Shippensburg University  
State University of New York - Brockport  
State University of New York - Plattsburgh  
The College of William and Mary  
University of California, Los Angeles  
University of Chicago  
University of Florida  
University of Maryland - College Park  
University of Mississippi

## APPENDIX B: Rating Changes, 2017–2018 Academic Year

SCHOOL NAME	2016–2017 RATING	2017–2018 RATING
American University	● Red	● Yellow
Auburn University	● Yellow	● Green
California State University - Long Beach	● Red	● Yellow
Claremont McKenna College	● Yellow	● Green
Colorado College	● Red	● Yellow
Dartmouth College	● Yellow	● Red
Eastern Michigan University	● Red	● Yellow
Emory University	● Yellow	● Green
Franklin & Marshall College	● Red	● Yellow
Keene State College	● Red	● Green
Kentucky State University	● Yellow	● Red
Kenyon College	● Red	● Yellow
Middle Tennessee State University	● Red	● Yellow
Northeastern Illinois University	● Red	● Yellow
Rice University	● Red	● Yellow
Salem State University	● Yellow	● Red
Shawnee State University	● Red	● Yellow
Swarthmore College	● Red	● Yellow
University of California Los Angeles	● Yellow	● Green
University of California Riverside	● Red	● Yellow
University of Central Missouri	● Yellow	● Red
University of Hawaii at Manoa	● Red	● Yellow
University of Kansas	● Red	● Yellow
University of Maine Presque Isle	● Red	● Yellow
University of Minnesota - Morris	● Red	● Yellow

**SCHOOL NAME****2016–2017 RATING****2017–2018 RATING**

University of New Hampshire	● Yellow	● Green
University of New Mexico	● Red	● Yellow
University of North Dakota	● Yellow	● Green
University of North Georgia	● Red	● Yellow
University of Richmond	● Red	● Yellow
University of South Dakota	● Red	● Yellow
Wellesley College	● Red	● Yellow
West Chester University of Pennsylvania	● Red	● Yellow
Williams College	● Red	● Yellow
Worcester Polytechnic Institute	● Warning	● Red

## APPENDIX C: Schools at Which a Faculty or Administrative Body Has Adopted a Version of the ‘Chicago Statement’

American University  
Amherst College  
Appalachian State University  
Arizona State University  
Ashland University\*  
Brandeis University  
California State University - Channel Islands  
Chapman University\*  
Claremont McKenna College  
Colgate University  
Columbia University  
Denison University\*  
Eckerd College\*  
Franklin & Marshall College  
Georgetown University  
Gettysburg College  
Johns Hopkins University  
Joliet Junior College\*  
Kansas State University  
Kenyon College  
Louisiana State University  
Michigan State University  
Middle Tennessee State University  
Northern Illinois University  
Ohio University  
Princeton University  
Purdue University  
Ranger College\*  
Smith College  
State University of New York - University at Buffalo  
Tennessee Technological University  
The City University of New York  
The Citadel\*  
University of Arkansas at Little Rock\*  
University of Central Florida

University of Colorado System  
University of Denver  
University of Maryland  
University of Maine System  
University of Minnesota  
University of Missouri System  
University of Montana  
University of Nebraska  
University of North Carolina - Chapel Hill  
University of Southern Indiana  
University of Virginia College at Wise  
University of Wisconsin System  
Vanderbilt University  
Washington and Lee University  
Washington University in St. Louis  
Winston-Salem State University

**NOTE: Some of the institutions on this list are not rated as a part of the Spotlight database at this time and thus do not fall within this report’s speech code analysis. However, they have been included here in order to provide a full list of the institutions at which either the administration or a faculty body has adopted a version of the Chicago Statement. Such institutions are denoted with an asterisk.**

## APPENDIX D: Schools with “Free Speech Zones”

Arkansas State University Auburn University Montgomery Ball State University Bemidji State University California State University - Bakersfield California State University - Dominguez Hills California State University - Los Angeles California State University - San Marcos Cameron University Cornell University East Tennessee State University Eastern Washington University Elizabeth City State University Florida State University Frostburg State University Lyndon State College Montclair State University Morehead State University Murray State University Northern Illinois University Old Dominion University Rutgers University - New Brunswick Saint Cloud State University Salem State University Southeast Missouri State University Southeastern Louisiana University Southern Illinois University at Carbondale Stanford University Tennessee Technological University Texas Woman's University The College of New Jersey Troy University Tulane University University of Central Arkansas University of Colorado at Boulder University of Illinois at Chicago University of Illinois at Urbana-Champaign University of Kentucky University of Massachusetts at Dartmouth University of Montana	University of North Carolina - Pembroke University of North Carolina School of the Arts University of North Georgia University of South Carolina Columbia University of Southern Mississippi University of West Alabama University of West Florida Valdosta State University
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