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Executive Summary

The U.S. Supreme Court has called America's colleges and universities "vital centers for the Nation's intellectual life," but the reality today is that many of these institutions severely restrict free speech and open debate. Speech codes—policies prohibiting student and faculty speech that would, outside the bounds of campus, be protected by the First Amendment—have repeatedly been struck down by federal and state courts. Yet they persist, even in the very jurisdictions where they have been ruled unconstitutional; the majority of American colleges and universities have speech codes.

FIRE surveyed 409 schools for this report and found that over 62 percent maintain severely restrictive, "red-light" speech codes—policies that clearly and substantially prohibit protected speech. That this figure is so large is deeply troubling, but there is good news: for the fifth year in a row, the percentage of schools maintaining such policies has declined.

In another encouraging trend, several more schools eliminated all of their restrictive speech codes this year, thereby earning FIRE's highest, "green-light" rating.

The extent of colleges' restrictions on free speech varies by state. In Illinois and Wisconsin, 100 percent of the schools surveyed received a red light. In contrast, some of the best states for free speech in higher education were Mississippi and Virginia, where 33.3 percent and 37.5 percent of schools surveyed, respectively, received a green light.

Unfortunately, progress continues to be threatened by new federal and state regulations

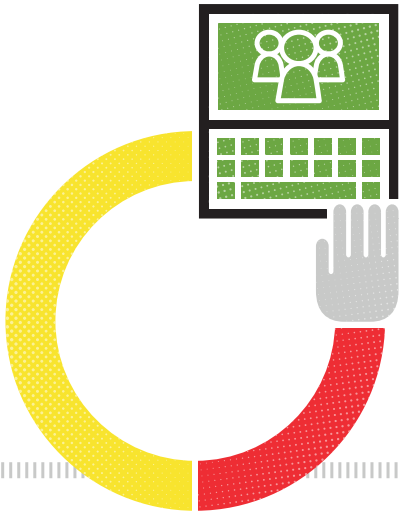


above: FIRE President Greg Lukianoff

on harassment and bullying. A number of universities have adopted more restrictive harassment policies threatening protected speech in response to the April 4, 2011, "Dear Colleague" letter issued by the federal Department of Education's Office for Civil Rights (OCR), the agency responsible for enforcement of federal anti-discrimination laws on campus. That letter backed away from OCR's previously robust support for students' expressive rights, and a number of universities have followed suit.

Moreover, a number of schools have adopted unconstitutionally overbroad and/or vague anti-bullying policies within the past year, under pressure from federal and state governments to address the issue of bullying on campus.

Thus, despite the trend towards fewer speech codes on campus over the past several years, there is ongoing reason for concern about new waves of campus censorship potentially facilitated by federal agencies and federal and state legislators.



Methodology

FIRE surveyed publicly available policies at 305 four-year public institutions as well as at 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 that both clearly and substantially restricts 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 important categories of campus expression. For example, a ban on “offensive speech” would be a clear violation (in that it is unambiguous) as well as a substantial violation (in that it covers a great deal of what would be protected expression in the larger society). Such a policy would give 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 before making a decision. At FIRE, we consider such action to be deceptive and serious enough that it alone warrants a red-light rating. In this year's report, three institutions receive a red-light rating for maintaining password protection on speech-related policies.¹

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, affect only narrow categories of speech.

¹ These are Connecticut College, Edinboro University of Pennsylvania, and Texas Tech University.



above: Peter Bonilla, Associate Director of FIRE's Individual Rights Defense Program

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 referencing alcohol or drugs” clearly restricts speech, it is limited in scope. Yellow-light policies are typically unconstitutional, and a rating of yellow rather than red 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.

GREEN LIGHT: If FIRE finds that a university’s policies do not seriously threaten campus expression, that college or university receives a green light. A green light does not necessarily indicate that a school actively supports free expression; it simply means

that the school’s *written* policies do not pose a serious threat to free speech.

NOT RATED: When a private university² expresses its own standards by stating clearly and consistently that it holds a certain set of values above a commitment to freedom of speech, FIRE does not rate that university.³ Nine surveyed schools are listed as “not rated” in this report.⁴

2 The “Not Rated” list also contains two public institutions, the U.S. Military Academy and the U.S. Naval Academy, both of which are among the nation’s top universities as named in *U.S. News & World Report’s* college rankings. Although these are public institutions, First Amendment protections do not apply in the military context as they do in civilian society. Rather, the U.S. Supreme Court has held:

The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service “is the subordination of the desires and interests of the individual to the needs of the service.” *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (internal citations omitted). These institutions clearly and consistently do not promise their students full freedom of speech—the *West Point Catalog*, for example, explicitly states that “[m]ilitary life is fundamentally different from civilian life” and requires “numerous restrictions on personal behavior”—and, like private universities, are not legally obligated to do so.

3 For example, Vassar College makes it clear that students are not guaranteed robust free speech rights. Vassar’s policy on “Academic Freedom and Responsibility” explicitly states:

As a private institution, Vassar is a voluntary association of persons invited to membership on the understanding that they will respect the principles by which it is governed. Because Vassar is a residential college, and because it seeks diversity in its membership, individuals have a particular obligation beyond that of society at large to exercise self-restraint, tolerance for difference, and regard for the rights and sensitivities of others. The policy further provides:

[M]embers of the college community accept constraints, similar to those of parliamentary debate against personal attacks or courts of law against the use of inflammatory language. Under the rule of civility, individuals within the community are expected to behave reasonably, use speech responsibly, and respect the rights of others.

“Academic Freedom and Responsibility,” *Vassar College Student Handbook*, available at <http://deanofthecollege.vassar.edu/documents/student-handbook/VassarStudentHandbook.pdf?1213> (last visited Oct. 15, 2012). It would be clear to any reasonable person reading this policy that students are not entitled to unfettered free speech at Vassar.

4 FIRE has not rated the following schools: Baylor University, Brigham Young University, Pepperdine University, Saint Louis University, the U.S. Military Academy, the U.S. Naval Academy, Vassar College, Worcester Polytechnic Institute, and Yeshiva University.

Findings

Of the 409 schools reviewed by FIRE, 254 received a red-light rating (62.1%), 131 received a yellow-light rating (32%), and 15 received a green-light rating (3.7%). FIRE did not rate 9 schools (2.2%).⁵ (See Figure 1.)

For the fifth year in a row, this represents a decline in the percentage of schools maintaining red-light speech codes, down from 75% five years ago.⁶ Additionally, the number of green-light institutions has risen from just 8 schools five years ago (2%) to fifteen schools this year (3.6%).

The percentage of *public* schools with a red-light rating also fell for a fifth consecutive year. Five years ago, 79% of public schools received a red-light rating. This year, 61.6% of public schools did—a dramatic change. (See Figure 2.)

FIRE rated 305 public colleges and universities. Of these, 61.6% received a red-light rating, 33.8% received a yellow-light rating,

⁵ See Appendix A for a full list of schools by rating.

⁶ The 2012 figure stood at 65%; in 2008, 2009, 2010, and 2011, it was 75%, 74%, 71%, and 67%, respectively. For a full list of rating changes since last year's report, see Appendix B.

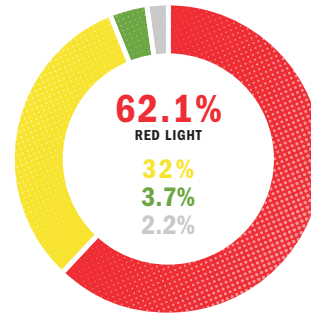


FIGURE 1: ALL SCHOOLS BY RATING

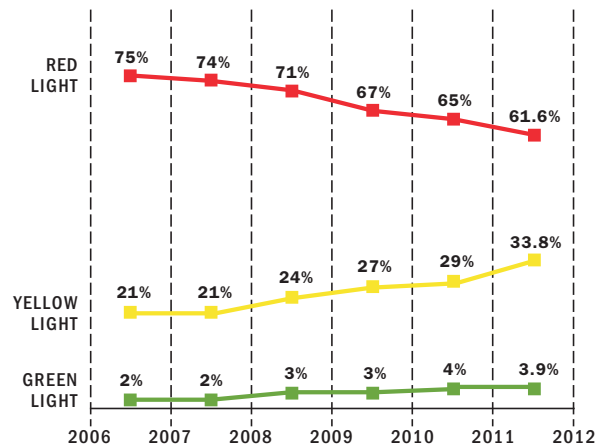


FIGURE 2: PUBLIC SCHOOLS BY RATING

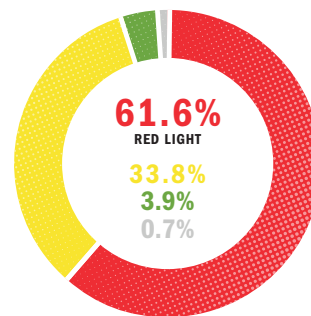


FIGURE 3: SPEECH CODES AT PUBLIC COLLEGES AND UNIVERSITIES

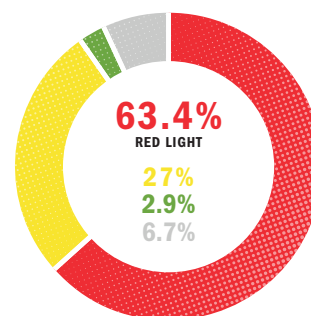


FIGURE 4: SPEECH CODES AT PRIVATE COLLEGES AND UNIVERSITIES

and 3.9% received a green-light rating.⁷ Two schools, both of them military institutions (0.7%), were not rated. (See Figure 3.)

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, this number hopefully will continue to drop.

The percentage of private universities earning a red-light rating declined, as well, from 65% last year to 63.4% this year. While private universities are not legally bound by the First Amendment, most make extensive promises of free speech to their students and faculty. Speech codes impermissibly violate those promises.

Of the 104 private colleges and universities reviewed, 63.4% received a red-light rating, 27% received a yellow-light rating, 2.9% received a green-light rating, and 6.7% were not rated. (See Figure 4.)

The data showed a wide variation in restrictions on speech among the states.⁸ In Illinois and Wisconsin, 100% of the schools FIRE surveyed received a red light. Texas and Louisiana also fared poorly, with 87.5% of the schools surveyed in each state receiving a red light. By contrast, only 25% of the schools surveyed in Virginia received a red light, and 37.5% received a green

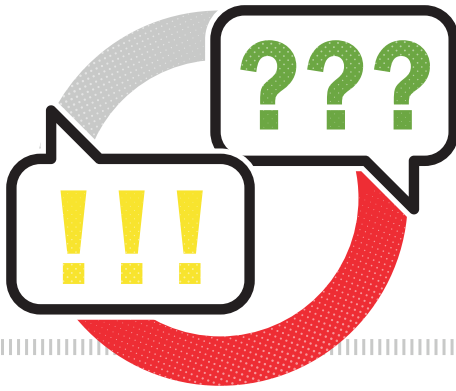
light. Mississippi had the next highest percentage of green-light schools (33.3%), since its two major public universities—Mississippi State University and the University of Mississippi—eliminated all of their speech codes this year and earned green-light ratings. Other states that fared comparatively well in our survey were Maryland (40% red light), North Carolina (42.5%), Indiana (43.8%), and California (45%).

The U.S. Court of Appeals for the Third Circuit, whose jurisdiction includes the states of Delaware, New Jersey, and Pennsylvania, has the strongest record in the nation of striking down university and even secondary-school speech codes on constitutional grounds.⁹ One would expect, therefore, to see very few speech codes in the public institutions of those states, but that is not the case. Delaware, for example, has two four-year public universities—Delaware State University and the University of Delaware—both of which receive red-light ratings. In New Jersey, 42.8% of the public schools FIRE surveyed received a red light. In Pennsylvania, 44.4% of public institutions surveyed received red-light ratings. Given the Third Circuit's unequivocal and robust support of students' free speech rights, the fact that these numbers do not even come close to zero reflects the extent to which speech codes are deeply entrenched in the institutional culture of American colleges and universities.

⁷ Joining the ranks of green-light schools this year were Mississippi State University and the University of Mississippi. Unfortunately, one former green-light school, the University of South Dakota, dropped to a yellow-light rating, bringing the green-light total to fifteen.

⁸ State-by-state data are given in Appendix C for the 28 states in which FIRE has collected information on five or more universities.

⁹ *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008); *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001).



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 hurt and offended by other students, college administrators enacted speech codes.

In doing so, however, administrators ignored or did not fully consider the legal ramifications of placing such 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.

Despite the overwhelming weight of legal authority against speech codes,¹⁰ the ma-

10 *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995); *University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio Jun. 12, 2012); *Smith v. Tarrant County College District*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *College Republicans at San Francisco State University 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 University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. Northern Kentucky University Board of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); *Corry v. Leland Stanford Junior University*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.); *UWM Post, Inc. v. Board of Regents of the University of Wisconsin*, 774 F. Supp. 1163 (E.D. Wisc. 1991); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). In addition, several institutions have voluntarily rescinded their speech codes as part of settlement agreements.

PUBLIC UNIVERSITIES VS. PRIVATE UNIVERSITIES

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

The guarantees of the First Amendment

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

THE FIRST AMENDMENT PROHIBITS THE GOVERNMENT—INCLUDING GOVERNMENTAL ENTITIES SUCH AS STATE UNIVERSITIES— FROM INTERFERING WITH THE FREEDOM OF SPEECH.

generally do not apply to students at private colleges because the First Amendment regulates only government—not private—conduct.¹² 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 private schools are not entitled to free expression. In fact, most private universities explicitly promise freedom of speech and academic freedom, presumably to lure the most talented students and faculty, since most people would not want to study or teach where they could not speak and write freely.

Georgetown University’s “Speech and Expression Policy,” for example, asserts: “[A]ll members of the Georgetown University academic community, which comprises

12 Although the First Amendment does not regulate private universities, this does not mean that all private universities are legally free to restrict their students’ free speech rights. For example, California’s “Leonard Law,” Cal. Educ. Code § 94367, prohibits secular private colleges and universities in California from restricting speech that would otherwise be constitutionally protected. The Leonard Law provides, in relevant part:

No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.

students, faculty and administrators, enjoy the right to freedom of speech and expression. This freedom includes the right to express points of view on the widest range of public and private concerns and to engage in the robust expression of ideas.”¹³ Similarly, Smith College’s “Statement of Academic Freedom and Freedom of Expression” states that “[f]reedom of speech and expression is the right both of members of the Smith College community and of invited guests.”¹⁴ Yet both of these schools prohibit a great deal of speech that the First Amendment would protect at a public university.

At private universities like Georgetown and Smith, it is this false advertising—promising free speech and then, by policy and practice, prohibiting free speech—that FIRE considers impermissible. Students may freely choose to enroll at a private institution where they knowingly give up some of their free speech rights in exchange for membership in the university community. But universities may not engage in a bait-and-switch where they advertise themselves as bastions of freedom and instead deliver censorship and repression.

13 “Speech and Expression Policy,” Office of Student Affairs, available at <http://studentaffairs.georgetown.edu/policies.html> (last visited Oct. 17, 2012).

14 “Statement of Academic Freedom and Freedom of Expression,” *Smith College Student Handbook*, available at <http://www.smith.edu/sao/handbook/policies/freexpression.php> (last visited Oct. 17, 2012).

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 only certain types of speech “free”?

Simply put, the overwhelming majority of speech is protected by the First Amendment. Over the years, the Supreme Court has carved out some narrow exceptions: 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 misused and abused by universities to punish constitutionally protected speech. In some instances, a policy may be constitutional as written—for example, a prohibition on “incitement”—but not in its application. In other instances, a written policy will purport to be a legitimate ban on something like harassment or threats, but will, either deliberately or through poor drafting, 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.

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,” in the constitutionally proscribable sense, as a “type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* at 360. Neither term would encompass, for example, a vaguely worded statement that is not directed at anyone in particular.

Nevertheless, particularly following the tragic 2007 shootings at Virginia Tech, universities have misapplied policies prohibiting threats and intimidation to infringe on protected speech.

In September 2011, for example, a professor at the University of Wisconsin–Stout was threatened with criminal charges and reported to the university’s “threat assessment team” for two satirical postings hung on his office door. The first posting was a printout of a picture of the actor Nathan Fillion from the television series *Firefly*. The posting included a well-known line from an episode of the show: “You don’t know me, son, so let me explain this to you once: If I ever kill you, you’ll be awake. You’ll be facing me. And you’ll be armed.” In response to the university’s actions, the professor posted a new flyer reading “Warning: Fascism,” with a mocking line at the bottom about the violence that fascists might perpetrate: “Fascism can cause blunt head trauma and/or violent death. Keep fascism away from children and pets.” The poster also included a cartoon image of a police officer striking a civilian. University police removed that poster on the grounds that it “depicts violence and mentions violence and death,”



above: FIRE Senior Vice President Robert Shibley

and summoned the professor to a meeting about the posters because of concerns raised by the university's threat assessment team.¹⁵ The university eventually reversed its decision to censor the posters, but only after FIRE launched a public campaign that generated national outrage over the case.

In the fall of 2008, officials at Lone Star College in Texas prohibited a student group from distributing a satirical "Top Ten Gun Safety Tips" flyer as part of the school's "club rush," an event where student groups attempt to recruit new members. When FIRE wrote to the college about this impermissible censorship, the school's general counsel responded that "the tragedy of Virginia Tech cannot be underestimated when it comes to speech relating to firearms—however 'satirical and humorous' the speech may be perceived by some."¹⁶ The only connection between the Virginia

Tech massacre and the Lone Star College flyer was that they both involved guns (in the flyer's case, actually, only the mention of guns).

Earlier that year, Colorado College found two students guilty of violating the college's policy on "violence" because of a satirical flyer—mocking a publication of the college's Feminist and Gender Studies Program—that administrators deemed "implicitly threatening." The original flyer of the Feminist and Gender Studies Program was entitled "The Monthly Rag"¹⁷ and contained various blurbs, including a definition of the word "packing" ("creating the appearance of a phallus under clothing") and a reference to "male castration." The parody flyer, entitled "The Monthly Bag,"¹⁸ contained blurbs that dealt with exaggerated male machismo instead of feminism. One comment, for example, concerned "chainsaw etiquette": "when possible, show off your guns [a well-known slang term for bicep muscles] while sawing shit." In finding the students guilty of violating the university's policy on violence, Dean of Students Mike Edmonds wrote, "I recognize that your intent in posting your publication was not to threaten but to parody. However, in the climate in which we find ourselves today, violence—or implied violence—of any kind cannot be tolerated on a college campus."¹⁹

Incitement

In FIRE's experience, universities also have a propensity to restrict speech that

15 Letter from Adam Kissel, Vice President of Programs, FIRE, to Charles W. Sorensen, Chancellor, University of Wisconsin-Stout, Sep. 21, 2011, available at <http://thefire.org/article/13590.html>.

16 E-mail from Lone Star College System General Counsel Brian Nelson to Adam Kissel, Oct. 14, 2008, available at <http://www.thefire.org/article/9815.html>.

17 "The Monthly Rag," available at <http://thefire.org/index.php/article/9086.html>.

18 "The Monthly Bag," available at <http://thefire.org/index.php/article/9085.html>.

19 Letter from Colorado College Vice President Mike Edmonds to Chris Robinson, March 25, 2008.

deeply offends other students on the basis that it constitutes “incitement.” The basic concept, as administrators see it, is that offensive or provocative speech will anger those who disagree with it, perhaps so much that it moves them to violence. A good recent example of this mindset comes from University of Pennsylvania professor Anthea Butler, who called for the imprisonment of the producer of the *Innocence of Muslims* film that at the time was believed to have sparked violent protests in the Middle East in the fall of 2012. After those protests, Butler tweeted “How soon is [*Innocence of Muslims* filmmaker] Sam Bacile going to be in jail folks? I need him to go now. When Americans die because you are stupid...”²⁰ In a subsequent article in *USA Today*, Butler reiterated that her call for Bacile’s imprisonment was not because he had denigrated Islam, but because he had “indirectly and inadvertently inflamed people half a world away, resulting in the deaths of U.S. Embassy personnel.”²¹ (While we now know that the attack on the U.S. Embassy in Libya was not related to the film, the flaws in Butler’s statement—made when that was still the prevailing theory—remain entirely relevant.) While preventing violence is an admirable goal, this is an inexcusable 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 listeners who agree with it 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 apply the doctrine to an opposing party’s reaction to speech is to convert the doctrine into an impermissible “heckler’s veto,” where violence threatened by those angry about the 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 be “unpopular with bottle throwers.”²²

The precise standard for incitement to violence is found in the Supreme Court’s decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). There, the Court held that the state may not “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action.” 395 U.S. at 447 (emphasis in original). This is an exacting standard, as evidenced by its application in subsequent cases.

For instance, the Supreme Court held in *Hess v. Indiana*, 414 U.S. 105 (1973), that a man who had loudly stated, “We’ll take the fucking street later” during an anti-war demonstration did not intend to incite or produce immediate lawless action (the Court found that “at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time”), and was therefore not guilty under

20 “UPenn professor Anthea Butler calls for imprisonment of filmmaker Sam Bacile,” Sep. 12, 2012, <http://twitchy.com/2012/09/12/upenn-professor-calls-for-imprisonment-of-filmmaker-sam-bacile/> (last visited Oct. 22, 2012).

21 Anthea Butler, “Opposing View: Why Sam Bacile Deserves Arrest,” *USA Today*, Sep. 13, 2012, available at <http://usatoday30.usatoday.com/news/opinion/story/2012-09-12/Sam-Bacile-Anthea-Butler/57769732/1> (last visited Nov. 20, 2012).

22 *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

a state disorderly conduct statute. 414 U.S. 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 ignore or abuse this jurisprudence.

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 (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, Cohen, was convicted in California for wearing a jacket bearing the words “Fuck the Draft” in a courthouse. The 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 Supreme 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 other types of vulgar expression.

For example, Alcorn State University’s Student Handbook forbids the “use of profanity.”²³ Similarly, California State University–Channel Islands prohibits “the use of rude, vulgar, indecent, or obscene verbal, non-verbal, and/or written expressions” in or around any of its residence halls.²⁴

Harassment

Actual harassment is not protected by the First Amendment. In the educational context, the Supreme Court has defined student-on-student harassment as targeted discriminatory conduct “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). This is *conduct* far beyond the dirty joke or “offensive” 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.

²³ “Codes of Conduct,” *Alcorn State University Student Handbook*, available at <http://www.alcorn.edu/WorkArea/DownloadAsset.aspx?id=10612> (last visited Oct. 22, 2012).

²⁴ “Profanity, Obscenity, and Lewd Behavior,” *California State University–Channel Islands Resident Handbook*, available at <http://www.csuci.edu/housing/abcmanual12-13.pdf> (last visited Oct. 22, 2012).

Universities are legally obligated to maintain policies and practices aimed at preventing this type of genuine harassment from happening on their campuses. Unfortunately, they often misuse this obligation by punishing protected speech that is unequivocally *not* harassment. The misuse of harassment regulations became so widespread that in 2003, the federal Department of Education’s Office for Civil Rights (OCR)—the agency responsible for the enforcement of federal harassment regulations in schools—issued a letter of clarification to all American colleges and universities.²⁵ Gerald Reynolds, the Assistant Secretary of Education at the time, wrote:

Some colleges and universities have interpreted OCR’s prohibition of “harassment” as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR’s jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.

Reynolds wrote that “OCR’s regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution” and concluded that “[t]here is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment.”

Unfortunately, while Reynolds’ words still hold true, OCR’s April 4, 2011,



above: FIRE’s 2012 Summer Interns Visit Independence Hall

“Dear Colleague” letter to universities seems to back away from the agency’s previously robust support for students’ free speech rights.²⁶

The 2011 letter discusses extensively the legal obligations borne by colleges and universities under Title IX to respond to both sexual harassment and sexual violence committed against students. However, it fails to mention the free expression concerns raised in the 2003 letter despite the fact that, as in 2003, a large number of institutions maintain harassment policies that violate students’ First Amendment rights.

Worryingly, the 2011 letter fails to replicate the exacting, speech-protective understanding of “hostile environment” sexual harassment contained in previous OCR guidance

25 Office for Civil Rights, “Dear Colleague” Letter, July 28, 2003, available at <http://www.ed.gov/about/offices/list/ocr/firstamend.html> (last visited Nov. 26, 2012).

26 Office for Civil Rights, “Dear Colleague” Letter, April 4, 2011, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (last visited Nov. 26, 2012).

letters, including both the 2001 Guidance²⁷ and the 2003 Dear Colleague letter. In its 2001 Guidance, OCR explicitly noted that its understanding of hostile environment harassment was informed by the Supreme Court's decision in *Davis*, whereas the 2011 letter contains no such statement.

OCR's apparent retreat from its earlier concerns about students' free speech rights is particularly troubling in light of the fact that hundreds of universities persist in maintaining overly broad definitions of harassment that restrict large amounts of constitutionally protected speech. Examples include:

- The State University of New York at New Paltz's harassment policy prohibits "Distribution, display or discussion of any written or graphic material that ridicules, denigrates, insults, belittles, or shows hostility or aversion toward an individual or group because of protected status."²⁸
- At Auburn University, "harassment" includes any "jokes ... relating to a student's race, color, sex, religion, national origin, age and disability."²⁹

These examples and many others demonstrate that too often, colleges and universities fail to limit their policies 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 the fact that many such policies have been struck down by federal courts.³⁰ These vague and overly broad harassment policies deprive students and faculty of their free speech rights.

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.

Anti-Bullying Policies

Over the past few years, "bullying" has garnered a great deal of media attention, bringing pressure on legislators and school administrators—at both the K-12 and the college levels—to crack down even further 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 that "[s]ome conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression."³¹ For such situations, the

27 Office for Civil Rights, "Revised Sexual Harassment Guidance," Jan. 19, 2001, available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> (last visited Sep. 27, 2011).

28 "Non-Discrimination/Anti-Harassment Policies & Procedures," available at <http://www.newpaltz.edu/hr/policies.html> (last visited Oct. 24, 2012).

29 "Policy Regarding Prohibited Harassment of Students," available at <https://sites.auburn.edu/admin/universypolicies/Policies/PolicyRegardingtheProhibitedHarassmentofStudents.pdf> (last visited Oct. 24, 2012).

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

31 Office for Civil Rights, "Dear Colleague" Letter, Oct. 26, 2010, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (last visited Nov. 20, 2012).

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*³² approach that is inappropriate in the college setting, where students are overwhelmingly adults.

The same problem exists in New Jersey’s Anti-Bullying Bill of Rights Act, which took effect on September 1, 2011.³³ In addition to addressing bullying at the K-12 level, the Act requires all of New Jersey’s public colleges and universities to prohibit “harassment, intimidation and bullying,” which it defines as:

[A] single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on the property of the institution of higher education or at any function sponsored by the institution of higher education, that substantially disrupts or interferes with the orderly operation of the institution or the rights of other students and that:

(a) a reasonable person should know, under the circumstances, will have the effect of physically or emotionally



above: FIRE’s Azhar Majeed Speaks to Students at FIRE’s 2012 Campus Freedom Network Conference

student’s property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;

(b) has the effect of insulting or demeaning any student or group of students; or

(c) creates a hostile educational environment for the student

(d) by interfering with a student’s education or by severely or pervasively causing physical or emotional harm to the student.

Under this definition, speech that does not rise to the level of actionable harassment (or any other type of unprotected speech) is now punishable as “bullying.” It is critical to note that the definition lacks any objective (“reasonable person”) standard, including as bullying any conduct that “has the effect of insulting or demeaning any student or group of students.” As a result, students

32 “In the place of parents.”

33 New Jersey Anti-Bullying Bill of Rights Act, P.L. 2010, Chapter 122, available at http://www.njleg.state.nj.us/2010/Bills/AL10/122_.PDF (last visited Nov. 20, 2012).

must appraise all of their fellow students' subjective individual sensitivities before engaging in controversial speech. While the Act does require that there be a "substantial disruption" to the educational environment, it places the onus squarely on the speaker to ensure that his or her speech will not cause another student, however sensitive or unreasonable, to react in a manner that is disruptive to the educational environment (such as by engaging in self-harm or harm to others).

Unsurprisingly, 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. Examples of such recent additions include:

- Southeastern Louisiana University's "Student Code of Conduct" prohibits "Stalking, bullying, and/or deliberate or inadvertent harassment which may or may not be directed toward another person or group of people...."³⁴
- At Central Michigan University, "[a] student shall not bully, haze, harass or stalk any person or group of persons."³⁵

Policies on Tolerance, Respect, and Civility

Many schools invoke laudable goals like

respect and civility to justify policies that violate students' free speech rights. While a university is certainly permitted to actively promote a tolerant and respectful atmosphere on campus, a school that claims to respect free speech must not limit expression to only the inoffensive and agreeable.

Here are just two examples of restrictive policies on tolerance, respect, and civility from the 2011–2012 academic year:

- Stevens Institute of Technology requires students, under threat of "disciplinary sanction," to display "[r]espect by treating others with civility and decency."³⁶
- Utah State University states: "All interactions with faculty members, staff members, and other students shall be conducted with courtesy, civility, decency, and a concern for personal dignity."³⁷

While civility may seem morally uncontroversial, most "uncivil" speech is wholly protected by the First Amendment, and is indeed sometimes of great political and social significance. Much of the expression coming from the civil rights movement of the 1950s and 60s 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.

34 "Student Code of Conduct," *Student Handbook*, available at http://www.selu.edu/admin/stu_affairs/handbook/files/2012_student_handbook.pdf (last visited Oct. 26, 2012).

35 "Bullying/Hazing/Harassment/Stalking," *Code of Student Rights, Responsibilities and Disciplinary Procedures*, available at http://www.cmich.edu/about/leadership/office_provost/dean/Pages/Responsibilities-of-Students.aspx (last visited Oct. 26, 2012).

36 "Conduct Required," *Student Handbook*, available at http://s3.amazonaws.com/os_extranet_files_test/14472_27863_handbook.pdf (last visited Oct. 26, 2012).

37 "Responsibilities of Students," *The Code of Policies and Procedures for Students at Utah State University*, available at <http://www.usu.edu/studentservices/studentcode/article1.cfm> (last visited Oct. 26, 2012).

Internet Usage Policies

A great deal of student expression now takes place online, whether via email or on sites like Facebook and Twitter. Numerous universities maintain policies—many of which were originally written before the Internet became one of students’ primary methods of communication—severely restricting the content of online expression.

FIRE frequently finds universities with such policies punishing students or faculty members for constitutionally protected online speech. In September 2011, for example, Syracuse University effectively expelled a graduate student from its School of Education because of comments he posted on Facebook complaining about a racially charged comment made in his presence by a community leader. In the course of his student teaching assignment, Matt Werenczak—who is white—was introduced to a black community leader who said that he thought the city schools should hire more teachers from historically black colleges. Werenczak later discussed the remark on Facebook, saying, “Just making sure we’re okay with racism. It’s not enough I’m ... tutoring in the worst school in the city, I suppose I oughta be black or stay in my own side of town.”³⁸ In response, Werenczak received a letter from Social Studies Education Coordinator Jeffery A. Mangram stating that because of his “unprofessional, offensive, and insensitive” comments, he would be required to attend anger management, complete extra diversity coursework, and write a reflection paper in order to even be considered for continued enrollment in the program.³⁹

38 Facebook comments, July 20, 2011, available at <http://thefire.org/article/14069.html>.

39 Letter from Jeffery A. Mangram to Matthew Werenczak, Sep. 7, 2011, available at <http://thefire.org/article/14070.html>.

Werenczak was eventually readmitted, but only after intense public pressure generated by FIRE.

A major part of the problem lies in Syracuse’s speech codes. Syracuse’s “Computing and Electronic Communications Policy” defines online “harassment” as, among other things, sending any “annoying” or “offensive” messages.⁴⁰

Examples of other impermissibly restrictive Internet usage policies in force during the 2011–2012 academic year include the following:

- The University of Wisconsin–Stout’s “Information Technology Acceptable Use Policy” prohibits the “[d]istribution of any disruptive or offensive messages, including offensive comments about race, gender, hair color, disabilities, age, sexual orientation, pornography, religious beliefs and practice, political beliefs, or national origin.”⁴¹
- Purdue University Calumet forbids the “[u]se of e-mail that degrades or demeans other individuals.”⁴²

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.

40 “Computing and Electronic Communications Policy,” available at <http://supolicies.syr.edu/it/computing.htm> (last visited Oct. 27, 2012).

41 “Information Technology Acceptable Use Policy,” available at <http://www.uwstout.edu/lit/upload/Info-Technology-Acceptable-Use-policy-09-66-2.pdf> (last visited Oct. 27, 2012).

42 “Policy for Access and Use of Purdue’s Electronic Mail System,” *Purdue University Calumet Student Handbook*, available at <http://www.purduecal.edu/studentaffairs/student-handbook.pdf> (last visited Oct. 27, 2012).

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. Universities tend to be heavily invested in such policies, having set up entire regulatory frameworks devoted solely to addressing bias incidents.

While speech or expression that is based on a speaker’s prejudice may cause offense, it is entirely protected unless it rises to the level of unprotected speech (harassment, threats, and so forth). The speaker’s bias has no bearing on whether or not the speech is protected. Often, these protocols also infringe on students’ right to due process by allowing for anonymous reporting that denies students the right to confront their accusers.

Here are some examples of bias incident policies in force during the 2011–2012 academic year:

- At Washington State University, students are instructed that if they “witness or experience” anything that “stereotypes” or “excludes” someone “based on some part of their identity,” they must “report it immediately.”⁴³
- At Lafayette College, a “bias-related incident” is “any incident in which an action taken by a person or group is perceived to be malicious ... toward another person or group.”⁴⁴

43 “Bias Hotline,” Washington State University Directory of Services, available at http://police.wsu.edu/DirectoryofServices.html#Bias_Hotline (last visited Oct. 27, 2012).

44 “Bias Response Team,” Division of Campus Life, available at <http://studentlife.lafayette.edu/student-health-and-safety/bias-response-team-brt/> (last visited Oct. 26, 2012).

Policies Governing Speakers, Demonstrations, and Rallies

Universities have a right to enact reasonable, narrowly tailored “time, place, and manner” restrictions that prevent demonstrations and speeches 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. At Montclair State University, for example, the group Students for a Democratic Society (SDS) was informed in 2011 that, due to “a number of concerned phone calls and emails” regarding SDS’s plan to host a lecture by education professor and former Weather Underground leader Bill Ayers, it would be expected to shoulder the cost of establishing and policing a “protest area.”⁴⁵ This is a clear violation of the right to free speech: any requirement that students or student organizations hosting controversial events pay for extra security is unconstitutional because it affixes a price tag to events on the basis of their expressive content.

The U.S. Supreme Court addressed this exact issue in *Forsyth County v. Nationalist*

45 Letter from Peter Bonilla, Director of Individual Rights Defense Program, FIRE, to Susan Cole, President, Montclair State University, Mar. 24, 2011, available at <http://thefire.org/article/13105.html>.

Movement, 505 U.S. 123 (1992), when 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. Criticizing 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.” 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.**” (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.⁴⁶ Many schools maintain policies setting forth vague criteria by which security costs will be assessed, inviting this type of viewpoint discrimination. For example, the University of Oklahoma’s policy on event security states:

Student Life, in conjunction with the University of Oklahoma Chief of Police, or his or her designee, shall review security requirements for all

events scheduled outdoors or in classroom facilities. When the director of Student Life determines that additional security beyond that normally provided is necessary, the director of Student Life shall so inform the [Registered Student Organization]. The RSO shall be responsible for the cost of additional security.”⁴⁷

Free Speech Zone Policies

Many universities have regulations creating “free speech zones,” which limit rallies, demonstrations, and speeches to small or out-of-the-way “zones” on campus. Many also require advance notice of any demonstration, rally, or speech. Such “prior restraints” on speech are generally inconsistent with the First Amendment.

From a practical standpoint, it is easy to understand why such regulations are burdensome. Demonstrations and rallies are often spontaneous responses to recent or still-unfolding circumstances. Requiring people to wait 48 or even 24 hours to hold such an event may interfere with the demonstrators’ message by rendering it untimely and ineffective. Moreover, requiring demonstrators to obtain a permit from the university, without explicitly setting forth viewpoint-neutral criteria by which permit applications will be assessed, is an invitation to administrative abuse.

In June 2012, in a lawsuit brought by a student group seeking to collect signatures on campus for an Ohio ballot initiative,

⁴⁶ For example, in recent years, FIRE has contested impermissible security fees at Central Michigan University, Montclair State University, Temple University, the University of Arizona, the University of California–Berkeley, the University of Colorado–Boulder, and the University of Massachusetts Amherst.

⁴⁷ “Facility Use and Solicitation Policy for Registered Student Organizations,” available at http://www.ou.edu/content/student-life/get_involved/student_organizations/policies/jcr%3acontent/mid_par/download_0/file.res/Facility%20Use%20and%20Solicitation%20Policy%20for%20Registered%20Student%20Organizations090611.pdf (last visited Oct. 27, 2012).



above: University of Cincinnati Campus, Aerial View

a federal judge in Ohio held that the University of Cincinnati's free speech zone policy violated the First Amendment. That policy required all "demonstrations, pickets, and rallies" to be held in a free speech zone comprising just 0.1% of the university's 137-acre West Campus, and required ten days' advance notice for any expressive activity taking place in the free speech zone.⁴⁸ Judge Timothy S. Black wrote:

This civil case presents the question, among others, as to whether the University of Cincinnati, a public university, may constitutionally subject speech on its campus, by both students and outsiders alike, to a prior notice and permit scheme and restrict all "demonstrations, picketing, and rallies" to a Free Speech Area which constitutes less than 0.1% of the grounds of the campus. For the reasons stated here, the Court determines that such a

⁴⁸ *University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio Jun. 12, 2012).

scheme violates the First Amendment and cannot stand.⁴⁹

Despite this decision and others holding free speech zones unconstitutional, numerous schools persist in maintaining them. For example:

- Southeastern Louisiana University's policy on "Public Speech, Assembly, and Demonstrations" requires that "[a]n application to assemble publicly or demonstrate must be made seven (7) days in advance on a form provided by the Assistant Vice President for Student Affairs...." The policy also establishes just three areas on campus for "public discussion and/or peaceful public assembly or demonstration."⁵⁰
- East Carolina University "permits assemblies and public addresses ... by University, student, and non-University-sponsored individuals or groups at the University's Designated Public Forum." The Designated Public Forum "is defined as the area located in the four-sided green space adjacent to the Cupola, which is adjacent to well-traveled pedestrian sidewalks, and has been open to public speech by tradition and administrative approval. The extent of the site is the area to the South of the Cupola bounded by sidewalks on all four sides."⁵¹

⁴⁹ *Id.* at *2.

⁵⁰ "University Policy on Public Speech, Assembly, and Demonstrations" *Southeastern Louisiana University Student Handbook*, available at http://www.selu.edu/admin/stu_affairs/handbook/files/2012_student_handboo.pdf (last visited Oct. 28, 2012).

⁵¹ "Assemblies and Public Addresses in Designated Public Forum," available at <http://www.ecu.edu/cs-ecu/PRR/customcf/pdf.cfm?policyNumber=07.30.02> (last visited Nov. 2, 2012).



What Can Be Done?

The good news is that the types of restrictions discussed in this report can be defeated. Students themselves are a tremendously effective vehicle for change when they are aware of their rights and willing to engage administrators in defense of them. Public exposure is also critical to defeating speech codes, since universities are usually unwilling to defend these codes in the face of public criticism.

Unconstitutional policies also can be defeated in court, especially at public universities. Speech codes have been struck down in federal courts across the country, including in California, Michigan, Pennsylvania, Texas, Wisconsin, the U.S.



Virgin Islands, and, most recently, Ohio. Any red-light policy in force at a public university is extremely vulnerable to a constitutional challenge. Indeed, FIRE has had a 100% success rate in court challenges to red-light speech codes. Moreover, as speech codes are consistently defeated in court, administrators are losing virtually any chance of credibly arguing that they are unaware of the relevant law, which means that they can be held personally liable when they are responsible for their schools' violations of constitutional rights.⁵²

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

⁵² Azhar Majeed, "Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators for Violating Students' Speech Rights," *Cardozo Public Law, Policy & Ethics Journal*, Vol. 8, No. 3 (2010), p. 515.

left: FIRE Director of Legal and Public Advocacy Will Creeley



Spotlight On: Censorship of Political Expression

In election years, FIRE typically sees an increase in restrictions on the political expression of students and faculty. Frequently, this occurs because schools misinterpret their own institutional obligation to avoid the appearance of favoring a particular party or candidate as a need to prevent students, student organizations, and faculty members from doing so in their individual capacities. In other cases, censorship appears to stem simply from political reasons.

One of the core motivations of the First Amendment was to protect political speech from official censorship or interference. As the Supreme Court has declared, “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Therefore, far from being required to *prohibit* students’ political expression, public universities—and private universities

that promise free speech rights—are under a clear obligation to *protect* such expression. Nonetheless, many schools—in policy and in practice—censor political expression. In September 2012, after a freshman at Ohio University (OU) taped a flyer critical of both Governor Mitt Romney and President Barack Obama to her door,¹ a resident advisor informed students via email that “NO political posters/flyers should be hung in the hallways or on you[r] door until 14 days before an election.”² Ten days later, following a room inspection, the student received an inspection form listing the violation of OU’s requirement that “political posters not [be] displayed outside room until within 14 days of election date” as a “Corrective Action.”³ The inspection form also noted that failure to remove the poster

1 Ohio University Students for Liberty Flyer, Sept. 4, 2012, available at <http://thefire.org/article/14972.html>.

2 Email from Andrea Stacho to James Hall Residents, Sept. 7, 2012, available at <http://thefire.org/article/14977.html>.

3 Ohio University Department of Residence Life Room Health and Safety Inspection Form, Sep. 17, 2012, available at <http://thefire.org/article/14974.html>.

**AS THE SUPREME COURT HAS DECLARED,
“WHATEVER DIFFERENCES MAY EXIST
ABOUT INTERPRETATIONS OF THE FIRST AMENDMENT,
THERE IS PRACTICALLY UNIVERSAL
AGREEMENT THAT A MAJOR PURPOSE OF THAT
AMENDMENT WAS TO PROTECT THE FREE DISCUSSION
OF GOVERNMENTAL AFFAIRS.”**

within 48 hours could result in referral to OU’s disciplinary system. After FIRE wrote to OU’s president reminding the university of its obligation to permit student political expression, the student received an email informing her that she was free to post political materials on her door and that OU “will work to clarify posting policies immediately.”⁴

In November 2011, Auburn University ordered a “Ron Paul for President” campaign banner removed from the inside of a student’s dorm room window while allowing other students to display numerous banners, stickers, and flags. Although the university cited a new residence life policy banning the display of any “flags, banners, decals, or signs” in dormitory windows, the student gathered substantial photographic evidence that the policy was being selectively enforced.⁵ The Auburn case was reminiscent of a similar incident during the 2008 election season, when the University of Texas at Austin (UT–Austin) attempted to enforce a policy banning all signs in

residence hall windows. In that case, two students were ordered to remove campaign signs from their windows or else be blocked from class registration. The resulting uproar led UT–Austin president William Powers Jr. to suspend the rule indefinitely, saying, “I believe that the free expression of ideas is crucial to our educational mission.”⁶

In spite of their clear obligations in this area, universities continue to maintain speech codes explicitly prohibiting political speech. Case Western Reserve University’s “Facility Use” policy, for example, provides that no university facilities or services may be used “to advocate a partisan position.”⁷

4 Email from Micah McCarey to Jillyann Burns, Oct. 1, 2012, available at <http://thefire.org/article/14978.html>.

5 “Auburn University Bans Ron Paul Banner from Dorm Room Window,” FIRE Press Release, Dec. 22, 2011, <http://thefire.org/article/13968.html>.

6 Azhar Majeed, “Victory for Freedom of Expression: University of Texas Permanently Suspends Window Posting Ban,” *The Torch*, July 30, 2009, <http://thefire.org/article/10919.html>.

7 “Facility Use,” *Case Student Handbook*, available at <http://students.case.edu/handbook/policy/campus/facility.html> (last visited Nov. 5, 2012).

Appendix A

SCHOOLS BY RATING

RED LIGHT

Adams State University
 Alabama A&M University
 Alabama State University
 Alcorn State University
 American University
 Angelo State University
 Arkansas State University
 Armstrong Atlantic State University
 Athens State University
 Auburn University
 Auburn University Montgomery
 Barnard College
 Bates College
 Bemidji State University
 Boston College
 Boston University
 Brandeis University
 Bridgewater State University
 Brooklyn College,
 City University of New York
 Brown University
 Bryn Mawr College
 Bucknell University
 California Institute of Technology
 California Maritime Academy
 California State Polytechnic University–
 Pomona
 California State University–
 Channel Islands
 California State University–Chico
 California State University–
 Dominguez Hills
 California State University–Fresno
 California State University–Fullerton
 California State University–Long Beach
 California State University–Los Angeles

California State University–Monterey Bay
 California State University–Sacramento
 California State University–Stanislaus
 California University of Pennsylvania
 Cameron University
 Carleton College
 Case Western Reserve University
 Central Connecticut State University
 Central Michigan University
 Central Washington University
 Centre College
 Cheyney University of Pennsylvania
 Chicago State University
 Clark 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
 East Carolina University
 East Stroudsburg
 University of Pennsylvania
 East Tennessee State University
 Eastern Kentucky University
 Eastern Michigan University
 Edinboro University of Pennsylvania
 Emory University
 Evergreen State College
 Fitchburg State University
 Florida Gulf Coast University

Florida International University
Florida State University
Fordham University
Fort Lewis College
Franklin & Marshall College
Frostburg State University
Georgetown University
Georgia Institute of Technology
Georgia State University
Gettysburg College
Governors State University
Grambling State University
Grand Valley State University
Harvard University
Howard University
Humboldt State University
Illinois State University
Indiana State University
Indiana University of Pennsylvania
Indiana University, Southeast
Iowa State University
Jackson State University
Jacksonville State University
Johns Hopkins University
Kansas State University
Kean University
Kenyon College
Lafayette College
Lake Superior State University
Lehigh University
Lincoln University
Louisiana State University–Baton Rouge
Macalester College
Mansfield University of Pennsylvania
Marquette University
Marshall University
Massachusetts College of Liberal Arts

McNeese State University
Michigan Technological University
Middle Tennessee State University
Middlebury College
Missouri State University
Missouri University of Science
and Technology
Montana State University–Bozeman
Montana Tech of the University
of Montana
Morehead State University
Mount Holyoke College
Murray State University
New York University
Nicholls State University
North Carolina Central University
Northeastern Illinois University
Northeastern University
Northern Arizona University
Northern Illinois University
Northern Kentucky University
Northwestern Oklahoma State University
Northwestern University
Oakland University
Oberlin College
Ohio University
Oregon State University
Princeton University
Purdue University
Purdue University Calumet
Rensselaer Polytechnic Institute
Rice University
Sam Houston State University
San Francisco State University
Sewanee, The University of the South
Shawnee State University
Smith College

Appendix A

SCHOOLS BY RATING

Southeastern Louisiana University	University of Central Arkansas
Southern Illinois University at Carbondale	University of Chicago
Southwest Minnesota State University	University of Cincinnati
St. Olaf College	University of Connecticut
State University of New York–Brockport	University of Delaware
State University of New York–Fredonia	University of Florida
State University of New York–New Paltz	University of Hawaii at Hilo
State University Of New York– University at Buffalo	University of Houston
State University of New York College of Environmental Science and Forestry	University of Idaho
Stevens Institute of Technology	University of Illinois at Chicago
Stony Brook University	University of Illinois at Springfield
Swarthmore College	University of Illinois at Urbana-Champaign
Syracuse University	University of Iowa
Tarleton State University	University of Kansas
Tennessee State University	University of Louisville
Texas A&M University–College Station	University of Maine–Presque Isle
Texas Southern University	University of Massachusetts–Amherst
Texas Tech University	University of Massachusetts at Lowell
Texas Woman’s University	University of Miami
The College of New Jersey	University of Michigan–Ann Arbor
The Ohio State University	University of Minnesota–Morris
Trinity College	University of Minnesota–Twin Cities
Troy University	University of Missouri–Columbia
Tufts University	University of Missouri at St. Louis
Tulane University	University of Nevada, Las Vegas
Union College	University of Nevada, Reno
University of Alabama	University of New Hampshire
University of Alabama at Birmingham	University of New Mexico
University of Alaska Anchorage	University of New Orleans
University of Alaska Southeast	University of North Carolina–Chapel Hill
University of Arkansas–Fayetteville	University of North Carolina–Greensboro
University of California, Irvine	University of North Carolina School of the Arts
University of California, San Diego	University of North Dakota
University of California, Santa Cruz	University of North Texas
	University of Northern Colorado

University of Northern Iowa
 University of Notre Dame
 University of Oregon
 University of Richmond
 University of South Alabama
 University of South Carolina Columbia
 University of South Florida
 University of Southern California
 University of Southern Indiana
 University of Southern Mississippi
 University of Texas at Arlington
 University of Texas at Austin
 University of Texas at El Paso
 University of Texas at San Antonio
 University of Toledo
 University of Tulsa
 University of Wisconsin–Eau Claire
 University of Wisconsin–Green Bay
 University of Wisconsin–La Crosse
 University of Wisconsin–Madison
 University of Wisconsin–Oshkosh
 University of Wisconsin–Stout
 University of Wyoming
 Utah State University
 Utah Valley University
 Valdosta State University
 Vanderbilt University
 Virginia Commonwealth University
 Wake Forest University
 Washington State University
 Washington University in St. Louis
 Wayne State University
 Wesleyan University
 West Chester University of Pennsylvania
 West Virginia University
 Western Illinois University
 Western Kentucky University

Western Michigan University
 Western State College of Colorado
 Westfield State University
 William Paterson University
 Winston Salem State University
 Worcester State University
 Wright State University
 Youngstown State University

YELLOW LIGHT

Amherst College
 Appalachian State University
 Ball State University
 Bard College
 Binghamton University,
 State University of New York
 Bloomsburg University of Pennsylvania
 Bowdoin College
 Bowling Green State University
 California Polytechnic State University
 California State University–Bakersfield
 California State University–East Bay
 California State University–Northridge
 California State University–
 San Bernardino
 California State University–San Marcos
 Claremont McKenna College
 Clarion University of Pennsylvania
 Clemson University
 Colorado Mesa University
 Colorado School of Mines
 Colorado State University
 Dakota State University
 Drexel University
 Duke University
 Eastern New Mexico University

Appendix A

SCHOOLS BY RATING

Elizabeth City State University
 Fayetteville State University
 Florida Atlantic University
 Framingham State University
 Furman University
 George Mason University
 George Washington University
 Grinnell College
 Hamilton College
 Harvey Mudd College
 Haverford College
 Henderson State University
 Idaho State University
 Indiana University–Bloomington
 Indiana University–Kokomo
 Indiana University–
 Purdue University Columbus
 Indiana University–
 Purdue University Fort Wayne
 Indiana University–
 Purdue University Indianapolis
 Indiana University South Bend
 Indiana University, East
 Indiana University, Northwest
 Keene State College
 Kentucky State University
 Kutztown University of Pennsylvania
 Lewis-Clark State College
 Lock Haven University of Pennsylvania
 Massachusetts Institute of Technology
 Metropolitan State University
 Miami University of Ohio
 Michigan State University
 Millersville University of Pennsylvania
 Montclair State University
 New Jersey Institute of Technology
 North Carolina A&T State University

North Carolina State University–Raleigh
 North Dakota State University
 Northern Michigan University
 Northwestern State University
 Occidental College
 Oklahoma State University–Stillwater
 Pennsylvania State University–
 University Park
 Pitzer College
 Plymouth State University
 Pomona College
 Reed College
 Rhode Island College
 Richard Stockton College of New Jersey
 Rogers State University
 Rutgers University–New Brunswick
 Saginaw Valley State University
 Saint Cloud State University
 San Diego State University
 San Jose State University
 Scripps College
 Skidmore College
 Slippery Rock University of Pennsylvania
 Sonoma State University
 South Dakota State University
 Southern Methodist University
 Stanford University
 State University of New York–Albany
 Temple University
 The City College of New York
 Towson University
 University of Alabama in Huntsville
 University of Alaska Fairbanks
 University of Arizona
 University of California–Riverside
 University of California–Merced
 University of California, Berkeley

University of California, Davis
 University of California, Los Angeles
 University of California, Santa Barbara
 University of Central Florida
 University of Central Missouri
 University of Colorado at Boulder
 University of Denver
 University of Georgia
 University of Kentucky
 University of Maine
 University of Maryland–College Park
 University of Massachusetts
 at Dartmouth
 University of Montana
 University of Montevallo
 University of North Alabama
 University of North Carolina–Asheville
 University of North Carolina–Charlotte
 University of North Carolina–Pembroke
 University of North Carolina–Wilmington
 University of Oklahoma
 University of Pittsburgh
 University of Rhode Island
 University of Rochester
 University of South Dakota
 University of Southern Maine
 University of Vermont
 University of Washington
 University of West Alabama
 University of West Georgia
 Virginia Polytechnic Institute
 and State University
 Washington & Lee University
 Wellesley College
 Western Carolina University
 Whitman College
 Wichita State University

Williams College
 Yale University

GREEN LIGHT

Arizona State University
 Black Hills State University
 Carnegie Mellon University
 Cleveland State University
 Dartmouth College
 James Madison University
 Mississippi State University
 Shippensburg University of Pennsylvania
 The College of William and Mary
 University of Mississippi
 University of Nebraska–Lincoln
 University of Pennsylvania
 University of Tennessee–Knoxville
 University of Utah
 University of Virginia

NOT RATED

Baylor University
 Brigham Young University
 Pepperdine University
 Saint Louis University
 United States Military Academy
 United States Naval Academy
 Vassar College
 Worcester Polytechnic Institute
 Yeshiva University

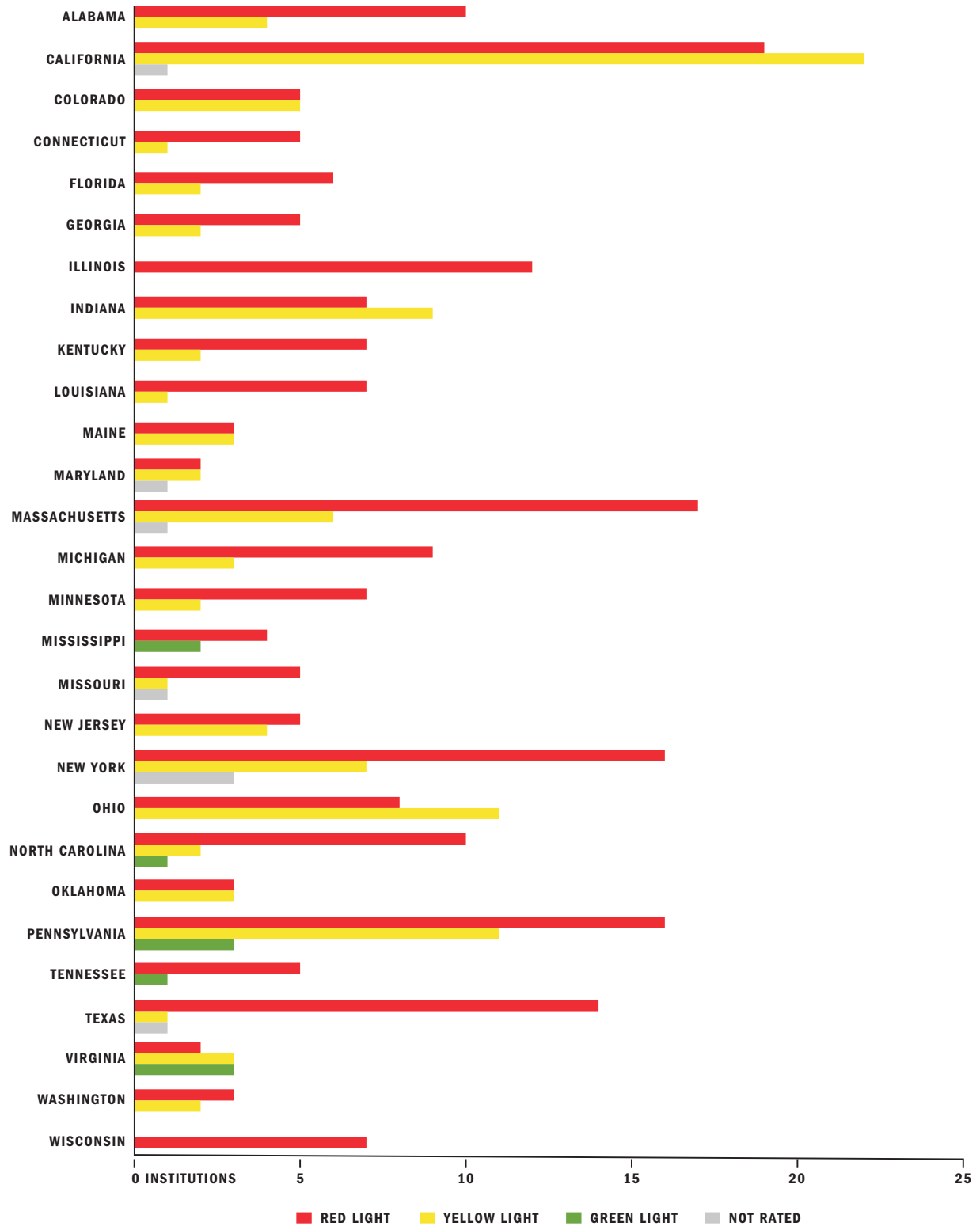
Appendix B

RATING CHANGES, 2011–2012 ACADEMIC YEAR

SCHOOL NAME	2010–2011 RATING	2011–2012 RATING
Appalachian State University	RED	YELLOW
Bowdoin College	RED	YELLOW
Claremont McKenna College	RED	YELLOW
Colorado Mesa University	RED	YELLOW
California State University–Bakersfield	RED	YELLOW
California State University–San Bernardino	RED	YELLOW
George Mason University	RED	YELLOW
Indiana University Northwest	RED	YELLOW
Lewis-Clark State College	RED	YELLOW
Michigan State University	RED	YELLOW
Mississippi State University	RED	GREEN
North Dakota State University	RED	YELLOW
Northwestern State University	RED	YELLOW
Richard Stockton College of New Jersey	RED	YELLOW
Shawnee State University	YELLOW	RED
University of California–Riverside	RED	YELLOW
University of Delaware	YELLOW	RED
University of Georgia	RED	YELLOW
University of Mississippi	RED	GREEN
University of North Carolina–Chapel Hill	YELLOW	RED
University of North Texas	RED	YELLOW
University of South Dakota	GREEN	YELLOW
University of Washington	RED	YELLOW
University of West Alabama	RED	YELLOW
Westfield State University	YELLOW	RED

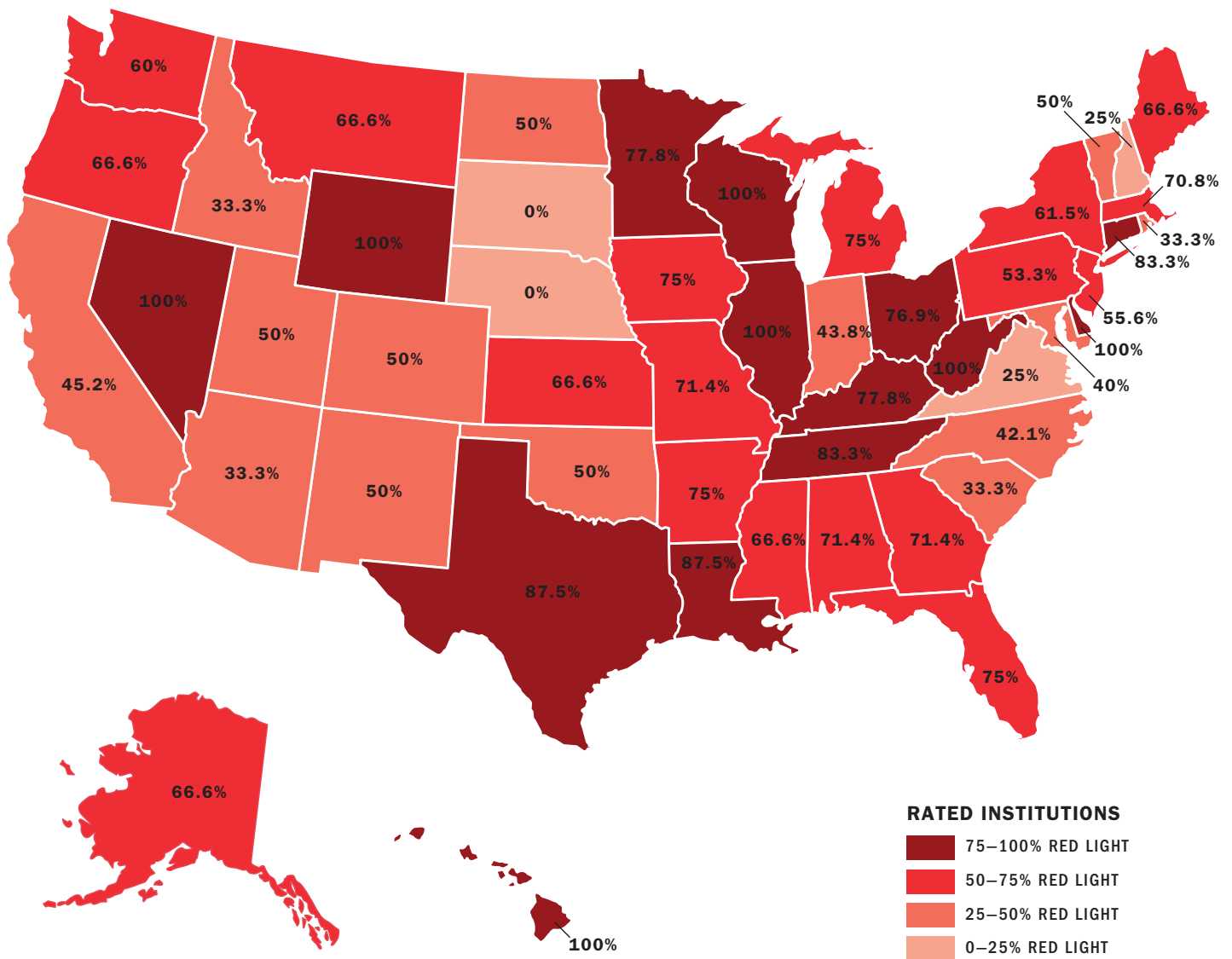
Appendix C

STATE-BY-STATE INFORMATION (MINIMUM FIVE INSTITUTIONS RANKED)



Appendix D

PERCENTAGE OF RED LIGHT INSTITUTIONS OF TOTAL INSTITUTIONS RANKED



**THE MISSION OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN
EDUCATION IS TO DEFEND AND SUSTAIN INDIVIDUAL
RIGHTS—INCLUDING FREEDOM OF SPEECH, LEGAL EQUALITY,
DUE PROCESS, RELIGIOUS LIBERTY, AND SANCTITY
OF CONSCIENCE—AT AMERICA’S COLLEGES AND UNIVERSITIES.**



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