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Beyond the Narratives: How Free Speech in Higher Education is Truly Restricted

*Azhar Majeed**

I. INTRODUCTION

Over the past year, much of the national conversation surrounding freedom of speech on college campuses has focused on controversial speakers, including those invited by students or student groups as well as those appearing on campus without an invitation. The debate continues to rage on as to whether university communities should allow allegedly offensive speakers to come to campus and spew their hateful views; whether universities have an obligation to foot the bill for the security they deem necessary to host such an event; and whether disruptions of speaker events are indicative of decreased tolerance on the part of today's students toward viewpoints with which they disagree.

Somewhat lost in the mix is the fact that universities continue to violate the basic expressive rights of their students and faculty members in ways that my organization, the Foundation for Individual Rights in Education ("FIRE"), has been fighting against for the better part of two decades.

To be sure, FIRE and other free speech advocates have achieved a number of successes in defending the rights of students and professors, both over the past year and in years past.¹ However, there has been comparatively little attention paid in recent months to the fact that too many institutions of higher education routinely violate their First Amendment obligations, or, in the case of private institutions, abandon the commitments to freedom of expression that they declare in official policy.

This Article will seek to illustrate that, in both policy and practice, our nation's colleges and universities still have a long way to go in terms of respecting their students' and faculty members' free speech rights. While such examples may not fit into the various narratives currently surrounding the issue of freedom of expression in higher education, they deserve close attention so that the public can join advocates such as FIRE in calling on universities to abide by their legal obligations as well as free speech principles.

II. CAMPUS SPEECH CODES: A CONTINUING THREAT TO STUDENT AND FACULTY RIGHTS

FIRE's most recent annual speech code report, *Spotlight on Speech Codes 2018*, found that approximately 32.3 percent of surveyed institutions (out of 461

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1. See, e.g., Press Release, Foundation for Individual Rights in Education, Victory in Eighth Circuit: Iowa State Can't Censor Pot Legalization T-Shirts (Feb. 13, 2017) (available at www.thefire.org/victory-in-eighth-circuit-iowa-state-cant-censor-pot-legalization-t-shirts).

colleges and universities) maintained at least one written policy earning a “red light” rating.² The red light rating indicates that such policies clearly and substantially restrict speech protected by the First Amendment.³ The report found that an additional 58.6 percent of institutions earned a “yellow light” rating, meaning their policies prohibited a more limited amount of protected speech, but were nevertheless amorphous regulations ripe for administrative abuse.⁴

These results are flatly unacceptable, given that FIRE’s report predominantly surveyed public colleges and universities bound by the First Amendment.⁵ Moreover, even among private institutions, the prevailing majority of such schools commit themselves in official policy to upholding the free speech rights and academic freedom of their students and faculty.⁶ FIRE’s position has long been that, when private universities make such clear commitments, they should be held morally accountable (and are perhaps legally bound as well) to follow through on their promises.⁷

Yet, as documented year after year by FIRE’s annual speech code report, the vast majority of surveyed colleges and universities continue to maintain unconstitutional and restrictive speech codes.⁸ These policies cause untold harm to the “marketplace of ideas” that a college campus is ideally meant to be, by (a) informing students and faculty that their expressive rights are lesser than what they actually are; (b) giving university officials a tool with which to censor or punish speech when it is unwanted by the administration or causes controversy on campus; and (c) chilling debate and discussion on the part of students and faculty who are wary of running afoul of the rules.

California State University, East Bay, for example, promulgates a posting policy the stated purpose of which is to prevent the posting of “content that may be deemed offensive to members of the campus community and visitors to the campus.”⁹ College of the Holy Cross, likewise, prohibits “intolerant language” and “offensive images” through its “Use of Information Technology Services” policy and further provides that “determination of what is obscene, offensive or intolerant is within the sole discretion of the College.”¹⁰ The University of Rhode Island, meanwhile, maintains a policy banning “bias-based incidents,” which it defines as any incident that “has a negative effect on an individual or group and which is based on or motivated by bias” against a particular personal characteristic.¹¹

2. *Spotlight on Speech Codes 2018: The State of Free Speech on our Nation’s Campuses*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., www.thefire.org/spotlight-on-speech-codes-2018.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See, e.g., Greg Lukianoff, *Liberty University, Free Speech, and the Private University*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Jun. 3, 2009), www.thefire.org/liberty-university-free-speech-and-the-private-university.

8. See, e.g., *Spotlight on Speech Codes 2017: The State of Free Speech on Our Nation’s Campuses*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Dec. 2, 2016), www.thefire.org/spotlight-on-speech-codes-2017.

9. Samantha Harris, *Speech Code of the Month: California State University, East Bay*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Nov. 20, 2017), www.thefire.org/speech-code-of-the-month-california-state-university-east-bay.

10. Samantha Harris, *Speech Code of the Month: College of the Holy Cross*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (July 14, 2017), www.thefire.org/speech-code-of-the-month-college-of-the-holy-cross-2.

11. Samantha Harris, *Speech Code of the Month: University of Rhode Island*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Dec. 21, 2016), www.thefire.org/speech-code-of-the-month-university-of-rhode-island.

These and other campus speech codes nationwide illustrate the problem with the way too many colleges regulate and restrict expression. The good news is that FIRE and other free speech advocates have made considerable strides in recent years in removing speech codes from the campus setting, whether through litigation,¹² legislation,¹³ or collaborative policy reform work with university administrators and general counsels. As a result of such efforts, 10 colleges and universities moved to earn FIRE's highest, "green light" rating in 2017, reserved for those institutions whose written policies do not seriously imperil freedom of expression.¹⁴ At present, 39 schools across the country earn this stellar speech code rating from FIRE. While this number is a fraction of the total number of red light and yellow light institutions in the country, as discussed earlier in this section, it nevertheless represents an improvement over past years and offers hope for the future.

In 2018 (and beyond), FIRE and other campus free speech advocates will need to continue to push for speech code reform if America's colleges and universities are to truly serve as bastions of inquiry and debate.

III. CASES INVOLVING THE VIOLATION OF STUDENTS' AND PROFESSORS' FREE SPEECH RIGHTS

In case after documented case, universities routinely violate the expressive rights of their students and faculty members. Pierce College, a member institution of the Los Angeles Community College District ("LACCD"), told a student that he could not hand out copies of the U.S. Constitution to fellow students outside of the college's "free speech zone," which comprised roughly 0.003 percent of the campus.¹⁵ The student, who was also seeking to recruit members for his Young Americans for Liberty student group, was informed by a college official that he needed a permit to use the designated space and would be asked to leave campus if he did not comply.¹⁶ The student eventually filed a federal lawsuit in March 2017; he challenged policies at both Pierce and the LACCD, the policies of which affect approximately 150,000 students.¹⁷

Likewise, student protesters at Rensselaer Polytechnic Institute ("RPI") in New York state have faced a number of restrictions over the past year. The administration's dispute with these students centers on control over the Student Union, which has been operated by RPI students for more than 125 years and houses a bookstore,

12. See, e.g., *Victory: Modesto Junior College Settles Student's First Amendment Lawsuit*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Feb. 25, 2014), www.thefire.org/victory-modesto-junior-college-settles-students-first-amendment-lawsuit.

13. See, e.g., *Comprehensive campus free speech bill becomes law in Tennessee*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (May 10, 2017), www.thefire.org/comprehensive-campus-free-speech-bill-becomes-law-in-tennessee.

14. *Spotlight on Speech Codes 2018: The State of Free Speech on Our Nation's Campuses*, *supra* note 2.

15. *Student Sues Los Angeles Community College District to Free over 150,000 Students from Unconstitutional 'Free Speech Zones'*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Mar. 28, 2017), www.thefire.org/student-sues-los-angeles-community-college-district-to-free-over-150000-students-from-unconstitutional-free-speech-zones.

16. *Id.*

17. *Id.*

spaces for student groups, and other student services.¹⁸ In April 2016, RPI denied the students' request to hold a "Save the Union" demonstration, an attempt the students sidestepped by working with a professor to hold a class about peaceful demonstrations at the exact location and time as the proposed demonstration.¹⁹

In October 2017, RPI once again denied the students permission to hold such a protest, citing the fact that it would be taking place during Homecoming weekend, depriving the students of the opportunity to reach alumni, donors, and other influential parties with their message.²⁰ The administration even went so far as to erect a fence across much of campus, in order to prevent protesters from coming close to a building where the president of RPI would be hosting a black-tie event for alumni and donors.²¹ Despite receiving multiple letters from FIRE detailing how the school's actions contradict its stated commitment, in official policy, to free speech, RPI has not backed down from its blatant censorship of vital campus discourse.

Drexel University in Philadelphia, meanwhile, subjected a professor to a months-long investigation over comments on Twitter that, while constitutionally protected, proved to be controversial.²² While FIRE repeatedly reminded the university of its policy commitments to free speech, Drexel continued to carry on a private investigation—thereby not only calling the professor's rights into question, but undoubtedly chilling the speech of his colleagues.²³

The University of South Carolina, like Pierce College, found itself embroiled in a federal lawsuit after investigating students who had engaged in protected expressive activity and threatening them with disciplinary action. In November 2015, members of the university's College Libertarians and Young Americans for Liberty student groups held an outdoor event on campus focusing on free speech issues, part of which included, ironically, posters depicting incidents of censorship that had taken place at other colleges and universities.²⁴ Following several student complaints that the event was "offensive" and "triggering," the university served one of the student organizers of the event with a "Notice of Charge" letter and threatened him with punishment up to and including expulsion for engaging in "discrimination."²⁵

While the investigation was ultimately dropped after the student met with an administrator and explained the intentions behind the event, he and the two student

18. Adam Steinbaugh, *Rensselaer Polytechnic Institute Denies Students Permission to Protest Administration - Again*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Oct. 9, 2017), www.thefire.org/renselaer-polytechnic-institute-again-denies-students-permission-demonstrate-peacefully.

19. Adam Steinbaugh, *Rensselaer Polytechnic Institute's Cynical Attempt to Shut Down Protest Fails Spectacularly*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Apr. 1, 2016), www.thefire.org/renselaer-polytechnic-institutes-cynical-attempt-to-shut-down-protest-fails-spectacularly.

20. *Rensselaer Polytechnic Institute President (Literally) Fences out Free Speech*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Oct. 12, 2017), www.thefire.org/renselaer-polytechnic-institute-president-literally-fences-out-free-speech.

21. *Id.*

22. Isaac Smith, *Drexel Publicly Promised Professor Freedom of Expression, but Privately Pursues Investigation*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Jun. 6, 2017), www.thefire.org/drexel-publicly-promised-professor-freedom-of-expression-but-privately-pursues-investigation.

23. *Id.*

24. *Students Interrogated for Organizing Free Speech Event File First Amendment Lawsuit Against University of South Carolina*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Feb. 23, 2016), www.thefire.org/students-interrogated-for-organizing-free-speech-event-file-first-amendment-lawsuit-against-university-of-south-carolina.

25. *Id.*

chapters filed a First Amendment lawsuit in February 2016, challenging the university's actions against them as well as a number of its policies regarding student expression.²⁶ As of July 2017, the students had appealed to the U.S. Court of Appeals for the Fourth Circuit, after a federal district court had dismissed the lawsuit.²⁷

These and other cases like them illustrate several trends. First, university officials routinely misapply First Amendment principles, or, in the case of private colleges, their own institutional commitments to freedom of expression. Second, administrators cater to the whims of offended students far too often, preferring to keep them happy by silencing speech with which they disagree rather than allowing all views to flourish on their campus. Third, universities are loathe to tolerate viewpoints and other developments in their community that may bring controversy or unwanted public attention to the institution. Fourth, the very speech codes discussed in the previous section are oftentimes the culprits in these cases. That is, while some may believe that such policies are ultimately harmless because they sit unenforced, the harsh reality is that they are prone to becoming the tools of censorship or punishment taken against constitutionally protected speech.

IV. CONCLUSION

Based on the above, it is clear that free speech advocates have a great deal left to achieve in 2018 and beyond. Part of that work includes changing some of the prevailing narratives surrounding the issue of freedom of expression in higher education, and convincing those who are not intimately familiar with the issue that there is a great deal more happening than the speaker controversies that tend to dominate the headlines.

Advocates like FIRE must continue to highlight the unconstitutional and restrictive policies that universities maintain in their codes of conduct, student handbooks, and related materials. They must likewise help students and faculty fight back when their rights are encroached upon. Students and professors, for their part, must be vigilant against the threat of censorship, be aware of their rights (both under the law and pursuant to university policy), and be willing to defend themselves when the situation calls for it. Finally, all members of the college community—whether they are administrators, faculty, or students—must be cognizant of free speech principles whenever a campus controversy arises. They must be willing to tolerate expression that they abhor, and to take the approach that counter-speech will be the most effective response to expression with which they fundamentally disagree.

These remedies, some of them legal and some cultural, offer the best antidote to the problems that currently plague the climate for freedom of expression at too many colleges.

26. *Id.*

27. *Student Groups to Appeal After Court Dismisses Lawsuit Against University of South Carolina Administrators*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Jul. 13, 2017), www.thefire.org/student-groups-to-appeal-after-court-dismisses-lawsuit-against-university-of-south-carolina-administrators.