Students, be warned: the college of your choice may be watching you, and will more than likely be keeping an eye on you once you enter the hallowed campus gates. America’s institutions of higher education are increasingly monitoring students’ activity online and scrutinizing profiles, not only for illegal behavior, but also for what they deem to be inappropriate speech.

Contrary to popular misconceptions, the speech codes, censorship, and double standards of the culture-wars heyday of the ’80s and ’90s are alive and kicking, and they are now colliding with the latest explosion of communication technology. Sites like Facebook and MySpace are becoming the largest battleground yet for student free speech. Whatever campus administrators’ intentions (and they are often mixed), students need to know that online jokes, photos, and comments can get them in hot water, no matter how effusively their schools claim to respect free speech. The long arm of campus officialdom is reaching far beyond the bounds of its buildings and grounds and into the shadowy realm of cyberspace.

A scary experience
Consider the case of Justin Park, a Korean-American student at Johns Hopkins University in Baltimore. An intelligent and driven young man — smart enough to start at Hopkins at 15 — Justin began his junior year this past fall. But due to charges of racial harassment stemming from a party invitation he posted on Facebook, he was suspended from school this past November.

As social chair of his fraternity, Justin composed an invitation to a “Halloween in the Hood” party, one of many intentionally un-PC themed parties the fraternity had thrown over the years (others included a “White Trash Trailer Bash” and a “Catholic Schoolgirl Party”). Taking his cues from Chapelle’s Show and MTV videos, he crafted the invite’s call, listing gangsta rapper Ice-T as the party’s host and asking partygoers to “come dressed in yo’ bomb ass Halloween costume or git smok’d.” It was an awkward attempt, to be sure, but Justin thought it was the kind of ironic humor that his peers would recognize as making fun of himself and the party as much as anything else.

Justin posted the party invitation on Facebook. After all, every one of his friends was a member of Facebook. Come to think of it, so was pretty much the entire student body. And that’s where the problem started.

Justin's friends weren’t the only ones who saw his invitation. In fact, the university’s director of Greek Affairs regularly monitored Facebook activity — and he was not amused. Calling the invite offensive, he asked Justin to take it down. He did. But once the
So Justin put up another invite the next day, making sure to remove what he thought to be the offensive language. In fact, he hammered it up: right next to the call for attendees to wear “copious amounts of so-called ‘bling bling ice ice,’ ” he wrote that he didn’t “condone or advocate racism, fascism, communism, consumerism, capitalism, terrorism, organised(s), sexism, womanism, jism, or any other –ism's,” but referred to Baltimore as an “HIV pit” and made mocking references to O.J. Simpson and Johnnie Cochran. As far as Justin and his friends were concerned, however, the invite was an obvious joke.

The party was held the next night, and it was well-attended. Not all who came, however, enjoyed themselves. According to the Baltimore Sun, members of the Black Student Union attended the party, and to many of them the party was a direct affront, a celebration of negative racial stereotypes. Black Student Union members took particular offense to a skeleton pirate dangling from a noose, which they perceived as an obvious symbol of lynching. (The university later concluded, however, that the skeleton had been meant to represent the motion picture Pirates of the Caribbean.)

A week later, Justin received a letter from John Hopkins’s associate dean of students, informing him that he’d been charged with violating university policy because of the language used in his invitations. Specifically, Johns Hopkins charged Justin with “failing to respect the rights of others and to refrain from behavior that impairs the university’s purpose or its reputation in the community,” violating the “university’s anti-harassment policy,” “failure to comply with the directions of a university administrator,” “conduct or a pattern of conduct that harasses a person or a group,” and “intimidation.”

Although they sound official, these quasi-legal charges wouldn’t stand for a second in a real court. According to a 2003 statement by the US Department of Education’s Office of Civil Rights (OCR), the legal standard for “harassment” is behavior that is “sufficiently serious (i.e., severe, persistent, or pervasive) as to limit or deny a student's ability to participate in or benefit from an educational program.” The OCR, in fact, issued the 2003 statement to address the rampant abuse of “harassment” charges to punish un-PC speech. Justin’s speech, however obtuse, was still well within the bounds of expression protected by the First Amendment. As Gregory Kane, an (African-American) English professor at Johns Hopkins wrote in an editorial column for the Baltimore Sun: “We’ll just keep saying it until the idea sinks in: There is no right, constitutional or otherwise, to not be offended.”

But the law and the principles of free speech didn’t matter; Justin wasn’t being tried in a real court. A university hearing was held, and afterward, Justin learned that despite his apologies he had been suspended for a year and was required to complete 300 hours of community service, attend a diversity workshop, and read 12 books, writing a paper on each.

But weren’t these invitations posted on an outside Web site, not connected with the university? Wasn’t Justin just joking with his friends? Why was he being punished so harshly for lame jokes made on the Internet — and since when is it the university’s job to watch what students do online?

A Vast New Frontier
Facebook and MySpace battles between students and universities have evolved through three distinct phases.

The first few Facebook cases began trickling in to the Foundation for Individual Rights in Education (FIRE, where both authors of this article work) sometime in late 2005. This first wave typically involved students documenting themselves engaged in illegal behavior, like underage drinking or using illegal drugs. Maybe this shouldn’t be surprising; after all, analysts estimate that Facebook is the Internet’s largest host of user-submitted photos, with over 2.3 million being uploaded daily. That tops even dedicated photography sites like Flickr.com. It was perhaps inevitable that students would eventually upload pictures of themselves or others drinking or otherwise partying — and just as inevitable that administrators would eventually see these incriminating snapshots and take action.

The next wave of Facebook cases concerned censorship in its rawest form, updated for the Internet age. Typically these cases involved administrators, faculty, or student officials being criticized or satirized online. Instead of responding with more speech, the “victimized” party often moved for censorship, thus echoing the centuries-old lament of censors the world over: I believe in free speech and all, but I will not be mocked!

For example, at Syracuse University, students who created a Facebook group to make fun of a teaching assistant were expelled from the class and placed on “disciplinary reprimand.” And two students at Cowley College in Kansas were banned from participating in theater-department activities after they complained about the theater department on a MySpace blog. Meanwhile, a student at University of Central Florida (UCF) was brought up on “personal abuse” harassment charges for calling a candidate for a student-government office a “Jerk and a Fool” on his Facebook account.

The latest wave of cases overwhelmingly revolves around racially insensitive speech. Around the time of the Dr. Martin Luther King Jr. holiday this year, FIRE received reports of racially themed parties at the University of Connecticut Law School, Tarleton State University (TX), and Clemson University — and in each case, the party was discovered via student postings on Facebook. The UConn party was typical of the three. According to the Hartford Courant, law students “dressed in hip-hop clothes and toted 40-ounce bottles of malt liquor”; photos later posted on Facebook depicted “partygoers wearing do-rags, muscle shirts, hoodies, and necklaces with gold medallions.” Along similar lines, at the University of Illinois Urbana-Champaign, a campus debate about the school’s mascot, Chief Illiniwek, has been engulfed in controversy since the creation of a Facebook group called “If They Get Rid of the Chief I’m Becoming a Racist.”
Public, Private, and the campus speech police

College administrators didn’t decide to start cracking down on student speech just because of Facebook’s popularity. Despite the fact that such institutions rely on free and open exchange to serve their societal functions, universities both public and private have been policing student speech for decades. While we do ourselves no favors imagining that there was ever a time in collegiate history that students’ rights were perfectly respected, the campus free-speech movement of the 1960s and ’70s was highly successful. The sad irony is that many from the generation that fought so hard for free speech in the ’60s and ’70s were the pioneers of speech codes and PC restrictions in the ’80s and ’90s and that we still see today.

The most common threats to student free speech are the ever-present and strangely tenacious campus speech codes: university rules or regulations that forbid speech that would be clearly protected under the First Amendment. A recent study by FIRE found that of 330 schools surveyed, over two-thirds maintained speech codes explicitly prohibiting substantial amounts of protected speech.

Most often schools ban speech in the name of combating “harassment.” For example, Drexel University, in Philadelphia, bans “inconsiderate jokes” and “inappropriately directed laughter,” while Northeastern University states that no student may use the Internet to “[t]ransmit or make accessible material, which in the sole judgment of the University is offensive. . .” Harvard can punish “Behavior evidently intended to dishonor such characteristics as race, gender, ethnic group, religious belief, or sexual orientation,” and Colorado State University’s Residence Hall Handbook bans “expressions of hostility against a person or property because of a person’s race, color, ancestry, national origin, religion, ability, age, gender, socio-economic status, ethnicity, or sexual orientation.” While these codes may be passed with good intentions, following the actual language of such a code would ban even the most commonplace criticism like “the university panders to rich kids,” “I am tired of the religious right,” or “men are pigs.” Of course, because such codes are impossible to enforce across the board — as virtually everyone would be guilty of violating them at some point — they remain on the books to warn students to tread lightly, and so that administrators can resuscitate them as needed.

Despite their pervasiveness, though, speech codes at public universities are flat-out unconstitutional. Public universities are state actors, and are thus bound to uphold the Constitution, including — you guessed it! — the First Amendment.

While hardly sympathetic, federal courts have deemed even offensively themed parties protected expression in public colleges and universities. The First Amendment does not require inaction against offensive expression, however; it only prevents official punishment. When word of parties such as the one hosted at John Hopkins by Justin Park’s fraternity gets out, it often generates passionate condemnation, causing the students to apologize. While the “meeting speech with more speech” approach may not be fully satisfying to many who want to see expressions of racism or intolerance stamped out, exposing speech we regard as ignorant or offensive to the public may be the best way to combat it while protecting our essential freedoms.

That speech codes at public universities still exist is a legal wonder, considering that no less than six federal cases nationwide have struck them down as unconstitutional. The US Supreme Court has yet to hear a university speech-code case, but the thrust of First Amendment law over at least the last 40 years leaves virtually no doubt that such codes would be overruled if they reached the Court. In Papish v. Board of Curators of the University of Missouri, for example, a 1973 case, the Supreme Court explicitly held 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.’ ” And in Healy v. James, a Supreme Court ruling from 1972, the Court announced that “state colleges and universities are not enclaves immune from the sweep of the First Amendment,” making clear that “[t]he college classroom with its surrounding environs is peculiarly the marketplace of ideas.” Given how extensive and clear the precedent regarding the unconstitutionality of speech codes is, it is stunning how many public universities still maintain speech codes, including, in some cases, codes identical to those declared unconstitutional at other universities. It seems as if many universities will not rewrite their codes to comply with the First Amendment unless directly challenged. That means that thousands of colleges and universities can rest assured that their codes are safe for the time being.

The guarantees of the First Amendment generally do not apply to students at private schools, since the First Amendment regulates only government — not private — conduct. However, the vast majority of private universities make extensive promises of free speech and academic freedom, presumably to lure the most talented students and faculty, and to reassure them that they can engage in truly open inquiry once they are part of the campus community.

For example, Princeton University advertises that “free inquiry and free expression within the academic community” are “indispensable” to the achievement of Princeton’s goals. Boston University, meanwhile, promises the right “to teach and to learn in an atmosphere of unfettered free inquiry and exposition.” Yet both of these universities prohibit a great deal of speech that would be protected by the First Amendment, including speech that “demeans” others “beliefs.”

So if they are clearly unlawful at public colleges and contrary to the mission of private colleges, why are speech codes so hardy? Undeniably, a powerful PC climate, particularly with regard to race and religious issues, remains on campus, as well as a tenacious belief that some students and administrators have a right not to be offended. What is less well known, however, is that speech codes are maintained by schools in no small part due to a deeply held fear of civil liability for harassment lawsuits arising from Title IX of the Education Amendments of 1972. Title IX prohibits discrimination — including sexual harassment — in any education program receiving federal funding. Plaintiffs in meritorious sexual-harassment lawsuits stand to win large damage awards, and the sheer number of those suits has become quite significant. Even when the claim is truly frivolous, the cost of mounting a defense is substantial.

In an attempt to prevent these claims, educational institutions have adopted a corporate risk-management posture. In the private corporate world, where the First Amendment is inapplicable, the response to the explosion of sexual-harassment-litigation has been to adopt policies that dramatically expand the definition of harassment, and to handle such charges in-house, in an attempt to pre-empt harassment lawsuits. While there is nothing in sexual-harassment law that prohibits “offensive” speech without reference to its severity or pervasiveness, corporate policies routinely prohibit any kind of subjectively “offensive” interaction and encourage
Facing off over Facebook - The Phoenix

the reporting of such interactions to higher management.

Paranoia about sexual-harassment liability on campus has been on the rise for years. In deciding between the fear of harassment lawsuits, which are comparatively common and expensive, and passing speech codes, legal challenges to which are comparatively rare and inexpensive, speech is too often the loser.

Through the looking glass

In light of this shameful tradition of controlling and limiting student speech on college campuses, we should not be surprised that social-networking sites like MySpace and Facebook — which greatly increase the visibility of once-private student interaction — send university administrators into a blind panic. And if, in light of that, increased administrative online monitoring seems inevitable, it is all the more so given that fellow students survey these sites, too, and report their findings.

Even unaffiliated gadflies can get in on the act. Badjocks.com, a popular Web site that reports instances of student-athlete misconduct, has achieved national prominence by combing through student athletes’ Internet profiles in search of pictures of “jocks behaving badly,” often with terrible results for both the athletes and their schools’ athletic departments. For a generation that has been keeping journals and posting photos of themselves online since they were in elementary school, it is simply too easy to play “gotcha!” with the online “paper trails” left by students, and too many administrators seem willing to respond with heavy hands.

It’s always possible that, after a protracted and probably nasty fight, campus administrators will realize that inter-student online communication is sometimes coded, sarcastic, and harsh — and thus incredibly easy to misinterpret — and that it is neither wise, nor even really possible, to police all students online. Thankfully, at this month’s Association for Student Judicial Affairs conference, one of the top conventions of campus disciplinary officials, some lecturers argued strongly against administrators hunting down student speech online. Less encouragingly, when at these same meetings people were asked how many check out their students’ online profiles, the overwhelming majority of hands went up.

A much more worrisome administrative response — one seriously discussed at a recent sports-law conference in New York City that FIRE attended — is more likely: the establishment of newly expanded university bureaucracies consisting of multiple administrators serving as campus Internet cops. Students and those who value freedom of speech should be gravely concerned.

The culture of privacy

With so many in-jokes and candid moments floating around cyberspace in infinitely reproducible digital formats, privacy is quickly succumbing to a digital onslaught of personal information run wild. How do we as a society deal with living lives more publicly than ever before? Maybe we simply have to become more sophisticated and accept that people behave badly sometimes, just as they always have; the only difference now is that we can see that misbehavior in color on our Web browsers. As the information citizens have about one another approaches the infinite, respecting privacy will increasingly be a duty incumbent upon the viewer.

Thankfully, while the cultural shift required may be monumental, a comparable legal reconfiguration is not yet necessary. Constitutional law is already extremely protective of speech, whether some college administrators choose to acknowledge this fact or not. From flag burning to cartoons implying Jerry Falwell lost his virginity in a drunken outhouse encounter with his own mother to virtual pornography and even burning crosses, the Supreme Court has been very clear that “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”

The Court has long recognized that not only is it contrary to our principles to police speech, but that those in power are uniquely unqualified to judge the value of words. After all, as Justice Harlan wrote in the 1971 case of Cohen v. California, “one man’s vulgarity is another’s lyric.” First Amendment case law provides real and useful wisdom and guidance to universities considering expanding their speech codes into the virtual world: it is a bad idea to police humor, it is a terrible idea to enforce taste, and politeness, while commendable, must not be the law. Attempts to do so result in arbitrary enforcement and abuse.

Justin Park’s case may be the harbinger of things to come. In response to the uproar about his Halloween invite, Johns Hopkins, one of the world’s elite universities, acted quickly to enact a shiny new speech code, far more restrictive than the policy already in place. Titled “Principles for Ensuring Equity, Civility and Respect for All,” the new code states sanctimoniously that “[r]ude, disrespectful behavior is unwelcome and will not be tolerated.” While Johns Hopkins, as a private university, is not explicitly bound by the First Amendment, this code is impossible to reconcile with the school’s stated commitments to free speech. Are we really to believe that “[f]undamental to the University’s purpose is the free and open exchange of ideas,” if students may be suspended any time the administration deems a joke or opinion rude? Doesn’t the university understand that there is always something arguably
“disrespectful” in any dissenting voice? Hopkins, which clearly wants to establish itself as a progressive and enlightened institution, has decided to pass a code that is as myopic and imperious as any morality regulation of the Victorian era.

In the ongoing search for identity and individual truth, students will engage in conversations others may view as inappropriate, just as they always have. As pleasant as politeness may be, it is of minuscule importance compared with the necessity of robust discussion on our college campuses. As ever, occasional offense is a small price to pay for continuing to honor the wisdom of the Bill of Rights as we navigate through this unparalleled communications revolution.

Greg Lukianoff is an attorney and the president of the Foundation for Individual Rights in Education (FIRE). Will Creeley is an attorney and a senior program officer at FIRE. They can be reached at fire@thefire.org.
Facebook recently started using face recognition in more ways. If you're creeped out by the idea of the social network being on the lookout for your face, here's how to disable it. Facebook claims it's honoring previous user privacy preferences here; if you've already turned off tag suggestions at some point, face recognition should theoretically be disabled when you check this setting. And if you had the tagging thing on, Facebook thinks you're fine with the new ways putting face recognition to use. Can I leave face recognition enabled for photo tag suggestions but turn off the other stuff? No. It's all or nothing. Facebook says users prefer a simplified, single switch to control all face recognition settings. The Cambridge Analytica scandal. What happened 8. Facing Off Over Facebook. A judge at the upcoming hearing will hear the plaintiffs argue for a shutdown of Facebook and a transfer to them of Zuckerberg's assets. They also want extra money to be paid as damages. The lawsuit alleges copyright infringement, the stealing of trade secrets, breach of contract and fraud. The allegations in the re-filed complaint remain substantially the same -- that Zuckerberg was an unpaid but full member of their site development team and stole the idea. The suit alleges business torts and unfair business practices. Facebook has filed a countersuit alleging defamation. He Never Looked Back. ConnectU did eventually get launched in May 2004, but it remains tiny compared to the wildly popular Facebook, which now has tens of millions of users.