Administrators at Risk: A FIRE Seminar on Common Legal and Policy Misunderstandings

David French, President, Foundation for Individual Rights in Education, david.french@thefire.org
Greg Lukianoff, Director of Legal & Public Advocacy, Foundation for Individual Rights in Education, greg@thefire.org

Note: Presenters will provide free hard copies of FIRE's new *Guide to Free Speech on Campus* to attendees, while supplies last.

Program Description:
The legal landscape that applies to today's colleges can be very confusing. In an environment marked by contradictory and sometimes erroneous information, we should hardly be surprised that many administrators misunderstand their legal, constitutional, contractual, and policy obligations. FIRE will draw information from state and federal law, important legal decisions, and dozens of examples of campus incidents to illustrate how universities get the law wrong.

David French and Greg Lukianoff are both attorneys who specialize in constitutional and free-speech-related law. They have both published extensively on the topic, and are co-authors of *FIRE's Guide to Free Speech on Campus*. Lukianoff is also a member of the ASJA Presidential Task Force on Free Speech.

Introduction: Mill and Free Speech Theory

In his classic treatise *On Liberty*, published in 1859, political philosopher John Stuart Mill noted that while many people claim to believe in "free speech," in fact just about everyone has his or her own notions of what speech is dangerous, or worthless, or just plain wrong, and thus does not deserve the same protection accorded to speech of which one approves (especially one's own).

Mill provided a thorough and potent argument for unfettered free speech. Mill argued that since human beings are (indisputably) neither infallible nor all knowing, those whose opinion one despises might, in fact, be right. Even if incorrect, their statements might "contain a portion of truth" that could not have been discovered if they had been silenced. Further, Mill argued, even if those who want to censor speech were privy to the whole truth, their ideas must be "vigorously and earnestly contested," or the truth would not be a fully understood or internalized idea, but more like a prejudice: something we insist on believing without being able to explain *why* we believe it. Above all, Mill saw that if people did not have to defend their beliefs and values, they would lose their vitality, becoming merely rote formulas instead of deep, living, and creative convictions. Mill's philosophy goes far beyond the practical, political, and historical reasons for

protecting speech, and demonstrated that "free speech" is much more than a legal concept: it is a philosophy and a fundamental way of life as a citizen in a pluralistic, diverse community.

As U.S. Supreme Court Justice Robert Jackson so eloquently stated in his famous opinion in the case of ***West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)**, "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

The Most Common Misunderstandings Relating to Students' Rights

1. **Because colleges and universities are institutions with specific educational and business functions, greater regulations of free speech than would be permissible in the larger society are permissible on college campuses.**

This is generally untrue. While a university (like any business) has the right to make sure the ordinary, everyday functions of the university are not substantially disrupted, colleges and universities are generally understood to be places where the greatest free-speech protections should apply. Indeed, public colleges and universities have been held to the highest level of scrutiny when they attempt to regulate the content of speech. As the Supreme Court put it in ***Sweezy vs. New Hampshire*, 354 U.S. 234 (1957):**

> *The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.*

2. **Federal and state sexual harassment laws require our university to issue policies that ban or limit offensive speech.**

Untrue. While both Titles VII and IX do have provisions that deal with sexual harassment, no federal law requires a university to pass speech codes that ban even only highly offensive speech. In fact, the federal government does not even have the power to enforce laws that violate the federal constitution, as a law requiring such speech codes would.

In July of 2003 the **United States Department of Education**, **Office for Civil Rights** issued a letter of clarification (included in this packet). It stated, "OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment."

Furthermore, OCR clarified the status of private schools with regards to federal anti-harassment rules:

> *There has been some confusion arising from the fact that OCR's regulations are enforced against private institutions that receive federal-funds. Because the First Amendment normally does not bind private institutions, some have erroneously assumed that OCR's regulations apply to private federal-funds recipients without the constitutional limitations imposed on public institutions. OCR's regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses. Any private post-secondary institution that chooses to limit free speech in ways that are more restrictive than at public educational institutions does so on its own accord and not based on requirements imposed by OCR.*

While neither public nor private schools are *required* by federal law to pass codes that ban offensive, rude, racist, or demeaning speech, public schools are affirmatively *prohibited* from having such codes under the First Amendment. The Supreme Court in ***R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)**, a case that was not directly about speech codes, indicated that most university attempts to forge speech codes that would punish speech that offended individuals based on their race, religion, or gender would likely be ruled unconstitutional. Below is a partial list of additional cases involving speech codes in which those polices were overturned as vague and/or overbroad:

- *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich.1989)
- *Dambrot v. Central Mich. Univ.,* 839 F. Supp. 477 (E.D. Mich. 1993)
- ***Booher v. Board of Regents*, 1998 U.S. Dist. LEXIS 11404** (E.D. Ky. July 21, 1998)
- *Bair v. Shippensburg Univ*., 280 F. Supp. 2d 357 (M.D. Pa. 2003)

3. If speech is experienced by the listener as highly offensive, it must be unprotected harassment or a violation of the "fighting words" doctrine.

Untrue. Neither harassment nor the fighting words doctrine sanction prohibiting speech based on a listener's subjective reaction to it. Both doctrines require behavior much more serious than simply offending a listener.

<u>Harassment</u>
In the half-dozen or so cases it has heard involving sexual and racial harassment at the school and workplace, the Supreme Court has made clear that there are very strong limits on the type of verbal behavior that qualifies as discriminatory harassment. In the case of ***Meritor v. Vinson*, 477 U.S. 57 (1986)**, a case that took place in the decidedly more restrictive workplace context,

the Court ruled that "[m]ere utterance of an ethnic or racial epithet which engenders offensive feelings" is not harassment. The Court further explained in the case of ***Faragher v. City of Boca Raton,* 524 U.S. 775 (1998)** that "[c]onduct must be extreme" to qualify as actionable discriminatory harassment. Warning against too broad an interpretation of discriminatory harassment, the Court clarified the law as follows in ***Oncale v. Sundowner Offshore Servs.,* 523 U.S. 75 (1998)**: "The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment."

<u>"Student-on-Student" Harassment</u>

***Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629 (1999)** is the only Supreme Court case to deal with peer-on-peer harassment in an educational setting. That case clearly established that the analysis for deciding if a pattern of behavior is substantially ratcheted up from the standard that would establish harassment in the employer-employee or faculty-student context. **The analysis prescribed by the Supreme Court requires the conduct in question be sufficiently "severe," "pervasive," *and* "objectionably offensive" to have a "systematic effect" that "effectively bars the victim's access to an educational opportunity or benefit."** It also suggests that in evaluating these questions, the "constellation of surrounding circumstances, expectations, and relationships" must be considered.

With regards to severity, the behavior at issue in *Davis* involved repeated groping, fondling, and invasion of personal space to such an extent that the perpetrator was eventually charged with and pleaded guilty to sexual battery. The Court, in fact, specifically noted that in *Davis,* the "harassment was not only verbal; it included numerous acts of objectively offensive touching." *Davis* even stated, "It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. **Damages are not available for simple acts of teasing and name-calling** among school children…" [Emphasis added]

It is important to note that *Davis* took place in the context of a public grade school. Since the Supreme Court has found on numerous occasions that the protections of the First Amendment are far greater in college context and at their lowest ebb in the grade school context, it is hard to imagine the severity of behavior necessary to trigger a finding of actionable peer-to-peer harassment in the higher education context.

<u>Fighting Words</u>

In the opinion of many legal scholars, the "fighting words" doctrine has been so deeply contradicted by a number of later Supreme Court cases as to be essentially dead. However, the Supreme Court continues to play lip service to the doctrine despite not having upheld a single fighting words decision since establishing the principle in ***Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)**.

Even accepting "fighting words" as a viable legal doctrine, there is much confusion in popular understanding about the term. "Fighting words" is an exceedingly narrow category of speech, encompassing only face-to-face communications that obviously would provoke an immediate and violent reaction.

In unsuccessfully trying to defend its speech code from legal attack in the important case of ***The UWM Post, Inc. v. Board of Regents of University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991)**, the University of Wisconsin argued that racial slurs should fall under the "fighting words" doctrine. The university conceded the obvious fact that speech that merely inflicts emotional injury does not constitute fighting words, but it claimed that racist speech can still qualify as "fighting words" because it could provoke violence. The university argued that it is "understandable to expect a violent response to discriminatory harassment, because such harassment demeans an immutable characteristic which is central to the person's identity."

In striking down that speech code, the U.S. District Court for the Eastern District of Wisconsin held that while some racist speech may of course promote violence, this could not possibly justify the university's prohibition on all racist speech. This is consistent with the doctrine of overbreadth, which says that the fact that a law may restrict some *narrow* category of *unprotected* speech does not mean it may also restrict a great deal of *protected* speech.

4. **Recent decisions like *Virginia v. Black* indicate that racist symbols or other forms of hate speech can be banned on campus.**

Untrue, except where a symbol is intended to convey an actual threat of bodily harm or death.

First, it must be remembered that *there is no "hate speech" exception to the First Amendment*. In order for speech to be truly free, speech that conveys unpleasant messages, including hate, must be protected. A free society has recourse to reason, evidence, outrage, and moral witness against such speech, but it may not turn to coercive power to silence it. Moreover, colleges and universities often label as "hate speech" expression that is perfectly serious, thoughtful and communicative simply because it offends the sensibility of a handful of individuals. For instance, at Gonzaga University, administrators banned a campus group from posting a flier advertising the author of the book "Why the Left Hates America" simply because it had the word "hate" in it. The administrator argued that this was an example of "hate speech."

In the case of ***Virginia v. Black*, 538 U.S. 343 (2003)**, the Supreme Court invalidated a Virginia statute that essentially defined all cross burnings as persuasive evidence of an intent to communicate a criminal threat. The Court said that although some forms of cross burning may be considered "intimidating" when carried out with the *intent* to communicate a threat of physical harm to a specific target, not all cross burning may be automatically considered such a threat.

The Court made clear that the discriminatory nature and message of a cross burning does not made it illegal, but rather the particular circumstances that might make a particular cross-burning a true threat. Nonetheless, this case has already been used by commentators like Richard Delgado to imply that the Supreme Court has loosened its opposition to "hate speech" restrictions. The first major misconception of this case is that *Virginia v. Black* banned cross burning or, by extension, other hateful symbols, thereby allowing "hate speech" to be punished. This is not at all true. The case's holding was very narrow. The burning cross, it found, had

been used for a hundred years to convey to black families that the Ku Klux Klan had targeted them and that they had best flee for their safety. The Court simply recognized this fact and said that *if* the cross burning were done with a clear intent to convey a threat of bodily harm, it can be punished as a criminal threat. The case also said that cross burning committed for pure expressive reasons was still protected. *Virginia v. Black* thus maintains the traditional line between protected (even if horrible) speech and unlawful threats or harassment.

5. **Federal anti-discrimination law requires colleges to make sure that all student groups are open to all students. Therefore student groups may not exclude students who do not share the core beliefs of the group from joining.**

Untrue. Federal law does not compel any university to prevent student groups from discriminating on the basis of their shared beliefs. In fact, in FIRE's legal judgment, it is far more likely that the constitution prevents the university from telling student groups that they may not "discriminate" on the basis of belief.

As FIRE wrote to the University of North Carolina at Chapel Hill, when defending AIO, a Christian fraternity that refused to promise not to "discriminate" on the basis of religion:

> *It is critically important to note that UNC has no legal obligation to prohibit a private, religious organization from 'discriminating' on the basis of religion. Title VI prohibits universities from discriminating on the basis of race, and Title IX prohibits universities from discriminating on the basis of gender.* ***Neither statute addresses the conduct of a private, religious organization****. Moreover, the Equal Protection Clause of the Fourteenth Amendment only requires the government to provide its citizens with equal protection of the law; it does not apply to private, religious organizations like AIO.* ***To be clear, UNC does not have a legal obligation to prevent a private, religious organization from selecting its members on the basis of religious conviction****. It has made an* ideological choice *to limit AIO's First Amendment rights; it does not do so due to any legal mandate.*
>
> *The actual law, on the other hand, demonstrates the breadth of AIO's fundamental First Amendment freedoms. Not only is UNC required to grant religious organizations equal access to campus facilities [see* Widmar v. Vincent*, 454 U.S. 263 (1981)], it is also required to grant religious organizations equal access—on a viewpoint neutral basis—to student fee funding. See* Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) and* Board of Regents v. Southworth*, 529 U.S. 217 (2000). Moreover, UNC cannot compel AIO to include individuals either as "participants" or leaders who will impair the organization's ability to share its chosen message. See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995) and* Boy Scouts of America v. Dale*, above. Simply put, UNC cannot require private student groups to conform to UNC's "message" or "mission" as a precondition for receiving recognition, benefits or facilities access. See* Healy v. James*, 408 U.S. 169 (1972).*

The above case citations represent Supreme Court statements of constitutional law. No federal, state, local, or university statute, policy, or regulation can trump the exercise of First Amendment rights guaranteed by the United States Constitution.

UNC was sued by the students and the Alliance Defense Fund. We are currently awaiting a decision.

6. **Public universities have extremely wide latitude in regulating expression on the basis of its "time, place, or manner."**

Depends. Public universities do have fairly wide latitude in promulgating content-neutral regulations, but this discretion is by no means unlimited. Recent cases indicate that this discretion is severely curtailed in the case of the public areas of universities (campus green, sidewalks, etc.), and a case cited below even implied that only the narrowest restrictions on speech would be allowed in such areas. Furthermore, public universities generally do not have the right to ban speech on the basis of viewpoint. The following chart lists two kinds of forums and the different kinds of restrictions that may (or may not) be allowed:

Type of Restriction	Traditional Public Forum (such as parks or sidewalks)	Limited Public Forum (such as lecture halls)
Viewpoint Based	Forbidden	Forbidden
Content Based	Usually Forbidden	Sometimes Forbidden
Content Neutral	Usually Allowed	Almost Always Allowed

Example: The "Free Speech Gazebo" at Texas Tech University

FIRE's case against Texas Tech University is instructive in understanding the limits of universities' power to regulate the time, place, and manner of student expression. When FIRE first entered the case, TTU was telling a group of students who wanted to protest the Bush administration's policy in Iraq that they could do so only in the "free speech gazebo." This gazebo was only about twenty feet wide, and before FIRE became involved it was the only space on campus designated for free-speech activities such as handing out pamphlets.

FIRE wrote to Robert Haragan, Texas Tech's President, on February 6, 2003, stating:

> *The only possible defense of the 'free speech' gazebo policy is that it is a 'reasonable time, place and manner' restriction as allowed by cases like* **Ward v. Rock Against Racism, *491 U.S. 781 (1989)***. *There is nothing 'reasonable,' however, about transforming 99.9 percent of your University's property—indeed,* public *property—into a 'censorship area.' The case law never intended to transform public institutions into places where constitutional protections are the exception rather than the rule. To be considered legal, 'time, place, and manner' restrictions must be 'narrowly tailored' to substantial governmental interests. A generalized concern about safety and order is neither specific enough nor substantial enough to justify this rule.*

While the university did expand the area designated as the "free speech zone" after FIRE became involved, the policy was still too restrictive. On July 12, 2003, FIRE coordinated a legal challenge against Texas Tech's speech polices. The court's opinion in that case held:

> ***To the extent the campus has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University's students, irrespective of whether the University has so designated them or not****…Of course, the University, by express designation, may open up more of the residual campus as public forums for its students, but it can not designate less. Consequently, any restriction of the content of student speech in these areas is subject to the strict scrutiny of the 'compelling state interest' standard, and content-neutral restrictions are permissible only if they are* ***reasonable*** *time, place, and manner regulations that are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication." [emphasis added]* From ***Roberts v. Haragan,*** **2004 U.S. Dist. LEXIS 19662 (N.D. Tex. Sept. 30, 2004).**

7. Since private schools are not bound by the Constitution, they are not obligated to protect students' rights.

This depends, but it is untrue with regard to most private universities. While not bound by the federal Constitution, private universities are bound by some state laws and by the promises they make to their students.

Case law indicates that students at private schools have at least these minimal rights:

a) Students generally have the right to rational disciplinary proceedings that are not arbitrary and, to a lesser extent, to rational, non-arbitrary results;

b) Students generally have the right to receive treatment equal to that received by those who have engaged in similar behavior;

c) Students generally have the right to honesty and "good faith" (generally defined as conformity with the basic, human standards of honesty and decency) from university officials; and

d) Students generally have the right to enjoy, at least to a substantial degree, all of the rights promised by university catalogs, handbooks, websites, and disciplinary codes. Based on FIRE's research, most private universities do promise some level of protection for free speech and open inquiry.

Furthermore, states like California have laws like the so-called "Leonard Law" (Section 94367 of California's Education Code) that guarantee free-speech protection even to students at private school. In ***Corry v. Stanford*****, Superior Court, State Of California, Case No. 74309 (1995)**, a California state court overturned Stanford University's speech code, which banned "personal vilification," among other provisions.