From Facebook.com to BONG HiTS 4 JESUS: Campus Rights in 2007

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Program Description:

2007 was a year of progress and challenge for individual rights in higher education, both on campus and in the courtroom. From Supreme Court cases creating new exceptions to free speech for minors, to a successful constitutional challenge of a public university's "civility" code, to overbroad harassment policies to policies that mandate particular student viewpoints, FIRE President Greg Lukianoff will explore the year's legal developments and their ramifications for campus administrators.

FREEDOM OF SPEECH

I. 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 demonstrates 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 Board of Education 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."

II. Speech Codes: A Continuing Threat

Case Law: Speech Codes

Courts across the country have consistently held speech codes at public universities to be unconstitutional. Public institutions of higher learning attempting to regulate the content of speech on campus are held to the most exacting level of judicial scrutiny. Indeed, no university speech code has survived challenge in federal court. Typically, courts find speech codes to violate the First Amendment because they are **vague and/or overbroad**. This means that because the speech code is written in a way that (a) insufficiently specifies what type speech is prohibited or (b) if applied, would prohibit constitutionally protected speech, it cannot be reconciled with the First Amendment's protection of freedom of speech.

For example, in ***Doe v. University of Michigan***, 721 F. Supp. 852 (E.D. Mich. 1989), a federal district court found the speech provisions of the University of Michigan's harassment code to be unconstitutionally overbroad. The code forbade:

> "Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed… and that… creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University[-]sponsored extra-curricular activities."

In invalidating the speech code, the court observed that "[t]he Supreme Court has consistently held that statutes punishing speech or conduct solely on the grounds that they are unseemly or offensive are unconstitutionally overbroad."

In ***Bair v. Shippensburg University***, 280 F. Supp. 2d 357 (M.D. Pa. 2003)—a case coordinated by FIRE—a federal district court found Shippensburg's speech code, which stated that "[t]he expression of one's beliefs should be communicated in a manner that does not provoke, harass, intimidate or harm another," to be in violation of the First Amendment. In finding the school's code unconstitutional, the court wrote that "regulations that prohibit speech on the basis of listener reaction alone are unconstitutional both in the public high school and university settings."

Not even codes that attempt to ban so-called "fighting words" pass constitutional muster. In ***UWM Post v. Board of Regents of the University of Wisconsin***, 774 F. Supp. 1163 (E.D. Wis. 1991), a federal district court ruled unconstitutional a policy prohibiting speech that:

> "Demean[s] the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; [and]… [c]reate[s] an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity."

In striking down the code, the court ruled that "the suppression of speech, even where the speech's content appears to have little value and great costs, amounts to governmental thought control."

FIRE Case: San Francisco State University

In October 2006, the San Francisco State University (SFSU) College Republicans held an anti-terrorism rally at which they stepped on homemade replicas of Hamas and Hezbollah flags. This offended several students in attendance because the flags contained the word "Allah" written in Arabic script. In response, offended students filed charges of "attempts to incite violence and create a hostile environment" and "actions of incivility," prompting an SFSU "investigation" that lasted five months. The charges culminated in a school disciplinary hearing in March 2007, at which time the College Republicans were cleared of wrongdoing.

However, in July 2007, the College Republicans brought a constitutional challenge to SFSU's speech codes in federal district court. In November 2007, Judge Wayne Brazil issued a preliminary injunction barring SFSU and other schools in the California State University system from enforcing several challenged policies, including a requirement that students "be civil to one another" and act in accordance with SFSU's "goals, principles, and policies." Judge Brazil also limited the CSU System's ability to enforce a policy prohibiting "intimidation" and "harassment," holding that the policy could only be applied to conduct that "reasonably is concluded to threaten or endanger the health or safety of any other person."

Case: Morse v. Frederick, 127 S. Ct. 2618 (2007)

In January 2002, high school student Joseph Frederick joined friends to unfurl a large banner reading "BONG HiTS 4 JESUS" in a highly visible location during an off-campus event attended by many fellow students in his hometown of Juneau, Alaska. The banner was seized and Frederick was punished by his high school principal, Deborah Morse. Frederick appealed his punishment, arguing that it violated his First Amendment right to free expression.

In June 2007, a divided Supreme Court held that because "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use," and because "no meaningful distinction [exists] between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion," Frederick's banner did not constitute protected speech. While *Morse*'s

holding purports to limit itself to advocacy of illegal drug use by high school students, the ruling holds the pernicious potential, if applied incorrectly, to further blur the distinction between the free expression rights enjoyed by high school and college students.

FIRE Case: Temple University

In February 2006, Temple University student Christian DeJohn filed a federal lawsuit against the university arguing that Temple's speech code was unconstitutional. During the course of the litigation, Temple altered its speech code, which prohibited "generalized sexist remarks," among other instances of protected speech. But the district court proceeded with the case and ruled that Temple's former speech code was indeed unconstitutional.

Temple appealed the district court's decision to the Third Circuit Court of Appeals, arguing that in light of the Supreme Court's ruling in *Morse v. Frederick*, its regulations on speech are acceptable because they seek to restrict only that student speech which they believe interferes with Temple's "educational mission." However, Justice Samuel Alito's controlling concurrence in *Morse* makes explicit that "[t]he opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission'"—the very argument that Temple makes for its speech code.

In September 2007, FIRE filed an amicus brief with the Third Circuit, urging the court to uphold the lower court's decision. FIRE's brief was joined by a coalition of nonprofit groups, including the ACLU of Pennsylvania, the Christian Legal Society, Collegefreedom.org, Feminists for Free Expression, the Individual Rights Foundation, Students for Academic Freedom, and the Student Press Law Center.

Second Annual FIRE Report Finds Speech Codes Widespread

In December 2007, FIRE released ***Spotlight on Speech Codes 2007: The State of Free Speech on Our Nation's Campuses***, a comprehensive survey of the speech policies of over 340 schools. Despite the clear unconstitutionality of speech codes and the stated commitments to free speech contained in many university materials, FIRE's study found that an overwhelming majority of American universities explicitly prohibit protected speech.

This year, FIRE rated a disturbing 75 percent of the 346 schools it surveyed as "red-light" institutions, meaning that those schools have at least one policy that clearly and substantially restricts speech protected by the First Amendment. There are over 3,750,000 students enrolled at red-light institutions.

The study is available at www.thefire.org/speechcodereport.php.

• Questions for Discussion: Are any speech codes constitutionally valid? May a private university enforce a speech code?

II. Speech Codes Reborn: Harassment and Offense Codes

FIRE Case: Glendale Community College

In November 2006, Professor Walter Kehowski of Glendale Community College in Arizona sent a copy of George Washington's "Thanksgiving Day Proclamation of 1789" to Maricopa County Community College District's (MCCCD's) "announcements" listserv. Kehowski found the address on conservative pundit Pat Buchanan's website and linked to the site, where Buchanan also discussed his views on immigration and other topics, in the e-mail. Some MCCCD employees were offended, and Kehowski was charged with violating district policies.

MCCCD found Kehowski guilty of violating its Equal Employment Opportunity policy and policies prohibiting unsolicited, non–work-related e-mails. Despite the fact that other MCCCD employees frequently use the "announcements" listserv to send unsolicited, opinionated, non–work-related e-mails, MCCCD Chancellor Rufus Glasper placed Kehowski on administrative leave in March 2007 and recommended his dismissal.

FIRE wrote to Chancellor Glasper in April 2007 to protest the actions against Kehowski, stating that the U.S. Supreme Court has held that for workplace expression to be considered "harassment," it must be "severe or pervasive enough to create an objectively hostile or abusive work environment." Sending a link to a website, which readers can either visit or simply ignore, does not fit this exacting standard. FIRE further wrote that MCCCD applied a double standard to Kehowski because numerous other employees frequently send similarly unsolicited announcements over the same listserv.

In June 2007, MCCCD and Kehowski reached a settlement that will allow Kehowski to return to teaching classes. MCCCD withdrew the charges that Kehowski violated its policies, though it will henceforth restrict his use of the district e-mail system. A confidentiality agreement prohibited either side from discussing the details of the settlement, but Kehowski affirmed that he is satisfied with the outcome.

FIRE Case: Tufts University

In December 2006, Tufts University's conservative student newspaper *The Primary Source* (*TPS*) printed a Christmas carol parody entitled "O Come All Ye Black Folk," a harsh criticism of race-based admissions policies. Realizing that the carol offended large portions of the Tufts community, *TPS* published an apology on December 6, 2006. Four months later, however, a student filed charges alleging that the carol constituted "harassment" and created a "hostile environment." Other students filed similar charges in response to *TPS*' April 11, 2007, piece entitled "Islam—Arabic Translation: Submission," a satirical advertisement that ridiculed Tufts' "Islamic Awareness Week" by highlighting militant Islamic terrorism through publication of factual statements about Islam.

Despite the university's explicit promises in its policies to protect controversial and offensive expression, the Tufts Committee on Student Life decided in May to punish *TPS*, finding that the two articles constituted harassment. Sanctions against *TPS*

included a ban on printing anonymous editorials—a prohibition that applied to no other student publication—and an ominous hint that the student government should cut funding to the conservative paper.

FIRE fought the administration's decision tirelessly, placing Tufts on FIRE's Red Alert list, which is reserved for institutions that have demonstrated severe and ongoing disregard for fundamental rights on campus. In August 2007, Tufts decided to overturn the ban on anonymous editorials, but left in place the formal finding that *TPS* committed harassment by satirically addressing matters of public concern. Despite widespread criticism from the national media and alumni, Tufts President Lawrence Bacow has thus far refused to rescind the finding of guilty against *TPS*.

• Questions for Discussion: Do students have a right not to be offended? How can colleges prevent harassment without infringing on constitutionally protected speech? Can private colleges and universities enforce different definitions of harassment?

FREEDOM OF THE PRESS

Case: Kansas State University

In July 2007, the Tenth Circuit Court of Appeals ruled that a First Amendment suit brought by two Kansas State University (KSU) student newspaper editors was moot because the students had graduated while their case was under review. Prior to appeal, the students' case (*Lane v. Simon*, Nos. 05-3266 & 05-3284 (10th Cir. 2007)) had been dismissed at the district court level for failure to state a claim upon which relief could be granted. Technically, the Tenth Circuit's ruling vacated the district court's dismissal, but effectively reinstated it on mootness grounds.

By requiring students to be enrolled at the time of their case's adjudication, the Tenth Circuit's decision spells trouble for any public university student bringing First Amendment claims against his or her school. Specifically, the court held that "[b]ecause defendants can no longer impinge upon plaintiffs' exercise of freedom of the press, plaintiffs' claims for declaratory and injunctive relief are moot." While there is a legal doctrine that provides an exception to mootness claims when the harm alleged is "capable of repetition, yet evading review," the Tenth Circuit found the exception inapplicable here because "there is no reasonable expectation that [plaintiffs] will be subjected, post-graduation, to censorship by defendants in connection with that newspaper."

The Tenth Circuit's failure to reach the merits of the students' First Amendment claims provides would-be administrative censors with an incentive to delay punishment based on speech until just before the student speakers graduate—or even just expel the students outright. The vast majority of potential punishments based on the content of student speech are blatantly unconstitutional; the very limited exceptions being speech that meets the stringent legal definitions of obscenity, harassment, incitement, or libel. By allowing schools to evade judicial review of their punitive responses to speech simply by timing the application of their punishments until a student's graduation is

imminent, the Tenth Circuit has pointed administrators towards an inviting loophole to the First Amendment.

FREEDOM OF ASSOCIATION

Case Law

Universities can prevent student groups from discriminating based on immutable characteristics, like race, sex, or age. But the freedom of association granted by the First Amendment means that student groups must be able to make leadership and membership decisions based on whether members or prospective members share the expressed beliefs of the group. In ***Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)**, a gay scoutmaster sued the Boy Scouts under New Jersey's public accommodation law for revoking his membership upon discovery of his sexual orientation. The Supreme Court ruled that the Boy Scouts' right to expressive association trumped NJ's interest in eliminating discrimination, and that accepting Dale as a member would significantly impair the group's ability to communicate its viewpoint.

FIRE Case: Central Michigan University

In April 2007, Central Michigan University (CMU) revised a policy that banned ideological and political groups from "discriminating" on the basis of "political persuasion." FIRE urged CMU to change this policy after students who disagreed with the mission of the Young Americans for Freedom (YAF) student organization attempted to become members of the group in order to destroy it from the inside.

YAF, a Registered Student Organization (RSO) at CMU, described itself in its constitution as "a conservative non-partisan, non-sectarian voluntary educational organization." Following an attempt by the CMU student government to derecognize YAF last February, YAF members reported that students from various liberal student groups began attending and disrupting YAF meetings. In February 2007, some CMU students created a Facebook.com group entitled "People who believe the Young Americans for Freedom is a Hate Group," where members posted messages suggesting ways to get YAF expelled from CMU. One post encouraged members of the Facebook group to attend YAF meetings, vote students opposing YAF's mission into board positions, and thereby force YAF's dissolution.

After learning of these proposed attempts to drive the group off campus, YAF President Dennis Lennox II e-mailed Assistant Director of Student Life Thomas H. Idema, Jr. to inquire whether YAF could deny membership to individuals who publicly disagreed with YAF's purpose. Idema responded in an e-mail by quoting from the non-discrimination clause of the RSO Manual, which states that "[a]n RSO may not discriminate in its membership criteria or leadership criteria on the basis of…political persuasion…." Idema further explained to Lennox that YAF could "not require members to be 'like-minded' as that opens [the group] up to discrimination based on political persuasion."

FIRE wrote to CMU President Michael Rao, reminding him that denying political or ideological student groups the right to associate with students who share the group's

beliefs violates the freedom of association afforded to all CMU students. FIRE explained that the U.S. Supreme Court addressed this exact situation in *Boy Scouts of America v. Dale* (2000), when it held that "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." FIRE also pointed out that CMU allows religious student groups to choose their membership based on shared beliefs, resulting in an inconsistency regarding the policy for secular student groups.

In late March 2007, CMU President Michael Rao informed FIRE that CMU would implement a new policy extending the rules in place for religious student groups to all belief-based student groups.

FIRE Case: Pace University Law School

In August 2007, Pace Law School approved the constitution of the Christian Law Students Association (CLSA), allowing the group to pursue its religious mission. The CLSA's status had been uncertain since January, when Pace objected to the group's constitution, leaving members unsure if they could maintain the organization's Christian character.

CLSA leader Cari Rincker tried to form a chapter of the national Christian Legal Society (CLS) in March 2006, calling her group the Pace Christian Legal Society (PCLS). In accordance with national CLS rules, she drafted a constitution that limited membership to students who were willing to sign and live by a statement of faith. The constitution also prohibited discrimination on the bases of "age, disability, color, national origin, race, sex, or veteran status"—but not on the bases of religion and sexual orientation. When the proposed constitution was met with hostility on campus, Rincker revised the constitution to prohibit discrimination on the additional bases of "religion or Christian denomination" and "sexual orientation." She also removed the requirement that members adhere to the statement of faith and even added, "Those that disagree with any or all of the aforementioned beliefs are still welcome to be members." These amendments to the constitution meant that Rincker's group could no longer call itself an affiliate of the national CLS, which maintains strict rules against granting membership to openly homosexual and non-Christian students. Rincker therefore changed the group's name from the Pace Christian Legal Society to the Christian Law Students Association.

Despite the amended constitution, the existence of other groups such as the Jewish Law Students Association, and Pace's clear promise to grant students freedom of association, at its November meeting the Student Bar Association rejected the group's application for recognition. FIRE wrote the school to protest its decision.

A month passed before Pace announced that it would provisionally recognize the CLSA, but that the university's legal counsel had to review and possibly revise the CLSA constitution. Rincker met with Pace Law School administrators late in the school year and reviewed the revised constitution, which both parties found acceptable. The CLSA began the 2007-2008 school year as a fully recognized student group, with the same rights as all other groups on campus.

• Questions for Discussion: What is the difference between one's status and one's beliefs? What legal consequences does this distinction entail?

FREEDOM OF CONSCIENCE

Case Law

In ***Wooley v. Maynard***, 430 US 705 (1976), the Supreme Court held that New Hampshire could not compel state residents to display the state motto on their license plates after George Maynard, a Jehovah's Witness, cut the words "Or Die" off his license plate, which had read "Live Free Or Die." In a bold ruling against compelled speech, the Court held "the right of individuals to hold a point of view different from the majority and to refuse to foster. . .an idea they find morally objectionable" to outweigh the state's interest in displaying its motto.

In ***West Virginia State Board of Education v. Barnette***, 319 U.S. 624 (1943), the Supreme Court issued a powerful decision protecting students' right to freedom of conscience. Justice Robert H. Jackson, writing for the Court, declared, "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."

In ***NAACP v. Alabama ex rel. Patterson***, 357 U.S. 449 (1958), the Supreme Court held that Alabama could not force the NAACP to reveal the names and addresses of its Alabama membership, holding that "[s]erious First Amendment questions arise . . . when there is such a nexus between anonymity and speech that a bar on the first is tantamount to a prohibition on the second."

Finally, federal law (the National Research Act of 1974) governs research on human subjects. First passed in 1974 after the public became aware of the government's Tuskegee Syphilis Study, the law's overriding purposes, as described in the accompanying Belmont Report, is to ensure that government agencies conducting research treat individuals as "autonomous agents." "To show lack of respect for an autonomous agent," the report explains, "is to repudiate that person's considered judgments" or "to deny an individual the freedom to act on those considered judgments."

FIRE Case: University of Delaware

In perhaps FIRE's biggest case of 2007, the University of Delaware (UD) dropped an ideological reeducation program that was referred to in the university's own materials as a "treatment" for students' incorrect attitudes and beliefs. The program's stated goal was for the approximately 7,000 students in Delaware's residence halls to adopt highly specific university-approved views on politics, race, sexuality, sociology, moral philosophy, and environmentalism.

Under the program, students were required to attend training sessions, floor meetings, and "one-on-one" meetings with their Resident Assistants (RAs). The university also instructed RAs to ask intrusive personal questions during one-on-one sessions,

including “When did you discover your sexual identity?” A student who responded, “That is none of your damn business,” was, according to the university’s own materials, written up—along with the student’s name and room number—as having one of the “wors[t] one-on-one” sessions.

The program’s materials stated that the goal of the residence life education program was for students in the university’s residence halls to achieve certain “competencies” that the university decreed its students must develop in order to achieve the overall educational goal of “citizenship.” These “competencies” included: “Students will recognize that systemic oppression exists in our society,” “Students will recognize the benefits of dismantling systems of oppression,” and “Students will be able to utilize their knowledge of sustainability to change their daily habits and consumer mentality.”

Following FIRE’s campaign, which called the attention of the national media and the blogosphere to the program, UD President Patrick Harker terminated the program in November 2007, just days after FIRE’s initial press release.

• Questions for Discussion: Can universities *ever* engage in mandatory ideological exercises? Could the University of Delaware program have been “saved”?

ONLINE ACTIVITIES: WHAT RIGHTS DO STUDENTS & INSTITUTIONS HAVE?

As in 2006, FIRE continues to receive a vast amount of cases revolving around issues of online student speech. Social-networking sites like MySpace and Facebook—which greatly increase the visibility of once-private student interaction—often send university administrators into a blind panic. 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.

• Questions for Discussion: May colleges punish students for posting on outside websites such as Myspace.com or Facebook.com? How do students deal with living lives more publicly than ever before?

Greg Lukianoff is the President of the Foundation for Individual Rights in Education. A graduate of Stanford Law School, Mr. Lukianoff specializes in constitutional law, focusing on the application of the First Amendment in academic environments. He has published extensively on free speech, including *FIRE’s Guide to Free Speech on Campus*. Mr. Lukianoff is a member of both ASJA and the ASJA Presidential Task Force on Free Speech.