FRONTPAGE ARTICLES

Make Comment View Comments Printable Article Email Article

Font 6pt

Pennsylvania's Historic Academic Freedom Hearings

By David French

FrontPageMagazine.com | October 28, 2005

Those who continue to doubt the wisdom of Justice Louis Brandeis's famous statement "Sunlight is the best disinfectant" should pay close attention to the news from Pennsylvania. A House Select Committee on Student Academic Freedom is conducting an investigation into the state of liberty and genuine intellectual diversity in Pennsylvania's public universities, and the academic establishment is fighting back.

It has become a common tactic for defenders of the academic status quo to equate scrutiny with "McCarthyism" and criticism with censorship. For example, at Brooklyn College, the local professors' union went so far as to declare that press stories about academic misconduct (such as punishing students who dissented from a professor's radical views) were part of an effort to "intimidate" the school's faculty. The union also asked the school's chancellor to condemn the *New York Sun* for its attempts to investigate and report faculty wrongdoing. In other words, a group of public officials (and public university professors are public officials) was calling on another public official to condemn the free press for investigating potential unlawful acts of the local government.

Brooklyn College's faculty is not alone in confusing criticism for censorship and equating oppression with academic freedom. In the June 8, 2005, issue of *Al-Ahram*, Joseph Massad, the Columbia University professor at the center of a firestorm of controversy regarding the treatment of pro-Israeli students in Columbia's Middle East Languages and Culture Department, wrote to decry "the campaign of the last three years . . . to attack U.S. universities as the last bastion where a measure of freedom of thought is still protected." And what was one of the prime movers in this alleged campaign against academic freedom? Once again, it was the free press – specifically the *New York Times*, a paper that Massad accused of disseminating "Israeli propaganda" as "objective truth."

In the distorted world of university censorship, actual violations of the law (such as Brooklyn College's absurd punishment of dissenting students) represent legitimate exercises of academic freedom, while free speech (such as the New York Sun investigation) is the equivalent of "intimidation" that has a "chilling effect" on academic expression.

It is thus not surprising that the academic establishment has reacted negatively to the decision of the Pennsylvania House of Representatives to establish a Select Committee on Student Academic Freedom to investigate potential abuses in Pennsylvania's public universities. Scrutiny is anathema to the academic establishment. While academics often applaud meticulous regulation of other governmental bodies (such as the Pentagon) and various private industries, their stance regarding the massive government bureaucracy that is public higher education is: "move along; nothing to see here." Even Pennsylvania's brief investigation (with no legislation under consideration) stirs calls of "McCarthyism" and fears of a "chilling effect."

On September 19, 2005, I testified before the Select Committee and sought to both dispel the fears of a so-called "chilling effect" and to explain the constitutional obligations of public universities to their students – and to the citizens of the state (for a complete transcript of my testimony, click here). First, I made it clear that the critical issue is not whether professors offend students or students offend professors – since no one has a right not to be offended – but whether a true marketplace of ideas exists on campus. The question is not whether an individual professor teaches in a provocative manner but instead whether that professor has the academic freedom to teach his or her subject and whether students have the academic freedom to dissent from that teaching without suffering retaliation. Also, given that a true marketplace of ideas cannot exist without diversity of viewpoints, the Select Committee should investigate to determine whether such diversity exists on Pennsylvania's public campuses, and if it does not exist (and there is no reason to believe that Pennsylvania's public universities are any less ideologically uniform that public universities elsewhere), the Select Committee should investigate the reasons why not.

At the hearing, I presented compelling evidence that Pennsylvania public universities have plainly failed to protect student free speech. A review of posted harassment policies reveals that the vast majority of Pennsylvania's public universities have enacted speech codes that prevent students from speaking freely on matters relating to race, gender, sexual orientation, religion, and class. For example, Indiana University of Pennsylvania prohibits the posting of material that is "insensitive to affirmative action issues." Is affirmative action so enshrined in Pennsylvania public policy that students are prohibited from being "insensitive" to the very issue? (This of course begs the question as to exactly how one can demonstrate insensitivity to something as impersonal as an "issue"). Millersburg University of Pennsylvania bans the transmission of any "messages and materials deemed offensive by university policy." Yet the state simply does not have the power to deem some messages "offensive" and then ban their transmission. Penn State's speech code includes a ban on "acts of intolerance" – a ban all the more remarkable given the recent decision by federal court in Pennsylvania to strike down a speech code at Shippensburg University that contained those same words. So, to university administrators and establishment academic defenders who say there is nothing wrong with higher education in Pennsylvania, there is a decisive response: your own written

policies violate the Constitution.

And yet the investigation has barely begun. I also emphasized the importance of intellectual diversity in higher education. Not even the higher education establishment can deny the importance of a broad range of viewpoints to a quality college education. When arguing before the Supreme Court of the United States in favor of affirmative action, the American Association of University Professors stated in its brief: "A diverse educational environment challenges [students] to explore ideas and arguments at a deeper level, *to see issues from various sides*, to rethink their own premises" (emphasis added). The American Council on Education's recent Statement on Academic Rights and Responsibilities states, "Colleges and universities should welcome *intellectual pluralism* and the free exchange of ideas" (emphasis added). In theory at least, there is broad agreement that a university education is enhanced by an exposure to a broad range of ideas.

In practice, ideological uniformity is a national problem, with the vast majority of professors on one side of the political spectrum (in fact, there tends to be more intellectual diversity in your average suburban church than in university humanities departments). The Select Committee should determine whether this national problem also infects Pennsylvania, and it should determine whether this problem is at least in part caused by actual violations of the law. Recent studies have shown, for example, that "observant Christians" are dramatically underrepresented on college faculties; yet religious discrimination in hiring, retention, and promotion is prohibited by law. Moreover, job advertisements and departmental mission statements are often explicitly ideological and send a clear message: conservatives need not apply. While self-selection is certainly one factor to consider when looking for reasons for ideological uniformity, it would be irresponsible not to consider whether Constitutional and statutory law are being violated. Certainly if the racial or gender disparities were so large, the university establishment would not be (and has not been) content with a simple explanation of "self-selection."

David French gave the following testimony before the Pennsylvania House Select Committee on Student Academic Freedom on Monday, September 19, 2005.

DAVID FRENCH: Mr. Chairman, members of the Committee, thank you very much for this opportunity to address you.

Let me begin with a quote from the Supreme Court of the United States. It is not the quote that begins the report that has been issued. It is a different one. It's from the case of *Sweezy v. New Hampshire*.

> 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 straightjacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. Teachers and students must always remain free to inquire, to study, to evaluate, to gain new maturity and

> understanding; otherwise, our civilization will stagnate and die.

Those are very powerful words from the Supreme Court. And, in fact, those words were, in part, the inspiration for the founding of FIRE, the Foundation for Individual Rights in Education. Very briefly, what we are is a nonpartisan, secular, civil liberties organization that defends free speech, religious liberty, freedom of conscience and due process on campuses across the country. We are based in Philadelphia. We have offices in the Curtis Center overlooking Independence Hall, which is appropriate for the defense of free speech. Our agenda is very simple. Our agenda is to preserve the marketplace of ideas on campus and, where the marketplace of ideas has been destroyed for whatever reason, to restore the marketplace of ideas on campus. To that end, the investigation of this Committee is central because the Committee obviously plays a central role in defining how higher education is run in this state and has a central role in defining what is and is not academic freedom in this state.

So my goal here is really quite simple. I want to discuss what academic freedom is and, importantly, what it is not, what the constitutional rights of students and professors are and are not; and what are the institutional responsibilities of Pennsylvania public universities. What are the responsibilities that these arms of the state have towards their citizens, The students who attend, the professors who teach. Quite simply, the best place to begin is with the First Amendment. The First Amendment – this comes sometimes as a, unfortunately, as a surprise to administrators – it applies to students and it applies to faculty. There's a very good short rule of thumb that if speech is constitutionally protected outside of the academy, it's generally constitutional protected inside of the academy.

There is no zone in the academy – or the academy is not an unfree zone and it's not an area where those who have responsibility for the academy have a greater latitude to restrict speech. In fact, the Supreme Court has long recognized that our school – our institutions of higher education, as distinct from secondary schools or elementary schools, are supposed to be marketplaces of ideas. They're supposed to be places where the uncomfortable questions are asked; where traditional notions of truth are challenged; where students can expect to sometimes be offended, sometimes be encouraged by the things that they hear and see on campus. The goal of the university is to be a place where truth can be discovered through inquiry, through debate, through exchange, not just scientific truth, but also historical truth, arguments about political truth – I'm not sure it's accurate to use the phrase political truth. The goal of the university is to create a place, a marketplace where you can debate and you can discuss, you can disagree, and you can even offend in the goal of exchanging ideas and the goal of advancing human knowledge and the goal of advancing our culture.

Unfortunately, our universities across this country – and, unfortunately, Pennsylvania is no exception – have to a large degree abdicated that responsibility.

For the interest of larger goals, or presumed larger goals, there are

now speech codes that govern student conduct on campus. A speech code, if you would like a definition, is any policy or practice that prohibits speech that the First Amendment would otherwise protect. Pennsylvania's public universities have several speech codes: Prohibitions against speech that one or another group would find subjectively offensive. Speech codes have been struck down in every single court in the United States where they have been challenged, including a federal district court in this state at Shippensburg University where a Shippensburg University speech code was struck down – or the enforcement of it was enjoined in late 2003. Unfortunately, despite this judicial decision, speech codes still exist. Students, professors, and institutions have academic freedom. Students, professors, and institutions have certain rights of expression. I'll begin with the students.

Students have a right to enjoy the fullest First Amendment rights. They have a right to dissent from the mainstream in politics. They have a right to protest peacefully and lawfully. They have a right to disagree with teachers. They have a right to disagree with administrators. They have a right to publish and publicize their disagreements.

When you talk about the First Amendment rights of students, you are talking about the First Amendment rights of citizens of the United States.

Their rights are extremely broad, extremely broad, limited only by lawful prohibitions and certain very small categories of speech such as fighting words; such as obscenity, as that term has been constitutionally defined; such as certain kinds of speech that rises actually to the level of harassment. But outside of these narrowly defined exceptions, the speech of students is widely protected. Now, to be clear – and I know that this has been an issue in public discussions – students do not have a right – their broad rights do not include a right to be taught what they want to hear. Their broad rights do not include a right not to be offended. Their rights do not include a right to have a teacher tell all sides of the story as they see all sides of the story. But their rights do include the ability to criticize a teacher into dissent even in class so long as dissenting or disagreeing is done in a way that's not disruptive and doesn't prevent the ability of the teacher from conducting the class. So students have very broad First Amendment rights.

Teachers do, as well, although, there are some limits that have been defined traditionally and have been defined by the American Association of University Professors.

On page 3 of our report, we quote from an AAUP statement, which I think, stands to this day. It was written in 1940 and stands to this day. It's still the single best statement of professors' academic freedom:

> College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline…[T]hey should at all times be accurate, should exercise appropriate restraint, and should show respect for the opinions of others and should make every effort to

> indicate that they are not speaking for the institution…Teachers are entitled to freedom in the classroom in discussing their subject; but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.

What does this mean? What it means is that a teacher who is teaching, for example, sociology or political science or history has an enormous amount of latitude in determining the curriculum, the readings of the class, the precise topics covered within the subject of the class; they have an enormous amount of freedom in the classroom discussion so long as the classroom discussion remains germane to the topic of the class; and that they in truth should be free from state oversight into those kinds of decisions. Because that is the core academic freedom function of a professor.

What is a professor not free to do? A professor is not free to use a class – let's say a mathematics class – to advance a particular political agenda. That is something that a university, an institution, can properly restrict without interfering with that professor's First Amendment rights. Their First Amendment rights do not extend to the ability to use the state-provided platform to advocate for personal political goals if those personal political goals are not the subject are germane to the topic of the class.

This is a source of enormous controversy on campus. But we need to be clear: There is a difference between a teacher teaching something that a student gets upset at, that a student is offended by. A student does not have a right not to be upset or not to be offended in the teacher misappropriating the use of a classroom for a partisan political end. Those are different things.

Now, institutionally, a university has an ability to shape its own message and curriculum to a large degree. In fact, if there's one kind of academic freedom that the federal courts have been virtually unanimous on finding is that there is institutional academic freedom.

Private universities have an enormous amount of institutional academic freedom. If you want to in this country, you have a constitutional right to set up a religious college where you only allow people to attend that college who agree with the statement of faith of the religion and then can actually exclude teachers and fire teachers who don't agree with the basis of faith of the college. That's for a private university.

Secular private universities have an equivalent level of freedom. They can decide to define themselves according to a particular agenda.

Public universities are different. They do have a degree of academic freedom, certainly, to advocate for certain kinds of ideas; but that is strictly limited by the Constitution of the United States. For example, a state university can't advocate for or against religion. A state university's academic freedom doesn't extend to endorsing or condemning any particular religious point of view, whereas a private academic university does extend that far. State universities can put forward things like mission statements. State universities can advocate for particular cultural solutions to

societal problems. However, in furtherance of their mission, they cannot, they cannot impose litmus tests on employees, on students. In other words, it is unconstitutional for a state university to condition the receipt of a state benefit, such as employment or a degree from the school, on the abandonment of certain constitutional rights such as free speech or freedom of association.

Now, with that very broad overview – and I'm going to welcome any questions – we get to two fundamental issues that I think are being addressed by the Committee.

One is free speech: Mostly free speech by students, but also free speech from professors. Free speech has two – there's two primary sources of censorship.

One is censorship by policy. Those are written policies in university handbooks, in student catalogs, in faculty handbooks that actually on their face restrict free speech.

On their face, they say to students, your free speech rights are contingent upon, for example – contingent, for example, to the extent to which another individual is offended or they are contingent upon the subjective feelings of another person.

There are two primary ways that speech codes work. One is by being overbroad. An overbroad speech code is one that actually prohibits more than just the unlawful behavior; it prohibits lawful behavior as well. An example of a overbroad speech code, here's one from the Indiana University of Pennsylvania, which prohibits behavior of a sexual nature that is directed toward another individual, based on their gender, which is demeaning or diminishing to their character.

The fact of the matter is that no one has a right not to feel demeaned. Because what does it mean to feel demeaned? I may say something to one person and it doesn't feel demeaning to them. And I may say the exact same thing to another individual and it feels demeaning to them. Have I in the one instance committed a lawful act and in the other instance committed an unlawful act in spite of the fact that I did the same thing both times? This kind of subjective uncertainty is absolutely unconstitutional. It is absolutely and has long been the case that you cannot test, you cannot test free speech based on subjective listener reaction. Now, does that mean that there are some demeaning things that I could say that could constitute harassment? Certainly there are some demeaning things that one could say that could constitute harassment. But that term is overbroad.

Millersville University of Pennsylvania prohibits the transmission of electronic messages and materials deemed offensive by university policy and by local, state, and federal laws. Now, who is deeming what offensive? Does any state official have the right to deem written material or communicated material offensive? No, absolutely not. The state does not have the ability to deem words offensive and, therefore, completely out of bounds.

Further, codes can be not just overbroad, but vague. It's a

constitutional rule that a policy or a code has to be clear enough that a person of average intelligence and understanding can know what's prohibited and what isn't.

If you don't know what's prohibited, it begins to have a chilling effect on speech as you – to go on the safe side, say less than what you might think so as to not run afoul of the vague rule. For example, a classic example and one from this state that was found to be unconstitutional as vague is a prohibition on acts of intolerance.

Shippensburg University had a speech code which, among other things, prohibited acts of intolerance on campus. The problem was, that's a term that's virtually impossible to define. If you ask a hundred people what is an act of intolerance, you may get a hundred different answers. And, in fact, at the oral argument when the judge on the case, when the judge directly asked the attorney representing Shippensburg, What is intolerance, there was no good answer forthcoming because, quite simply, there's no good answer. Nobody knows really what it is. And so that phrase, “act of intolerance,” has been struck down, but it still lives in some speech codes in this state.

Edinborough University of Pennsylvania prohibits offensive or inappropriate sexual behavior. What is inappropriate sexual behavior? That's an excellent question. I mean, I have my own moral sense of what would be inappropriate sexual behavior. I'm sure it differs with many people in this room. Everyone has his or her own moral sense regarding what is or is not inappropriate. But what this does is it delegates the decision of what is not inappropriate to state officials; and state officials, using their own subjective terms and their own subjective beliefs, then decide for members of the community.

That's vague. If you asked a hundred people to list all the examples they can think of, of inappropriate sexual behavior, you would get quite a few different answers.

Further, public universities, in addition to enacting rules that are overbroad and vague, tend to also enact rules that prohibit free exercise of religion on campus. And they do it in a very subtle way, but in a way that dramatically restricts free expression of religious ideas.

It is very typical now for large universities to have expansive non-discrimination rules that they apply to their student organizations. Now, in the abstract, there's nothing wrong with applying a nondiscrimination rule to a student organization to say that you shouldn't discriminate on the basis of race or gender, for example. But some of these non-discrimination rules include non-discrimination on the basis of religion and they ask religious organizations to sign on to that. The upshot of that is that religious organizations are no longer able to use religious principles when making their decisions if they expect to be a student organization on a public campus.

Ironically, although on-discrimination on the basis of religion or creed is undoubtedly designed to protect religious individuals, it ends up restricting religious freedom. For example, at Penn State,

no organization can obtain or maintain university recognition if it discriminates on the basis of, amongst other things, religious creed. Innumerous groups, from the Muslim Student Association to Campus Crusade for Christ to, you name it, make religious decisions. That's their reason for being; yet they face the possibility of expulsion from campus just by being religious.

Across the United States, there have been at least 60 instances where this exact kind of policy has been used to restrict religious expression on campus or to evict from campus religious organizations. Currently, such policies are enjoined by federal courts in North Carolina and in the 7th Circuit Court of Appeals; yet Pennsylvania's public universities have some of these very policies on their books.

Another way that students' freedom is restricted is not just by policy, but by practice; in other words, someone – there may be no speech code in place, but in spite of the lack of speech code, the university will take action anyway.

Now, this is a category that nationally is quite prevalent. Nationally, it's quite common for students to be punished for their speech even when they haven't violated any university rule. But I would suggest for this Committee it would be an interesting line of inquiry to determine whether that is, in fact, happening here; although, Pennsylvania is so laden with speech codes that you can almost always find a policy restricting free speech to punish a student in this state.

But by practice, the problem with determining the extent of that there's a difficulty with determining the extent of that problem in that it relies on self-reporting.

Students who are censored must

(A) know that they can complain; and
(B), know who they can complain to.

At FIRE, we receive hundreds of complaints per year; but all the information that we've received indicates nationally that that's a drop in the bucket.

We have not received extensive complaints from Pennsylvania. There have been some specific incidents at Pennsylvania public universities, but not in the numbers that we have seen in the other states. Whether that is a function that Pennsylvania public universities are protecting free speech in reality or just that students don't know to complain, we don't know the answer to that.

Moving from student free speech to intellectual diversity, there is a powerful and almost self-evident argument that a broad range of ideas on campus is a desirable thing; that, in fact, a university that's supposed to be a marketplace of ideas can and should have a broad range of ideas on campus to foster debate, to test hypotheses, to test theories, to challenge historical assertions.

A broad range of viewpoints is a good thing. It's a non-controversial statement. The

American Association of University Professors, in fact, made that clear in its own arguments to the Supreme Court of the United States when arguing to preserve race-based Affirmative Action policies in the University of Michigan, declaring in its own brief that universities should provide a broad range of ideas and a broad range of viewpoints, that that is part of the function of the university, and the university is enhanced by that. So it's really not controversial to say that there should be a broader range of ideas in the university. What is controversial is the answer to this question: Does a broad range of ideas exist?

There are national studies that would tend to indicate that universities are rather ideologically monolithic. There are a variety of studies indicating that those who self-identify on the left side of the political spectrum outnumber those who self-identify on the right side of the political spectrum by a substantial margin; in some cases, 9-to-1, 10-to-1, 30-to-1 in some departments, according to recent studies.

Now, the question is, Does that matter from a standpoint of intellectual diversity? And, more importantly for this Committee's purposes, if such disparities are real, are they real because of misconduct? Are they real because of actually unconstitutional activities?

Bear in mind that earlier I said that you may not condition the receipt of a state benefit on the surrender of some basic First Amendment rights. There's a case called *Perry v. Sinderman* that involved an at-will, untenured professor at a university who was terminated; and he, allegedly, has been terminated as a result of his free speech rights. The university said, Well, he was an at-will employee. We can terminate him for any reason or no reason at all. In response, the Supreme Court said very clearly that you cannot condition the receipt of a state benefit on the abandonment of basic free speech or free association rights.

There exists a very real and very lively question now based on multiple recent studies: Is that happening in university hiring, firing, promotion, and retention? The answer is hotly disputed and I would say not firmly established at this point. So from the standpoint of intellectual diversity, it's critical to the state's responsibility with regards to intellectual diversity is I think important to define.

One is, in this case, the State of Pennsylvania has an institutional academic freedom itself running its school system. And the State of Pennsylvania, if it believes that intellectual diversity is a good thing in the university and helps to foster the marketplace of ideas, would certainly have an interest in making sure that intellectual diversity exists and discovering the reasons why it may not. However, what the State of Pennsylvania should not and cannot do is to go to individual professors in individual departments around the state and say to – just take a name – pick a name out of the hat – Professor Jones or Professor Smith, what we want you to do is to teach your class in a different way so as to be more diverse. That violates that individual professor's academic freedom and should not be done. But what a state can do is say, in an economics department, Do we have a broad range of ideas present here? And if we do not, should we be seeking a broad

range of ideas?

If we do not have a broad range of ideas present, is it because of any actual unconstitutional or illegal activity; for example, prohibitions on discrimination on the basis of sex or race or religion? State universities violate those prohibitions on occasion. Is that happening here? Or are there de facto ideological litmus tests being applied to candidates for a particular job? Are they being forced to adhere to a particular ideology?

So what I would suggest as the true constitutional obligation of a university going forward is to, No. 1 – this is very basic – protect the constitutional rights of your students. Make sure they have a right to free speech, the same right they'd have to free speech if they stepped off the university campus;

Number 2, in addressing any perceived constitutional violations against the students, do not violate the constitutional rights of professors, who do have a right to challenge students, who do have a right to even offend students on occasion;

Number 3, in the quest for intellectual diversity on campus, since I would presume that intellectual diversity, differing viewpoints on campus, is a good thing and the quest for intellectual diversity on campus, do not violate the academic freedom rights of any individual.

And look hard at the reasons for the disparity. Is self-selection at play? Are there actual unconstitutional actions being taken? Take a close look at not just what exists, but why it exists.

With that, I'll open the floor to any and all questions.

REPRESENTATIVE GRUCELA: Thank you, Mr. Chairman. I appreciate you giving me the opportunity to go first due to the other commitment. I sort of have two questions. One, what's the relationship to the Patriot Act in the Federal Patriot Act? Is there any relationship? Given the current climate, shall we say, in the United States vs. free speech, does the Patriot Act apply in any way to any of these things?

MR. FRENCH: It is my belief that the Patriot Act, in practice, should not have any bearing on the academic freedom dispute. Now, saying that, I will tell you that there have been circumstances where professors who have made what many would deem to be very inflammatory remarks about the war on terror, there have been individuals who have tried to creatively think of ways to apply various national security statutes to restrict that speech. But I have never seen any actual application of Patriot Act provisions or any other national security-based provision to restrict an individual person's speech that would otherwise be constitutionally protected. Because, bear in mind, the First Amendment would trump even the Patriot Act. If there was any sort of speech that was constitutionally protected but somehow prohibited by a provision in the Patriot Act or by implication from the Patriot Act, the First Amendment would be supreme.

REPRESENTATIVE GRUCELA: And, secondly – and I'm going to bring up a couple sensitive areas here and they are by no

means meant to be facetious in any way, shape, or form, because they truly exist – I'm curious about that statement that says Penn State cannot, or can, prevent any organization that you listed a whole bunch of things and emphasized religious creed.

So my question is, If I belong to a religious group that believes in torturing animals, if I belonged to a religious group that believes as part of an initiation or part of my tribal, whatever, believes in smoking marijuana or the use of any illegal drugs, or if I belong to a religious group that believes in polygamy or same sex marriage, you're telling me that Penn State can't stop me from starting a group like that on their campus?

MR. FRENCH: A lot of the specific examples you mentioned such as torturing animals or polygamy or same-sex marriage are acts that are prohibited by statute and by constitutional statute. So the answer is, somebody could start a club that advocated, based on religious beliefs, the torturing of animals, but the actual torturing of animals would be prohibited by statute, and lawfully prohibited by statute. Someone could start a religious club that advocated for polygamy and stated as part of its beliefs that polygamy was acceptable, but to actually engage in polygamy is prohibited by constitutional statute.

So it's not an anything-goes scenario. The argument is that an organization that's formed around a certain belief, whether that belief is political or religious or cultural, has a right to advocate for that belief and to have members and leaders who share that belief. You know, the Democratic Party has every right to exclude individuals who advocate for every plank in their public and party platform or to exclude self-identified Republicans and vice-versa. So what this provision does is say to religious organizations, you cannot use your religious beliefs when you're determining who your members and your leaders are, even though you are a religious organization. It's nonsensical. It would be like prohibiting political ideology discrimination on the part of political parties. It strikes to the core of what they are and what they do.

Now, there's one thing I want to be very, very, very clear about. There's a difference between status and belief. For example, there’s nothing about a person's status as a white person that says they couldn't agree with every single part of the NAACP's platform. But if they were a White Supremacist, then the NAACP could certainly exclude them. There's nothing about, say for example, a person's gender that says they couldn't enjoy the game of chess. But if they hated chess, the chess club could rightfully exclude them. What these provisions do is they basically say to religious organizations, on those core principals that matter the most to you, you may not utilize them in determining leadership and membership and stay on this campus.

REPRESENTATIVE GRUCELA: Could Penn State or any other state institutions prohibit the Ku Klux Klan?

MR. FRENCH: Almost certainly they could not prohibit any particular organization on the basis of its perceived ideology. They could prohibit an organization that was engaged in otherwise unlawful activity. So if the Ku Klux Klan was engaged in

terrorism or violating existing state and federal laws, certainly it could exclude them; but they could not exclude the Klan on the basis that it has a point of view that is horrific.

REPRESENTATIVE GRUCELA: One last thing: this is probably not in existence, at least I hope not, but what if the religion advocated the overthrow of the government? As long as we didn't do it inside the group?

MR. FRENCH: Actually, that's pretty well-established constitutionally. It used to be, in fact, that you couldn't even get a driver's license in some states without swearing an oath of allegiance to the United States government. All these loyalty oaths have been struck down. They're gone. So you cannot say to a student organization, "You must swear off any advocacy of violent overthrow of the U.S. government as a condition for being on campus." Although, I haven't seen that situation come up. There's some case law dating from the Vietnam War relevant to that. But in recent years, I have not seen circumstances like that student chapter of the Klan or student chapter of the group that was seeking the violent overthrow of the government.

REPRESENTATIVE GRUCELA: Thank you very much. Thank you, Mr. Chairman.

CHAIRPERSON STEVENSON: Thank you. Representative Herman.

REPRESENTATIVE HERMAN: Thank you very much. I have just two questions, Mr. French. If either a faculty member of a university or student felt that their constitutional rights were abridged or offended or academic freedom suppressed, what should they do?

MR. FRENCH: Unfortunately, most universities do not explain to students either what their rights are or what they can do in the event that they're violated. So a student has to come at that knowledge through outside sources. And the vast majority of students, quite frankly, you know, don't get that knowledge. So I think institutionally what a university should do is do a better job of informing students their constitutional rights and providing them for an avenue, a formal avenue of complaint in the event that they perceive that their constitutional rights are violated, short of running to a lawyer and filing a lawsuit.

With respect to the students, at the present time, FIRE has an enormous education effort. We tried to reach the students and explain to them what their rights are. But what they should do if their rights are violated, one thing is – to put in a plug for FIRE – is contact FIRE.

Another thing is, if they feel like their rights are being violated by a professor or by a member of the administration, they should closely look their school's own policies, because hidden within some of these policies will be sometimes some procedures that can give them protection. So they should take a look at their own student handbook, take a look at the catalog.

But, unfortunately right now, students are in a vast sea of

ignorance regarding their rights and often have a tendency when someone tells them that they can't do something, to believe it, to believe that, if you read this policy, that prohibits acts of intolerance to think, well, I better not commit an act of intolerance because that's unlawful; instead of going back and thinking, Hum, is that unconstitutional? I don't even know what that is. So what should they do I think is contact appropriate officials as outlined in the student handbook or catalog; but, unfortunately, that's not often an avenue available to them.

REPRESENTATIVE FLEAGLE: You had mentioned that (in) Pennsylvania, the numbers were not as great as in other states for contacts for FIRE?

MR. FRENCH: Correct.

REPRESENTATIVE FLEAGLE: And I know you backed it up by saying that that's not really indicative of the fact that there may not be abuses of academic freedom. When they say the states are the laboratories of democracy, have you seen any state universities or public universities in a particular state who seem to have their act together? I know you probably only see the downside of the question, but surely you've seen some examples of a good policy?

MR. FRENCH: I have seen examples of good policies. As far as any individual university that stands out as better than the others or any individual university system that stands out as better than the others, none are coming to mind. You're right; we receive complaints. I do know of universities that have been very responsive once we have made the complaints known to the universities. But as far as a specific policy that stands out nationally, there is – there is not a university policy that I'm aware of that I would say is better than all the others and worth emulating.

In fact, I would say that the AAUP's 1940 statement on academic freedom, which has been around for a long time, is still one of the best, if not the best, articulations of academic freedom, particularly from the professor's level. And universities have adopted this 1940's statement as a rule; however, they also adopt speech codes often. So they contradict some of their own policies.

You mentioned the states as a laboratory of democracy. One of the things that we have found is universities are often like small European countries: They tend to be very bureaucratic. Often the right hand doesn't know what the left hand is doing. Policy documents can be extremely confusing and labyrinthine. So at Pennsylvania schools there are some very good academic freedom statements, but you go to a policy book and you'll find a speech code.

At FIRE we have – to give you an understanding of the extent of the problem – we have rated the speech policies of approximately 350 leading universities in the United States. Seventy percent have at least one policy that is constitutionally problematic. The ones that do not have constitutionally problematic policies tend to have a statement like the AAUP statement and then nothing else. They tend not to have an affirmative free speech statement, so much as they just don't have prohibitions.

REPRESENTATIVE FLEAGLE: The complaints that you get from other states vs.
Pennsylvania, do they tend to be a homogeneous type or does one state have more of a problem?

MR. FRENCH: It's the same type of complaint we get all over. When there's one case publicized in one state, what tends to happen is that there are several other complaints that will come because of the publicity and the awareness.

I would say the most common type of complaint is the misunderstanding of what discrimination and harassment is. Universities have been for a very long time telling their students that discrimination or harassment is an act that offends you or that makes you upset on the basis of race, gender, sexual orientation. So many of our cases involve individuals who are upset on the basis of one of these factors and believe that, because they're upset, someone needs to be punished. And they get a lot of comfort in that from of their policies.

One of our efforts is to try to educate people as to what harassment actually is. It's not actually a state of just being upset.

In fact, in our materials that we distributed, there is federal law that says that for something to be harassment in a student-on-student circumstance, the pattern of behavior must be so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the educational opportunity or benefit. So, in other words, it has to be so bad the person can't get an education, not that it's so bad that I feel really mad about it. And, in fact, in July of 2003, the Department of Education's Office for Civil Rights issued a letter, a "dear colleague" letter, and said that some colleges and universities have interpreted OCR's prohibition of harassment as encompassing all offensive speech regarding sex, disability, race, or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction – these are the antidiscrimination statutes – must include something beyond the mere expression of views, words, symbols, or thoughts that some person finds offensive.

To give you two concrete examples – again, these are not Pennsylvania – but very recent examples: In a public community college in Florida, an individual was prohibited from handing out fliers protesting the treatment of animals in slaughter houses because the administrator was offended by the content of those fliers. Because the administrator was offended, it obviously violated policy banning offensive speech and, therefore, could be suppressed. Other examples would include conservative protests of Affirmative Action, usually done through something called an Affirmative Action bake sale, where they sell baked goods at different prices based on race or gender of the purchaser.

In many schools, those protests have been suppressed, prevented or punished, because they made people angry. Not because the speech wasn't protected, but because they made people angry. So if there's one category that trumps all others, it's a misunderstanding regarding what is or is not harassment and the misinterpretation of anything that offends me, that makes me

upset, is harassing.

Click Here ***to continue reading David French's testimony.***