The Good, the Bad, and the Ugly: Campus Rights in 2005

Given at the 2006 Annual Conference of the Association for Student Judicial Affairs

Presenters:
Greg Lukianoff, Interim President, Foundation for Individual Rights in Education, *greg@thefire.org*
Robert L. Shibley, Program Manager, Foundation for Individual Rights in Education, *robert@thefire.org*

Program Description:
2005 was the busiest year in FIRE's history. From the Ward Churchill case at the University of Colorado, to FIRE's victory against SUNY Brockport's unconstitutional speech code, to the campus press freedom case of *Hosty v. Carter*, FIRE reports on the status of and challenges to individual rights on campus in the past year.

I. Speech Codes on College and University Campuses

In 2003, FIRE began its Speech Codes Litigation Project by coordinating a lawsuit that struck down an unconstitutional speech code at Shippensburg University in Pennsylvania. The Project's most recent success came in May 2005 against a speech code in effect at SUNY Brockport. The project aims to overturn unconstitutional public university speech codes in every federal circuit.

FIRE Case: SUNY Brockport

SUNY Brockport's (now former) speech code banned a great deal of constitutionally protected expression. Its harassment policy listed the following among examples of harassment: "cartoons that depict religious figures in compromising situations"; "calling someone an 'old bag'"; "jokes making fun of any protected group"; and even merely "discussing sexual activities."

FIRE Legal Network Attorney Robert Goodman filed a challenge to this unconstitutional code. SUNY Brockport chose to settle the case, agreeing to remove those examples of sexual harassment from its policies and to post changes to policies wherever handbooks were distributed. It also removed from rulebooks a policy stating that "free speech, academic freedom and individual rights [should be] expressed only with responsible and careful regard for the feelings and sensitivities of others."

Public colleges and universities have been held to the *highest* level of scrutiny when they attempt to regulate the content of speech.

Title VII and IX Concerns

No federal or state sexual harassment laws require universities to issue policies that ban or limit offensive speech. Titles VII and IX do have provisions that deal with *actual* sexual harassment, but the federal government may not enforce laws that violate the federal constitution, as a law requiring prohibitions against offensive speech would. In fact, in 2003 the U.S. Department of Education's Office for Civil Rights (OCR) issued a letter stating that "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." OCR also noted that no private school is required to enact such restrictions under OCR rules.

Speech Restrictions Based on "Harassment" Codes

The Supreme Court has placed very strong limits on the type of verbal behavior that qualifies as discriminatory harassment. In ***Meritor v. Vinson*, 477 U.S. 57 (1986)**, a case that took place in the workplace (a more restrictive environment than a public college campus), 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 ***Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)** that **"conduct must be extreme" to qualify as actionable discriminatory harassment**. And in ***Oncale v. Sundowner Offshore Services*, *Inc.*, 523 U.S. 75 (1998)**, the Court noted that "[t]he 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."** (Emphasis added.)

***Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)** is the only Supreme Court case to deal with peer-on-peer harassment in an educational setting. The decision made it clear that the standard for peer-on-peer sexual harassment is significantly higher than it would be for employer-employee or faculty-student harassment. **For an institution to be held liable for peer-on-peer harassment, the Court required that the institution not only must act with "deliberate indifference" towards the harassment but that the harassment itself must be sufficiently "severe, pervasive, and objectively offensive" to have a "systemic effect" that "effectively bars the victim's access to an educational opportunity or benefit."**

Referenced here is a partial list of additional cases involving speech codes in which university or college policies were overturned as **vague and/or overbroad**:

- ***Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989)**
- ***Dambrot v. Central Michigan University*, 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 University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003)**
- ***UWM Post v. Board of Regents of the University of Wisconsin*, 774 F. Supp. 1163 (E.D. Wis. 1991)**

II. "Free Speech Zones"

Many colleges and universities quarantine free speech to small or remote areas of campus that FIRE calls "free speech zones." While the ostensible purpose of most "free speech zone" policies is to limit disruption, they often place unconstitutional limits on free expression by limiting rallies, speechmaking, demonstrations, or even pamphleteering to designated areas only. Often, those who wish to engage in expressive activities therefore cannot direct their message toward their intended audience.

Reasonable "time, place, and manner" restrictions

In ***Ward v. Rock Against Racism*, 491 U.S. 781 (1989)**, an organization sponsored outdoor concerts in New York City. Noise complaints led the city to enact regulations forcing event sponsors to use "sound-amplification equipment and a sound technician provided by the city." The Supreme Court upheld these rules because there was no credible argument that the city was discriminating on the basis of content or viewpoint and because the regulation was considered a "narrowly tailored" means of accomplishing a legitimate government purpose (noise control).

To be legal, such "reasonable time, place, and manner" restrictions must be content-neutral and "narrowly tailored" to substantial governmental interests. **A generalized concern about safety and order is neither specific enough nor substantial enough to justify free speech zone regulations.**

In the FIRE-coordinated ***Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004)**, a Texas Tech University student wished to pass out religious literature outside Texas Tech's small free speech "gazebo." He was denied permission. A federal judge determined that "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."

When it comes to outsiders with no involvement with or invitation from members of the campus community, more regulation may be permissible. For example, in ***ACLU v. Mote*, 423 F.3d 438 (4th Cir. 2005)**, the Fourth Circuit determined that outdoor spaces at the University of Maryland were a "limited public forum" with regard to the general public if there was no connection to the campus community. However, colleges should also keep in mind state law concerns. In ***State v. Schmid*, 423 A.2d 615 (N.J. 1980)**, the New Jersey Supreme Court ruled that a state constitutional guarantee—that "every person may freely speak…on all subjects"—prevented the private Princeton University from enforcing a rule requiring those unconnected with the university to obtain permission before distributing political literature on campus.

FIRE Case: University of North Carolina-Greensboro

A student group protested UNCG's "free speech zone" policy outside of the school's two small free speech zones on a grassy area outside the library. The students were brought up on disciplinary charges after they refused to move when ordered to by an administrator. FIRE wrote UNCG, reminding it that "time, place, and manner" restrictions must be "narrowly tailored" to substantial governmental interests and that a generalized concern about safety and order cannot justify blanket free speech zone regulations. Facing intense public pressure, UNCG dropped the charges and is now reevaluating its speech zone policy.

III. Religious Student Groups and the Exclusion of Non-Believers

Many institutions have enacted nondiscrimination policies that forbid religious groups from excluding those who do not share the beliefs of the group. While universities may certainly prevent discrimination on the basis of immutable characteristics, **constitutional freedom of association requires that student organizations be allowed to make membership and leadership decisions based on whether members share the expressed beliefs of their organization.**

Freedom of Association

In ***Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)**, an openly gay assistant scoutmaster sued the Boy Scouts under New Jersey's public accommodation law for revoking his membership in the organization when they found out about his sexual orientation. The New Jersey Supreme Court determined that the state's compelling interest in eliminating discrimination in society outweighed the Boy Scouts' freedom of association. The U.S. Supreme Court reversed the New Jersey decision, saying **that the state's interests did not justify such intrusion on the group's rights to freedom of expressive association because it would significantly impair the group's ability to communicate its viewpoint.**

FIRE Case: University of North Carolina-Chapel Hill

In the ongoing case of ***Alpha Iota Omega Christian Fraternity v. Moeser*, No. 04-00765 (M.D.N.C. Mar. 2, 2005)**, UNC-Chapel Hill informed a Christian fraternity, whose purpose was to spread the Christian message, that they could not use religious affiliation as a criterion for membership under the university's nondiscrimination policy.

FIRE informed UNC-Chapel Hill that it 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 applies to a private, religious organization like AIO.

FIRE also reminded UNC that **it is required to grant religious organizations equal access to campus facilities**, ***Widmar v. Vincent*, 454 U.S. 263 (1981)**, and to grant religious organizations equal access to student fee funding on a viewpoint neutral basis. *See* ***Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995)** and ***Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000)**. **UNC also could not compel AIO to include individuals who, as participants or leaders, would 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***, *supra.* 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)**.

It is important to have a full understanding of the difference between "status" and "belief" in such situations. It is FIRE's position that expressive groups on public campuses are free to exclude those who do share their beliefs or expressive purpose. We do not believe that a group has the right to exclude members merely on the basis of status, like race, gender, etc, or when the religious belief in question has nothing to do with the nature of the organization (for example, it would not be appropriate for the chess club to exclude Muslims). However, an orthodox religious group, for example, may exclude gay students from membership if they do not share the beliefs of the group regarding sexual morality or other beliefs.

When UNC-Chapel Hill would not change its policy, the Alliance Defense Fund filed suit. A federal judge has issued a preliminary injunction in favor of the fraternity, saying that it was likely to succeed in its claim that the policy "imposes conditions for the receipt of benefits on a religious organization not imposed on non-religious organizations." The case is still in litigation, but the University of North Carolina's related campus at Greensboro has already made some changes to its policy under the pressure of the ***Alpha Iota Omega Christian Fraternity v. Moeser*** lawsuit and of student activism.

FIRE Case: Louisiana State University

LSU similarly used its nondiscrimination policy to deny recognition to a Muslim student group. Unlike UNC-Chapel Hill, LSU chose to engage FIRE and examine its policies. After an exchange of several letters, FIRE asked LSU to recognize the Muslim group and give it the right to choose members based on belief. LSU did so, and FIRE issued a press release commending LSU for working to safeguard the rights of its students.

IV. The Heckler's Veto

Problems with the "heckler's veto" can arise when a university forgets that **it has twin duties when it comes to freedom of expression: the duty not to censor and the duty to prevent mob censorship.**

The "Heckler's Veto" and the Court

In ***Terminiello v. Chicago*, 337 U.S. 1 (1949)**, a notoriously racist speaker was charged with breach of the peace after an angry crowd gathered outside the auditorium in which he was speaking. A Chicago ordinance punished speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." The Supreme Court cleared the speaker, finding that **free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger…. There is no room under our Constitution for a more restrictive view."**

In ***Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992)**, a white supremacist group sued over a law that gave authorities some discretion about how much to charge for a rally permit. The Supreme Court found that the ordinance was unconstitutionally content-based because it required that the county had discretion to examine the content of the message conveyed, estimate the public response to that content, and judge the number of police necessary to meet that response. Such wide discretion over expressive rights is unconstitutional.

In ***Feiner v. New York*, 340 U.S. 315 (1951)**, a speaker refused to end a speech calling for a crowd to "rise up in arms" to fight for civil rights after being asked to do so three times by police. The Supreme Court upheld his arrest since the police reasonably believed that he was inciting a violent riot that would be impossible for them to control and that would immediately take place. However, it noted that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker." Generally, though, police have the same duty to protect speakers on controversial topics that they have to protect other law-abiding citizens.

FIRE Case: Washington State University

At Washington State, hecklers shouted down, interrupted, and even made threats of physical violence to the cast of a performance of the satirical play "Passion of the Musical," a purposely offensive student-authored production. Campus police refused to remove disruptive students when asked to do so, and actually asked the cast to censor lyrics to avoid angering the crowd. FIRE later discovered that WSU had actually bought 40 tickets for hecklers and helped plan the disruption. FIRE objected in a letter to WSU's actions and to the fact that police made no effort to protect the performance or even to quiet the noisy and disruptive crowd, but WSU continually defended the hecklers.

However, in December 2005, the same playwright produced another play, the *Mangina Monologues*, which was equally offensive. This time WSU put up a notice beforehand that "disruption to this performance, or any program will not be tolerated and will be dealt with accordingly, up to and including participants being escorted from the venue."

V. Equality in Student Fee Funding

Viewpoint neutrality is the general rule when determining which student organizations or publications are entitled to funding from mandatory student fee systems at public universities. This includes neutrality among various political, religious, nonpartisan, and secular groups, publications, and viewpoints.

The Viewpoint Neutrality Requirement for Student Fees

In ***Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995)**, the University of Virginia wanted to deny student fee funding to a Christian student newspaper. The Supreme Court held that religion itself is considered a viewpoint. **Universities therefore may not exclude religiously oriented publications from receiving student fees without violating the requirement of viewpoint neutrality.** As the Supreme Court said, "It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint."

In ***Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000)**, a group of students sued the university, claiming that the fact that some of their mandatory student fees went to support organizations they did not agree with violated their freedom of expression. **The Court determined that mandatory student fee funding schemes at state universities were acceptable as long as they distributed mandatory student fee funds to student groups on a viewpoint neutral basis.** Student fees are to be a subsidy for speech in general that helps to support a richer forum for ideas.

FIRE Case: University of Wisconsin-Eau Claire

The University of Wisconsin-Eau Claire's student government tried to pass an amendment that would defund all student groups that expressed a political or religious viewpoint after a student publication, *The Flip Side*, refused to commit to being a nonpartisan news source. While the university refused to intervene until FIRE brought public attention to the situation, the student government eventually funded the publication but remained confused about its constitutional commitment to viewpoint neutrality.

VI. *Hosty v. Carter* and Campus Press Freedom

In ***Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005)**, the Seventh Circuit ruled that a dean of students who exercised prior restraint over a student newspaper—unequivocally because of its content—is entitled to immunity from liability. Margaret Hosty was the editor of the Governors State University student newspaper, *The Innovator*, which was supported primarily by student fees and was very critical of the GSU administration. Ignoring school policy, Dean Patricia Carter instituted a regime of prior review over the newspaper's content. Federal district and three-judge appeals courts found for Hosty,

but an *en banc* panel found for the university under ***Hazelwood School District. v. Kuhlmeier*, 484 U.S. 260 (1988)** because the paper was funded by the university through student fees.

The *Hosty* opinion, which FIRE believes was wrongly decided, has serious implications for both administrators and the student press. The good news for administrators is that it sets a very high bar for breaching qualified immunity. The more ambiguous news is that colleges within the jurisdiction of the Seventh Circuit may be able to justify taking increased editorial power over the student press. FIRE, of course, hopes this will not be the case; however, administrators that do choose to exercise control over the student press should be aware that such actions will bring an increased chance of being successfully sued for what the student press publishes.

VII. Exercise: The Ward Churchill Affair

In early 2005, University of Colorado Professor Ward Churchill was much in the news when, before a talk at Hamilton College, activists discovered an essay in which Churchill called the World Trade Center victims of the 9/11 attacks "little Eichmanns." Further, during a speech, Churchill seemed to explain how to go about launching a terror attack on a civilian target in the United States and to encourage a person to do this. A national uproar ensued, and the University of Colorado's Board of Regents launched an investigation of Churchill's comments.

The original purpose of its investigation was to answer two questions: "(1) Does Professor Churchill's conduct, including his speech, provide any grounds for dismissal for cause, as described in the Regents' Laws? And (2) if so, is this conduct or speech protected by the First Amendment against University action?"

Questions on the Churchill Case

Could Churchill have been lawfully fired from his professorship?
Could Churchill's comments have been lawfully punished if someone found them offensive?
Could Churchill's comments have been lawfully punished as incitement?
Could Churchill's comments have been lawfully punished as hate speech?
Could Churchill have been lawfully fired as department chair?