FROM LAW BOOKS AND THEORIES TO PRACTICE: FREE SPEECH ON TODAY'S CAMPUSES

Up to this point, we have buried you, we fear, in an avalanche of legal doctrines and arguments. The fact is that First Amendment law is a complex maze that even lawyers find difficult to navigate. It is very important, therefore, for any comprehensive free speech *Guide* to demonstrate *how* the law is applied in *practice*. The scenarios that follow are based on real cases that FIRE has confronted—and continues to confront—in its ongoing battle for free speech on campus.

1. Your College Enacts (or Considers Enacting) a Policy That Bans "Offensive" or "Harassing" Speech

SCENARIO: *The student government of your university is considering enacting rules that would ban "offensive" speech, or speech that "demeans," "provokes," or "subordinates" any*

What is a Speech Code?

FIRE defines a speech code as *any campus regulation that punishes, forbids, heavily regulates, or restricts a substantial amount of protected speech*. While it would be helpful for purposes of identification (and more honest) if universities listed their speech restrictions in a section of the student handbook called **"OUR SPEECH CODE,"** almost all universities disguise their speech restrictions, if only for public relations. The current generation of speech codes may come in the form of highly restrictive "speech zone" policies, email policies that ban "offensive" communication, diversity statements that include provisions that punish people who engage in "intolerant expression" or "acts of intolerance" and, of course, the ever-present "harassment policies" aimed at "unacceptable" viewpoints and words. No one denies that a university can and should ban true harassment or threats, but a code that *calls* itself a "harassment code" does not thereby magically free itself from its obligations to free speech and academic freedom. The reality, not the name, determines the nature of these things. Know your rights.

member of a particular group. Or, perhaps, it is trying to redefine punishable "fighting words" as any speech that "stigmatizes" a student on the basis of race or gender. Or, perhaps, the administration is passing new rules that require all student

speech to be "civil." Would this be allowable at a public university? How about a private university? What if your school already has rules that punish this sort of speech?

What If Your University is Considering a Speech Code?

Rules that punish merely "offensive" speech are plainly unconstitutional at public colleges and universities. Indeed, as the courts frequently remind us, the First Amendment is most important for its role in protecting speech that others find offensive or dangerous. Popular and pleasant speech rarely needs special protection, because it is almost never the target of censors. In every major case in which offensive speech codes have been challenged, courts have struck them down. All of these unconstitutional speech codes characterized offensive speech as a form of harassment, analogous to sexual harassment, or as fighting words, or as some combination of these two reasons for curtailing expression. All of these codes dealt specifically with speech that concerned race, sex, sexual orientation, or a number of other protected categories. (In the University of Michigan case, special protection was extended to "race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status," leaving someone trying to avoid these categories in quite a bind.) No matter how these policies

were drawn or how hard the authors of these speech codes tried to make them look as if they applied only to speech that was already unprotected, they failed.

The three reasons that the courts consistently gave for overturning these policies were that they were vague, overbroad, and discriminated on the basis of viewpoint (see the earlier discussions of vagueness, overbreadth, and viewpoint discrimination). For example, because it is unclear what sort of speech "stigmatizes on the basis of creed," a code would be unconstitutionally vague. Because speech that may "demean" someone on the basis of sex may include unmistakably protected speech (for example, "I just don't think that men deserve the right to vote"), it would be overbroad. Also, because all of these codes were aimed at speech with a point of view about race, sex, or sexual orientation (usually they were aimed at speech that was in some way hostile to the "university's values" on these subjects) they were impermissible viewpoint-based restrictions. A rule that required students to be "civil" in their discourse also would likely be unconstitutionally vague and overbroad, and it would almost certainly be applied in an unconstitutionally viewpoint-discriminatory way.

Whether a private university may legally enact a speech code depends on several factors. First, as discussed previously, some states have rules that require private universities to give free speech rights to their students, as was the case when Stanford University's

speech code was struck down in 1995. A second consideration is how the university promotes itself. If a private university not in a state providing speech protections to students says prominently in its promotional literature that it values "community standards" above all other rights and concerns, it could legally enforce a speech code based on these advertised standards. If a private university promotes itself as a place that provides the greatest possible free speech rights to its students, however, but it then tries to forbid speech that may be offensive to some, it is likely to be violating its contract with its students and therefore committing fraud. A student in this situation would have a fairly powerful claim against his or her school, especially if contract law in that state takes seriously such pacts between school and student.

Even when a private university has the *legal* right to pass a speech code, you should force it to consider seriously whether it is *wise* or not to do so. Does Harvard University, for example, truly want to provide (or be known to provide) less free speech than the local community college? When fighting a speech code, remind your university that First Amendment law is not simply a collection of inconvenient regulations, but a free people's collective wisdom on expressive liberty. Even if your school is not legally bound to the Constitution, it should recognize that the broad protections and carefully chosen limitations of the First Amendment may be the best "speech code" for any institution of higher educa-

tion. You have tremendous *moral* authority when you talk in terms of the university's solemn obligation to protect freedom of inquiry and discourse. Take advantage of that authority. Take the debate public. As Justice Brandeis correctly observed, "Sunlight is the best disinfectant."

What If Your University Already Has a Speech Code (As It Probably Does)?

Sadly, hundreds of American colleges and universities already have speech codes, even though these codes generally violate the Constitution, state law, or their own stated policies. Many schools added these policies to their rules in the 1980s and 1990s and never took them off the books. We recommend that you investigate your university's policies to see if you have a speech code. Remember, it may be part of your university's code of misconduct, or be hidden in the language of the sexual or racial harassment policies, or located in any number of places in your student code. The bottom line is that if the policy applies to speech and goes beyond the narrow permissible limitations on protected speech outlined in this *Guide*, it likely is an unconstitutional speech code on public campuses and a violation of contractual promises on private campuses. Often, prosecutions based on these codes occur behind closed doors, with no publicity, with the frightened respondent accepting a demeaning plea-

bargain in order to avoid severe punishment. The fact that you never have heard of such a prosecution does not mean that speech is not punished on your campus. Investigate and act on behalf of freedom. Once administrations are aware that you know that they have a speech code, they will have to weigh the value of the code versus the very real possibility the courts will force them to eliminate or narrow it or that public opinion will shame them for their betrayal of American values.

While it is vital to know the law and use it to defend your rights, most of these battles are won in the field of debate and public persuasion. You should challenge those students and faculty who defend the speech codes, who claim that they are necessary to protect minority, female, or homosexual students. You should argue that sheltering students from speech that might offend them is patronizing and paternalistic. No one who claims that groups of students are too weak to live with the Bill of Rights or with freedom is their friend. You should argue that repression results only in people hiding their real attitudes. If prejudice, bigotry, or ignorance exists, it is far better to know how people actually think, to discuss such things, and to reply appropriately than to force such things underground, where they only fester and worsen. If you are hated by someone, it is better (and safer) to know who hates you and why. It is counterproductive to force educable human beings to disguise their true beliefs and feelings. It is counterproductive to create a

climate in which students are afraid to speak frankly and freely with each other. Challenge the administration on the university's motivation for passing these speech codes. Do such restrictions of liberty serve the educational development of students and the search for truth, or do they merely give administrators the appearance of peace and quiet at the expense of real progress and candor? Is the administration simply interested in "quiet on its watch" rather than in real education and honest human interaction? Remind administrators that pain and offense—the inevitable by-product of having one's fundamental beliefs challenged—is a vital part of the educational process, and that if students graduate without ever having to evaluate their positions on fundamental principles, then the university has failed them. Finally, for those who are not interested in principled arguments, remind them that history shows us that the censors of one generation are the censored of the next. Everyone should defend free speech out of self-interest, if for nothing else. In any democracy, as a result of elections, the pendulum always swings. What is sauce for the goose soon becomes sauce for the gander. Those in power should value liberty not only for its own sake, but for their own. Freedom of speech is a precious thing. It is indispensable to our living decently, peacefully, and fairly with each other. It also is indispensable to protecting all of us from abuses of arbitrary power.

Finally, you may run into administrators who reply to criticism of the speech code by assuring you that "it is never enforced." Even if you believe this is true (which you should by no means take for granted, since universities often actively conceal such information), the fact that it is not enforced is irrelevant. A law on the books that is hostile to speech would still be void for vagueness and overbreadth even if it were not ordinarily enforced. Even if a campus has never enforced its speech code, the code remains a palpable and harmful form of coercion. As long as the policy exists, the *threat* of enforcement remains real and can influence how people speak and act. Indeed, it may well be that the very existence of the code has successfully deterred a certain level of vigorous discussion and argument. In First Amendment law, this is known as a chilling effect: By having these codes in student handbooks, administrators can prevent most of the speech they seek to censor just by disseminating the policy. When students see what the administration bans—or even if they are unsure, because of the breadth or vagueness of the definitions—they will play it safe and avoid engaging in speech that, even though constitutionally protected, may offend a student or a disciplinary board. Under such circumstances, students will, more often than not, censor themselves. The law wisely holds that these sorts of rules unconstitutionally chill speech, stopping debate before it starts, by forcing individuals to

wonder whether or not they can be punished for speech before they open their mouths.

Further, the "unenforced" code is there for moments of crisis, which is precisely when rights and liberty have the most need of protection. At such moments of crisis, discussion of speech codes becomes least rational and least principled. Now is the time to ensure the state of freedom on your campus.

2. Abuse of Hostile Environment Law: Tufts University and The Primary Source

SCENARIO: *Your school newspaper, on its humor page, runs a joke (along with dozens of other unrelated jokes) that makes fun of the leader of the student labor association for wearing tight clothes. The next day you find that you and your paper have been charged with sexual harassment for running the joke and that your paper is threatened with loss of funding? Can the school do this?*

This scenario actually happened at Tufts University to a conservative paper called *The Primary Source*. The paper published three remarks in its humor pages ridiculing the appearance and dress of female members of another student group that the paper routinely opposed. FIRE became involved when one of the mocked students brought sexual harassment charges against the paper, and the paper was threatened with being shut down.

This case is important because even though Tufts is a private university not bound by the First Amendment, it was still not willing to deviate so starkly from First Amendment principles in order to punish student speech, once the case was brought to public attention. Tufts originally claimed (and possibly sincerely believed) that its sexual harassment policy was required by federal law. When FIRE wrote to Tufts, it made the obvious and telling point that federal law cannot compel any institution to violate rights protected by the Constitution.

FIRE further argued that 1) *The Primary Source* was engaging in what would be clearly protected speech in the larger society; 2) this use of a sexual harassment rationale not only conflicted with the actual law, but also trivialized the real offense of sexual harassment; 3) the threats against the paper constituted an attack on parody and satire, time-honored traditions that are constitutionally protected in American society; 4) such a broad interpretation of sexual harassment law could potentially be used to ban all speech at the university, and such a vague rule would prevent students from voicing any controversial opinions; 5) Tufts was demonstrating an intolerable double standard in its application of this overbroad policy only to this instance of offensive speech; and 6) the University would be publicly humiliated if it became widely known that Tufts was shutting down student newspapers for printing jokes.

Shortly after receiving FIRE's letter, Tufts found *The Primary Source* innocent of all these charges.

3. Libel at the University of North Carolina, Wilmington

SCENARIO: *A fellow student sends out an email diatribe that angers you, and you respond with an email that calls the student's communication "bigoted and unintelligent." The student declares that she is going to sue you for libel. Can she win?*

A similar scenario took place at the University of North Carolina at Wilmington. FIRE became involved when a student accused a professor of libel for calling a political message that she sent out widely by mail "undeserving of serious consideration," among other critical statements. While the law of libel is complex, the professor's statement was clearly not defamatory. First, to be libelous, the statement must be a provably false allegation of fact. This means that it must allege something "objective," something that could be established through facts. (For example, falsely stating that someone committed a crime—"Jim set fire to the dormitory"—could be libel. Merely giving your subjective opinion of someone, however—"Jim is a jerk" or "Jim is ugly"—is not libel.) Furthermore, the fact that the professor's criticism was directed at the content of what the student said, and not at the student, puts it well within the realm of pro-

tected speech. When an allegation is not simply a matter of opinion, then truth, of course, is an absolute defense against a charge of libel. Libel is one of the most common charges that plaintiffs file, and one of the most likely to fail. If you engage in political speech and are accused of libel, never assume that your accuser has a legitimate claim against you.

4. Compelled Speech: Forcing Students to Utter Beliefs

SCENARIO: *To complete the requirements for your major, you must take a class in which the professor has promulgated "Guidelines for Classroom Discussion." The Guidelines list the basic principles to which everyone in the class must agree if they are to participate in the classroom discussion. The Guidelines assume as true many complex arguments about the nature of race, sex, and your own role in society, all of which normally would be subject to disagreement and debate. Participating in classroom discussion is necessary to get a good grade in the class. Can the professor do this?*

This scenario arises from the growing tendency in Women's Studies courses to use a set of such guidelines. In FIRE's view, the fact that the class was mandatory makes the classroom guidelines unacceptable because they could not be avoided by an unwilling or dissenting student. If this class were one of many classes that a stu-

dent could take to complete a major, then a student could elect to take a class that did not restrict speech and expression. If the class were elective, the professor would have a strong First Amendment or academic freedom argument that he or she could define the terms of classroom debate.

In this situation, however, a professor is requiring students to profess certain beliefs in a mandatory class or risk being graded down. This requirement therefore crosses the line into unconstitutional "compelled speech." Forcing citizens to mouth propositions regardless of whether they believe them is alien to a free society. In many ways, it is even worse than forms of censorship that simply stop a person from saying what he or she believes. Public universities that force students to attend mandatory diversity training or "sensitivity training" sessions, at which they must pledge themselves to this or that cause or attitude—or that require them to take classes in which they must make ideological statements with which they disagree—are likely violating both constitutional rights and guaranteed academic freedom. Additionally, private schools that promise their students free speech or academic freedom are in stark violation of their contracts if they require such ideological loyalty oaths—loyalty and adherence to a particular orthodoxy, belief system, or ideology.

5. Free Speech Zones: West Virginia University

SCENARIO: *Your school designates two small areas on your campus as "free speech zones"—areas where you can engage in "free speech activities," including protests or speeches. You are "caught" handing out pamphlets outside a public meeting on your campus, and the campus police tell you that you cannot be doing that outside of the free speech zone. Can your school do this?*

While "free speech zones" that turn the rest of a campus into censorship zones are increasingly prevalent on American campuses, this scenario actually occurred at West Virginia University (WVU). FIRE became involved when a student group notified us that it had been prevented by campus police from handing out protest literature beyond the designated speech zone. Additionally, a student was removed from a public presentation simply for being a known protester attending a meeting outside the free speech zone.

FIRE wrote to the school and informed administrators that under the United States Constitution, public colleges and universities are allowed to impose only reasonable time, place, and manner restrictions and only if those restrictions are narrowly tailored and are related to a compelling state interest (usually preventing the disruption of university functions). Under these doctrines, administrators may place certain legitimate limitations on events, but they most surely may not quarantine all

speech to two small areas on campus. As FIRE wrote, "We assure you that there is nothing 'reasonable' about transforming ninety-nine percent of your University's property—indeed, *public* property—into 'Censorship Zones.'"

FIRE also pointed out that cordoning off free speech runs completely contrary to the special role of a university in a free society:

> The irony of this policy is that the societal function of the university, in any free society, is to serve as the ultimate "Free Speech Zone." A university serious about the search for truth should be seeking at all times to expand open discourse, to foster intellectual inquiry, and to engage and challenge the way people think. By limiting free speech to a tiny fraction of the campus, you send the message that speech is to be feared, regulated, and monitored at all times. This message is utterly incompatible with a free society and stands in stark opposition to the ideals of higher education.

After receiving FIRE's letter (and after the widespread publicity that resulted when FIRE made its letter public), the school agreed to change its policies. In the end, WVU eliminated its speech zones altogether, allowing protest in most places throughout the campus. Some other schools that had adopted or were considering speech zones abandoned them in the face of enhanced public scrutiny, including Tufts University, Texas Tech, Western Illinois University, Citrus College, and Appalachian State University.

6. Charging a Fee for Free Speech, Directly or Indirectly

SCENARIO: *Your college or university includes a provision in its new public assembly policy that requires student groups planning to hold protests or other events to pay insurance or security costs in advance. The policy leaves the decision regarding the amount of the insurance or security costs to the campus police or to the administration's estimate of how risky the event will be. Is this an acceptable policy?*

FIRE has seen numerous cases where colleges and universities have given the administration or campus police complete discretion to decide how much groups should pay for insurance, security, or other costs. Because these policies often include great administrative discretion, which could easily be used to silence any viewpoint, they are usually unconstitutional. Liberty frowns on excessive administrative discretion. A Supreme Court case called *Forsyth County v. The Nationalist Movement* (1992) dealt with a provision of a county ordinance declaring that the cost of protecting demonstrators on public property should be charged to the demonstrators themselves, if that cost exceeded the usual cost of law enforcement. A county administrator was given the authority to assess the strain on public resources that various demonstrations would have and to adjust the security costs accordingly. In overturning this ordinance as unconstitutional, the Supreme Court explained that

any policy imposing charges on speech, when those charges are based on an official's estimation of the likely disruption, necessarily requires an evaluation of the content of the message, and, therefore, both could and likely would be used to censor speech. Under the policy declared unconstitutional in *Forsyth*, your university would be free to prevent any group it did not like from holding an event, simply by charging those groups prohibitively high rates. Censorship by disguised means is as unconstitutional as direct and open censorship.

Even if your university policy removes the discretion of school administrators and charges all students a flat rate for security and insurance, you may still wish to challenge the policy on moral and educational grounds. You should point out to your administration that campuses should welcome free speech, including protests and demonstrations, as a valuable part of the educational environment. Furthermore, students already pay, through tuition and fees, for the campus security they enjoy. Part of what you are paying for is the protection of your rights to free speech and expression, including your right to hear the views of others. If there is any charge for expressive activities, the charge should be borne by all students, not by the individual groups—otherwise passive students will be rewarded for their lack of public activity while those contributing to the vitality of campus life will be taxed for being politically active. While it might be reasonable to levy security charges on

large commercial events (like concerts or productions), where the events generate funds from which such costs could be paid, FIRE sees no reason why students wishing to carry out peaceful demonstrations (and peaceful events are the only kind allowed under any university's policies) should be taxed for their exercise of free expression.

7. Newspaper Theft

SCENARIO: *You are the editor of a college student paper, and you decide to run a column that is critical of a campus student group. When your paper goes to print and is distributed throughout the campus, the student group that you have criticized seizes virtually every copy of your publication and throws it out. Is there anything you can do?*

Newspaper thefts are far too common on university campuses and represent a vigilante form of censorship as dangerous to free expression as any act by the campus administration. The hardest part of the case may be proving that the papers were stolen and not legitimately picked up. Fortunately many of these would-be censors simply drop them in nearby dumpsters, making proof of foul play a great deal easier.

If you believe that your paper has been stolen in order to suppress your point of view, make certain that the entire campus, including the administration, knows about the theft. Some states are considering legislation

that would make newspaper thefts a crime even if the newspaper is distributed for free (and the state of Maryland, faced with a string of such thefts, already has a law against them in its code). Indeed, in most states, such theft, even if the newspaper is distributed for free, might still constitute a crime, such as malicious destruction of property or conspiracy to violate civil rights. Either way, your school has a duty to protect your free speech rights from mob rule. Call the administration on this, point out any double standard they might have applied for different publications, and if they don't budge, let FIRE and local and national media know. Universities may be indifferent to the book-burning mentality of some members of the campus community, but the general public (including alumni and donors) are usually appalled and react strongly against any university that allows the mob to silence minority or unpopular points of view. Also, the nation's newspapers understand full well the nightmare and the danger to liberty of such destruction and suppression of the published word.

8. Investigating Protected Speech: The University of Alaska

SCENARIO: *You have authored a poem deploring the sexual abuse of young women among native Alaskans. Native Alaskan student activists protest and attempt to have you pun-*

ished. The administration initiates an investigation. When you contact these administrators to tell them that they cannot punish you for exercising artistic expression, they reply that their action is fine because, so far, it is "only an investigation." What can you say in response?

This situation happened to a professor of English at the University of Alaska, Fairbanks. If your school tells you not to worry because it is only investigating you for your speech, do not accept this explanation. If the university were to investigate speech every time someone reports offense, the result would be the same as if it actually punished the speaker: People would avoid speaking, especially on controversial topics, in order to avoid being investigated. The president of the entire University of Alaska system, after discussion with FIRE, eventually intervened and put an end to administrative dangers to the Constitution. He informed administrators at Fairbanks and at all Alaska campuses that in matters of controversial speech, "There is nothing to investigate." By taking a stand against scrutinizing clearly protected expression, the president earned a reputation as a defender of free speech and was publicly celebrated for his act. His defense of the Constitution and of academic freedom was commended by Alaska's Democratic governor, by its Republican senators, and by a bipartisan resolution of the state legislature. His example should serve as a model to university presidents who are tempted to bow to the pressure of would-be censors.

9. Rough Times for Satire and Parody: Harvard Business School

SCENARIO: *You are an editor of the primary student newspaper at a professional school of a private university. You publish a cartoon that mocks the Career Services office for a series of serious and debilitating computer blunders during the crucial week of students' career interviews. After the cartoon runs, you are summoned into a top administrator's office, scolded for the article, told to print more friendly things about the school, and informed that you will be held personally accountable for any future objectionable content. You are also told to consider this meeting a "verbal warning," the first level of sanction at your school. Can they do this?*

This scenario took place at Harvard Business School (HBS). The HBS paper published an editorial cartoon that criticized the school's Career Services for severe and chronic technical problems during "Hell Week" (the time when HBS students go through the job interview process). The cartoon showed a computer screen with pop-up announcements about the problems with, and inefficiency of, Career Services. One announcement had two words expressing the exasperation of HBS students: "incompetent morons."

FIRE became involved after the Dean of HBS publicly defended the school's behavior toward the editor. In one email to all students at HBS, the Dean wrote: "Regardless of the role(s) we play on campus, each of us

first and foremost is a member of the Harvard Business School community, and as such, we are expected to treat each other respectfully. Referring to members of our community as 'incompetent morons' does not fall within the realm of respectful discourse." This case represents a classic example of an administration's appeal to civility and respect as a pretext for allowing the administration to exercise far-reaching powers. Be very careful anytime a dean uses "the community" as an excuse for punishing speech. *You* are part of the community; do not let the administration argue that it must censor speech to please the community. The idea that there is a conflict between free speech and the academic community fundamentally misunderstands both the goals of higher education and the nature and role of free speech.

As FIRE stated in its letter to HBS:

> It is generally taken for granted by deans of major universities that they, their staff, and their programs will be criticized, lampooned, and satirized. Deans usually handle this natural part of their job with grace and understanding. Threatening a student for publishing an editorial cartoon unbecomes a great liberal arts institution. Is the administration of HBS too weak to live with freedom? Are HBS students unworthy of the protections that any community college would have to offer under the Bill of Rights?

Because Harvard is a private university, our letter also noted:

> While you claim to encourage "debate, discussion, and dialogue," the parameters you establish for allowable speech are as narrow as those of the most oppressive censors. A rule that outlaws speech that offends administrative power is not compatible with—and teaches contempt for—the most basic components of freedom. If you have such a rule, FIRE expects that you will immediately notify all students, prospective students, and faculty members at Harvard Business School of the changes in policy and the end of freedom of speech at your institution. To advertise the critical and intellectual freedom of Harvard University and then to deliver repression of freedom is a "bait-and-switch" that HBS should know to be unethical, if not a material breach of contract.

After FIRE's letter and the national attention that surrounded this case, HBS reversed course. In a letter to FIRE, the administration apologized and affirmed its commitment to free speech at HBS. If only all universities were so willing to acknowledge and correct their mistakes.

10. Allegedly Threatening or Intimidating Speech: San Diego State University

SCENARIO: *You overhear several students loudly celebrating the success of a recent terrorist attack that claimed thousands of American lives. You approach the students and chide them emotionally and morally for their opinions, which are offensive to you, but you never threaten them. The students, who out-*

number you four to one, charge you with "abusive behavior" for confronting them about their speech.

This situation took place, shortly after the attacks of September 11, 2001, at San Diego State University (SDSU) and involved a student named Zewdalem Kebede. In response to the university's investigation of Kebede, FIRE wrote:

> Zewdalem Kebede's right to speak applies even if his language was found to be emotional or fervent. The United States Supreme Court decided long ago, in Cohen v. California (1971), that the expressive and emotive element of speech enjoys the full protection of the First Amendment. FIRE noted with irony that a university purporting to value diversity appears unable to tolerate diverse modes of discussion and debate, which differ profoundly from nation to nation or individual to individual. By this action, San Diego State University endangers speech on any topic that incites students' feelings and emotions, leaving only the most sterile and innocuous topics safe for analysis and debate.

While the school is completely within its rights to punish "true threats" (for example, "I am going to kill you, Jim"), it must remember that the emotion attached to speech is part of the reason why it is valuable and needs protection. After receiving FIRE's letter and attracting considerable negative media attention, SDSU decided not to punish Mr. Kebede. Most colleges and universities routinely call upon students to "confront" racist or sexist speech whenever and wherever they over-

hear it. It is highly likely that SDSU was far from viewpoint neutral in its original investigation of Kebede.

11. Restrictions on Religious Speech or Association: University of North Carolina

SCENARIO: *You are a member of a Christian association that allows any student to join. The rules of your organization, however, require that in order to serve in the leadership of the organization, you must be a practicing Christian. You get a letter from the school saying that your organization will lose recognition (be derecognized) because its rule constitutes "religious discrimination." Could this be right?*

This remarkable situation actually has happened on several campuses throughout the country, and recently at the University of North Carolina-Chapel Hill. The university has regulations that prohibit student organizations from discriminating against individuals on the basis of religion, sexual orientation, and other grounds. Therefore, the university argues, groups that discriminate on religious grounds, even if these groups are religious in nature, must lose campus recognition, which typically means that the group cannot hold meetings on campus, has a limited ability to advertise its existence, and is denied funding from student fees.

The university must be reminded that a local rule on antidiscrimination cannot trump the protections of the First Amendment. The First Amendment's Free Exercise

Clause, combined with First Amendment protections for free speech and free association—not to mention decency and common sense—clearly permit religious organizations to use their religious principles to select their leaders. (For more information on this topic, please consult *FIRE's Guide to Religious Liberty on Campus*.)

There are several relevant Supreme Court cases here. *Rosenberger v. University of Virginia* (1995) holds that any regulation that bans religious student groups from equal participation in student fee funding discriminates on the basis of viewpoint and is unconstitutional. The Supreme Court followed *Rosenberger* with its decision in *University of Wisconsin v. Southworth* (2000), which required that student fees be distributed on a strictly viewpoint-neutral basis. It ruled that the beliefs of the organization cannot be taken into account when distributing student funds. The final link in this chain of cases on freedom of association and viewpoint neutrality is *Boy Scouts of America v. Dale* (2000), in which the Court states that a group's right to associate freely, another right protected by the First Amendment, is destroyed if it is not allowed the freedom to choose its own leadership. Any one of these cases should make it clear that derecognizing a religious student group because it wishes to have religious leadership is a violation of that group's rights of free speech, freedom of association, and free exercise of religion. Taken together these cases make it quite difficult for any public university to argue that it has the right to close

down a student group on this basis, and it certainly defeats any argument that civil rights or any other laws *require* them to do so.

The schools that have attempted to ban Christian groups on this basis have faced a public relations disaster. The public and the media understood what was wrong with these actions far more clearly than did the university administrators. FIRE has won cases of this sort both at private and at public campuses. In this particular case, the University of North Carolina quickly backed down, expressed its deep support for religious freedom, and quickly recognized and funded the Christian fellowship. FIRE would expect and fight for the same result if the group in question were the student Atheist Association, challenged for seeking a leadership that shared the group's disbelief.

12. Double Standards: University of California, San Diego

SCENARIO: *You are an editor at a humor and satire magazine at a public university, and your publication often causes controversy. The administration has publicly condemned your paper multiple times and tried through a variety of ways to shut it down. Now, your paper is charged with a minor infraction, but it appears that the paper will lose funding from student fees and be disbanded if you are found guilty. It is clear*

that the administration is targeting your controversial content by punishing your paper so harshly. What should you do?

This situation happened to *The Koala*, a student publication that satirizes and parodies everything and everyone at the University of California, San Diego (UCSD). University representatives had harshly condemned the publication on numerous occasions, including once stating: "On behalf of the UCSD community, we condemn *The Koala's* abuse of the Constitutional guarantees of free expression and disfavor their unconscionable behavior." (The only "behavior" engaged in was constitutionally protected expression.) UCSD's administration is entitled to its own opinions, but it then proceeded to lodge a series of dubious charges against the paper for numerous alleged infractions, charges that reflected an outrageous double standard.

While preparing to help *The Koala*, FIRE uncovered the fact that the very same vice-chancellor who now condemned *The Koala* had issued—at another time—a ringing endorsement of the freedom of expression of another campus paper. In 1995 a radical Hispanic student paper, *Voz Fronteriza*, ran an editorial that urged the murder of Hispanic agents of the Immigration and Naturalization Service and celebrated the fact that one had died while doing his job. "All Migra pigs should be killed, every single one…It is time to organize an anti-Migra patrol," *Voz Fronteriza* wrote in its May 1995

issue. In response to calls for censorship and punishment issued by an outraged public and by members of Congress, the vice chancellor stated: "The University is legally prohibited from censuring the content of student publications….Previous attempts by universities and other entities to regulate freedom of speech, including hate speech, have all been ruled unconstitutional." He also wrote that *Voz Fronteriza* had "the right to publish their views without adverse administrative action." While, in FIRE's view, *Voz Fronteriza* did have the right to publish this editorial, it is far, far closer to the line of nonprotected speech (see the earlier sidebar on incitement) than anything that ever came from *The Koala*.

FIRE confronted UCSD with this breathtaking double standard, shortly after which *The Koala* was found innocent of the charges against it. The lesson of this case is that many college administrators can be both grossly unfair and wildly inconsistent. They fervently protect speech with which they agree or sympathize, while punishing the speech of the students whose views they do not like. It may be wise and particularly useful to look into the history of the administrators who are trying to censor you. You may well find that in previous instances they have issued ringing endorsements of free speech in situations involving different points of view. Armed with this information, you should demand that the administration live up to the noble statements made in other cases. Double standards and hypocrisy are the enemy of

liberty and honesty, and they shame their practitioners when revealed.

13. Controversial Websites

SCENARIO: *Your university allows any enrolled student to have a website on the university server. You, along with hundreds of other students, maintain a website that includes information about yourself, as well as information on topics that you think others might find interesting. One web page includes your thoughts about a company that you believe is actually a harmful pyramid scheme. The company contacts the web administrator, claiming that he will sue the university unless it shuts down the "libelous" website. The school not only complies, immediately shutting down your website, but also brings you up on disciplinary charges, including the charge that you failed to use your website solely for "study related work." What can you do?*

A situation very similar to this happened to a student at a public university in California. FIRE wrote to the school and explained that 1) the student's speech represented true political speech, the kind of speech the First Amendment most clearly protects; 2) the university had created something similar to a limited public forum by granting all students web privileges and, therefore, could not discriminate against the student on the basis of his viewpoint; 3) the university immediately and unfairly assumed that the website was illegal (and immediately

turned on its own student); 4) the university's claim that websites had to be related to academic work did not describe the actual practice at the university; 5) singling out only one website because of dubious complaints was inconsistent with its own rules and practice, and demonstrated an intolerable double standard; and 6) the university would most likely be immune from a lawsuit for the content that its students post to their own webpages, even if those pages are on the university server. In the light of all these considerations, the school had no reason (and no excuse) to shut down the student's website.

The University eventually compromised. It should be noted, however, that the law regarding websites hosted on university servers is unclear and is in a state of flux. While FIRE believes the arguments that it made to the university were legally sound, there is no reasonable assurance that a court will interpret the university's obligations in the same way. FIRE will closely monitor developments regarding the legal rights of students (and others) relating to website content on public servers and, as always, will argue forcefully for free speech and expression.

14. Obscenity: University of Memphis

SCENARIO: *You participate in an Internet chat room composed of university students who openly and graphically discuss sexual topics and fantasies. When someone who posts to the site*

asks everyone what they find arousing, you respond in explicit detail. Shortly thereafter you receive notification that your Internet access has been revoked and you face disciplinary charges for disseminating an "obscene" message. Is this really obscenity?

While obscenity is a category of unprotected speech, its legal definition actually covers only a quite narrow range of expression (see the earlier section on obscenity and the *Miller* test). FIRE knows of no case since *Miller* where a purely *written* statement was found to be unprotected obscenity. (Typically, pictures or live performances more readily qualify as obscene.) Also, even things that would otherwise be considered obscenity in terms of graphic sexuality can be punished only if "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." If your vulgarity is for the sake of science, art, or politics, it is not obscenity.

A private school could choose to define its rules against "obscenity" as being less demanding than the *Miller* test. However, if they use the word "obscenity" to describe banned expression but then seek to redefine it to cover a wider array of expression than the legal definition, they run a risk of running afoul of the law and of your right to rely on the school's written policies. As discussed previously, courts normally will interpret the university's promises to its students in the way that the students are most likely to understand them.

In the course of dealing with this case, administrators

at the University of Memphis were deluged by learned and compelling communications, from across the country, by defenders of civil liberties and the First Amendment. After months of such lessons in the law, the dean in charge of the case dropped all charges, writing to the defendant that "the posting, taken as a whole within the context of the ongoing political discussion on the newsgroup, did not meet the three-part test for obscenity as articulated by the United States Supreme Court in the *Miller v. California* case." She concluded: "As an institution of higher education, we are committed to…free speech and academic freedom, and we recognize our role as a marketplace of ideas." The moral? Never become fatalistic: College administrators, often sincerely misinformed, can be educated about rights and liberty.

15. Heckler's Veto: The University of South Florida—"We Cannot Guarantee Your Safety."

SCENARIO: *You appear on television to voice your opinions on global political matters, and the show's host surprises you by bringing up a variety of very controversial things you have said in the past. When you return to your university, calls flood in, demanding that you be expelled. The university says to you: "We are not expelling you because of your speech, but because the reaction to your speech has been so negative and*

dangerous that we can no longer promise your safety. Sorry, we have to kick you out." Can your university do that?

Something very similar to this case happened to a professor at the University of South Florida (USF). FIRE became involved when the university tried to remove the professor and claimed that it was forced to do so because the campus could no longer guarantee his safety and because his presence represented a threat to safety. His speech had so angered others that the university allegedly was receiving death threats.

When a university punishes someone because of the hostile reactions of others to his or her protected political speech, they are conferring what is called a "heckler's veto" upon anyone who would want to silence speech. The practical implications of conferring a heckler's veto are devastating for a free society, but especially for a university. If a university punishes people on the basis of how harshly or violently other people might react to their words, it creates an *incentive* for those who disagree to react violently. This policy would confer veto power over speech upon the least tolerant and most dangerous members of society, an invitation to mob rule. It is extremely dangerous to all of our freedoms ever to grant a heckler's veto.

The free speech provisions of the First Amendment exist primarily to protect *unpopular* speech. There would be little need for an amendment to protect only popular,

mainstream speech, since the democratic process would protect that speech through its own mechanism of majority control. Universities have a positive duty to protect students and faculty from violence for stating their opinions. A college that would expel someone because of the violent reaction of others to his or her speech has its obligations completely backwards. It is the university's duty to protect the speakers and to punish those who break the law by threatening them.

Perhaps recognizing the dire consequences for speech on its campus, USF abandoned this line of argument after FIRE became involved. The professor was later terminated for reasons that were unrelated to his speech or expression and that had nothing to do with granting a heckler's veto to the mob.

16. Controversial Speakers: Ithaca College

SCENARIO: *You invite a controversial speaker to campus. When the speaker arrives, several students attempt to have you arrested by campus police on charges of committing a "bias related incident" (that is, hate speech). Can they do this?*

This situation happened to the College Republicans at Ithaca College when they invited a speaker to campus to discuss "The Failures of Feminism." Fortunately, Ithaca declined to press charges, but the case still represents the

bizarre and extreme expectations created by campus harassment policies. The theory was that the speaker (female, by the way) was so antiwoman that her speech constituted harassment of the entire community based on sex. This was, of course, just another attempt to silence unpopular speech on campus, and though it would never pass constitutional muster if attempted at a public school, students will likely try this approach again. If they do, they should be reminded that such a broad definition of harassment is flatly unconstitutional. If this takes place at a private university, however, it is best to remind the administration that such a policy could be used to prevent *any* speaker from coming to campus, and would guarantee ferocious battles over who should and should not be invited in the future, and, since every controversial speaker offends someone, would lead either to silence or to double standards.

As for the students who would try to use harassment polices in this way, they should know that their example will become a *cause célèbre* and will be used by those who oppose *all* "bias-related harassment rules." By trying in this way to censor their fellow students, they not only bring disrepute to themselves, but also to the very notion of protection from genuine harassment. Also, of course, they sacrifice the very grounds on which it would be possible to defend their own free speech rights against those whom they offend.

17. Unequal Access for Student Groups—Denying the Right to Freedom of Association: The University of Miami

SCENARIO: *You wish to start up a student group that discusses conservative philosophy, and you apply for funding from student fees, just like dozens of other groups at your public university. The student government, which recognizes student groups, refuses to recognize your group because, it argues, there is already one other recognized conservative group on campus, namely the College Republicans. On the other hand, the student government has formally recognized dozens of other closely related student groups. Can it deny funding to your group?*

This scenario happened at the University of Miami (UM). A group of women attempted to form a conservative organization, Advocates for Conservative Thought (ACT). Its purpose was "the exposition and promotion of conservative principles and ideas." ACT was repeatedly denied funding by UM, because, the student government claimed, its intended purpose would "overlap" with the College Republicans and with one group that promoted nonpartisan political debate. FIRE wrote a letter to the UM's president, pointing out that the school could not deny funding to one group because of its viewpoint while allowing dozens of other groups on the other side of the spectrum their individual recognition.

Such discrimination against groups based purely on the proposed purpose and ideology of the group is in direct violation of the Supreme Court's prohibitions against content-based and viewpoint discrimination. It also violates the same free association rights that applied in the scenario relating to freedom of religious association (see scenario 11).

The Supreme Court has also established that each such freely organized group has the right to equal student funding at public universities, and may not be discriminated against on the basis of the content of the group's ideology. In *University of Wisconsin v. Southworth* (2000), the Court held that a public university must distribute funds equally to each recognized group on campus without any consideration of the organization's viewpoint. Under *Southworth*, if the university does not comply with this limitation, it may not charge mandatory student fees to support extracurricular activities.

No matter what your group's ideology, the purpose and content of your organization may not be grounds for denying your group official recognition as a student group. Furthermore, there is a strong constitutional right of voluntary association that allows individuals to form groups with a purpose and content of their choosing. Your group may be denied recognition on other legitimate grounds (such as insufficient membership), but the purpose and belief system of your group should

never be the factor that prevents your group from gaining recognition and equal access to the school's resources.

UM is a private university, and not bound by *Southworth*, but FIRE raised the issue of whether it was willing to deny its students the fundamental rights and legal equalities granted by any public college. In response to FIRE's letter and press release, the university president convened an urgent meeting. Immediately after the meeting, ACT was informed that it would receive official recognition regardless of its content or purpose. UM President Donna Shalala wrote to FIRE to thank it for bringing this vital matter to her attention. The moral? Constitutional principles are so often not merely legal principles, but are moral principles as well. Colleges and universities ignore them to their shame and peril.

CONCLUSION

As the pages of this *Guide* seek to make clear, the First Amendment grants individuals and groups an enormous amount of autonomy and authority not only to define their own message, but to express it in creative and even in controversial ways. We truly are a land of liberty. Given these clearly defined and expansive legal rights, those who seek to censor and indoctrinate the campus community can accomplish their goals only if individuals acquiesce, if they consent to censorship by their silence. This is manifestly true on public campuses, but it is also true, as we have seen, on private campuses that promise basic rights of free expression, legal equality, and academic freedom.

The pressure for students to remain silent can be overwhelming. Those who dissent are often threatened with or subjected to campus discipline. Through secret

or confidential proceedings, students are instructed to keep disputes "in the community," as if universities were somehow sacrosanct entities that would be corrupted by the knowledge and outrage of outsiders. Administrators promise reasonable treatment if "offenders" agree to campus "dialogue" (often a code word for unconstitutional thought reform and moral reeducation). Whatever the method, the message is clear: Further dissent brings greater retribution.

Although it requires no small amount of courage to bear moral witness and to stand against oppression, you should never acquiesce to demands to keep quiet or to insincere pressure to resolve things "within the community." Your freedom is precious in and of itself, and it is the foundation of everyone else's freedom, whether they know it or not. It is malicious for campus officials to bring speech-related charges against isolated individuals or groups and then reinforce their isolation by insisting that they cut off their access to outside assistance. This malice is also a mark of weakness, because it arises ultimately from fear that if the public sees how academic administrators are acting, it will voice disapproval or worse. It is rare, indeed, for oppressors to survive the glare of publicity unscathed, especially in a land as devoted to free speech and expression as our nation.

To put it quite simply: You are not alone. In your quest to protect the values of academic freedom, critical

inquiry, and free expression, you have friends and allies. There are many individuals and groups within the walls of your campus that will defend your rights passionately and vigorously. These defenders include many people who may disagree completely with your beliefs, but who will nevertheless defend your right to express your views and to live by the lights of your conscience without being silenced, censored, or maliciously charged with harassment.

You should not, however, limit your allies to supportive faculty members and students. The Foundation for Individual Rights in Education exists to bring oppression to light, and, once oppression has been exposed, to destroy it. FIRE will defend the free speech, freedom of association, and academic freedom rights of students and faculty utterly without regard to the political persuasions of those who are censored. To that end, FIRE maintains a formidable array of media contacts, academic associates, and legal allies across the broadest spectrum of opinion, all of whom are committed to individual rights. Since 1999, FIRE has deployed its resources on behalf of individual students, faculty members, and student groups at schools small and large, public and private. If your individual rights are being trampled, visit www.thefire.org. FIRE will defend you, and, in similar circumstances, the rights of your critics. Liberty and legal equality are not reserved for favored individuals and groups. When you

face oppression—when you are silenced by a seemingly all-powerful administration—remember the foundational principle of the First Amendment as it is eloquently set forth in *West Virginia Board of Education v. Barnette* (1943): "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."

Five Steps to Fighting Back

After reading this *Guide*, you now have much greater knowledge of your rights to free speech, free association, and academic freedom. FIRE strongly suggests that whenever you believe that your rights are being violated, you should take the following actions:

1. Take careful notes of conversations and keep copies of any written correspondence with university officials, whether administrators, faculty members, or student leaders. Whenever you want to create reliable records of verbal communications, it is tactically and legally helpful to put your version of the conversation in a letter to the administrator (or faculty member, or student leader) with whom you spoke. Indicate within

that letter that you want to "confirm" the contents of your communication. Such a letter communicates that you are serious about protecting your rights, and it often results in the other party creating a written record that they cannot later refute.

2. Closely read your student handbook, disciplinary code, and any other policies that apply to you or your organization. When you read such policies, take great care to identify the specific decision makers who have the authority to decide your case. Knowledge is power. You can win a free speech dispute simply through a superior understanding of campus rules and procedures.
3. Reread the sections of this *Guide* that are applicable to your school—public or private.
4. Contact FIRE and allow us to assist you as you bring your case to the appropriate university officials. It is a fundamental part of FIRE's mission and purpose to assist individual students and student groups—across the spectrum—to fight back against the censorship and oppression of the modern university.
5. Always attempt to build a campus coalition—contact other students (or student groups) who suffer from the same policies or actions or who share your values.

When informed by the powerful knowledge contained in this *Guide*, armed with the information applicable to your unique situation, and allied with the committed advocates at FIRE, you will no longer be helpless or alone. Time and again, courageous students who have taken these steps have turned the tide against censorship and have restored liberty and true intellectual diversity to their university communities.