Report on the First Amendment Responsibilities of Pennsylvania State-Funded Colleges and Universities

Introduction

> *If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.*
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> —*West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)

U.S. Supreme Court Justice Robert Jackson's words, written during the unprecedented national crisis of World War II and in the context of striking down a law that would have required schoolchildren to salute the American flag in class, signify how freedom of conscience is central to our identity as Americans. World War II was a struggle for the continued existence of not only American ideals, but the ideal of liberty throughout the world. During the crisis of World War II, the need for national unity and the need to strive for a common goal were critical to the survival of the United States. Yet even during this time, our nation's highest court rejected the idea that a state could *require* children to salute the flag in class as a sign of loyalty to a nation at war. Justice Jackson also noted in *Barnette* that, under our Constitution, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."

Despite this ringing affirmation of American liberty, however, the notion that government may not dictate what people are to say, write, or believe about controversial subjects has remained hotly contested. Those in power, whether in government or outside of it, inevitably find it convenient to restrict expression or even dictate matters of conscience in order to ensure a more "just," "fair," or "orderly" society or organization. Today, one of the most likely places to find rules and regulations that restrict expression or dictate matters of conscience is at one's local college or university campus—including the public college and university campuses of the state of Pennsylvania.

This report is intended to summarize the First Amendment responsibilities that Pennsylvania's state-funded institutions of higher education have in regard to the rights of their students and faculty. These responsibilities originate not only from the First Amendment of the U.S. Constitution, but also from Sections 3 and 7 of the Pennsylvania Constitution, which protect, respectively, freedom of conscience and freedom of speech. As taxpayer-funded agencies of the Pennsylvania state government, Pennsylvania's state colleges and universities are bound to follow the strictures of the U.S. and Pennsylvania Constitutions.

The Responsibility to Respect the Expressive Rights of Students and Faculty Members

Pennsylvania state colleges and universities are legally bound to respect the free speech rights of their students and faculty members. A good rule of thumb is that if a state law would be declared unconstitutional for violating the First Amendment rights of Pennsylvanians, a similar regulation at a state college or university would be equally unconstitutional.

FIRE defines a "speech code" in a very straightforward manner: at public universities, a speech code is any university regulation or policy that substantially prohibits constitutionally protected expression. It is not necessary for a speech code literally to be labeled "SPEECH CODE"; indeed, university speech codes are seldom found in a section of university regulations that labels itself as containing restrictions on speech. Most often, their components can be found in sections dealing with harassment, either sexual, discriminatory, or against protected groups; policies dealing with diversity, multiculturalism, tolerance, respect, sensitivity, or hate speech; and loyalty oaths and honor codes.

Speech codes gained popularity with college administrators in the 1980s and 1990s. As discriminatory barriers to education declined, institutions of higher education saw an unprecedented increase in female and minority enrollment. College administrators feared that these changes would cause tension and that students who finally had full educational access would arrive at institutions only to be hurt and offended by other students. In an effort to avoid this friction, administrators enacted policies to restrict potentially offensive speech—in other words, they enacted speech codes.

Despite numerous court decisions that overturned speech codes at public colleges and universities and a number of U.S. Supreme Court cases that clearly indicated highly restrictive speech codes would be unconstitutional at public universities, the majority of these institutions still maintain unconstitutional speech codes. Public universities in Pennsylvania are no exception: of the 18 four-year public institutions of higher education in Pennsylvania, 16 institutions have at least one policy that both clearly and substantially restricts freedom of speech. A "clear" restriction is one that unambiguously infringes on protected expression. A "substantial" restriction on free speech is one that is broadly applicable to important categories of campus expression. The remaining two schools have at least one policy that *could* be used to ban or excessively regulate protected speech.

Academic Freedom

Academic freedom is prominent among the expressive rights that are vital to any system of higher education. While courts have defined academic freedom in a number of ways, one very widely used definition of academic freedom can be found in the American Association of University Professors' 1940 *Statement on Academic Freedom and Tenure*. The critical points of this statement for the purposes of this report are that "[t]eachers 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"; and that:

> [c]ollege 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, but…they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

Academic freedom protects not only professors, but also students and the institutions themselves that hold academic freedom rights. For instance, a student cannot be punished for disagreeing with a professor's political views, and political or ideological litmus tests cannot be used in determining student grades. At the same time, students do not have the right to have a professor terminated simply because they believe that professor's point of view is abhorrent or biased.

State educational institutions themselves also have the academic freedom to have their own institutional viewpoints, to decide which subjects will be taught, and generally to conduct the business of the university. They do not, however, have the right to unconstitutionally discriminate on the basis of these views. For instance, a university can declare itself to be institutionally in favor of a certain brand of, for example, "tolerance" or "diversity," but it may not then take action against professors or students who dissent from the university's chosen views.

Federal Anti-Harassment Law

Anti-harassment policies are among the worst offenders in the realm of campus speech codes. Colleges and universities often try to justify these policies by arguing that they are required, under threat of liability, to prevent harassment on their campuses. Title VI of the Civil Rights Act (which bans race-based discrimination at institutions receiving federal funds) and Title IX of the Civil Rights Act (which bans sex-based discrimination in higher education) require schools to protect students against harassment. However, Title VI and Title IX do not—in fact, cannot—prohibit speech that is protected by the First Amendment. As the Supreme Court stated in the only case it has faced dealing with student-on-student harassment, the pattern of behavior must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit," *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999), a standard stricter than that required for workplace harassment. Therefore, merely unpleasant behavior, even if the behavior is based on animosity towards a person's race or gender, is not enough. Harassment is a serious pattern of unwelcome behavior directed at an individual.

Colleges and universities often use their obligations under federal anti-harassment law to justify speech codes that violate the First Amendment rights of their students. In fact, this type of abuse of harassment regulations became so widespread that in July 2003, the federal Department of Education's Office for Civil Rights (OCR) issued a letter to all of America's colleges and universities. Assistant Secretary Gerald Reynolds wrote, "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, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive." Reynolds wrote that "OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution," and concluded that "[t]here is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment." This letter forecloses any argument that federal anti-harassment law requires colleges to adopt speech codes that violate the First Amendment.

Overbreadth and Vagueness

The main constitutional problems with college or university speech codes are overbreadth and vagueness. A regulation is said to be unconstitutionally overbroad if, in addition to whatever else it may appropriately prohibit, it significantly restricts protected First Amendment freedoms. As the

Supreme Court has stated, to avoid overbreadth, a "statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 522 (1972).

An example of a state law that would be overbroad is a law that prohibited people from "insulting, offending, or physically threatening others." While the state can prevent physical threats, attempting to restrict speech that insults or offends others would ban an enormous amount of constitutionally protected speech. *See Doe v. University of Michigan*, 721 F. Supp. 852, 863 ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

Many Pennsylvania public universities maintain speech codes that are unconstitutionally overbroad. For example:

- Indiana University of Pennsylvania prohibits "behavior of a sexual nature that is directed toward another individual, based on their gender, which is demeaning or diminishing to their character."
- Kutztown University of Pennsylvania prohibits "acts of threatening, demeaning, or seriously embarrassing behavior."
- Millersville University of Pennsylvania prohibits the transmission of electronic "[m]essages and materials deemed offensive by University policy, and by local, State and Federal Laws."

While these policies certainly prohibit the severe, persistent and pervasive conduct that constitutes actual harassment, they also prohibit a great deal of constitutionally protected speech (such as, for example, merely offensive e-mails). Therefore, these policies are overbroad.

Many speech codes also suffer from the problem of vagueness. A law or regulation is unconstitutionally vague when people of common intelligence would have to guess at its meaning or would easily disagree about its application. As the Supreme Court has stated, laws must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

"These concerns apply with particular force where the challenged statute affects First Amendment rights." *The UWM Post, Inc., v. Board of Regents of University of Wisconsin System*, 774 F. Supp. 1163, 1178 (E.D. Wis. 1991). That is because in the case of speech, vague laws cause a profound and destructive "chilling effect" that may stifle public discourse on controversial issues. The above example of a speech code prohibiting people from "insulting, offending, or physically threatening others" would also be void for vagueness, since one person cannot necessarily know what another person will find insulting, and determining with certainty what another person would find offensive is similarly impossible.

Many Pennsylvania public universities maintain speech codes that are unconstitutionally vague. For example:

- Indiana University of Pennsylvania prohibits "the posting of material that is insensitive to affirmative action issues…."

- Edinboro University of Pennsylvania prohibits "offensive or inappropriate sexual and/or sexually harassing behavior."
- West Chester University of Pennsylvania prohibits "any actions which demonstrate a lack of respect for the human rights and personal dignity of any individual."

These policies leave students to guess at what might get them in trouble—for example, how is an ordinary person to know what Indiana University of Pennsylvania's administrators might deem "insensitive to affirmative action issues"? Since most people do not want to risk punishment, students will self-censor in the face of these vague policies, leading to the "chilling effect" discussed above.

The Responsibility to Protect Religious Liberty on Campus

Pennsylvania state colleges and universities are required by the First Amendment to protect the religious liberty of their students. Unfortunately, on many public campuses today, religious liberty is under assault by administrators with a defective understanding of what the Constitution's guarantees of religious liberty and freedom of association mean when applied to the modern college campus. And once again, many of the problems stem from a misapplication of discrimination laws or regulations to activities that are protected by the First Amendment's guarantee that individuals and groups may freely exercise their religion.

Religious Groups Must Be Free to Choose and Limit Their Leadership and Membership

Religious student groups on Pennsylvania's state college and university campuses must be allowed to have religious requirements for the leadership and membership of their religious groups, and those groups with such requirements must be treated by the university on an equal basis with other groups that lack such requirements. This has become a growing problem of late, with college administrators across the country withdrawing recognition from campus religious groups that restrict their leadership or membership to those who share their beliefs, typically Christian or Muslim. Administrators argue that since the groups discriminate on the basis of religion in their leadership or membership, they are engaged in illegal discrimination. The withdrawal of recognition from these groups not only generally means that they are ineligible for funding on an equal basis with secular groups but that they often cannot reserve space to meet or even use the university's name in the name of the group.

Yet in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Supreme Court held that forcing the Boy Scouts to include an openly gay Scout leader would violate the organization's First Amendment right to freedom of association. The Court held that forced inclusion violates a group's freedom of association "if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648. Needless to say, with religious student groups, the ability to choose members and leaders who share the same faith is essential to those groups' ability to express their religious messages.

At least one court has held that these nondiscrimination requirements probably violate students' right to freedom of association. In March 2005, a federal judge in North Carolina granted a preliminary injunction in favor of a Christian fraternity that filed suit against the University of North Carolina at Chapel Hill challenging a nondiscrimination clause. The university tried to force the fraternity, whose mission was to train Christian leaders, to adopt a nondiscrimination clause that would have prohibited it from considering religion when determining "membership and participation" in

the group. The fraternity members felt that the nondiscrimination clause would hinder the fraternity's ability to maintain its character as a group of believing and practicing Christian students. The court preliminarily enjoined UNC from enforcing its nondiscrimination policy, holding that it "raises significant constitutional concerns and could be violative of the First Amendment of the United States Constitution…." *Alpha Iota Omega Christian Fraternity v. Moeser et al.* (M.D.N.C. Mar. 2, 2005).

Many Pennsylvania public universities maintain nondiscrimination policies that interfere with the constitutionally protected associational rights and religious liberty of their students. For example:

- Penn State provides that "No organization shall obtain or maintain University recognition which discriminates on the basis of age, ancestry, color, disability or handicap, national origin, race, **religious creed**, gender, sexual orientation or veteran status with respect to its membership" (emphasis added).
- Clarion University of Pennsylvania provides that "Any [student organization] denying membership on the basis of gender, race, **creed**, age, veteran status, disability, national origin, or sexual orientation, except as provided for under state or federal law, shall not be eligible to receive University recognition" (emphasis added).
- At Edinboro University of Pennsylvania, student organizations are required to submit a constitution that must contain, among other provisions, "A statement that the organization will not exclude or discriminate against individuals on account of sex, race, **creed**, ancestry, national origin, or disability" (emphasis added).
- At Kutztown University of Pennsylvania, student organizations must sign a form stating that "we shall not discriminate on the basis of race, color, age, **religion**, veteran's status, sex, national origin, or disability in our educational programs or activities" (emphasis added).

Forbidding a religious group to limit its membership to students who share its religious identity denies its members the rights of freedom of association, freedom of expression, and the free exercise of religion. Pennsylvania's public institutions are legally required to uphold these constitutional rights.

The Responsibility to Protect Freedom of Conscience on Campus

When we think of the First Amendment, we often think of the right to be *free from* censorship and other restrictions on speech. However, the First Amendment also protects the right to be *free to* choose our own belief systems. This right—the freedom of conscience—is one of the most sacred rights protected by the Constitution. As discussed earlier in this report, the Supreme Court has held that Americans can never be compelled to profess their loyalty to or belief in a particular set of values or ideals. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Sadly, however, many colleges and universities are violating their students' freedom of conscience by forcing them to profess their belief in an officially approved set of principles and values. Shippensburg University of Pennsylvania maintained such a requirement until it was struck down by a federal judge in 2003. Shippensburg had a "Racism and Cultural Diversity Statement" providing that "Shippensburg University's commitment to racial tolerance, cultural diversity and social justice will require every member of this community to ensure that the principles of these ideals *be mirrored in their attitudes* and behaviors" (emphasis added). Despite the judge's finding that this provision was unconstitutional, numerous Pennsylvania public universities continue to maintain similar loyalty oaths.

For example:

- Kutztown University of Pennsylvania's Code of Civility provides that, as a member of the Kutztown community, "I shall appreciate diversity and encourage its acceptance by others."
- Indiana University of Pennsylvania's Civility Statement provides that, as a member of the Indiana community, "I will discourage intolerance, hatred, and injustice and promote constructive resolution of conflict."

Regardless of the intention of these oaths, public universities—arms of the Commonwealth of Pennsylvania—may not require their students to adhere to officially mandated orthodoxies regarding diversity and multiculturalism. These loyalty oaths violate the constitutional right to freedom of conscience enjoyed by all citizens of Pennsylvania, including those attending Pennsylvania's institutions of higher education.

Conclusion

The foregoing examples[1] illustrate the unfortunate reality that Pennsylvania's state-supported institutions of higher education are, in many cases, failing to uphold the most basic constitutional rights of their students and faculty. In numerous cases, including that of Shippensburg University of Pennsylvania, federal courts have held that public universities' speech codes are unconstitutional. Pennsylvania's public colleges and universities should know that it is very unlikely that the policies quoted in this report could survive a constitutional challenge. Unconstitutional restrictions of fundamental American freedoms are, of course, not confined to Pennsylvania's colleges and universities alone. Yet given the Commonwealth of Pennsylvania's immense historical role in the founding of a free nation, as well as its reputation as one of the special homes of human liberty, Pennsylvania's institutions of higher education should not be content to maintain a low standard in the area of fundamental American rights. While Pennsylvania's state-funded institutions of higher education might seem at times to believe that they exist in a vacuum, the truth is that neither our nation's courts nor its people look favorably upon speech codes or other restrictions on basic freedoms.

[1] While we have only provided examples in this report for brevity's sake, a more complete listing of the policies in force at Pennsylvania's public institutions is available on FIRE's website at http://thefire.org/index.php/states/PA.

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