Back to FIRE Home

I. STATEMENT OF IDENTITY

Amicus curiae FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, INC. ("F.I.R.E.") is a Massachusetts non-profit corporation, tax-exempt under Section 501(c)(3) of the Internal Revenue Code, with headquarters in Philadelphia and a satellite office in Boston. Its Mission Statement states in part:

The mission of the Foundation for Individual Rights in Education, Inc. is to defend and sustain individual rights at America's increasingly repressive and partisan colleges and universities. These rights include freedom of speech, legal equality, due process, religious liberty, and the sanctity of conscience -- the essential qualities of individual liberty and dignity. FIRE's core mission is to educate the public and communities of concerned Americans about the threats to these rights on our campuses and about the means to protect them.

* * * *

FIRE will sustain a network of individual lawyers and will work closely with public-interest legal foundations, making them aware of the specific facts of campus abuse of power. When public exposure alone does not suffice, it will secure the protection of law for those who now are defenseless before the new repressive orthodoxies.

FIRE files this *amicus curiae* brief out of a concern that a misguided unconstitutional application, to campuses of higher education, of "sexual harassment" and "hostile environment" regulations and case law developed to regulate conduct in the commercial workplace, will wittingly or unwittingly

extinguish fundamental and long-accepted concepts of academic freedom and free speech, both of which have the unequivocal *imprimatur* of the United States Supreme Court and are insulated from both direct and oblique attack.

II. THE COLLEGE OFFICIALS' MULTIPLE ATTEMPTS TO PUNISH PLAINTIFF-APPELLEE JOHN BONNELL CONSTITUTE A PROHIBITED ATTACK ON CORE FREE EXPRESSION AND ACADEMIC FREEDOM, PROTECTED BY THE FIRST AMENDMENT FROM INFRINGEMENT, BY EITHER DIRECT OR OBLIQUE MEANS, ON PUBLIC CAMPUSES OF HIGHER EDUCATION.

A. THIS DISPUTE INVOLVES SPEECH GERMANE TO THE COURSE FOLLOWED BY A CONTROVERSY OF INTENSE CAMPUS AND PUBLIC CONCERN AND INTEREST INVOLVING THE HEALTH OF ACADEMIC FREEDOM ON THE MACOMB CAMPUS -- A CONTROVERSY TO WHICH PROF. BONNELL HAD A CONSTITUTIONAL RIGHT AND A PROFESSIONAL OBLIGATION TO CONTRIBUTE.

The brief filed by the Appellants and that of the Michigan Community College Association ("MCCA") as *amicus curiae* seeking to overturn the order below, suffer from a massive misconception that posits that various aspects of workplace "sexual harassment" law may, indeed must, be applied to college campuses. To whatever extent the relevant administrative agency (the Equal Employment Opportunity Commission, or "EEOC") and the federal courts have insisted that rules be adopted by employers in the workplace pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000 *et seq.* (hereinafter "Title VII"), the wholesale transplantation of these concepts to the academic side of a public campus of higher education is clearly prohibited by the First Amendment. This is the reason why, although there are numerous examples where purportedly "offensive" speech has been successfully classified as actionable and prohibited "sexual harassment" in the workplace setting, *amicus* FIRE. has been unable to

find, and neither Appellants nor *amicus* MCAA have cited, a single instance where a federal appellate court has ruled that mere speech, unassociated with prohibited and unprotected conduct,(1) may be prohibited on a public campus of higher education. There is a reason for this -- pure speech in an academic setting, no matter how offensive to some, is granted an extraordinarily high level of constitutional protection.

In its "Order and Opinion Granting Plaintiff's Renewed Motion for Preliminary Injunction" (hereinafter "the Opinion"), the District Judge found that Prof. Bonnell, an experienced, effective, popular tenured English professor at Macomb Community College ("Macomb"), a public institution of higher learning, used what might be deemed racy (and, to some, profane) language during the course of discussing acknowledged works of English literature that dealt with controversial, challenging, and racy or profane issues, including human sexuality. (R. 75, Opinion 3, APX ___) This language was germane to the course.(2)

A female student ("student #1") complained that Prof. Bonnell's use of profane language, even though the language was contained within his classroom lectures and discussion and was "not directed at any student," amounted to sexual harassment in violation of Macomb's sexual harassment policy. (R. 75, Opinion 3, APX ___) At the time, the policy, in its 1992 version, provided:

the [MCC] administration concluded that academic freedom does not protect acts of sexual harassment or the use of profane, vulgar, or obscene language which is unrelated to the course content and educational purpose.

(R. 75 Opinion 4, APX ___) The defendant officials of Macomb (Appellants herein), while not deeming the complaint as one sounding in "sexual harassment" even though they found the student's complaint "colorable," nonetheless proceeded to punish Prof. Bonnell's language in the classroom, even though germane to the course. (R. 75, Opinion 3, APX ___) A three-day suspension followed.

Macomb's sexual harassment policy was revised twice more, so that by May 1997 the provisions governing the relationship between sexual language and sexual harassment read:

Regular use of profane, vulgar, or obscene speech in the classroom which is not germane to course content (and thus educational purpose) as measured by professional standards will lead to the imposition of discipline.

(R. 75, Opinion 5, APX ___) As the court below recognized, there is a relationship between the concepts of prohibited "profane" speech and prohibited "sexual harassment" as the latter concept was apparently understood (or, more accurately, mis-understood) by the complaining student. This problem of conflating mere speech and actionable harassment follows quite naturally from Macomb's sexual harassment policy which chooses to prohibit, under the guise of prohibiting "sexual harassment," the use of sexually graphic language or the commonly-understood vulgar vernacular. In other words, on its face the policy allows the mere use of language that some might find offensive to be deemed "sexual harassment," even if that language is not directed to a particular student.

When a parent complained in January 1998, Macomb's Vice-President for Human Resources, defendant-appellant William MacQueen, who had drafted the college's sexual harassment policy, called Bonnell in to explain himself. Bonnell explained the pedagogical and philosophical reasons for his use of such language in his classroom. (R. 75, Opinion 6, APX ___) Nonetheless, MacQueen issued a warning to Bonnell. (R. 75, Opinion 6, APX ___)

This paved the way for the second student complaint in the 1998 fall semester, when student #2 complained about Prof. Bonnell's language under the rubric of "sexual harassment." As the Court below noted: "The written complaint alleged that, in discussing sexually charged literature, Bonnell used 'lude [sic] and obscene comments...[which] were dehumanizing, degrading, and sexually

explicit.'" (R. 75, Opinion at 6 [bracketed material in the original]. An investigation of Prof. Bonnell's use of language followed, at which point he distributed to his students copies of the student's complaint, with her identity redacted, and posted it on a bulletin board outside his classroom.

Prof. Bonnell, when he appeared before MacQueen, again explained how and why the use of his language was germane to the course. (R. 75, Opinion 7-8, APX ___) A little more than a week later, Prof. Bonnell wrote and then distributed to faculty members what the court below found was "an acerbic satire entitled '*An Apology: Yes, Virginia, There is A Sanity Clause*'" (hereafter sometimes referred to as "the satire"). (R. 75, Opinion 8, APX ___) In that satire, Prof. Bonnell, again without revealing the name or identity of the complaining student, asserted his First Amendment right to use such language in his course and classroom. The court below found, after an evidentiary hearing with witnesses whose credibility the judge could personally gauge, that "Prof. Bonnell's motive in writing the *Yes, Virginia* memorandum was not to retaliate for a sexual harassment complaint, but instead to discuss First Amendment concerns in the context of classroom language." The court further found that "in the instant case..., these are matters of significant public First Amendment concerns." (R. 75 Opinion 36, APX ___)

At a subsequent disciplinary hearing, the second student complaint, much like the first, was deemed to state a violation not because it constituted "sexual harassment," but rather because of the classroom language at issue. (R. 75, Opinion 8-9, APX ___) MacQueen at this point prohibited Prof. Bonnell from disclosing or discussing anything relating to the student's complaint or his defense. As the court below put it, "this directive prevented a college English professor from informing his adult students that he was being suspended from teaching for three days." (R. 75 Opinion 10, APX ___) Prof. Bonnell then further distributed copies of his acerbic satire along with the redacted student complaint, this time to the news media and the college newspaper. The court below deemed the gag order an unconstitutional prior restraint on protected speech. (R. 75 Opinion 12, APX ___).

Eventually, MacQueen concluded that Prof. Bonnell appeared guilty of four

charges, including:

(1) **Insubordination** by distributing copies of the student's sexual harassment complaint and by discussing his discipline with students, both in violation of MacQueen's January 8, 1999 directive; (2) **Breach of Confidentiality** by distributing copies of the student's complaint and the satirical *Yes, Virginia* memorandum to the faculty, media, and a former student in violation of both the collective bargaining agreement...and the Federal Family Educational and Privacy Rights Act (FERPA); (3) **Retaliation** against the complainant student by distributing the student's complaint in violation of MCC's policy prohibiting sexual harassment, federal Title IX...; and (4) **Disruption of the Educational Process** by materially contributing to the absences of nearly all of his students in his classes and distributing the student's complaint."

(R. 75, Opinion 16, APX ___)

The instant litigation followed Prof. Bonnell's four-month suspension. The administration deemed punishment appropriate in part because of Prof. Bonnell's reaction to the student's complaint and, then, to the disciplinary proceedings. Prof. Bonnell treated the matter as an opportunity for what pedagogues might call "a teachable moment" -- the object of that "teachable moment" being, as Prof. Bonnell claimed (R. 75, Opinion 7, APX ___) and the court below found (R. 75, Opinion 42-43, APX ___) -- an object lesson in the importance of the First Amendment and academic freedom. Nonetheless, Prof. Bonnell's making a teachable moment out of his woes was deemed by the Macomb administration to be "retaliation" and "insubordination" because, as they tellingly argued to the district judge during a hearing: "All he has is a right to industrial due process, as it was, industrial relations due process...." (R. 75 Opinion 17, APX ___, emphasis supplied) Even now, both the appellants (brief at 9, 12-21) and the MCCA *amicus* (brief at 10-14) view this case as a traditional run-of-the-mill workplace labor dispute involving, and of legitimate interest to, nobody except the professor and the college. The response of the court below was correct and demonstrated an

ability to piece through the rhetoric to get to the heart of the matter:

The Court recognizes that colleges are a resource for ideas, free thought, experimentation, and critical thinking. The position of a college English professor included with it First Amendment protections that may not be present in the military service or in an industrial job. The teaching of college English requires the communication of thoughts and ideas by reading and writing, and the use of the entire English language. When a college gags the professor or censors the students, the free expression of ideas and thoughts as supported by the First Amendment is impinged upon."

(R. 75, Opinion 18, APX ___)

The district judge's fact-findings and rulings of law followed ineluctably from his recognition that the court was dealing with an institution of higher learning, rather than a widget factory. The court made findings and conclusions (R. 75, Opinion 41-45; APX ___) which dictate the required outcome of this case.

Briefly summarized, the court's findings indicate that the Macomb administration initially suspended Prof. Bonnell because it deemed his classroom speech, even though not *per se* sexual harassment, to violate the sexual harassment policy's proscription against certain language. Prof. Bonnell then distributed a redacted copy of the second student's complaint and of his "acerbic parody" (the *Yes, Virginia* memorandum) responding to that complaint and to the administration's taking action on the basis of the complaint. Prof. Bonnell's response was part of his long-standing concern for the health of academic freedom on the campus, and his motive for going public with this latest manifestation of the problem was to further the debate concerning academic freedom, a topic of intense and appropriate public concern and interest. The Macomb administration deemed Prof. Bonnell's responses to the student complaint and to the administration's reactions to that complaint to be retaliation against the student for complaining, in violation of the anti-retaliation provisions of the sexual harassment code and in

violation of MacQueen's having warned him not to do so (hence guilt of insubordination as well as retaliation).

In sharp contrast, the court below found that Prof. Bonnell's going public with the contents of the complaint, having been careful to redact the identity of the complaining student, and his having distributed his parody, provided "necessary context" (R. 75 Opinion 43, APX ___) for his being able to raise the First Amendment issue among his students, his colleagues, and the members of the public whose tax money supported the institution. There was no "breach of confidentiality" involved in Prof. Bonnell's conduct; instead, he was suspended entirely because of his use of language in the classroom to which the administration (and two student complainants) objected. (R. 75, Opinion 44, APX ___)

To summarize the analysis of the court below: What the appellants viewed as "retaliation," the court viewed as a wholly appropriate and constitutionally protected response to a student's effort to censor and to the administration's taking that effort seriously. Similarly, what appellants viewed as insubordination and a violation of confidentiality, the court viewed as an appropriate and protected contribution to a public debate on an urgent matter of legitimate public interest.

B. PROF. BONNELL'S CLASSROOM SPEECH AND HIS SUBSEQUENT COMMUNICATIVE ACTIVITY AIMED AT VINDICATING HIS, AND PROTECTING HIS AND OTHERS' RIGHT TO ENGAGE IN FREE SPEECH IN THE CLASSROOM, ARE CLEARLY PROTECTED BY THE FIRST AMENDMENT, AND THE USE OF 'SEXUAL HARASSMENT' CODES TO SQUELCH THAT SPEECH CONSTITUTES A PROHIBITED OBLIQUE ATTACK ON THE FIRST AMENDMENT.

1. The Invalidity of Speech Codes, and the Non-applicability, To Campuses of Higher Education, of Verbal "Hostile Environment Harassment" Rules Devised and Upheld for the Workplace.

In recent years, there has been some confusion as to some of the controlling legal concepts for drawing the line between prohibited and protected verbal activity on campuses of higher education. Proponents of speech codes, more recently denominated as "harassment codes," have generally sought to justify the adoption of such campus legislation under one of two rubrics -- either banning "offensive speech" and "fighting words" under the claimed authority of Chaplinsky v. New Hampshire. 315 U.S. 568 (1942), or, more recently, prohibiting "sexual harassment" by means of the expression of language deemed so offensive to women so as to create a "hostile educational environment," thereby supposedly making it more difficult for women to take full advantage of what the college has to offer. The former formulation fell out of favor when three such speech codes were challenged in court and all three were declared unconstitutional. See UMW Post v. Board of Regents of the University of Wisconsin, 774 F.Supp. 1163 (E.D. Wisc. 1991); Doe v. University of Michigan, 721 F.Supp. 852 (E.D. Mich. 1989; Robert J. Corry, et al. V. The Leland Stanford Junior University, et al., Case No. 740309, Superior Court, State of California, County of Santa Clara, Order on Preliminary Injunction, February 27, 1995.(3) See also Nadine Strossen, "Regulating Racist Speech on Campus: A Modest Proposal," 1990 Duke Law Journal 484.

However, the effort to censor otherwise constitutionally protected speech has of late been predicated not upon the notion that "offensive speech" *per se* may be directly banned, but rather on the theory that speech that offends women (and, on the typical campus, other "protected groups" as well) may -- indeed, must -- be banned under the rubric of protecting female students from "sexual harassment" that creates a "hostile educational environment" that violates their civil rights by depriving them of comfortable, and hence full, access what the college has to offer.(4)

Despite the relative success of the "hostile environment verbal harassment" theory gaining hold in the workplace under Title VII, it is not true that these workplace standards have gained judicial approval for application to college campuses under the purported authority of Title IX of the Education Amendments

of 1972, 20 U.S.C. §§ 1681-1688 (1997). Nonetheless, this fallacious claim is repeatedly made, most recently in the Brief of Appellants that makes repeated reference to Macomb's obligations and liabilities pursuant to federal sexual harassment law, and to the college's "powerful interest fostering an atmosphere wherein students feel comfortable about asserting their civil rights." (Appellants' brief at 31) The MCCA *amicus* brief is even more explicit, in that it argues (at 1-4) that Title VII workplace sexual harassment law has been engrafted wholesale onto Title IX and that college campuses, like industrial companies, "must create and enforce anti-harassment policies in order to avoid liability for hostile environment discrimination...." (MCCA *amicus* brief at 2-3) An adjunct to the college's obligation to provide a "comfortable" atmosphere free from a "hostile environment", is the obligation to be certain that students complaining of violations are not made uncomfortable in doing so. (Id. at 3) "As a result, colleges not only have a right, but also an obligation to promulgate and enforce policies to protect their students from hostile environment sexual harassment by an employee" as well as "a duty for colleges to protect students from...retaliation by any college personnel following the filing of a sexual harassment complaint." (Id at 3)

This analogy between Title VII workplace rules and Title IX higher education campus rules breaks down completely, however, when its proponents seek to justify a college's punishing a faculty member or student for engaging in what otherwise would be constitutionally protected speech activity. The notion that workplace rules may be applied to pure speech uttered on a college campus is based upon a gross misreading not only of Title IX law, but also of controlling Supreme Court precedents.

It is true, as *amicus* MCCA asserts, that the Supreme Court in 1986 upheld the EEOC's power to issue its "hostile environment" regulations governing sexual harassment in the workplace. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). It is likewise true that in 1992 the Court held that Title IX was violated by a high school receiving federal funds when "a teacher sexually harasses and abuses a student" and the school does not take adequate preventive and ameliorative steps. MCCA *amicus* brief at 2, citing Franklin v. Gwinnett County

Public Schools, 503 U.S. 58 (1992). However, MCCA *amicus* fails to mention that Franklin involved a situation where a high school male teacher had coerced a student into having intercourse and where school authorities took no action to halt this conduct and discouraged the student from pressing charges. Franklin is hardly a "pure speech" case. It is likewise true that in a workplace, Title VII may be used to punish an employer for failing to take steps to stop sexual harassment in the form of offensive language of a sexual nature. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). There is, however, no appellate case under Title IX allowing, much less requiring, that a public college or university punish pure speech in our out of the classroom.

These three cases, taken separately or together, are therefore hardly precedent for the proposition that the administration of a public institution of higher learning has the power, much less the obligation, to censor a tenured faculty member when he utters germane sexually-oriented speech in a classroom that happens to disturb a female student who dubs it "sexual harassment." Nor are these cases precedent for the proposition that when the professor, pursuing his long-held intense interest in academic freedom, makes the matter public, releases the charges against him and writes an acerbic parody, he is subject to punishment.

Furthermore, it is assuredly not true that there is any reported federal appellate case that holds that an institution of higher education can be held liable, or can lose federal funds, because it protects rather than punishes the use of even the most offensive language when that language is not associated with prohibited activity (such as *quid pro quo* extortion of academic favors for sexual favors, or threats, or unwanted physical groping or other such assaultive activity). Indeed, extensive anecdotal experience demonstrates that it is the colleges and universities that have sought to punish protected speech under the rubric of preventing "sexual harassment" that have opened themselves up to liability and have had to settle for sometimes large sums when sued.(5) In stark contrast, the undersigned *amicus*, notwithstanding extensive research, has not found a single reported federal appellate opinion that has imposed liability on a college because it has protected, rather than punished, speech (in contrast to conduct) under the rubric "hostile environment sexual harassment" or, for that matter, any rubric

whatsoever.

The reason for this becomes apparent when one examines recent Supreme Court precedents dealing with oblique assaults on First Amendment protected activity.

2. Oblique Attacks on First Amendment Protected Activity Have Been Decisively Turned Back by the United States Supreme Court in Recent Years.

Just as "the rose by any other name would smell as sweet,"(6) an assault on the First Amendment, no matter how disguised, is unconstitutional, and hence numerous oblique schemes have been decisively repelled in recent years by a unanimous Supreme Court. A brief review of these cases demonstrates that the Court would not tolerate any scheme by which a professor in a public institution of higher learning could be punished for engaging in even the most offensive and disgusting sexually-oriented language in the context of an English literature class where, as the court below has found, the language is germane to the subject of the class. Nor would the Supreme Court tolerate punishment for the professor's "retaliation" or "insubordination" where that retaliation and insubordination consist of the professor's engaging in a discussion with his students, his colleagues, and his fellow taxpayers whose funds support public colleges, on the paramount importance of academic freedom in higher education.

Three recent cases are of particular relevance.

The Hustler Magazine v. Falwell "intentional infliction" case

In the early 1980s, well-known minister, commentator, and socially conservative leader the Rev. Jerry Falwell sued his polar opposite, Larry Flynt and Flynt's *Hustler* Magazine, charging invasion of privacy, libel, and intentional infliction of emotional distress. This arose from a parody in the form of a mock interview in which Rev. Falwell disclosed "that his 'first time' was during a drunken incestuous rendezvous with his mother in an outhouse." The parody, stated the Supreme Court, "portrays [Falwell] and his mother as drunk and immoral, and

suggests that [Falwell] is a hypocrite who preaches only when he is drunk." Hustler Magazine v. Falwell, 485 U.S. 46, 48 (1988). The jury found in Falwell's favor, but the only claim that survived for Supreme Court review was that for intentional infliction of emotional distress, for other claims having been thrown out on First Amendment grounds.

Chief Justice Rehnquist's opinion for a unanimous Court(7) made clear that parody, no matter how offensive and painful, is protected:

[Falwell] argued, however, that a different standard should apply in this case [than in a traditional libel case] because here the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication.... In [Falwell's] view..., so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict emotional distress, it is of no constitutional import whether the statement was a fact or an opinion or whether it was true or false. It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Hustler Magazine v. Falwell, 485 U.S. at 50-51.

The Court went on to hold that the parody was protected, regardless of the rubric of the legal attack mounted by Falwell:

In Garrison v. Louisiana, 379 U.S. 64 (1964), we held that even when a speaker or writer is motivated by hatred or ill-will, his expression was protected by the First Amendment....

Were we to hold otherwise, there can be little doubt that political cartoonists and

satirists would be subjected to damages awards without any showing that their work falsely defamed its subject.... The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events -- an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided.

Hustler Magazine v. Falwell, 485 U.S. at 53-54.

Hence, the case had to be analyzed not under the rubric of tort law, but under the principles attendant to First Amendment law. Citing FCC v. Pacifica Foundation, 438 U.S. 726 (1978), the Court noted:

The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, the consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.

Hustler Magazine v. Falwell, 485 U.S. at 55-56.

The "pornography as civil rights violation" case

In 1985, Judge Frank Easterbook of the U. S. Court of Appeals for the Seventh Circuit wrote the panel's opinion in American Booksellers Association, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985). The City of Indianapolis had enacted an anti-pornography ordinance that claimed to protect women from the "subordination" encouraged by pornographic imagery. The court saw through the ordinance's veneer of a "civil rights" law and described it more accurately as an effort to coerce a change in attitudes via censorship. Noting that supporters of the ordinance "say that it will play an important role in reducing the tendency of men to view women as sexual objects," the court concluded that it faced an insurmountable constitutional obstacle: It not only sought to alter attitudes, but it did so in a manner that discriminated by viewpoint, that is, favoring only "speech treating women in the approved way -- in sexual encounters 'premised on equality'." The First Amendment, the court ruled, prohibits the state from enforcing such ideological preferences through censorship.

Responding to the city's argument that pornography poisoned the atmosphere for women, the court rejected any "answer [that] leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us." The First Amendment permitted neither "thought control" nor an officially "approved view of women...."

When the city appealed to the Supreme Court, the Court accepted the case for review and affirmed summarily and unanimously the opinion of the Seventh Circuit. Hudnut v. American Booksellers Association, Inc., 475 U.S. 1001 (1986).

The St. Patrick's Day parade case

More recently, the Court dealt with another clever but equally futile oblique attack on free speech disguised as a civil rights measure. The South Boston Allied War Veterans had been authorized by the City of Boston to organize the annual St. Patrick's Day Parade. The Veterans Counsel had earlier refused to allow a gay rights organization, the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") to march under its own "gay pride" banner. The parade sponsors, who organized, paid for, and ran this private parade, again refused to

allow GLIB's message to compete with its own traditional "family values" message. GLIB sued, and the City sided with GLIB, claiming that Boston's "public accommodations" ordinance required that GLIB be given equal access to participation in the parade which it dubbed a public accommodation.

In a unanimous opinion written by Justice Souter, the Court in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995), held that the parade was an expressive event, not just a means "for a group of people to march from here to there...to reach a destination." The Court concluded that the Veterans Council had a right to have its parade reflect its chosen message. Justice Souter cited one after another decision from the civil rights struggles of the 60s and 70s, in which Dr. Martin Luther King, Jr. and his allies fought for the right to hold their own peaceful marches. Justice Souter noted that the First Amendment protects a variety of expressive and, to some, disturbing activities, including the rights to refuse to salute a flag, to wear an armband to protest a war, to march in uniform and display the swastika, and other such expressions. Hurley, 515 U.S. at 569.

The Court agreed that the Massachusetts public accommodations law "has a venerable history" in the protection of civil rights and that the state has the undoubted power to enact such legislation to assure equal access by its citizens to places of public accommodation. However, the Court went on to point out that basing a demand to limit the Veterans Council's First Amendment rights, in the name of equality of access to public accommodations, is to try to wring more out of civil rights laws than the First Amendment allows:

On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference. [However,]

when the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their

expression to whatever extent beneficiaries of the law choose to alter it with messages of their own.... Our holding today rests not on any particular view about the Council's message but on the Nation's commitment to protect freedom of speech. Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others.

Hurley, 557 U.S. at 578, 581.

* * * * *

The analogy of these three cases to the case at bar is obvious. Speech may not be abrogated by the government, regardless of how offensive it is or how much it deviates from the government's preferred social views. Speech may not be abrogated merely because the government claims to be enforcing civil rights or tort laws. It does not matter how the attack on free speech is styled; all that matters is that the assault seeks to abridge protected speech. All three cases were decided unanimously. Macomb Community College's position in the instant litigation has not the slightest chance of surviving Supreme Court review. There is likewise no basis for its surviving in this court.

3. Courts Must Be Exceptionally Vigilant To Protect First Amendment Rights On a Public Campus of Higher Learning Because Principles of Academic Freedom Join With Those of the First Amendment to Require an Elevated Level of Protection.

The modern Supreme Court has been remarkably consistent in its protection of even the most offensive speech. See, for example, Terminiello v. Chicago, 337

U.S. 1 (1949) (antisemitic ranting that "induces a condition of unrest" and "even stirs people to anger"); Street v. New York, 394 U.S. 576 (1969) (flag-desecration accompanied by the words "we don't need no damned flag"); Cohen v. California, 403 U.S. 15 (1971) (the words "Fuck the Draft" printed on the back of a young man's jacket, worn in a courthouse during the Vietnam War); Gooding v. Wilson, 405 U.S. 518 (1972) (the words "White son of a bitch, I'll kill you," uttered by a young man to a police officer at an antiwar protest at an army induction center); Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973) (the phrase "Motherfucker Acquitted" in a headline in a student newspaper, written by a graduate journalism student who was ordered reinstated in the university); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (cross-burning by white youngsters on the property of a black family, in violation of a city ordinance making it a crime to place "on public or private property a symbol...which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender").(8)

Any doubt that the First Amendment trumps Macomb's efforts to censor Prof. Bonnell on the basis of legal doctrines taken from the workplace regulatory arena, disappear when one examines the Supreme Court's enhanced First Amendment protection given to public campuses of higher education. The reason for this elevated protection is that people at such campuses enjoy not only the First Amendment protections granted ordinary citizens on the street and in their homes, but also the protections afforded by academic freedom.

Even a cursory examination of the Supreme Court's views on the role of academic freedom in First Amendment jurisprudence makes the point.

An alliance between the First Amendment and academic freedom took an important early step in 1957, with Sweezy v. New Hampshire, 354 U.S. 234 (1957), in which the Court, seeking to protect the sanctity of the teaching process from the depredations of the state's efforts to coerce professorial conformity and expressions of loyalty during the McCarthy era, reversed a professor's contempt citation. In so doing, the Court spoke in terms that made clear the majority's

displeasure with the intrusion into the teaching process as well as into the professor's conscience and views. It spoke of the "essentiality of freedom in the community of American universities" as being "almost self-evident." "To impose any strait jacket upon the intellectual leaders of our colleges and universities," warned the justices, "would imperil the future of our Nation." Sweezy, 354 U.S. at 250.

Even more dramatically, Justice Felix Frankfurter, himself an academic before joining the high court, wrote a concurring opinion in which he criticized the then-politically correct justification the state had asserted for wielding powers of inquiry and intimidation over academics -- the notion that interference with academic freedom could occur "in a limited area in which the legislative committee may reasonable believe that the overthrow of existing government by force and violence is being or has been taught, advocated or planned." This "governmental intrusion into the intellectual life of a university" created such "grave harm," Justice Frankfurter wrote, that this purported justification for repression was inadequate. He stressed "the dependence of a free society on free universities" and decried the state's "intervention...that inevitably tends to check the ardor and fearlessness of scholars." Sweezy, 354 U.S. at 261- 262.

Subsequent cases decided by the Supreme Court followed Justice Frankfurter's lead and adopted the rationale that First Amendment rights combined with academic freedom assure the highest level of protection to those on public college and university campuses. The landmark case came in 1967 in Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589 (1967) (struck down New York's teacher loyalty laws, noting that "our Nation is deeply committed to safeguarding academic freedom, [a] transcendent value to all of us and not merely to the teachers concerned," and decrying efforts to "cast a pall of orthodoxy over the classroom"). See also Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) (granting a degree of academic freedom protection, under the rubric of the First Amendment, even at the high school level); Healy v. James, 408 U.S. 169 (1972) (unanimously upholding the speech and associational rights of radical student members of a chapter of Students for a Democratic Society, observing that "state colleges and universities

are not enclaves immune from the sweep of the First Amendment" and "reaffirming this Nation's dedication to safeguarding academic freedom").

III. Conclusion

The Macomb Defendants-Appellants here are engaged in a massive defiance of the United States Supreme Court's jurisprudence with respect to protection of free speech and academic freedom on public campuses of higher education. They ignore as well the warnings of the writer George Orwell concerning the dangers inherent in distorting language to the point where words begin to mean their opposite.

Here, Prof. Bonnell, an experienced and accomplished tenured English professor has for years used challenging and, to some, disturbing language in his classroom germane to the subject matter, and he suddenly was punished for that language. When a subsequent complaint arose, the professor engaged the complaining student and the college administration, as well as his students, colleagues, and, eventually, members of the general public, with an intellectual riposte in which he used a variety of arguments, including "acerbic parody," to demonstrate how foreign and dangerous those attitudes were to free speech and academic freedom.

Remarkably, this attempt to educate the complaining student (even while not subjecting her to the humiliation of identifying her) is deemed "retaliation" and "sexual harassment" by the administration. The professor's refusal to keep quiet about the administration's efforts to censure and censor him for exercising academic freedom and his refusal to refrain from engaging in public debate on the subject, becomes "insubordination" and "breach of confidentiality." When Prof. Bonnell's students boycott the classroom from which he has been unconstitutionally removed, the professor is found guilty of "disruption of the educational process." This is the "Newspeak" of which Orwell prophetically warned. In a public academic setting, it is not retaliation, harassment, disruption or insubordination for a professor to engage a student, the administration, his colleagues, and the tax-paying public in a debate about academic freedom; rather, it is what is expected of our professors.

For the foregoing reasons, the injunctive and other relief granted by the court below, and the court's conclusion that Prof. Bonnell's activities were constitutionally protected, should stand.

Respectfully,

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, INC.

437 Chestnut St., Suite 200

Philadelphia, PA 19106

Amicus Curiae

By its attorneys,

_____

Harvey A. Silverglate (MA Bar #462640)

Silverglate & Good

83 Atlantic Avenue

Boston, MA 02110

Tel. (617) 523-5933

Gerald K. Evelyn (P-29182)

645 Griswold, Suite 2000

Detroit, MI 48226

Tel. (313) 962-3500

1. Examples of conduct that might accurately be deemed prohibited and actionable "sexual harassment" on a college or university campus would include, for example, so-called *quid pro quo* harassment where a teacher offers to exchange good grades or letters of recommendation for sexual favors, or situations where an instructor insists on physically touching students who express objection to the familiarity that such conduct connotes, or where a professor imposes a different set of rules and standards on one or

more students on account of his or her gender, such as where the professor refuses to recognize the student(s) in class or insists that the student(s) sit in the back of the classroom. For anything approaching pure speech to be deemed actionable harassment one would have to posit a situation where the time, place or manner of delivery of the speech would constitute harassment within the common law definition of that term -- as, for example, where a professor puts his face to within an inch of the student's face and shouts epithets. In such an example, it is the manner of the delivery, rather than the content of the message, which makes it actionable and removes it from the category of constitutionally protected speech.

2. The court below quotes Prof. Bonnell's explanation for how and why his use of such language is germane, (R. 75 Opinion 6, APX ___), and the court concurs in the conclusion that the language was indeed germane (R. 75 Opinion 43, APX ___).

3. The speech code at Stanford was declared unconstitutional, even though it is a private rather than a public university, because the California legislature enacted a statute providing that free speech rights that are protected on public campuses by the state and federal constitutions would hence forth apply on private campuses of higher education as well. For more background in the legal battle against "offensive speech" codes on campuses of higher education, see Alan Charles Kors and Harvey A. Silverglate, *The Shadow University: The Betrayal of Liberty on American's Campuses* (New York: The Free Press, 1998), particularly Chapter Four. See also Nadine Strossen, "Regulating Racist Speech on Campus: A Modest Proposal," 1990 Duke Law Journal 484.

4. The ideological, historic and legal basis for the claimed power to ban "harassing" speech on college campuses is explained more fully in Kors and Silverglate, *The Shadow University, supra*, especially in Parts I and II.

5. Many of these cases and examples are collected in Kors and Silverglate, *The Shadow University, supra*, especially Chapter 7.

6. Shakespeare, *Romeo and Juliet.*

7. Justice Kennedy had recused himself, leaving an eight-member Court to decide the case.

8. In R.A.V., every member of the Supreme Court agreed that the ordinance was unconstitutional, and a five justice majority singled out, as the controlling ground, that government has no power to use the criminal law in order to aid one side of a hot-button social or political issue or viewpoint. The applicability of this doctrine to efforts to use "hostile environment/sexual harassment" regulations and codes in order to ban "offensive speech" on the basis of gender, on a public campus of higher education, is too obvious to belabor.

Back to Top

Back to FIRE Home