



Foundation for Individual Rights in Education

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TESTIMONY OF GREG LUKIANOFF, J.D.
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Mr. Chairman and members of the Committee:

My name is Greg Lukianoff, and I am the director of legal and public advocacy for the Foundation for Individual Rights in Education, commonly known as FIRE. For four years now, FIRE has been fighting for free speech and academic freedom on college and university campuses across the nation, following through on the analysis and recommendations contained in a book written by FIRE's co-founders, Alan Charles Kors and Harvey A. Silverglate—*The Shadow University: The Betrayal of Liberty on America's Campuses*. Prior to working for FIRE, I was unaware of how common serious violations of students' basic free speech rights are on today's campuses. Since working at FIRE, however, I have witnessed hundreds of cases in which private and public universities have demonstrated a distressing disregard for free speech. FIRE has come to the defense of anti-war protestors, pro-war demonstrators, satirists, political activists from across the political spectrum, student newspapers, and students and faculty who often have done little more than criticize an administration or its policies, or who have tried constructively and peaceably to address pressing social or political concerns.

While violations of basic expressive rights are always troubling, it is especially disturbing when they take place at our colleges and universities—institutions that depend on an open exchange of ideas in order to fulfill their most basic mission. Colleges and universities should be the institutions where individuals enjoy the greatest possible free speech rights. Sadly, students and faculty too often have to fight for the right to express opinions that citizens outside of academia would simply take for granted as enjoying full legal protection.

Despite the protections of the First Amendment at public universities and the powerful statements of commitment to free speech and academic freedom at most private liberal

arts colleges and universities, many campuses still promulgate speech codes. You may wonder what we mean by “speech codes.” FIRE defines a speech code as any campus regulation that punishes, forbids, heavily regulates, or restricts a substantial amount of expression that would be protected in the larger society. Our definition is straightforward and applies to all university policies whether they call themselves “speech codes” or not. In contrast to the way that such codes were put into effect during their heyday in the late 80s and early 90s, colleges today are loath to label their policies “speech codes” even when they restrict or forbid clearly protected speech. This may be a result of a series of court cases in which university speech codes were struck down as unconstitutional, or perhaps it is a reaction to public relations disasters that were generated by early attempts to regulate student speech.

But make no mistake, as Harvey Silverglate and I explain in our attached article, speech codes are alive and well on college campuses.

The current generation of speech codes come in many shapes and sizes, including but not limited to e-mail policies that ban “derogatory comments,” highly restrictive “free speech zone” policies, “diversity statements” with provisions that outlaw “intolerant expression,” and so-called “harassment policies” that extend to speech that may “insult” or “demean.” While they may not call themselves “speech codes” anymore, a speech code by any other name still suppresses speech.

FIRE has been combating speech codes as a part of its general operations for the last four years. We have come to the defense of thousands of individuals who have been the victims of rules and regulations that should have no place on our campuses. Drawing from that experience, we decided to undertake a colossal program that seeks to catalog the restrictive speech policies on every college and university campus across the country. The preliminary results of this massive research undertaking can be found on a public website, speechcodes.org. The website—which, according to our research, is current through this past summer—now features nearly 200 hundred public and private colleges and universities. FIRE has rated each of the non-sectarian universities using a “lighting scheme”: green lights indicate that we found no policy that seriously imperils speech; yellow lights indicate that a university has some policies that could ban or excessively regulate protected speech; and red lights are awarded to universities that have policies that ban a substantial amount of what would be clearly protected speech in the larger society. Of 176 rated universities only 20 have earned green lights, while 80 earned yellows. A distressing 76—forty-three percent of the institutions rated—earned red lights.

Some of these red light policies are truly bizarre. For instance, Hampshire College in Massachusetts bans “psychological intimidation, and harassment of any person or pet.” Others are almost quaint, like Kansas State University, which bans the use of “profane or vulgar language” when it is used in a “disruptive manner.” It has long been settled in constitutional law that free speech is not limited only to the pleasant or the pious.

Some codes are remarkably broad and vague, like that of Bard College in New York, which states, "It is impermissible to engage in conduct that deliberately causes embarrassment, discomfort, or injury to other individuals or to the community as a whole." By banning speech that "discomforts," Bard takes a position that has been adopted by many colleges and universities: valuing and promoting peace and quiet at the expense of robust debate and intellectual engagement. To be sure, politeness is a commendable value, but it simply does not compare in importance to unfettered debate and discussion in a pluralistic democracy. Furthermore, it is not the place of college administrators to force students to speak in any particular fashion. Civility should, perhaps, be inculcated when a student is young, by his or her elementary school teachers and by parents. In college, it should be learned by example. Furthermore, conditioning speech on civility virtually denies the existence of justified moral outrage.

Other codes define the "protected class" of the speech code so broadly as to ban even the most basic forms of free speech. The University of California-Santa Cruz, for example, warns against speech that shows "disrespect" or "maligns" on the basis of, among other categories, "creed," "physical ability," "political views," "religion," and "socio-economic status or other differences." One can only imagine what dreary places colleges would be if students weren't even allowed to express passionate political criticisms.

Still others dangerously trivialize society's most serious crimes in an effort to get at "offensive speech." Ohio University's "Statement on Sexual Assault," for example, declares that "Sexual assault occurs along a continuum of intrusion and violation ranging from unwanted sexual comments to forced sexual intercourse." One should be very concerned about any university that cannot make a principled distinction between loutish comments and rape.

Most colleges, however, rely on this strategy: they redefine existing serious offenses to include protected expression. Hood College in Maryland, for example, defines "harassment" as "any intentionally disrespectful behavior toward others." While "disrespectful behavior" may be rude, it certainly does not rise to the level of the crime of harassment. No one denies that a college can and should ban true harassment, but hiding a speech code inside of a "racial-harassment code," for example, does not thereby magically shield a college or university from the obligations of free speech and academic freedom.

A particularly pernicious brand of speech code goes beyond punishing what one says and extends to what one feels, thinks, or believes. Transylvania University in Kentucky bans "oral, and written actions that are intellectually... inappropriate" if they touch upon a broad list of protected classes. Florida State University's "General Statement of Philosophy on Student Conduct and Discipline" states, "Since behavior which is not in keeping with standards acceptable to the University community is often symptomatic of attitudes, misconceptions, and emotional crises, the treatment of these attitudes, misconceptions, and emotional crises through re-education and rehabilitative activities is an essential element of the disciplinary process." All citizens should be very

concerned when state universities, which often offer only a bare minimum of due process, take upon themselves the “re-education” of adult students and empower themselves to compel correct “attitudes.” That is not worthy of a free nation.

Another kind of speech code is the so-called “speech zone” policy, which limits protests, debates, and even pamphleteering to tiny corners of campus. FIRE has identified or fought these policies at over two dozen public universities. Until this past summer, Western Illinois University provided students with only one “Free Speech Area.” This area was only available during business hours and had to be reserved five days in advance. Even within the “Free Speech Area,” additional speech restrictions applied. Until FIRE intervened, Texas Tech University—a school with 28,000 students—provided only one 20-foot-wide gazebo to be used as a “Free Speech Area.” Protests, demonstrations, pamphleteering, speeches, and even the distribution of newspapers had to receive prior, official approval if they were to occur outside of the “free speech” gazebo and requests had to “be submitted at least six university working days before the intended use.”

Texas Tech has since expanded the number of speech zones on campus, but FIRE continues to fight, along with a broad coalition that includes the Alliance Defense Fund in the courts and a new student group called Students for Free Speech on the ground. We are determined to make Texas Tech grant its students the full freedoms that students at an institution of higher learning deserve—not just the bare legal minimum.

Lest anyone think that these speech codes might not be such a threat if they are applied judiciously and fairly, they need only consult our website at www.thefire.org. In the past year alone we have seen dozens of examples of blatant violations of the free speech rights of students and faculty members. At Harvard Business School, an editor was threatened with discipline for publishing a mildly critical political cartoon. We continue to work on behalf of a professor who was fired for “faithlessness and disloyalty” for daring to criticize the policies of the president of Shaw University in North Carolina. At California Polytechnic State University we came to the assistance of a student who had been subjected to a seven-hour hearing and found guilty of disruption for posting an “offensive” flier advertising an upcoming speech by a black conservative. The flier only contained information about the speech, the name of the speaker’s book, and a photo of the speaker. FIRE is currently helping a fifty-five-year-old grandmother who is a student at SUNY Suffolk and has been found guilty of “harassment” and “intimidation” for using a single profanity in an e-mail accidentally sent to a professor. At Roger Williams University in Rhode Island, just within the past few weeks, administrators froze an entire year’s worth of printing funds for a student newspaper, *The Hawk’s Right Eye*, when it published number of controversial articles. At this very moment, FIRE is involved in half a dozen other cases involving serious infringements upon the free speech rights of students and faculty, and these cases keep on coming.

Free speech is not, nor should it ever be, a partisan issue. Part of the brilliance of our form of government is that it binds the rights of each individual to the rights of all citizens. As a society, we only enjoy the rights that the least of us receive. Therefore,

all of our rights depend on the protection of even the most controversial or “politically incorrect” of us—and, rest assured, the definition of “political correctness” changes dramatically over time. However, since colleges and universities recognize that if they were really to ban all speech that offends anyone all colleges and universities would be reduced to silence, they often apply their speech restrictions with an unconcealed double standard.

While it has been FIRE’s experience that students and professors with orthodox religious views, conservative advocates, and bold satirists are more likely than others to be censored under the current campus climate, we all have a common interest in the free speech of our nation’s students. While it may be the more conservative students who today feel the brunt of speech codes on campuses, it was only a generation or two ago when the shoe was on the other foot and liberal students bore that burden. The problem is censorship, pure and simple. The group that bears the brunt of censorship at any given moment in history is of academic interest, but the existence of censorship that can silence you one year and your opponent the next is the ongoing problem. Not only are all students affected by these overbroad policies—and students of every political stripe are punished if they cross certain, often arbitrary, lines—but everyone suffers when any side of an important debate is stifled, silenced, or otherwise quashed.

And make no mistake about it, the war for free speech is often not ideological at all. Campus censorship is quite often a simple, naked exercise of power. For example, at Hampton University in Virginia, the entire press run of last week’s *Hampton Script* was confiscated by administrators who were angry about the paper’s refusal to run a letter from the university’s acting president on the front page. College and university administrators too often view criticisms of their policies as tantamount to sedition. Furthermore, many administrators censor viewpoints not to achieve an ideological purpose or ideological homogeneity, but rather to avoid having offended students conduct noisy demonstrations that embarrass the administration. But this kind of “trouble”—loud, vociferous, and often unruly dissent—is indispensable to higher education; it is not an embarrassment or an inconvenience that needs to be stamped out. American freedom may occasionally be more troublesome than the order that exists in a police state, but it is our most precious birthright.

As noted earlier, if there is one constant in the history of free speech, it is that the censored of one generation often become the censors of the next. This vicious cycle of censorship teaches citizens to take advantage of any opportunity that they have to silence those on the other side. Students educated in this environment can hardly be blamed if they come to view speech as little more than a tool that one must do their best to deny their enemies, rather than as a sacred value. That is a terrible threat to American liberty.

FIRE hopes that we can put an end to this vicious cycle of censorship with this generation. With the help of a coalition of individuals and organizations from across the political spectrum, we can teach the current generation that a free society’s cure to “bad” speech is more speech.

It is important to mention, however, that there are grave dangers that you must avoid in congressional involvement to return free speech to campus or through any other attempt to legislate an expansion of intellectual diversity. Well-intentioned legislation designed to protect the interests of different groups of students is all too often used as an excuse for censorship. For example, the sexual harassment regulations issued by the Office for Civil Rights of the Department of Education (OCR) have been abused and misinterpreted so commonly to justify regulations that punished merely “offensive” speech that the OCR decided it needed issue a letter of clarification this past summer. This letter of clarification stated what one might think would be a self-evident point: no federal regulation may be used as a justification for denying students or faculty the free speech rights that are protected under the First Amendment. The OCR incident is only the most recent example of how regulations that were passed with the best of intentions can be turned into weapons of censorship.

History shows that efforts to control either speech or the content of speech almost always result in abuse, leading to the suppression of unpopular ideas or opinions. Any bill that would ban “indoctrination” on campus, for example, or that would promise “unbiased teaching,” could too easily result in a nightmare of abuse and suppression as different sides fight to label the other sides’ arguments as “indoctrination” and their own as simply “truth.” The best way for Congress to ensure intellectual diversity on campus is simply to work to remove the often unlawful restrictions on speech that currently exist. When students and faculty do not have to fear punishment for expressing their deeply held beliefs—no matter how outrageous or unpopular—greater intellectual diversity will result.

Yet any such legislation should be crafted with great care so as to avoid undue governmental control of or influence over institutions of higher learning, particularly at private institutions. Legislation should remind public universities that they have not only a moral, but also a legal duty to protect rather than infringe upon free speech, and that speech restrictions that would be unconstitutional in the outside world are likewise unconstitutional on public university campuses, regardless of whether or not administrators believe that such restrictions would advance other values. Legislation affecting private colleges should avoid imposing the same obligations that are imposed on public campuses, since true diversity requires that private institutions be allowed to deviate and vary from the norm. What would be most helpful would be legislation that simply required private institutions to fulfill whatever promises they make in their catalogues and literature. Thus, if a private college promises intellectual diversity and academic freedom, it should be required to deliver it. FIRE is in favor of true disclosure and of private institutions living up to their promises and assurances, rather than of governmental efforts to dictate the values to which such institutions should be dedicated. If ABC College says that it is a liberal arts institution devoted to academic freedom, then it should deliver this or else be held accountable for breaking its contractual assurances to its students. Fraudulent inducement is not a part of academic freedom.

While any remedial action should be considered carefully and thoroughly, the cost of leaving things as they are is too high. One chilling example of how poorly free speech is understood and how little it is respected in higher education today is the phenomenon of newspaper thefts. For over a decade in at least five dozen documented instances, students have stolen and destroyed tens of thousands of copies of student-run newspapers on colleges and universities across the country in an effort to silence viewpoints with which they disagree. In some cases these newspapers were thrown out, and—in at least a half dozen cases—they were burned. I hope I do not need to remind you of the fate of societies of the previous century when they began burning books. In fact, this form of mob censorship has become so commonplace that this month the Berkeley City Council passed an ordinance making newspaper theft illegal. This was in part a response to an incident involving Berkeley's current mayor, Tom Bates, who stole 1,000 copies of a student newspaper after it endorsed his opponent in the mayoral race. With those in power teaching the current generation these kinds of lessons about free speech, how can we expect them to defend their own basic rights when they are threatened? It would truly be a terrible thing to have a whole generation of students so unfamiliar with their basic liberties that they would not even know if they lost them.

Thank you.

Addenda:

"Speech Codes: Alive and Well at Colleges..." by Harvey A. Silverglate and Greg Lukianoff.
http://www.thefire.org/offsite.php?page=chronicle_080103.htm