FREE SPEECH: THE BASICS

What is Speech?

The First Amendment declares that Congress shall make "no law…abridging the freedom of speech." Read quite literally, the amendment would seem to protect speech only—and not the various forms of *conduct* that can communicate a message. For many years, states and other governmental entities used the distinction between speech and conduct to argue, for example, that waving a flag was not protected "speech" or that wearing a jacket with a protest message was unprotected "conduct."

However, the Supreme Court has consistently held the First Amendment to protect much more than mere "words." As the Court noted in the famous case of *Cohen v. California* (1971), the amendment protects not just speech but "communication." In that case, an antiwar

protester wore a jacket in the Los Angeles County Courthouse that used a vulgar profanity to express his objection to the draft. The State of California prosecuted the protester for "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person …by…offensive conduct." The Court rejected California's argument that it was merely regulating the protester's conduct and noted that "the only 'conduct' which the State sought to punish is the fact of communication. Thus we deal with a conviction resting solely upon 'speech.'"

With the First Amendment understood in such terms, it should not be surprising that our courts have held that this amendment protects a dizzying array of communicative activities. Speech has been broadly defined as an expression that includes, but is not limited to, what you wear, read, say, paint, perform, believe, protest, or even silently resist. "Speech activities" include leafleting, picketing, symbolic acts, wearing armbands, demonstrations, speeches, forums, concerts, motion pictures, stage performances, remaining silent, and so on.

Further, the subject of your speech (or communication) is not, contrary to widespread misunderstanding, confined to the realm of politics. The First Amendment protects purely emotional expression, religious expression (see box), vulgarity, pornography, parody, and satire. (Some of these forms of expression, of course, can constitute political speech.) Your speech, to enjoy constitu-

RELIGIOUS EXPRESSION

Religious students who are vaguely aware of constitutional protections often think that their rights are protected solely by the so-called Free Exercise Clause of the First Amendment—the portion of the amendment that protects individuals and groups from government interference in the free exercise of their religion. The Supreme Court, however, has long held that purely religious speech is protected by the Free Speech Clause as well. As the Court eloquently noted in the case of *Capital Square Review and Advisory Board v. Pinette* (1993), "In Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince."

tional protection, does not have to be reasoned, articulate, or even rational, much less polite.

Although the distinction between pure speech and conduct is vital, the law always has recognized that there are circumstances where the expression of words for certain purposes is prohibited. In fact, there is some speech that can be prohibited precisely because it coerces or causes specific conduct. For example, statements such as "Sleep with me or you'll fail this course," when made by professor to student, or "Your money or your life," when

made by an armed individual, are not constitutionally protected. Despite being "speech" within the common meaning of the term, these statements are considered to be merely an incidental part of the commission of an illegal act, such as a threat.

Indeed, the speech protections of the First Amendment are so very broad that it is much easier to grasp the full scope of the First Amendment by noting the limited exceptions to its rule—areas of speech (expression) that are *not* protected by it— than by attempting to list all of the conceivable communications that the First Amendment protects. In the sections that follow, this *Guide* will briefly describe the limited categories of so-called "unprotected speech."

COMMERCIAL SPEECH

Many campuses strictly regulate so-called "commercial speech." Commercial speech refers primarily to advertising, or speech with the purpose of initiating or engaging in a business transaction of some kind. Commercial speech has a unique status in constitutional law. While not entirely unprotected, it explicitly enjoys less protection than other forms of speech. Therefore, even a public university has an increased—but certainly not unlimited—power to regulate commercial as opposed to noncommercial speech.

Beware of school administrators who attempt to limit speech or communication to only those ideas or thoughts that are not "offensive," "harassing," or "marginalizing." They may try to argue that your speech is less worthy of protection because, from their perspective, it is not "constructive," it does not "advance campus dialogue," or it is "hateful" or detracts from "a sense of community." As this *Guide* makes clear, if your only goal is to express an opinion or idea (no matter how bizarre or unsettling that opinion strikes others), that expression is protected by the First Amendment from governmental interference.

Categories of Unprotected Speech

As noted earlier, the First Amendment's Free Speech Clause covers a remarkably wide range of communicative acts, conferring protections on individuals and actions as diverse as a preacher denouncing immorality from the pulpit, an erotic dancer, or a political demagogue. Not all communicative acts, however, are protected by the Constitution. Some limited categories of speech receive, in fact, no constitutional protection at all. Because college administrators will at times invoke—sometimes out of a genuine misunderstanding of the law— these extremely limited categories of expression to justify bans on controversial (or even just inconvenient) speech, it is critical for students and university officials to

understand the real boundaries of the limited categories of truly unprotected speech.

"Fighting Words"

Among the kinds of speech that are not constitutionally protected are so-called "fighting words," words that by the very act of being spoken tend to incite the individual to whom they are addressed to fight—that is, to respond violently and to do so immediately, without any time to think things over. This doctrine is old, and for many observers, it has been so deeply contradicted by a number of later Supreme Court cases as to be essentially dead. However, the Supreme Court continues to pay lip service to the doctrine (despite the fact that the Court has not upheld a single fighting words decision since deciding the original case of *Chaplinsky v. New Hampshire* [1942], the source of the fighting words doctrine).

Even if we accept fighting words as a viable legal doctrine, there is much confusion in popular understanding about the very term. After all, if there is no such thing as a permissible "heckler's veto" (see box) under the First Amendment, then how can a speaker be guilty of uttering fighting words likely to provoke a violent response? Is it not the obligation of law enforcement authorities to apprehend the violent responder, rather than to arrest the speaker? Fortunately, fighting words is an exceedingly narrow category of speech, encompassing only face-to-

The Heckler's Veto

Allowing people to be punished because of the hostile reactions of others to their speech creates what is called a "heckler's veto." In such a situation, a member of the audience who wants to silence a speaker would heckle the speaker so loudly as to make it impossible for the speaker to be heard. Similarly, someone wishing to ban someone else from speaking would threaten a "breach of the peace" (a disruption of public order) if the speaker were to continue speaking, and the authorities, rather than discipline or arrest the heckler, would remove the speaker. If a society were to restrict speech on the basis of how harshly or violently others reacted to it, there would be an incentive for those who disagree to react violently or at least to threaten such violence. This would confer a veto on speech to the least tolerant, most dangerous, and most illiberal members of society, which obviously would result in a downward spiral to mob rule.

The issue of the heckler's veto arises most commonly when people are charged with violating laws that prohibit a breach of the peace. For example, in the Supreme Court case of *Terminiello v. Chicago* (1949), a lecturer was charged with violating a city breach of the peace ordinance after an angry crowd of about 1,000 people gathered outside the auditorium in which he was speaking. The trial judge instructed the jury that it could find the

speaker guilty of effecting a breach of the peace if he engaged in "misbehavior" that "stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance...." His guilt, therefore, hinged not on the content of his speech, but on the crowd's reaction to his speech. The Supreme Court overturned the speaker's conviction, ruling that the ordinance was unconstitutional. Speech, the Court held, "best serves its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

When, however, hecklers present a clear and present danger of creating immediate riot or disorder, the police may ask a speaker to stop speaking, at least temporarily. For example, in *Feiner v. New York* (1951), the Supreme Court upheld the disorderly conduct conviction of a soapbox speaker who refused to end his address after the police asked him to do so because they reasonably believed there was a threat and danger of riot. In a sense, a speaker's insistence in going forward in the face of uncontrollable violence could be seen as speech delivered at an inappropriate time and place. The same speech, delivered just a few minutes later or in a somewhat different place, might be once again fully protected. As we shall see later, *reasonable time*, *place*, *and manner* restrictions may lawfully be imposed on speech, even while the authorities may not *control* the content of that speech.

face communications that obviously would provoke an *immediate* and violent reaction, such that both the speaker and the provoked violent listener would be in violation of the law. Underlying this doctrine is the assumption that there are some confrontational situations in which there is not the slightest possibility that the listener will think things over and respond to the speaker with words rather than with violence.

Proponents of campus speech codes have used a deliberately distorted interpretation of fighting words to justify restrictions on speech that is obviously constitutionally protected. While many college speech codes purport to limit their coverage to fighting words, they interpret this category, in fact, far more broadly than the First Amendment would ever allow.

THE FIGHTING WORDS DOCTRINE: A SOURCE OF CONFUSION

The confusion over the fighting words doctrine has its origins in the 1942 case of *Chaplinsky v. New Hampshire*. In that case, the Supreme Court examined the constitutionality of a New Hampshire law that, though seemingly broad in scope, had been narrowly interpreted by the state court. The text of the law prohibited a person from addressing "any offensive, derisive or annoying word to any other person." This definition would, of course, include a great deal of constitutionally protected speech. The New Hampshire Supreme Court, however, had

interpreted the law to forbid only speech with "a direct tendency to cause acts of violence by the persons to whom, individually, [it] is addressed." Because the Supreme Court looks at state laws as state courts have interpreted them, the law that came before the Justices (as we call, with a capital "J," the judges of the Supreme Court) was a narrow (or narrowly *interpreted*) one. The Court ruled that this law, narrowly understood, did not infringe on free speech, and it held that words that provoke an individual immediately to fight do not deserve constitutional protection.

Elsewhere in the decision, however, the Court defined fighting words in an imprecise way, stating that they are words that "by their very utterance" (1) "inflict injury," or (2) "tend to incite an immediate breach of the peace." This definition is, unfortunately, the part of the decision most frequently quoted today. The quote is significantly more expansive than *Chaplinsky's* actual holding. (The "holding" is the actual rule announced by a court opinion.) The definition includes words that don't tend to provoke a fight, but merely "inflict injury" (a large category of speech indeed, if "injury" is defined to include psychological harm). Later Supreme Court cases, however, have made clear that, despite the unfortunate loose definition of *Chaplinsky*, the fighting words exception applies only to words that actually tend to provoke an immediate violent fight.

In the years since *Chaplinsky*, even this definition of fighting words has been narrowed by the Supreme Court and by other state and federal courts. Presently, in order to be exempt from First Amendment protections, fighting words must be directed at an individual, and that person must be someone who realistically might actually fight. Addressing outrageous words to a policeman, for example—the case in *Chaplinsky*—is constitutionally protected, since a policeman is assumed to have the professionalism and self-control not to respond violently. This clearly shows a major shift from the opinion in *Chaplinsky*, which upheld the conviction of a protester who called a police officer a "fascist." As the law is understood today, it is obvious that a citizen calling a policeman a "fascist" is protected by the First Amendment.

FIGHTING WORDS ON CAMPUS

The law has clearly limited the fighting words exception to those words that would tend to provoke the individual to whom they are addressed into responding immediately with violence. Since *Chaplinsky*, the Supreme Court has not found a single case in which it deemed speech to be sufficiently an instance of fighting words that could be banned. The category of fighting words, thus, is alive far more in theory than in any actual practice.

Universities, however, have used an intentionally

overexpansive interpretation of the fighting words doctrine as a legal justification for repressive campus speech codes, as if the college or university were populated not by students and scholars, but by emotionally unstable hooligans. For example, in unsuccessfully trying to defend its speech code from legal attack in the important case of *UWM Post v. Board of Regents of the University of Wisconsin* (1991), the University of Wisconsin argued that racial slurs should fall under the fighting words doctrine. The university conceded the obvious fact that speech that merely inflicts injury does not constitute fighting words, but it claimed that racist speech can still qualify as fighting words because it could provoke violence. The university argued that it is "understandable to expect a violent response to discriminatory harassment, because such harassment demeans an immutable characteristic which is central to the person's identity."

In striking down the speech code, the United States District Court for the Eastern District of Wisconsin held that while some racist speech may of course promote violence, this could not possibly justify the university's prohibition on all racist speech: The doctrine of overbreadth (discussed in more detail later) says that the fact that a law may restrict some *narrow* category of *unprotected* speech, does not mean it may also restrict a great deal of *protected* speech.

In sum, the fighting words doctrine does not allow, as the University of Wisconsin learned, prohibition of

speech that "inflicts injury." College administrators who seek to justify speech codes by citing the fighting words doctrine demean not only the minority groups deemed incapable of listening peacefully to upsetting words and ideas, but demean as well the entire academic community. Moreover, their argument has failed in *every* court in which it has been made. A student on a campus of higher education, just like any average citizen in a free society, is entitled, in the words of the childhood rhyme, to protection from "sticks and stones," but not from "words." Free people have much recourse against name-callers, without calling upon coercive authority.

Causing a Riot: The Incitement Doctrine

One form of constitutionally unprotected speech is "incitement"—speech that provokes unlawful action. While administrators may try to paint certain kinds of student speech or advocacy as illegal incitement, it takes very extreme and specific speech added to serious actions to meet this standard. In other words, unless you have actually incited a riot, chances are your speech was not incitement in any legal sense. In *Brandenburg v. Ohio* (1969), the Supreme Court held that, in order to qualify as punishable incitement, the speech must be "directed to inciting or producing imminent lawless action and is

likely to incite or produce such action." That case involved a rally and speeches by members of the Ku Klux Klan, who suggested that violence against blacks and Jews might be appropriate to protect white society. Thus, the mere advocacy of violence was protected, as long as the speaker took no actual steps towards violence.

The Court's stance was reconfirmed in *Hess v. Indiana* (1973). Hess involved a Vietnam War protester who allegedly threatened, after a demonstration was broken up by authorities, that "We'll take the fucking street later." The Court overturned his conviction, stating that Hess's "threat" "amounted to nothing more than advocacy of illegal action at some indefinite future time." The suggested illegal act, in other words, was not at all *imminent*. The typical example of speech that would be considered unprotected incitement would be urging a violent mob in front of City Hall to burn it down *now*. As John Stuart Mill argued in *On Liberty*, someone has the right to claim that grain merchants are thieves, but not to incite with those words an angry mob bringing torches to a grain merchant's home. If your speech is less extreme than these examples, it likely not punishable under the incitement doctrine, and if it is that extreme—literally leading a riot to destroy property—then you should hardly be surprised if the authorities intervene.

Obscenity, Indecency, and Pornography

There are yet further kinds of speech that are not protected by the Constitution. These include obscene speech—which can be loosely defined as "hard-core" depictions of sexual acts. You do not have a First Amendment right to produce, transmit, or even, in many situations, possess obscene material on campus. (The Supreme Court has made one exception—a citizen has a First Amendment right to possess adult obscene materials in the privacy of his or her home.) By contrast, material that is merely pornographic (designed to cause sexual excitement, but not so hard-core as to be obscene) or indecent (offensive or tasteless, but not obscene) enjoys essentially the same free speech protections available to all other speech, both on and off campus.

The government must give all of the traditional protections granted to other expressive activities to pornographic and indecent speech. The courts have long held that obscene material should not enjoy free speech protections, but they have not found it easy to differentiate between the obscene and the merely pornographic. The difficulty of drawing this line led to Justice Potter Stewart's famous quip that though obscenity may be indefinable, "I know it when I see it." Despite this, an experienced free speech litigator can frequently determine whether particular depictions, in a particular jurisdiction, might be deemed obscene.

In an attempt to define what Justice Stewart suggested cannot really be defined, the Supreme Court in *Miller v. California* (1973) outlined three questions that must be asked and answered to determine if particular material is obscene:

1) Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the "prurient interest" (an inordinate interest in sex)
2) Whether the work depicts or describes, in a patently offensive way, sexual conduct
3) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value

If the answer to each of these questions is yes, the material enjoys virtually no First Amendment protections, and the university may choose to regulate its transmission, communication, or sale. It is very important to note that the third prong of this test is considered an "objective" standard. Therefore, even if a sculpture, painting, or manuscript would be considered "prurient" and "patently offensive," it cannot be banned if the work has meaningful (as opposed to incidental) "literary, artistic, political, or scientific value." This prong has protected works of art ranging from D. H. Lawrence's *Lady Chatterly's Lover* to the movie *Carnal Knowledge*.

It is vital to emphasize, given a free society's interest in privacy, that the government may not criminalize the simple possession of obscene matter within one's home. (This is not so with material involving the sexual depiction or exploitation of children. See more on this in the next section.)

Indecent Speech

Since the sale or communication of obscene materials is often prohibited by criminal laws, it is also often prohibited on campus, just as the commission of any crime on campus is also a crime against the state. Public universities, however, cannot ban or punish merely indecent or pornographic speech. This principle derives from the Supreme Court case of *Papish v. University of Missouri* (1973), which concerned the expulsion of a journalism student from a state university for distributing a newspaper that contained indecent but nonobscene speech (among other things, the newspaper reproduced a political cartoon depicting policemen raping the Statue of Liberty). The Court held that the Constitution's protection of indecent speech applied to campus, and that the student therefore could not be disciplined: "The mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"

As a practical matter, the courts do allow for greater regulation of sexually explicit speech even when it is not obscene, but, in general, only under circumstances when exposure to such expression could be harmful to minors. Among consenting adults, only obscenity can be banned. It is, however, more likely that material might be deemed unlawful if it is positioned or displayed where passers-by (including children) might be confronted and affronted by it involuntarily. A racy art display, in other words, is more safely expressed in a college classroom or art museum than on a public billboard.

A warning note concerning child pornography: While the definition of punishable obscenity is rather narrow, and while the possession of obscene materials in the privacy of one's home is constitutionally protected, the rules are quite different for what is known as "child pornography." The Supreme Court has allowed state and federal governments to pass laws making it a crime not only to create or transfer, but even to possess—in the privacy of one's home or on one's private computer—sexually graphic depictions showing underage children in sexually provocative poses or activities. While *adult* pornography is constitutionally protected, *child* pornography (and, of course, child obscenity as well) enjoys no First Amendment protection.

Intentional Infliction of Emotional Distress

It is not a crime to do or say something that will cause another person severe emotional distress. The law, however, does recognize that people have a civil obligation not to inflict severe emotional distress on their fellow citizens *intentionally* and *without good reason*. Someone who disregards this obligation is said to have committed a tort, or private civil (as opposed to criminal) wrong. A person who has committed a tort is liable to the injured party for money damages determined by a court in a civil trial, much as a person who has injured another by his or her negligent driving is liable to pay money damages.

To prove intentional infliction of emotional distress in court, a person must first show that he or she suffered severe emotional distress and that the distress was a result of the defendant's intentional or reckless speech or conduct. Next comes the hard part: The plaintiff (the person suing) must show that the defendant's actions were "outrageous." The particulars vary from state to state, but the burden for proving outrageousness is always extremely high, especially in speech cases, because of the premium the Constitution places on free expression. **According to the guidelines many states have followed in crafting their tort law, conduct must be "beyond all possible bounds of decency" and "utterly intolerable in a**

civilized community" to qualify as outrageous. It must be "so severe that no reasonable man can be expected to endure it." "Mere insults" do not qualify.

Whether racial epithets alone can qualify as "outrageous" depends to some extent on the state in which you reside. Some state courts have granted money damages to people who were the victims of racist tirades; other state courts have declined to do so. In every jurisdiction, speech must be utterly extreme to qualify as outrageous, but it pays to know your state law, since claims of intentional infliction of emotional distress are more difficult to make in some jurisdictions than in others.

However, it also pays to know your federal First Amendment law, since the First Amendment imposes very severe limits on how restrictive a state's "intentional infliction" law may be when dealing solely with offensive speech. The Supreme Court of the United States, in a famous lawsuit by the Reverend Jerry Falwell against *Hustler Magazine* and its publisher Larry Flynt, has refused to apply the "intentional infliction of emotional distress" doctrine to even the most biting and insulting of parodies (*Hustler v. Falwell* [1988]). Such parodies, said the Court, are *meant* to inflict emotional distress on their targets, and they are fully protected by the First Amendment. (The Court's decision in the case was unanimous.) What this means is that even the most painful

speech, if it has a socially useful purpose (Hustler's vicious barbs against Reverend Falwell were deemed permissible criticism), is constitutionally protected. Speech classified as "intentional infliction of emotional distress," therefore, has to be in some sense gratuitous and serving no valid social or communicative purpose. Anyone interested in better understanding the line between protected and unprotected hurtful speech would do well to read the *Hustler* opinion. The Court concluded that speech aimed at communicating disdain and even hatred is constitutionally protected precisely because it communicates information and ideas, and that in order to be guilty of "intentional infliction of emotional distress" solely by the use of words, the speaker would have to choose a particularly inappropriate time, place, or manner for communicating those words—on the telephone at 3:00 AM, for example.

Special Rules for the Educational Setting: Less or More Freedom on Campus?

Public university administrators will often appeal to the "unique" need for civility, order, and dignity in the academic environment to justify a variety of severe regulations of speech. They have been tireless in their efforts to suppress any speech that they view as disruptive and

offensive, but they appeal most often, in fact, to a series of Supreme Court cases dealing with free speech in public *high schools*—a very different place in the eyes of law, we shall see, from college campuses. They hope to apply these high school cases to higher education because, in their minds, true education cannot take place when feelings are bruised or debates grow heated. These officials prefer an artificially imposed harmony to the sometimes contentious free exchange of ideas.

High School: The Source of Confusion

It might seem strange that university officials often compare their open, free-wheeling campuses to the regimented world of public high school. When called upon to defend regulations or actions that stifle free expression and unpopular viewpoints, however, our universities too often step back to a time when students were children and food fights in the cafeteria were a greater practical danger to educational order than a protest for or against a nation's foreign and domestic policies.

In a series of three landmark cases, the Supreme Court provided the general outline of student rights on the public *high school* campus. First, in the case of *Tinker v. Des Moines Independent Community School District* (1969), the Court emphatically held, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the

schoolhouse gate." Indeed, it declared such a holding "unmistakable." The school had punished students for wearing black armbands as a silent protest against the Vietnam War. The school claimed that it feared that the protest would cause a disruption at school, but it could point to no concrete evidence that such a disruption would occur or ever had occurred in the past as a result of similar protests. In response, the Supreme Court wrote that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," and it declared the regulation unconstitutional.

After *Tinker*, regulation of student speech (in public high schools) is generally permissible only when the school reasonably fears that the speech will substantially disrupt or interfere with the work of the school or the rights of other students. Tinker was not the final word on student speech in public high school, however. Seventeen years later, the Court decided the case of *Bethel School District v. Fraser* (1986), in which it upheld a school's suspension of a student who, at a school assembly, nominated a fellow student for class office through "an elaborate, graphic and explicit sexual metaphor." In the most critical part of its opinion, the Court stated, "The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent or offensive speech and conduct such as that indulged in by

this confused boy." According to *Fraser*, there is no First Amendment protection for "lewd," "vulgar," "indecent," and "plainly offensive" speech in a public high school.

The final crucial Supreme Court public school speech case is *Hazelwood School District v. Kuhlmeier* (1988). In *Hazelwood*, the Court upheld a school principal's decision to delete, before they even appeared in the student newspaper, stories about a student's pregnancy and the divorce of a student's parents. The Court reasoned that the publication of the school newspaper—which was written and edited as part of a journalism class—was a part of the curriculum and a regular classroom activity. Consequently, the Court ruled, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."

Taken together, these three cases give public high school officials the ability to restrict speech that is substantially disruptive, indecent, or school-sponsored. If these rules were applied to the university setting, the potential for administrative control over student speech would be great, although hardly total. All manner of protests or public speeches could be prohibited, contentious classroom discussions could be silenced or restricted, and many school-sponsored expressive organizations could face censorship and regulation.

The Supreme Court, however, just as it never equated

the constitutional rights of kindergartners and high school students, also has *never* held that high school speech cases are applicable to public *universities*. The Court, in general, extends vital constitutional protections to public higher education. In the area of university-sponsored speech, the Court has decided two vitally important cases, in 1995 and in 2000, which both clearly held that universities must remain *viewpoint neutral* when funding student organizations. Viewpoint neutrality means that public universities, in making their decisions about funding, may not take into consideration what position or opinion a student or group of students stands for or advocates. In the first case, *Rosenberger v. University of Virginia* (1995), the Court held that the university, having disbursed funds to a wide variety of other campus organizations, could not withhold funds collected as part of student fees from a Christian student publication and thus discriminate against religious viewpoints. In the second case, *University of Wisconsin v. Southworth* (2000), the Court held that a university could not impose mandatory student fees unless those fees were dispensed on a viewpoint-neutral basis.

The reasons for the distinction between public high schools and universities are plain. First, public high school students are almost exclusively children. College students are almost exclusively adults. The age and maturity differences between secondary school students and university students have long been critical to the

Court's analysis in a variety of constitutional contexts. The Twenty-Sixth Amendment to the Constitution, which makes the official voting age eighteen years of age across the United States, also makes it especially clear that both law and society recognize a distinction between college-age students (typically eighteen and over) and high school students (typically under eighteen). Second, America's universities traditionally have been considered places where the free exchange of ideas—academic freedom, in short—is not only welcome but, indeed, vital to the purpose and proper functioning of higher education. As the Court noted in *Widmar v. Vincent* (1981), speech regulations must consider "the nature of a place [and] the pattern of its normal activities." The public university—with its traditions of research, discourse, and debate, and with its open spaces and great freedom of movement by students on campus—is so strikingly different, in so many essential ways, from the heavily regulated and more constricted public high school.

The educational experience at a public university enjoys a constitutional uniqueness precisely because it is suited and intended to be a "free marketplace of ideas." Traditionally, there have been few other places in American society where ideas are exchanged and debates engaged in as freely and as vigorously as on the campuses of our public universities. Arguments that attempt to end that tradition by citing those constitutional principles that apply to our nation's children are constitutionally

flawed, intellectually dishonest, and terribly demeaning to the young adults of our colleges and universities.

Free Speech and the Private University

So far, this *Guide* has focused above all on the First Amendment and its application to *public* universities, but it is vitally important to understand both what the Constitution does and does *not* protect. The First Amendment of the Constitution of the United States protects individual freedoms from *government* interference. It does not, as a rule, protect individual freedoms from interference by *private* organizations, such as corporations or private universities. For example, while the government could never insist upon allegiance to any particular political philosophy or any particular church, private organizations often make such allegiance a condition of employment (the local Democratic Party, for example, is obviously free to require its employees to be registered Democrats, and the Catholic Church is obviously wholly free to employ only Catholics as its priests). Private organizations such as political parties and churches have freedoms denied to government—the freedom to violate liberties that would be constitutionally protected if the issue were *government* interference. Indeed, the Constitution protects the free exercise of those liberties because we could not have a free and plu-

ralistic society if private organizations did not enjoy this freedom of association around shared beliefs and practices.

Private universities, then, are free, within the law, to define their own missions, and some choose to restrict academic freedom on behalf of this or that religious or particular agenda. Most private, secular colleges and universities (and a vast number of private church-affiliated campuses) once prided themselves, however, on being special havens for free expression—religious, political, and cultural. In fact, many of America's most respected private educational institutions have traditionally chosen to allow *greater* freedoms than public universities, protecting far more than the Constitution requires and permitting forms of expression that public universities could legally prohibit. Until recently, few places in America allowed more discussion, more varied student groups, and more provocative and free expression than America's celebrated private campuses.

Unfortunately, that circumstance has changed. Even some of America's most elite private, secular, and liberal arts colleges and universities are centers of censorship and repression. They have created a wide array of barriers to unfettered discourse and discussion: speech codes; sweeping "antiharassment" regulations; wildly restrictive email regulations; broadly defined bans on "disruptive" speech; overreaching and vague antidiscrimination policies that sharply restrict the expression of ideas and

beliefs by unpopular religious and political groups; and absurdly small and unreasonable "free speech zones."

Liberal arts institutions that advertise themselves as welcoming the fullest pluralism and debate too often have little time, patience, or tolerance for students who dissent from the political assumptions of the institution. Unlike many schools that openly declare a religious or other particular mission, most secular, liberal arts institutions still present themselves to the public as intellectually diverse institutions dedicated to the free exchange of ideas. They should be held to that standard. Indeed, the vulnerability of college administrators at campuses is precisely the gulf between their public self-presentation (in which they claim to support academic freedom, free speech, and the protection of individual conscience) and their actual practice (which too often shows a flagrant disregard of such values). If a private college openly stated in its catalogue that it would tolerate only a limited number of "correct" viewpoints, and that it would assign rights unequally (or deny them entirely) to campus dissenters, then students who attend such schools would have given their informed, voluntary consent to such restrictions on their rights. It is likely, of course, that fewer students would choose to attend (and fewer freedom-loving philanthropists choose to support) a private school that offered fewer freedoms than the local community college.

To prevail in the battle for free speech and expression,

the victims of selective (and selectively enforced) speech codes and double standards at private colleges and universities need to understand several relevant legal doctrines, and the moral bases that underlie them. These include basic contract law, which requires people, businesses, and institutions (such as universities) to live up to the promises they make. Morally, of course, the underlying principle is that decent individuals and associations keep their promises, especially when they receive something in return for those promises. Legally, doctrines such as contractual obligations may vary from state to state, but many common principles exist to provide some general guidance for students. For those who treasure liberty, the law can still provide a powerful refuge (although publicity may sometimes be as powerful, because university officials are hard pressed to admit and justify in public what they believe and do in private). The strength of that legal refuge depends on many factors: the laws of the individual state in which the university is located; the promises made or implied by university brochures, catalogues, handbooks, and disciplinary rules; and the precise governance and funding of the institution. To some extent, however, and in most states, private universities are obliged in some manner to adhere at least broadly to promises they make to incoming students about what kinds of institutions they are. There is a limit, in other words, to "bait-and-switch" techniques that promise academic freedom and legal

equality but deliver authoritarian and selective censorship. A car dealer may not promise a six-cylinder engine but deliver only four cylinders. Unfortunately, the equivalent of such crude bait-and-switch false advertising and failure to deliver on real promises is all too common in American higher education.

Individual State Laws Affecting Private Institutions

In America, legal rights can vary dramatically from state to state. The United States Constitution, however, limits the extent to which any state may regulate private universities, because the Bill of Rights (which applies both to the states and to the federal government) protects private institutions from excessive government interference. In particular, the First Amendment protects the academic freedom of colleges and universities at least as much as (and frequently more than) it protects that of the individuals at those institutions.

Fortunately, decent societies have historically found ways to protect individuals from indecent behavior. State law often reflects those traditions of decency, making it particularly relevant to how a university may apply its policies and how government officials may behave toward students (and faculty). Many states follow doctrines from the common law, which evolved as the foundation of most of our states' legal systems. For example,

some states have formulated common-law rules for associations—which include private universities—that prohibit "arbitrary and capricious" decision making and that require organizations, at an absolute minimum, to follow their own rules and to deal in good faith with their members. These standards can provide a profoundly valuable defense of liberty in the politically supercharged environment of the modern campus, where discipline without notice or hearing is all too common. (For more information about how to combat the lack of due process on university campuses, see also *FIRE's Guide to Due Process and Fair Procedure on Campus*, available at www.fireguides.org.)

In most states, court decisions have established that school policies, student handbooks, and other documents represent a contract between the college or university and the student. In other words, universities *must deliver the rights they promise*. Most campuses explicitly promise a high level of free speech and academic freedom, and some (including some of the most repressive in actual practice) do so in ringing language that would lead one to believe that they will protect their students' rights well beyond even constitutional requirements.

Since universities have the power to rewrite these contracts unilaterally, courts, to help achieve fairness, typically will interpret the rules in a student handbook or in other policies with an eye toward what meaning the school should reasonably expect students or parents to

see in them. As a consequence, the university's interpretation of its handbook is much less important than the *reasonable* expectations of the student.

It is not uncommon for groups of students or for individuals who deviate from campus orthodoxies to be railroaded off campus. Campus officials or campus judicial boards might hold closed, late-night meetings, or they might not inform accused students or groups of the charges against them. Frequently, dissenters are victims of selective prosecution and sentencing: Although other individuals have committed the same offense, or other groups have the same policies, only individuals or groups with viewpoints that are out of favor will be prosecuted. In such cases, the prosecuted individual or group may have legal means to force the university to employ sound procedures in a fair and equitable way.

Importantly, some states have statutes (or state constitutional provisions) that provide students at private schools with some measure of free speech rights. For example, California's so-called "Leonard Law" (more technically, Section 94367 of California's Education Code) states that "no private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that . . . is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution."

In other words, students at California's private, secular colleges and universities (the Leonard Law does not to apply to students at religious colleges) enjoy the same level of free speech rights as students at California's public colleges. Other states, while not protecting students' rights to the same extent that California does, have ruled that private universities may not make blanket rules restricting speech. In the vital case of *State of New Jersey v. Schmid* (1980), the New Jersey Supreme Court ruled that a state constitutional guarantee—that "every person may freely speak…on all subjects"—prevents Princeton University (even though a private school) from enforcing a comprehensive rule that requires all persons unconnected with the university to obtain permission before distributing political literature on campus. This ruling, however, certainly did not grant students at private colleges the same rights as those at public universities.

While the Leonard Law and *Schmid* are important to discussion of free speech at private campuses, students should not conclude that similar statutes or cases exist in the majority of states. In fact, far more states have *rejected* claims of rights to freedom of expression on privately owned property than have accepted such claims.

Beyond rights that are protected explicitly by contract or by statute, however, state law provides common-law rules against *misrepresentation*. Simply put, there is a long tradition of laws against *fraud and deceit*. Very often, a university's recruiting materials, brochures, and even its

"admitted student" orientations—which are designed to entice a student to attend that institution rather than another—will loudly advertise the institution's commitment to "diversity," "academic freedom," "inclusion," and "tolerance." Students will be assured that they will be "welcomed" or find a "home" on campus, regardless of their background, religion, or political viewpoint. Promises such as these will often lead students to turn down opportunities (and even scholarships) at other schools and to enroll in the private secular university. If these promises of "tolerance" or of an equal place in the community later turn out to be demonstrably false, a university could find itself in some legal jeopardy. While private universities may be rightfully beyond the reach of the Constitution, they remain part of a decent society of laws, and they have no license to deceive with false promises. The law prohibits deceptive promises that cause the person deceived to sign a contract, and such prohibitions against false advertising can be used in a quite credible effort to force a change in an administration's behavior. As noted, our colleges and universities should honor their promises. That is good ethics, and that is good law.

There is a final source of possible legal protection for a student at a private university, although it involves a particularly difficult legal and political question: When does the extent of the government's involvement in the financing and governance of a self-proclaimed "private"

college make it "public"? If that involvement goes beyond a certain point, it is possible that the institution will be found, for legal purposes, to be "public," and in that case all constitutional protections will apply. This happened, for example, at the University of Pittsburgh and at Temple University, both in Pennsylvania. State laws there require that, in return for significant public funding, a certain number of state officials must serve on the universities' boards. That fact led these formerly "private" campuses to be treated, legally, as "public." Nonetheless, this is a very rare occurrence, and the odds of any private school being deemed legally public are very slim. Unless a school is officially public, one should always assume that the First Amendment does not apply.

There are many students, faculty members, and even lawyers who believe, wholly erroneously, that if a college receives *any* federal or state funding it is therefore "public." In fact, accepting governmental funds usually makes the university subject only to the conditions—sometimes broad, sometimes narrow—explicitly attached to those specific programs to which the public funds are directed. (The most prominent conditions attached to all federal funding are nondiscrimination on the basis of race and sex.) Furthermore, the "strings" attached to virtually all federal grants are not always helpful to the cause of liberty, which needs a certain breathing room away from the government's interference. This is one reason why people who worry about excessive government power

are often opposed to governmental funding of private colleges and schools.

As a legal matter, there is no specific level of federal funding that obligates a private college or institution to honor the First Amendment. Many factors, such as university governance, the appointment of trustees, and specific acts of legislation, need to be weighed in determining the status of any given institution. That should not stop students, however, from learning as much as they can about the funding and governance of their institution. There are moral and political questions that arise from such knowledge, beyond the legal issues. Do the taxpayers truly want to subsidize assaults on basic free speech and First Amendment freedoms? Do members of the Board of Trustees truly want to be party to such assaults? Do donors want to pay for an attack on a right that most Americans hold so dear? Information about funding and governance is vital and useful. For example, students may find that a major charitable foundation or corporation contributes a substantial amount of funds to their college, and they may inform that foundation or corporation about how the university selectively abuses the rights and consciences of its students. Colleges are *extremely* sensitive to contributors learning about official injustice at the institutions that those donors support. This is another example of our most general principle: Colleges and universities must be accountable for their actions.

Protecting Your Freedom at the Private University: Practical Steps

When applying to a private college or university, students should ask for its specific policies on free speech, academic freedom, and legal equality, and they should do research on the schools to which they are applying, starting at FIRE's database on restrictions of student speech, at www.speechcodes.org. Once at an institution of higher learning, individuals who find themselves subjected to disciplinary action (or in fear of disciplinary action) should immediately look very closely at the college's or university's own promotional materials, brochures, and websites. If you are such a student, read carefully the cases cited in the Appendix to this *Guide*, so that you can better understand the extent of your rights.

Embattled students should take care to recollect (and to confirm with others) any specific conversations they may have had with university officials regarding free speech and expression. If those promises or inducements are clear enough, then a court may well hold the university to its word. This is an area of law, however, with many variations and much unpredictability. Some courts have given colleges vast leeway in interpreting and following their own internal policies and promises, and in some states, therefore, a college will be held only to what lawyers call "general"—as opposed to "strict"—adher-

ence to its own rules. Still, the general rule remains: *If a university has stated a policy in writing, a court will require the university to adhere to that policy, at least in broad terms.*

Regardless of the level of legal protection enjoyed by students at any given private university, they should not be reluctant to publicize the university's oppressive actions. Campus oppression is often so alien and outrageous to average citizens outside the university that university officials—unwilling or unable to "justify" their shameless actions to alumni, donors, the media, and prospective students—find it easier to do the right thing than stubbornly to defend the wrong thing. Again and again, FIRE has won victories without resorting to litigation simply by reminding campus officials of their moral obligation to respect basic rights of free speech and expression, and by explaining to them what the public debate about such obligations would look like. A brief visit to FIRE's website, www.thefire.org, demonstrates how public exposure can be decisive, and many cases never appear on the website because an administration will back down at the first inquiries about its unjust or repressive actions. As a result of FIRE's intervention, university policies have been changed, professors' jobs have been preserved, student clubs have been recognized, and, above all, students' individual rights, moral and legal—including freedom of speech—have been saved or expanded. Do not be fatalistic, and do not feel

alone. Liberty is a wonderful thing for which to fight, and there are many voices in the larger society, across the political spectrum, who understand the precious value of freedom of expression.

University officials are all too aware of the devastating impact of public exposure on authoritarian campuses. As a result, they will often be desperate to prevent embattled students from going public. Students who fight oppressive rulings are often admonished (in paternalistic tones) to keep the dispute "inside the community" or are told that "no one wants to get outsiders involved." Unless you are absolutely certain that private discussions will bear fruit, *do not take this "advice."* Very often, **public debate is the most powerful weapon in your arsenal**. Donot lay down your arms before you even have an opportunity to defend yourself and your rights.

Summary of Free Speech Rights on Private Campuses

Because private colleges have such broad freedom to determine their own policies, and because state laws vary so widely, it is safest to speak only of having "potential" rights on a private campus. However, the following generalizations can be made with a certain degree of confidence, unless you have given informed consent to (you have knowingly agreed to) the terms of a voluntary asso-

ciation (generally a group, club, or organization) of which you have chosen to be part (in which case you have waived the rights that you knowingly agreed to waive):

1) You have the right to rational disciplinary proceedings that are not arbitrary and, to a lesser extent, to rational, nonarbitrary results.
2) You have the right to receive treatment equal to that received by those who have engaged in similar behavior.
3) You have the right to honesty and "good faith" (generally defined as conformity with the basic, human standards of honesty and decency) from university officials.
4) You have the right to enjoy, at least in substantial degree, all of the rights promised you by university catalogues, handbooks, websites, and disciplinary codes.

Know Your Censors and Your Rights

While methods of censorship are limited only by the creativity of the censors, most campus efforts to suppress what should be protected speech follow several obvious patterns. Universities typically attempt to control or limit student rights through what lawyers call "compelling" speech (forcing individuals to say things they

otherwise might choose not to say) or, closely related, by requiring some form of stated agreement with the political and ideological views of administrators and members of the faculty. This is almost always undertaken through *vague* or *overbroad* rules. Often, our colleges and universities abuse legitimate laws and regulations in order to punish, unlawfully or immorally, unpopular viewpoints. Often, they impose what are known as "prior restraints," that is, rules that silence speech *before* it can be uttered (rather than deal with it afterward). Often, our campuses abuse "hate speech" or "harassment" regulations in wholly illegitimate ways.

If students intend to protect their rights, they need to understand the nature of the oppression that others would impose on them. Just as a doctor needs a diagnosis before prescribing a medication, students need to identify the unconstitutional restrictions they face before bringing the correct arguments to bear. The insight that "knowledge is power" applies very much to constitutional law. You should never assume that university officials either know or have considered the law—even if the official in question is a lawyer. In FIRE's experience, few university lawyers have more than a passing knowledge of the First Amendment. Students would be well advised to consult (and well instructed by consulting) the specific and helpfully indexed First Amendment library at www.firstamendmentcenter.org. By defining the terms of the debate—and the doctrine that actually applies to a

problem—students and their supporters can win battles for their basic human and constitutional rights at the very start.

Compelled Speech and the Constitutional Ban on Establishing a Political Orthodoxy

The government may not require citizens to adopt or to indicate their adherence to an official point of view on any particular political, philosophical, social, or other such subject. While the government can often force citizens to conform their *conduct* to the requirements of the law, the realm of the mind, the spirit, and the heart is, in any free and decent society, beyond the reach of official power. The obligation to profess a governmental creed—political, religious, or ideological—invades perhaps the most sacred of our constitutional and moral rights: freedom of belief and conscience. The rights of individual conscience are fundamental to our liberty, and it is intolerable that the government—in a state capital, in Washington D.C., or at a public college or university—would even contemplate, let alone practice, the violation of such rights. When George Orwell, in his chilling analysis of totalitarianism, *1984*, tried to imagine the worst tyranny of all, it was the State's effort (successful, sadly, in his book) to get "inside" of our souls. Many public campuses, however, trample on the right to conscience with such audacity that FIRE is devoting an

entire *Guide* to this subject (see the forthcoming *FIRE's Guide to First-Year Orientation and to Thought Reform on Campus*, to be published during the 2004-2005 academic year). Because the right to conscience has its roots in the First Amendment, we take up the subject briefly here.

At the outset, it is useful to think of the First Amendment's free speech clause as having two related sides. The first, with which we are most familiar, deals with *censorship*. It prohibits the government from interfering with the right of citizens to say what they believe or simply wish to say. The second side, less frequently recognized, prohibits the government from forcing citizens to say something that they do not believe. This second aspect of the First Amendment, recognized emphatically by the Supreme Court, denies to the government the power to establish *officially approved beliefs or orthodoxies* that citizens are compelled to believe or say they believe. Free men and women choose their own beliefs and professions of belief. To force citizens to state belief in something with which they differ is even more invasive than censoring expressions in which they believe, because compelled belief or utterance invades the heart and soul of the human being, intruding upon the deepest and most private recesses of one's inner self.

This freedom from imposed government, roughly described as the right to conscience, was most clearly and eloquently articulated in the landmark Supreme

Court case of *West Virginia Board of Education v. Barnette* (1943), in which the Court struck down a West Virginia state law requiring all public school students to participate in a compulsory daily flag salute and recitation of the Pledge of Allegiance. The Court ruled, even in these darkest days of World War II, that the patriotic requirement was unconstitutional because it forced citizens to "declare a belief." This, it held, violated the First Amendment, whose purpose is to protect the "sphere of intellect and spirit" from "official control." As Justice Robert Jackson wrote for the Court, in some of the most famous words in American constitutional history: "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." Any student, and indeed any American citizen, would do well to read *Barnette*. Academic administrators on public campuses stand in vital need of understanding the limits it places on their power. They, like the members of the West Virginia Board of Education reigned in by *Barnette*, are precisely the sort of "petty officials" who must understand that the Bill of Rights restrains their effort to violate our freedom to make the voluntary choices that belong to all free men and women. *Barnette* dealt with the case of school children. As we have seen, the constitutional protections of

the rights of young adults are far, far greater. *Barnette*, both morally and legally, should stop abusive public administrators in their tracks.

Political Orthodoxies on Campus

Under *Barnette*, it is unconstitutional for the government to adopt a point of view on a particular subject and force citizens to agree. Thus, the administration of a public college or university may impose certain requirements for student *conduct*, but it may not require statements of student *belief*. This has some very practical results. It would be unconstitutional under *Barnette* for a public university to impose ideological prerequisites for course admission: One could not be required to declare one's agreement with the university's nondiscrimination policy, for example, to be admitted to a civil rights course, or to declare oneself a feminist to take a course on feminism, or to declare oneself a Christian to take a course on Christianity. The third section of this *Guide* contains more information about a few actual incidents in which universities have imposed such requirements.

Although no direct test case, to our knowledge, has been reported, mandatory "diversity training" and freshman orientation programs at which students are introduced to the university's official viewpoint on issues of race, gender, ethnicity, and sexual orientation may well

be unconstitutional under *Barnette*. Such sessions would most likely be constitutional if they were truly educational—for example, informing students of the university's policies governing student conduct. If such sessions are aimed at forcing students to change their minds or adopt officially sanctioned attitudes, however, they may very well cross the line established by *Barnette*. The government is permitted to advance its own message only so long as people who disagree or who simply do not want to hear the message can take reasonable steps to avoid hearing it and have the absolute right to state their disagreement with that message.

The Constitution Does Not Allow Overbreadth

Laws are said to be overbroad if, in addition to whatever else they might appropriately prohibit, they significantly restrict protected First Amendment freedoms. Overbreadth takes what might be a legitimate use of law or regulation and extends it into areas where it threatens freedom itself. Often, when a provision of a law violates the First Amendment, it is possible to salvage the rest of the law by cutting out the offending section. For example, a law prohibiting *both* physically assaulting *and* criticizing an official could be successfully challenged, but that challenge would lead to the removal of the ban on criticism and not bring down the ban on physical

assault. However, laws may be stricken in their entirety as overbroad if it is impossible to separate their constitutional and unconstitutional provisions without writing a completely new law.

Overbreadth is the central legal doctrine used in challenges of campus speech codes. The doctrine, as noted, exists precisely to challenge regulations that include in their vast sweep both speech that could legitimately be regulated and speech that is constitutionally protected. It was on grounds of overbreadth that a graduate student at the University of Michigan successfully challenged the University of Michigan's speech code in *Doe v. University of Michigan* (1989). The United States District Court for the Eastern District of Michigan found that the code was blatantly overbroad in prohibiting, among other things, speech that "victimizes an individual on the basis of race … and that …creates an intimidating, hostile or demeaning environment for educational pursuits." Similarly in the 1995 case of *Corry v. Stanford*, a California state court struck down Stanford University's speech code on grounds of overbreadth. Many attempts to regulate speech share this very common but fatal flaw of overbreadth, because it is difficult to craft laws restricting expression that do not prohibit some constitutionally protected speech. It is a very good thing, however, that it is difficult for power to abridge the people's basic freedoms.

How and Why the Constitution Does Not Permit Vagueness

The Constitution requires that our laws be written with enough clarity so that individuals have *fair warning* about what is prohibited and what is permitted conduct, and that police and the courts have clear standards for enforcing the law without arbitrariness. (One can imagine how easy it would be for police officers to arrest only those whom they dislike if the laws could be molded into any interpretation.) Without a prohibition against vague rules, life would be a nightmare of uncertainty regarding what one could or could not do. When faced with vague laws, the average citizen would refrain from many lawful, constitutionally protected, and profoundly important activities in order to avoid crossing a vague line that is hard to discern. The courts do not demand mathematical certainty in the formulation of rules, but they can declare a law "void for vagueness" if people of common intelligence would have to guess at its meaning or would easily disagree about its application.

The strictness of the requirement of clarity in any particular case depends on the extent to which constitutional rights and values are involved. Codes that do not directly involve matters of special constitutional concern can be written loosely. For example, ordinary disciplinary rules regulating antisocial *conduct* at colleges and

Savings Clauses

In order to weasel their way out of the problem of overbreadth, some universities include so-called "savings clauses" in their speech codes, stating that the codes do not apply to speech protected by the First Amendment. Michigan's code, for example, contained an exemption for protected speech, stating that the university general counsel's office would rule on any claims by a student that the speech for which he or she was being prosecuted was constitutionally protected. As Harvard Law School professor Laurence Tribe has pointed out in his highly regarded treatise *American Constitutional Law*, however, the problem with such savings clauses is that while they save laws from being overbroad, they make them terribly vague. What could be vaguer than a law that prohibits all sorts of speech that is clearly protected by the Constitution, but then says that everything protected by the Constitution is not prohibited? The very purpose and effect of such laws are to create a chilling effect by confusing individuals who would speak on any subject that might draw a complaint, or by sending the message that a student speaks at his or her own peril. Imagine a law forbidding "annoying" religious practice and worship that added a savings clause with an exemption for the free exercise of religion protected by the Constitution. Savings clauses do not make unconstitutional laws constitutional—they only shift the defect from overbreadth to vagueness.

universities are not held to a very high standard of precision and specificity. (The issue of vagueness as applied to ordinary disciplinary rules is taken up in detail in *FIRE's Guide to Due Process and Fair Procedure on Campus*.) By contrast, rules that touch on First Amendment freedoms must be written with exacting clarity: If individuals are afraid to speak their minds because of the possibility that their speech would be found illegal, they will likely refrain from speaking at all, or at least refrain from saying anything controversial (or perhaps even anything important). A rule prohibiting "bad speech," for example, would leave everyone afraid to speak. Speech, therefore, would be, as lawyers and judges put it, "chilled," that is, inhibited, diminished, or stifled. Preventing this "chilling effect," so that free people may speak their minds without fear, is one of the essential goals of the First Amendment.

A law does not have to be vague to be overbroad, nor overbroad to be vague, but the two problems often overlap. For example, in *Doe v. University of Michigan*, discussed in the previous section, the Court found that the University of Michigan's speech code was not only overbroad (that is, it covered too broad an array of speech), but also so vague that it was "simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct."

How and Why the Constitution Does Not Allow Viewpoint Discrimination

It should go without saying that public colleges and universities (or private colleges and universities that promise constitutional levels of academic freedom and liberty of expression) may not regulate speech on the basis of the point of view it conveys. Viewpoint discrimination is, as Justice William Brennan put it, "censorship in its purest form." As discussed earlier, the history of censorship is full of examples of viewpoint discrimination (as in the Alien and Sedition Acts, which did not ban *any and all* speech about the president or about politics, but only speech that was *critical* of the president). Laws that ban only certain viewpoints are not only clearly unconstitutional, they are completely incompatible with the needs, spirit, and nature of a democracy founded upon individual rights.

Most censors practice viewpoint discrimination, wishing to censor only speech with which they disagree or that they find offensive. Viewpoint discrimination is prohibited, however, not only by the First Amendment but also by the Fourteenth Amendment's guarantee of "equal protection of the laws," which requires that the government apply the same rules equally to people in similar circumstances.

In *Rosenberger v. Rectors of the University of Virginia* (1995) the Supreme Court overturned a University of

Virginia rule barring student group recognition for any association that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." The Court held that the rule was unconstitutional because while it allowed *antireligious* perspectives on theological questions and cultural issues, it prohibited *religious* perspectives on those same issues.

Viewpoint discrimination is distinct from *content discrimination*. Content discrimination relates primarily to the general subject matter of the speech in question. For example, a decision by a college to open an economics lecture hall to "discussions and debates on the subject of economics" discriminates on the basis of content (no speech except speech about a particular subject matter, economics) but not on viewpoint. Viewpoint discrimination would occur if the college opened the facility to discussions and debates on economics but prohibited any discussion, for example, of the alleged efficiencies or alleged inefficiencies of free markets.

Content discrimination is sometimes permissible, depending on the location of the speech and the breadth of the speech regulation. Viewpoint discrimination is virtually never permissible. Later, this *Guide* will address what are known as "time, place, and manner" restrictions on speech. It is in that area of law that the distinction between content discrimination and viewpoint discrimination becomes critically important.

The Use of Student Activity Fees

Public colleges and universities may collect mandatory fees from their students to support extracurricular activities on campus. As the Supreme Court ruled in *University of Wisconsin v. Southworth* (2000), requiring students to pay such fees is constitutional as long as the university forbids its officials or agents from considering a group's viewpoint when deciding whether to fund it. As the Supreme Court held in Rosenberger (see above), denying funding to a group because of the viewpoint it advocates violates the First Amendment's prohibition on viewpoint discrimination. The subject of student activity fees is taken up in detail in *FIRE's Guide to Student Fees, Funding, and Legal Equality on Campus*. At a private campus that advertises itself as open and as not discriminating on grounds of religion, of course, such viewpoint discrimination in the use of student activity fees would be immoral and well might be a breach of contract.

How and Why the Constitution Does Not Allow Prior Restraint

"Prior restraint" refers to the practice of prohibiting publications or speech *before* they are published or communicated (think of *restraining* individuals *prior* to their speaking). This is distinct from the more common type

of censorship, punishing speech *after* it has been uttered. Prior restraint is one of the most ancient, primitive, and effective forms of censorship. The traditional example of a prior restraint is the print licensing system the Crown of England relied upon in the sixteenth and seventeenth centuries, against which John Milton, quoted in our Preface, wrote so eloquently. Under the licensing system, books were reviewed for content *before* they could be printed. If the Crown disagreed with the content or tone, the book would not go into print. Even before the United States became a country, English legal minds recognized that prior restraint was the enemy of a free people. American courts have continued this proper fear of and hostility to such a remarkable power of censorship, repeatedly holding that prior restraint on speech and publication is *almost never* permissible. In typical censorship, an individual utters the prohibited words, his or her fellow citizens hear or read them, and the individual then faces governmental action for such speech. However, where there is prior restraint, the general public never learns what it is that the government does not want a fellow citizen to say and the public to hear. Prior restraint is a profoundly serious threat to liberty.

Unconstitutional prior restraint can take many forms, such as requiring that students get prior approval of the content or viewpoint of campus demonstrations; denying the use of a public theater for showing a controversial production; imposing broad restrictions on public speak-

ing and reporting; banning leafleting; or enacting a rule that allows local officials unfettered discretion to decide who is allowed to organize a parade. The most typical instance where prior restraint occurs is when a state body, such as a public college or university, requires that speech of any kind must receive prior approval.

The legal presumptions against prior restraint are extremely strong. For example, in *New York Times v. United States* (1971) the Supreme Court ruled against suppressing the publication of the "Pentagon Papers," despite the fact that some Justices recognized that their release *might even harm national security*. In order to qualify for a prior restraint court order, material about to be published must have a clear, immediate, and devastating impact on national security. The classic example of permitted prior restraint would be a ban before publication of the schedule or route of troop ships in time of war (such publication likely would be ordered postponed until the ships have arrived). Because the presumptions against prior restraint are so powerful, public university students should feel quite confident that their university is breaking the law if it tries to limit their speech through the use of a prior restraint.

Some narrow exceptions exist that allow the government to screen films before they are released—for example, to decide if they are obscene. However, even these procedures need to be swift, governed by explicitly stated standards, and viewpoint neutral. In the rare cases

where some campus prescreening is allowed (placing a flier on a campus bulletin board reserved only for events approved by the student government, for example) the criteria must likewise be explicit, standardized, and unrelated to the viewpoint expressed.

The Student Press and Prior Restraint

Some public universities have policies that require all student newspapers to be submitted to an advisor before they are published. Federal (and state) court decisions strongly suggest that this practice is unconstitutional. Furthermore, if these policies give any member of the administration of a public university the right to edit content on the basis of viewpoint—either explicitly or in practice—then such policies will almost certainly be struck down in a court of law.

Censors may attempt to justify prepublication review by citing a case discussed previously in this *Guide*, *Hazelwood School District v. Kuhlmeier* (1988). As you will recall, *Hazelwood* limited the rights of *high school* journalism students who printed a school newspaper as part of a journalism class. The Court ruled that, under those circumstances, the school could regulate so-called "school-sponsored" speech (the administration acting, in effect, as the publisher) as long as the regulation was related to "reasonable pedagogical concerns." Thus far, however, the courts have not applied *Hazelwood* to *university* news-

papers, and, indeed, cases decided before *Hazelwood* already had made it quite clear that prepublication review is impermissible.

FIRE's position is that colleges and universities should never seek editorial control over student newspapers. Further, the law does not allow them to rely on *high school* procedures to institute *college* censorship. The attempted application of *Hazelwood* to colleges is both legally incorrect and morally wrong. Even at private universities, if a school's newspaper is run by students, university officials should neither want nor use the power to review each issue before it goes to print. Student media play an important role in educating and bringing issues to the campus community. Universities that do not allow a free student press deprive the campus community of an important component of the open discussion, debate, and expression that universities exist to foster.

The Misuse of Harassment Codes

Federal law requires that colleges and universities prohibit "discriminatory harassment" on their campuses. The scope of discriminatory harassment law (most commonly divided into issues of "racial harassment" and "sexual harassment") is controversial, and many campus administrators attempt to have speech that otherwise would be protected banned as so-called "harassment." At present, however, both the courts and the relevant

federal agencies have limited harassment law (as it applies to students) to speech or conduct based on race or gender that is so repeated, or pervasive, or terribly severe that it actually prevents another person from obtaining an education. When speech is judged to be harassment, it is considered to be part of an outrageous pattern of behavior in which the time, place, and manner of its expression goes far beyond what is merely unpleasant and, instead, deprives someone of real rights. (Having everyone treat us pleasantly would be a wonderful thing, but it is certainly not a legal right.) Universities must prohibit illegally extreme behavior on their campuses. Nationwide, however, college administrators have taken advantage of this narrow category in order to impose a vast scheme of censorship over their institutions, intentionally suppressing whole areas of discussion and protected communication on our campuses.

Today, almost every campus has a code that prohibits students from engaging in discriminatory harassment. In general, there are two types of such codes. First, there are codes prohibiting true discriminatory harassment—the precise kind of discriminatory harassment that federal law says universities must prohibit. Under antidiscrimination laws and Department of Education rules, any educational institution—from a primary school to a research university—that allows such discriminatory harassment on campus may lose its federal funding. Even more importantly, schools are liable for monetary dam-

ages in lawsuits by students harmed by the school's failure to prohibit real discriminatory harassment. Schools that don't have procedures for preventing harassment find themselves at legal and financial risk. The constitutionality of specific laws that require universities to prohibit certain forms of discriminatory harassment is still an open question, but the law currently creates real obligations for our campuses.

Second, however, there are codes that *claim* to ban discriminatory harassment but that, in fact, ban constitutionally protected speech and expression. Universities commonly call these disguised speech codes "discriminatory harassment codes" or "harassment policies" to convince people that they do not pose First Amendment problems and are in fact required by law. Fortunately, courts have uniformly struck down all of the disguised speech codes that have come before them, and it is clear that speech codes posing as genuine discriminatory harassment codes are unconstitutional. There is a difference between speech and action, and between protected speech and speech that becomes harassing by virtue of its time, place, or manner.

THE DEFINITION OF DISCRIMINATORY HARASSMENT

To understand whether your school has a true (and legal) discriminatory harassment code or a speech code disguised as such, you first need to understand what type of

behavior the law defines as genuine discriminatory harassment. There are two kinds of discriminatory harassment prohibited by law: 1) hostile environment harassment, and 2) *quid pro quo* harassment.

The Supreme Court has held (see later) that for students at colleges and universities, behavior, to qualify as "hostile environment" discriminatory harassment, must be *"unwelcome" and "discriminatory" speech or conduct, undertaken "because of" an individual's race or gender. The behavior must be so "severe," "pervasive," and "objectively offensive" that it has the "systemic effect" of denying the victim "equal access" to education.* In other words, the speech or conduct must be so serious and intense that it truly interferes with a person's *ability* to get an education. Speech or conduct that is severe enough actually to drive a person off the campus thus becomes a civil rights violation, depriving that person of his or her right to receive an education at that campus. Under this theory or doctrine, there is a pattern of behavior that may involve speech so strikingly awful and persistent, and so focused on a person's sex or race, that the law must treat it not simply as speech, but as discriminatory behavior that constitutes a civil rights violation. Further, for speech or conduct to qualify as "hostile environment" discriminatory harassment, it must be directed at a person "because of" his or her race or sex or, possibly, in some jurisdictions, because of other categories such as sexual preference or Vietnam-era veteran status.

General federal laws banning discrimination in education (specifically, Title VI of the Civil Rights Act of 1964—dealing with race—and Title IX of the Education Amendments of 1972—dealing with sex) govern the prohibition against race-based and sex-based harassment. ("Titles" are sections of large, comprehensive laws.) If a person's race or sex is not the reason that he or she is the subject of harmful treatment, then, even if such treatment breaks other laws, it is not discriminatory harassment under federal law.

In the *employment* context, in order for behavior to be considered hostile environment harassment, it must be either serious ("severe") or repeated ("pervasive"). As the Supreme Court put it in a decision known as *Harris v. Forklift Systems, Inc.* (1993), behavior that is "merely offensive" does not qualify as severe or pervasive. In the *educational* context, the behavior, to qualify as discriminatory harassment, must be so severe ***and*** pervasive, and so "objectively offensive" that it "effectively bars the victim's access to an educational opportunity or benefit." (*Davis v. Monroe County Board of Education*, 1999) "Objectively offensive" is an important requirement, because it shifts the consideration of the behavior from the subjective experience of a particular person (who might be very easily offended) to the experience of reasonable men and women. This is vital, making the standard for what is legally intolerable not the sensibilities of

this or that possibly hypersensitive person, but rather the sensibilities of a normal, reasonable person. The requirement that the behavior effectively deny "equal access" is crucial, because it limits discriminatory harassment to conduct that is not only severe or pervasive and objectively offensive, but also so outrageous that it has the "systemic effect" of preventing the victim from getting an education. For conduct to constitute sexual harassment, the Department of Education has ruled in its regulations to enforce federal law, it must also be "unwelcome," which means that the victim or victims found it "undesirable or offensive," and did not welcome, invite, encourage, or seek out the behavior. Thus, the behavior has to be *both* objectively offensive and perceived by the victim as offensive.

In the six or so cases that it has heard involving sexual and racial harassment at the school and workplace, the Supreme Court has made clear that there are very strong limits on what type of verbal behavior qualifies as discriminatory harassment. In the case of *Meritor v. Vinson* (1986), a case that took place in the decidedly more restrictive workplace context, the Court ruled that "Mere utterance of an ethnic or racial epithet which engenders offensive feelings" is not harassment. In *Davis v. Monroe County Board of Education* (1999), the Court held that "teasing and name-calling among school children . . . even where these comments target differences

in gender" did not rise to the level of discriminatory harassment. As the Court explained in the case of *Faragher v. City of Boca Raton* (1998), "Conduct must be extreme" to qualify as actionable discriminatory harassment. Warning against too broad an interpretation of discriminatory harassment, the Court, in *Oncale v. Sundowner* (1998), clarified the law as follows: "The prohibition of harassment on the basis of sex requires neither asexuality [the absence of sexuality] nor androgyny [absence of difference between men and women] in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." As the court had ruled in *Davis*, to qualify as harassment, conduct must be extremely serious—"serious enough to have the systemic effect of denying the victim equal access to an educational program or activity." (*Davis v. Monroe County Board of Education*, 1999)

Precisely because the Supreme Court cases describe only *very extreme forms* of speech as "harassment," we believe that it makes good sense to think of speech-as-harassment in terms of the time, place, and manner restrictions that the Constitution permits: If the speech is repeated, uttered at inappropriate times and places, and is so uncivilized and pervasive so as to make the victim unable to attend to his or her studies and other activities, then it risks being prohibited and punished.

Davis, the only Supreme Court case to deal with

harassment by a student against another student, provides an example of extreme conduct that could meet these criteria in the Court's view and would, therefore, not enjoy the protection of the First Amendment. The case involved a fifth grade student, who, during a period of six months, not only repeated vulgar statements of his sexual intentions to a female student, but also repeatedly groped, fondled, and invaded her personal space to such an extent that he was eventually charged with and pleaded guilty to sexual battery. The Court, in fact, specifically noted that in *Davis*, the "harassment was not only verbal; it included numerous acts of objectively offensive touching." As a result of these behaviors—some of which involved *speech*, but some of which also involved terrible *actions*—behaviors to which the school district did not respond, the student victim even contemplated suicide. In that case, it was eminently reasonable to conclude that the student offender may have "effectively bar[red] the victim's access" to her education. The Court decided that if all these facts were true, harassment had taken place.

Note well that *Davis* took place in the context of a grade school and that the Supreme Court (which assigns far greater First Amendment protections to the college as opposed to the grade school setting) has yet to rule on what would constitute harassment among *college* students.

QUID PRO QUO HARASSMENT

As noted, there is a second type of conduct called *quid pro quo* ("this for that") sexual harassment. Such harassment occurs when individuals in positions of actual authority over their victims demand sex in return for fair or special treatment. As the Department of Education regulations define it, *quid pro quo* sexual harassment takes place when "a school employee [faculty, staff, or administrators] explicitly or implicitly conditions a student's participation in an education program or activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature." Just as federal law requires all educational institutions to prohibit hostile environment harassment, it requires the prohibition of *quid pro quo* harassment and its equivalents. Restrictions on *quid pro quo* harassment and equivalent discriminatory conduct do not pose any First Amendment issues. The First Amendment does not

But I Thought That Harassment Meant Stalking…

Many people confuse the concept of "discriminatory harassment" with that of simple "harassment" as understood by the common law. When one targets speech or conduct that serves no communicative purpose at a spe-

cific person in order to cause severe emotional distress in that person, one commits the crime of harassment. Examples of harassment might include following someone in a public place (stalking) or making persistent, uninvited phone calls to that person. Speech used to harass someone enjoys no First Amendment protection. "Discriminatory harassment" and "harassment," however, are two different categories. When the concept of "discriminatory harassment" was first formulated in the 1970s, its founders borrowed a name from the existing concept of "harassment," because one of the ways in which such discrimination can be effected is through persistent behavior. Because persistent behavior is a mark both of harassment and discriminatory harassment, some behavior is in fact both harassment and discriminatory harassment, but neither behavior is necessarily the other.

Here again, analyzing speech and acts in terms of "time, place, or manner" is helpful. If you repeatedly phone a student in the early morning hours to tell her you *hate* her, that intrusion would constitute harassment. However, if you phone repeatedly at those hours to say that you love her, and the calls are not welcome, that, too, is harassment, despite the message of love instead of hate: What is harassing is the pervasive, repeated, unwelcome nature of the message at an inconvenient and disturbing hour, against the will of the listener.

protect a professor's demand that a student "Sleep with me for an A," just as it does not protect a criminal's demand for "Your money or your life." In fact, *quid pro quo* sexual harassment has been illegal for centuries, since it constitutes the crime of extortion—making threats to obtain something to which one is not entitled. Many threats are illegal, of course, even if one actually is entitled to something. Extortion and illegal threats of violence, thus, are not protected speech.

TRUE DISCRIMINATORY HARASSMENT

FIRE has examined hundreds of campus harassment codes and compiled them on its website, www.speechcodes.org. As of this writing, only a minority of these codes limit themselves to prohibiting discriminatory harassment in compliance with federal laws.

Often, however, universities do not directly follow the language contained in the Department of Education's regulations and in case law, but modify them in various ways. These modifications tend to contort the regulations and to make the codes unconstitutionally overbroad, prohibiting too much protected speech. As noted, many campus codes are based upon the Equal Opportunity Employment Commission's (EEOC) *workplace* regulations, which can be much too broad for a community of *learning* (in contrast to a community of labor). Thus, communicating an unpleasant opinion to a fellow

student is a perfectly appropriate part of the college learning experience and of academic freedom, but it might be inappropriate and bordering on harassment in the workplace. The dangerous application of workplace standards to an academic setting causes many difficulties for a freedom of speech and an academic freedom that are both essential to education.

The Supreme Court has not yet decided any case that answers precisely the question of how far a university may go in prohibiting unpleasant speech in the name of preventing discriminatory sexual or racial harassment. Nonetheless, since the Court has decided, in such cases as *Hustler Magazine v. Falwell* (discussed earlier) that even the most biting parody is constitutionally protected, it is quite likely that the Court would put very real and strong limitations on the extent to which merely unpleasant speech, not delivered in a truly harassing time place, or manner, could be ruled to be discriminatory harassment.

In short, the precise line between protected speech and speech that is discriminatory harassment has not yet been drawn by the Supreme Court. Many First Amendment scholars expect the Court to address this issue fairly soon, since many college administrators have taken advantage of the new doctrine of discriminatory harassment to increase their arsenal of weapons of censorship. There are indications among the lower courts (see our later discussion) that the discriminatory harassment doctrine will

not be allowed to swallow up the First Amendment. Indeed, on July 28, 2003, the Office for Civil Rights (OCR) of the Department of Education, which enforces regulations against discriminatory harassment, wrote in a "Dear Colleague" letter to college and university administrators that "OCR's regulations and policies do not require or prescribe speech, conduct, or harassment codes that impair the exercise of rights protected under the First Amendment," rights that it declared to be "of central importance to our government, our heritage of freedom, and our way of life." OCR rules and regulations must be applied "in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech." As the letter explained, "The OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position." To say the least, then, the mere fact that another student might be offended by something you say, on the basis of sex or race, should not lead to a finding that you are guilty of discriminatory harassment.

Nonetheless, your own college's or university's harassment code might say otherwise, and it then would be up to you and your attorney to get a court to declare that code unconstitutionally overbroad. Before such a step, however, arm yourself with knowledge of Supreme Court decisions, such as *Hustler*, and with the OCR's own assertion of the obvious priority of First

Amendment rights over considerations of discriminatory harassment. You well might convince a college administrator that if a unanimous Supreme Court decided that remarkably hostile speech was protected by the First Amendment, and if the government's own chief enforcer, the OCR, formally has declared that harassment must go far beyond mere expression offensive to some, it takes a great deal more than a single unpleasant remark to a fellow student to constitute a campus crime. Indeed, you well might convince such an administrator that he or she would have to defend indefensible censorship. Also, you might refer to those federal cases that threw out speech codes that sought to prohibit merely "offensive" language, such as *Doe v. University of Michigan* (1989) and the other college speech code cases discussed below. In short, simply renaming insults "discriminatory harassment" does not overthrow the Constitution and the Bill of Rights. To fall into that grave category, speech truly must be so extreme and pervasive that it genuinely deprives the victim of an equal opportunity to pursue his or her education. Such cases are extremely rare.

DISGUISED SPEECH CODES

FIRE's survey of speech codes reveals that the vast majority of so-called harassment codes are in fact speech codes in disguise. These codes prohibit, in this case, "verbal conduct" or "verbal behavior" that is demeaning,

upsetting, or offensive to members of protected groups. In a free society, however, speech is permitted to demean, upset, and offend (indeed, much honest criticism and polemic aims to do precisely that), and such speech is protected by the First Amendment. Protected speech certainly does not qualify as discriminatory harassment.

These disguised speech codes have been uniformly rejected by the courts. The first and perhaps the most important of these decisions is *Doe v. University of Michigan* (1989), discussed earlier, in which the United States District Court for the Eastern District of Michigan struck down the University of Michigan's "discrimination and discriminatory harassment" code on ground of overbreadth and vagueness. The code had prohibited any speech "that stigmatizes or victimizes an individual" on the basis of protected group membership (race or sex) that has the "effect of interfering with an individual's academic efforts." As should by now be quite clear, such a rule bears absolutely no relation to the concept of discriminatory harassment: Rather, the code prohibits essentially any offensive speech, without reference to its being so severe, pervasive, or objectively offensive that it has the systemic effect of denying equal access to education.

Similar results were reached in *UWM Post v. Board of Regents of the University of Wisconsin* (1991), a "discriminatory harassment policy"; *Dambrot v. Central Michigan*

University (1995), a "discriminatory harassment policy"; *Corry v. Stanford University* (1995), a "harassment by personal vilification policy"; *Booher v. Board of Regents of Northern Kentucky University* (1998), "a sexual harassment policy"; *Saxe v. State College Area School District* (2001), an "anti-harassment policy"; and, most recently, *Bair v. Shippensburg University* (2003), a "racism and cultural diversity policy." Both *UWM Post* and *Booher* state the principle that the First Amendment's guarantee of free speech is fundamental and obviously trumps any requirements imposed by Federal statutes or regulations. As the court put it in *UWM* Post: "Since Title VII is only a statute, it cannot supersede the requirements of the First Amendment." As we have seen, the Office for Civil Rights of the Department of Education has stated the same obvious constitutional truth.

Intimidation: The Next Legal Model for Campus Censorship?

In the case of *Virginia v. Black* (2003), the Supreme Court invalidated a Virginia statute that basically defined all cross burnings as persuasive evidence of an intent to communicate a criminal threat. The Court said that although some forms of cross burning may be considered "intimidating" when carried out with the *intent* to communicate a threat of physical harm to a specific target,

not all cross burning may automatically be considered as such an intent to intimidate.

The Court made it clear that it was not the discriminatory nature and message of a cross burning that made it illegal, but, rather, the particular circumstances that might make a particular cross burning a true threat. Nonetheless, this case is already being used by campus censors as the rationale for speech restrictions. Their first major misconception is that *Virginia v. Black* banned cross burning or, by extension, other hateful symbols, thereby allowing "hate speech" to be punished. This is not at all true. The case's holding was very narrow. The burning cross, the Court found, had been used for a hundred years to convey to black families that the Ku Klux Klan had targeted them and that they had best flee for their safety. The Court simply recognized this fact and said that if the cross burning were done with a clear intent to convey a threat of bodily harm, it can be punished as a criminal threat. The case said that cross burning committed for pure expressive reasons was still protected. *Virginia v. Black* thus maintains the traditional line between protected (even if horrible) speech and unlawful threats or harassment. The decision hardly opens the floodgates to a new generation of campus hate speech codes.

It is precisely because university abuse of discriminatory harassment codes has become so prevalent that OCR issued its "Dear Colleague" letter of July 28, 2003, quoted earlier. The OCR was wonderfully clear about the limits of discriminatory harassment regulation:

> Some colleges and universities have interpreted [the 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. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program.

Unless your university's harassment code limits itself to banning such severe speech and severe effects, it is almost certainly unconstitutional.

HATE SPEECH

The term "hate speech" is frequently applied as a synonym for "racist speech" (or, more recently, for "sexist speech" or "homophobic speech"). Even racist speech, however, is protected by the First Amendment. If someone makes the argument to you that a particular form of mean speech can be prohibited (as opposed to criticized)

because it is hate speech, you now know that the argument is without merit. There is no hate speech exception to the First Amendment. In order for speech to be truly free, speech that conveys unpleasant messages, including hate, must be protected. A free people have recourse to reason, evidence, outrage, and moral witness against such speech, but it does not turn to coercive power to silence it. Although it is hardly admirable to use hate speech merely because the First Amendment allows it, colleges and universities, alas, often label as hate speech expression that is perfectly serious, thoughtful, and communicative, simply because it offends the sensibility of a handful of students, or, more likely, a handful of administrators. Thus, for example, a discussion of whether or not women are physically and temperamentally suited for military combat would be an entirely protected and serious exercise of speech in the public arena, but on certain campuses it would be judged, by some, to express a hateful attitude toward women. If some zealots had their way, all such disagreement would be hate speech.

Universities use many legal theories, all of which lack merit, to justify such broad restrictions on speech. However, because it is overwhelmingly clear that the Constitution grants free speech protection to so-called hate speech, it is highly unlikely that your university will try to justify its speech code to a court on the ground that hate speech may be prohibited on a public university campus. Such a legal theory would be frivolous.

PARODY AND SATIRE: INCREASINGLY UNDER ATTACK

Parody and satire are facing difficult times at American universities, where many administrators have either lost their sense of humor or substituted a stifling and misguided paternalism that makes many forms of humor impossible. This is tragic, because parody—a crucial form of dissent and social criticism—is an invaluable component of life in a free society. Parody, as free speech, enjoys sweeping constitutional protections. Again, students are well advised to read the Supreme Court's unanimous decision in the case of *Hustler Magazine v. Falwell*, discussed earlier, and to be prepared to use it defensively if accused by a campus administration of being guilty of creating a "hostile educational environment" by means of a mean-spirited, slashing parody seemingly intended to inflict emotional distress on its target. As the Supreme Court has noted, forms of speech such as biting parody and spiteful political cartoons are time-honored ways of communicating disapproval. Indeed, parody and satire succeed in their mission only when they inflict distress.

Common Legal Limits on Speech

As you should now be well aware, many (if not most) of the usual attempts by government (including public university) officials to limit freedoms of speech and expression are unconstitutional. This is not true, however, of

all such attempts. Among the most common limits on free speech and expression—and the most relevant to the university setting—are restrictions on the time, place, and manner of expression, restrictions on the speech rights of public employees (such as faculty members), and restrictions on obscenity, libel, slander, and defamation. However, it is important both to understand when speech legitimately may be restricted *and* to know what the boundaries are of those exceptions to the rule of freedom. Campus officials who are hostile to your speech can be expected to push their power not only to the limits, but also beyond.

When, Where, and How? Time, Place, and Manner Restrictions

Perhaps the most common legitimate governmental limit on speech is the "time, place, or manner" restriction. Loosely speaking, these restrictions define when, where, and how you may present your message. For example, while it may be permissible to shout "Stop the war!" or "Support our troops!" at noon in the public square in front of the administration building, the campus administration certainly has the right to prevent the same speech from being delivered at the same decibel level in the hall of a dormitory at 3:00 AM. When put this way, time, place, and manner restrictions certainly

seem like a matter of common sense. However, here, as with so many other legal doctrines about speech, the devil is in the details.

Any good analysis of time, place, and manner begins with the place. Place will be the most critical aspect of the legal doctrine that courts will apply. As a general rule, speech, as the courts define things, occurs in one of three kinds of places: traditional public forums, limited public forums (also called "designated public forums"), or nonpublic forums.

Courts define the public forum as those government or public properties which "by long tradition or by government fiat have been devoted to assembly and debate." Since the Supreme Court's decision in *Hague v. Committee for Industrial Organization* (1939), it has been settled in the law that public parks—since they are held in trust for the public and have traditionally been used for assembly, communication, and public discussion—are "traditional" public forums. Other examples include public streets and sidewalks. On the modern public campus, many of the open spaces between buildings and many public squares scattered throughout the campus would be considered public forums.

Once a place has been designated a public forum, the government's power to limit speech there is extremely narrow. Viewpoint discrimination (discussed previously) is *never* permissible. Content discrimination (discrimina-

tion based on the subject matter of the speech, whatever the point of view taken on it) is acceptable only if the government can show the following:

1) There is a *compelling state interest* for the exclusion.
2) The regulation making the exclusion is *narrowly drawn* to achieve that state interest.
3) The regulation leaves open ample alternative channels of communication.

These three conditions are met, for example, by narrow rules prohibiting electioneering near polling booths. Electioneering is typically permitted in the traditional public forum of the public street, but on Election Day there is a compelling state interest in prohibiting such speech (whichever party or candidate one favors or opposes) very near polling places. Because ample alternative channels for communication are available, this kind of modest regulation is permitted.

What the courts call "limited" or "designated public forums" are those governmental properties that have been opened to the public for expressive activity. These forums include places such as municipal theaters or public university meeting facilities. The government is not required to create these "limited public forums," but once it has designated a place as a public forum, that space must be treated as such for all comers. The gov-

ernment may not suddenly restrict such arenas merely because an unpopular speaker is about to take the platform.

The government has slightly more control over speech in the limited public forum than in a public forum. For example, the government may draw distinctions based on the specific purpose of the property and the relationship of speakers to those purposes. Just as was the case with public forums, however, viewpoint discrimination is absolutely prohibited. Further, if the forum is considered "generally open" (to the campus community, for example), then even content discrimination can be justified only by the "compelling state interest" standard discussed above. This principle was illustrated in the case of *Widmar v. Vincent* (1981). In *Widmar*, the Supreme Court considered whether there was a compelling state interest in preventing religious organizations from using facilities that were "generally open to student groups." The Court held that although the university did have an interest in complying with its constitutional obligations under the Establishment Clause (the part of the First Amendment that forbids the government from establishing a religion), this interest was not sufficiently compelling to justify discrimination against speech with a religious content.

The following chart illustrates the legality of content and viewpoint-based restrictions in the traditional public

forum and in the limited public forum. You will note that *viewpoint* discrimination is *always* prohibited:

Type of Restriction	Traditional Public Forum (such as parks or sidewalks)	Limited Public Forum (such as lecture halls)
Viewpoint based	Forbidden	Forbidden
Content based	Usually forbidden	Sometimes forbidden
Content neutral	Usually allowed	Almost always allowed

The third speech location is the nonpublic forum. A place does not become a public forum simply because it is owned by the government. The government may establish events or designate places where speech is limited to particular, narrow subjects, or where only a select group of citizens is permitted to speak. In *Perry Education Association v. Perry Local Educators' Association* (1983), the classic case on this point, the Supreme Court ruled that it was not prohibited discrimination for a school district to grant access to an interschool mail system to the officially recognized teacher's union while denying that access to a second, rival union. The internal mail system was not open for use by the general public, and, as the Court wrote, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." Courts must recognize this authority even when they

believe that the government made a poor policy choice in designating a nonpublic forum for a particular limited use.

As the Court held in *Perry*, the standard for deciding whether the government may bar a speaker or topic from a nonpublic forum is whether the restriction is "reasonable in light of the purpose which the forum at issue serves." This standard gives universities broad authority to create nonpublic forums and to restrict use of them to their intended purpose. For example, in *Chapman v. Thomas* (2002), the United States Court of Appeals for the Fourth Circuit upheld, as designed to promote a legitimate interest, a university policy that allowed only candidates for student government, and not students advocating other political causes, to engage in door-to-door solicitation in the dormitories. Courts will intervene, however, when a university wrongly claims that a particular type of speech falls outside the limits of a nonpublic forum. In the Fifth Circuit case of *Gay Student Services v. Texas A &M* (1984), for example, a university claimed that its refusal to recognize a gay student group was justified by its policy of recognizing political but not fraternal and social groups. The court disagreed, however, ruling that the public service purposes of the group in question fell squarely within the limits the university had set on its nonpublic forums, and that the university was thus obliged to recognize the group.

What Kind of Discrimination—Content or Viewpoint?

Because content discrimination is sometimes permissible in public forums, while viewpoint discrimination is always unconstitutional in such places, universities will often argue that viewpoint discriminatory regulations are really "content" regulations. Indeed, governments will go to amazing lengths to make such arguments. In one recent example, *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia DMV* (2002), the State of Virginia argued to the United States Court of Appeals for the Fourth Circuit that a ban on the use of the Confederate flag on special license plates was not about a particular viewpoint but instead was a ban on "all viewpoints about the Confederate flag." Also, in cases regarding equal access to campus facilities by religious students or student groups, campuses will sometimes try to argue that they are simply excluding speech with a religious *content*. However, when the actual use of the facilities is examined, students often discover that the facilities have been used by students or groups speaking on a wide variety of topics (politics, sexuality, the environment, and so on). In such a circumstance, courts have noted that permitting discussions on sexuality, from a secular standpoint, for example, but not from a religious standpoint is, in fact, viewpoint discrimination.

Students who find themselves silenced when others are speaking—or who are denied access to facilities when others are granted access to the same space—should find out the nature of the speech that is permitted. If those granted the right to speak address the same topics as you—but from a different point of view—then you are almost certainly the victim of viewpoint discrimination. If, on the other hand, access is given to an entirely different class of speaker or entirely different subject matter (for example, reserving a particular lecture hall only for "faculty lectures" or the math building only for "discussion of mathematics"), then the discrimination at issue is most likely content based and may be acceptable.

When Is a Time, Place, and Manner Regulation Unconstitutional?

Even if the government's time, place, and manner restrictions are viewpoint and content neutral, they are still not always lawful. Even content-neutral regulations of public forums must be what the courts term appropriately "narrow." The Supreme Court explained this clearly and well in the case of *Ward v. Rock against Racism* (1989). "Rock against Racism," an organization "dedicated to the espousal and promotion of anti-racist views," sponsored concerts at the Naumberg Acoustic Bandshell in New York City. After several years of noise complaints,

the city established mandatory procedures for granting concert permits, setting out rules on twelve subjects, including sound amplification. The sound provisions required event sponsors to use "a sound system and sound engineer provided by the city, and no other equipment."

Rock against Racism sued to overturn New York City's policy. The Supreme Court upheld the city's rules, and its explanation of why it did so sets forth a good guide to the issue of "narrow" laws and regulations. Because the policy applied to any and all sponsors who sought to use sound amplification, there was no credible argument that the city was discriminating on the basis of content or viewpoint. Further, the regulation was considered a "narrowly tailored" means of accomplishing a legitimate government purpose, that is, curbing excessive noise in and around Central Park. Of great importance, the Court also held and explained that while a time, place, and manner restriction indeed must be "narrowly tailored," this did not mean that such a restriction had to be the only means or even the "least restrictive" means of advancing the government's interests: "So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."

The practical result of *Ward* is to give the government some discretion in devising and applying *content-neutral*

regulations of public forums. Nonetheless, public universities still must take care that such regulations are not too broad. This warning is growing increasingly important on the modern campus, where more and more public universities limit free speech to specific "zones" on campus. In some instances, these so-called "free speech zones" represent a tiny fraction of the open, public space on a university campus. Even though speech zone regulations are ostensibly content neutral (everyone must comply, regardless of subject or speaker), it is difficult to argue that the actual destruction of traditional and designated public forums—and the confinement of free speech that results from this—is a regulation that is "not substantially broader than necessary" to achieve the university's purpose.

The bottom line is that the government is allowed considerable discretion in what kind of time, place, and manner restriction it imposes, as long as the restrictions are truly content neutral. However, the government's power is not unlimited, and you should never just assume that harsh limitations of demonstrations, pamphleteering, putting up posters, or other speech activities are reasonable. Many schools limit speech far more than the Constitution tolerates. The First Amendment, the Court has ruled, permits certain *reasonable* time, place, and manner restrictions. University administrators too often forget the word "reasonable." To limit free speech to a tiny part of the campus would be the same as limiting

free speech to the time between 1:00 PM and 1:10 PM. These indeed would be "place" and "time" restrictions, but they most surely would not be "reasonable" place and time restrictions. A reasonable legal restriction of the exercise of a right does not give officials wild authority to destroy constitutional protections. Whenever an administrator states that a rule is "merely" a time, place, or manner restriction, remind that official that such a condition is never enough: It must be a "reasonable" restriction that achieves a legitimate purpose without going much farther than is necessary.

The Public Concern Doctrine: Restrictions on Employee Speech

The nation's public universities function primarily as educational institutions, as places dedicated to the pursuit of knowledge, understanding, and the free exchange of ideas. In pursuing this mission, however, the university —like any public institution— also functions in a secondary capacity as an employer. In case after case, courts have been called upon to determine when the state's interest in maintaining a harmonious and purposeful workplace trumps the rights of state employees to speak on matters related to the workplace, or, indeed, to speak even on matters beyond the workplace.

Faculty members—critical participants in the university as a marketplace of ideas—are often shocked to learn

that many of the same rules that apply to employees of the postal service also apply to professors at public universities. While faculty members do enjoy certain academic freedom rights (discussed later in this section) that postal workers don't have, they both operate under the same legal framework, what courts call the "public concern doctrine." This doctrine does not apply to students as students, but since the vitality of your college or university depends in great part on the freedom of your teachers to speak freely, including to speak freely with you, this issue matters for students.

The Supreme Court has made clear that state employers may not dismiss or discipline employees when their only "crime" is speaking out on a matter of "public importance." In *Pickering v. Board of Education* (1968), the Court applied this doctrine specifically to teachers at public schools, holding that the state's interest in limiting the ability of its employees to contribute to public debate "is not significantly greater than its interest in limiting a similar contribution by any member of the general public." (A free nation itself, of course, has an almost immeasurable interest in having citizens contribute to public debate.) Without proof that the employee knowingly or recklessly made false statements, "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."

Speaking out on issues of public importance, however,

does not protect an employee from dismissal when he or she has violated other legitimate rules or policies. For example, while teachers may demonstrate for animal rights outside a local cosmetics testing facility, they may not cancel classes or refuse to grade papers so that they can dedicate themselves more fully to their activism.

In *Connick v. Myers* (1983), the Supreme Court decided a case involving the free speech rights of a state-employed attorney. There, the Court found that when a government employee spoke on a matter of merely "personal" rather than "public" concern, "a federal court," absent unusual circumstances, "is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." For speech to be a matter of "public concern," it must address a matter of "political, social, or other concern to the community." In plain English, this case means that public employees cannot sue for violations of First Amendment rights when they are fired for loudly complaining about their boss or their wages, unless unusual circumstances make these sorts of personal issues questions of public significance.

On campus, as two recent cases decided by the United States Court of Appeals for the Sixth Circuit demonstrate, the truly difficult problems arise from applying the public concern doctrine to classroom speech by professors. In the first case, *Bonnell v. Lorenzo* (2001), the court upheld a college's discipline of a professor who, in

the college administration's view, used sexually offensive language in the classroom, and who published a satirical "apology" for his actions. (According to the professor, he used the language to show his students how "chauvinism" marginalized women.) Here, the court ruled that because Bonnell's "offensive" classroom speech was not related to the topic of his course, it was not constitutionally protected. Further, it ruled that while the satirical apology (which addressed the issue of sexual harassment) related to matters of public concern, the school's interests in maintaining a learning environment free of sexual harassment outweighed the professor's interests in free speech and academic freedom.

Just months after *Bonnell*, however, the same court decided the case of *Hardy v. Jefferson Community College* (2001). Here, the court ruled that a college could not terminate a professor for using offensive language about women and minorities when such language was "germane" to the subject matter of the class. (Hardy had used the language to help his students examine how language can be used to "marginalize" women and minorities.) In *Hardy*, the court applied the principles of academic freedom to decide that, in this case, college administrators even could be held liable for punishing a professor's allegedly "offensive" language during class. As reasonable academic officials, the court found, they "should have known" that the professor's speech, when germane to the subject material of a class and when advancing a

legitimate academic purpose, is always protected by the First Amendment.

Obviously, these two cases, taken together, can lead to uncertainty and confusion. In *Hardy*, so-called offensive language was considered "germane" to classroom discussions and is therefore constitutionally protected. In *Bonnell*, similarly offensive language was considered a "deliberate superfluous attack on a captive audience." Within the scope of the holdings of other courts, however, *Bonnell* appears aberrational. In cases such as *Cohen v. San Bernardino Valley College* (1996), courts have held that speech policies similar to those used to discipline Bonnell were void because they were too vague and because the policies unconstitutionally restricted a teacher's right to free speech and academic freedom in the classroom. It might well take a Supreme Court decision to resolve the differences between the two sets of views.

One lesson that may be drawn from these seemingly conflicting cases, however, is that *context matters*. The standard of what language is "germane" to the classroom will always remain a matter of contention and must be decided on a case-by-case basis. Despite all the confusion, the principles of academic freedom serve to emphasize the particular importance of giving broad free speech rights to the academic environment. The protections of academic freedom, however, are not limitless. In

fact, a faculty member's best protection from restrictions on his or her classroom speech may come not from the First Amendment, but from the school's individual academic freedom policy (discussed later in this section).

Defamation (Libel and Slander)

Defamation is among the most misunderstood areas of First Amendment law. During intense discussion of political or social issues (and especially during discussions of controversial personalities), people throw around allegations of libel and slander thoughtlessly and imprecisely. Often, student newspapers are intimidated into adjusting or even killing stories by threats of libel suits. Given the frequency of the accusations and the consequences to free speech of ignorance and fear in these matters, it is critical to have a basic understanding of a doctrine that should have, in fact, little impact on the free marketplace of ideas.

Defamation is a false communication that harms individuals' reputations, causes the general public to hate or disrespect them, or damages their business or employment. A respected legal definition of defamation is a communication that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." The concept of defamation includes

both *libel* (usually, written defamation) and *slander* (spoken defamation), although the two are frequently confused or lumped together.

Laws prohibiting defamation are both very ancient and very complex, but even a cursory summary of the law should reassure most of you. If you are accused of libel, don't panic. Although defamation is one of the most frequently made claims in law, it is also one of the most frequently dismissed. Many college students profoundly misunderstand and underestimate how *difficult* it is, in fact, to win a defamation case. Even so, if you find yourself accused of defamation, you certainly may wish to consult with a lawyer to determine if you are at any risk of liability.

In general, you can speak passionately about individuals and issues without fear of a defamation lawsuit. There are indeed, however, some kinds of statements that carry particular risk, such as falsely accusing someone of having a disease or of being promiscuous; falsely saying that someone is incompetent at his or her job; or falsely stating that someone committed a serious crime or a sexual offense. As always, some amount of common sense and basic moral judgment are good rules-of-thumb. If you wrote an article claiming that "John is a rapist" when you knew this to be a lie or even without any reasonable grounds for believing it true, you should not be surprised to find yourself in serious legal difficulty.

The precise legal elements of defamation vary from

state to state, but the offense must always be premised on a *false* and derogatory statement. (If a statement is true, it is not defamatory. Proving the truth of your statement, of course, can sometimes be difficult.)

Furthermore, to be defamatory a statement must be an *assertion of fact* (rather than mere opinion) and capable *of being proven false*. A statement of opinion, by itself, cannot be defamation. For example, saying that "Alex is a jerk" would not be defamation. This would not be understood by any reasonable listener to be anything other than opinion. Also, statements that are so hyperbolic or exaggerated that no one could consider them to be statements of fact are also protected (for instance, "Alex has the charm of a rattlesnake"). Because of these requirements, everyday insults and epithets are usually not considered defamatory. However, writing that "Alex is a murderer" could well be libel, because the statement seems to be communicating a factual allegation. It is important to note that while "pure" opinions are protected, you still may be held liable if you make a factual statement after first stating "in my opinion." Since the Supreme Court case of *Milkovich v. Loraine Journal Co.* (1990), it has been clear that just adding "*in my opinion*" to the false statement, "Alex walked up to Liam and shot him," will not stop a statement from being defamatory. Again, common sense is not a bad first guide in all of this.

In addition to being false, the statement, to be defamatory, must *identify* its victim by naming or reasonably

implicating the person allegedly defamed. For example, if you were to say falsely that "the whole chess club" is involved in a real crime, and there were only a few people in the chess club, each of them would likely have a legal claim against you.

Usually, state laws also require the statement to be *published* (literally, made public or announced) before it can be deemed defamatory. However, the common legal definition of "published" in this context requires only that the allegedly defamatory statement be communicated to the target and at least one other person. While this is a fairly easy definition of publication to meet, it does keep exclusively private communications between two people from being defamatory. If you say something privately to the person you scorn, it is *not* defamatory in any legal sense.

States require that the plaintiff (the individual claiming to be defamed) prove at least some *fault* on the part of the publisher, speaker, or author of the defamatory statement. Someone bringing a claim must show that you were, at the very least, *careless* in making the defamatory statement. If you were very careful in checking all your sources before making a supposedly defamatory statement, then, in all probability, you will not be found liable, even if for some reason your statement turned out to be false.

Finally, it is necessary that the plaintiff prove that he or she was actually *harmed* by the statement. An impor-

tant misconception about defamation is that the offense comes from the emotional hurt the defamation causes. That is not the case. The reason behind laws against defamation is not to protect individuals from feeling bad, but to prevent unjust damage to their *reputations*, *livelihoods*, *or both*. Such harm, to be defamatory, must have real negative impact on their lives. In many libel cases the supposedly defamed plaintiffs must show that their careers or finances suffered from the statement. Defamation is not based solely on the emotional distress felt by the target. In other words, defamation is about *objective harm*, not *subjective hurt*.

Constitutional Limits on Defamation Claims

Because the First Amendment would be virtually meaningless if we could never criticize anyone, especially a public figure, without feeling exposed to financial ruin from a libel suit, there are very strong constitutional limitations on defamation lawsuits. The most important and best known protections exist precisely to make certain that defamation is not used to punish people for participating in socially important debate, discussion, and expression.

First, there is the protection given to criticism of public figures. The landmark Supreme Court opinion in *New York Times v. Sullivan* (1964) ruled that the status of the person claiming to be defamed—is that individual a

"public" or a "private" figure?—is one of the most important factors in a defamation case. Because the area of defamation law dealing with "public" or "private" status is complex, the best way to understand the law here is to analyze how it applies to the kinds of *people* discussed and to the kinds of *statements* that are made.

CATEGORIES OF PEOPLE

Public Officials and Public Figures. To preserve a society in which citizens are free to criticize those who hold and have held power, the law makes it quite difficult for public officials and public figures to sue someone successfully for defamation. Public officials would include not only the president of the United States, congressmen, and governors, but also, almost certainly, the president of your university. Public figures need not be governmental officials, but also can include celebrities or others who have achieved a high degree of public notoriety. The talk show host and celebrity Oprah Winfrey, for example, would be what the law calls an "all-purpose public figure," a person who is so well known that virtually everything about him or her is considered to be of public interest.

Some individuals can be what the courts define as "limited purpose public figures." That is to say, they are so involved in certain topics or issues that they are considered public figures on that limited topic. On other

issues, however, they are treated as private citizens. Whether your professor is a public figure is not always clear, but some professors are such celebrities on some topics that they may be considered public figures in those areas of expertise or fame. If someone appears on television and radio to discuss certain issues, for example, or writes books on certain subjects, then, with regard to those topics, he or she is almost certainly, at the least, a "limited purpose public figure."

It is extremely difficult for a public figure or a limited purpose public figure to win a defamation suit. A public figure basically would have to prove that a newspaper or individual not only made false statements, but *knew*, or unmistakably *should have known*, that the statements were false when made. In other words, the Constitution allows public figures to recover for damages, in defamation cases, only when the harm is caused either by intentional falsehoods or by falsehoods resulting from what the courts call "a reckless disregard for the truth." It is not enough for public figures who sue for defamation to prove that you were merely *careless*; instead, they would have to prove either that you lied knowingly or that you showed a wild disregard for the truth in saying what you said.

Private Persons. Anyone who is not a public figure or official is considered a "private person" in defamation law. This category includes the great majority of citizens, and

it almost certainly includes most students, faculty, staff, and ordinary administrators at a public or private university. It is easier to be successfully sued for defaming a private person than a public figure. Private figures generally do not have to prove that you knew your defamatory statements were false when you made them. In other words, you can be guilty of defamation even if you were not *intentionally* lying about the plaintiff.

CATEGORIES OF STATEMENTS

Statements on Topics That Concern the Public Welfare. As a general rule, a statement on a topic that affects the public's welfare is a statement that has a substantial impact on a substantial number of individuals. Examples of such statements in the educational setting would include a widespread cheating scandal, the resignation of a prominent administrator, tuition hikes, and a controversial decision to fire a professor. Much like statements regarding public figures, statements on topics that concern public welfare enjoy a substantially high level of constitutional protection. The reason is obvious: We want to encourage fairly unfettered discourse and debate on subjects of substantial public importance. It is in society's deepest interest not to chill such discussion.

Statements on Purely Personal Matters. The definition of a "personal matter" is largely an issue of common sense. Discussions of another person's romantic relationships,

divorce, pregnancies, illnesses, personal finances, and so on, all would be matters of purely personal concern. False and injurious comments about such personal matters (especially the personal concerns of private rather than public figures) enjoy the least constitutional protection in defamation law.

Finally, it is important to note that the most critical defense to a defamation suit is, quite simply, the *truth*. If you can prove that what you are saying is true, you have no legal consequences to fear from a defamation claim. While other defenses to defamation may be available (such as an argument that the defamed individual *consented* to publication or that the defamatory comments are *privileged* in some way), none of those defenses has as much legal power as the truth. You are most likely to be found guilty of defamation if someone can prove that you knew the defamatory allegation you made was false when you made it, or when you intentionally avoided finding out the truth. You are virtually certain to escape liability if you are telling the truth and can prove that it is the truth. In the eyes of the law, honesty really is the best policy.

Academic Freedom

Few concepts have traditionally had more persuasive—or at least rhetorical— force at our colleges and universities than academic freedom, which administrators,

faculty, and students so often praise. The Supreme Court has even recognized academic freedom as related to First Amendment rights in the case of *Keyishian v. Board of Regents* (1967). In *Keyishian*, the Court declared: "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools."

Despite this ringing judicial endorsement, however, a recent commentator, Alisa W. Change, after surveying more than forty years of actual case law (decisions reached by courts) regarding academic freedom, noted: "The Supreme Court has spoken in grand terms about the importance of preserving academic freedom yet has failed to translate its poetic rhetoric into concrete doctrinal guidance as to what academic freedom truly is, where the limits of such liberty lie, and how it should be guarded by lower courts." In the absence of such guidance, courts typically use "academic freedom" as merely one additional legal factor or rhetorical device to be weighed with or against other constitutional doctrines, such as the public employee speech rules that we discussed earlier.

In fact, because of the lack of guidance from the Supreme Court, there is a current and serious debate over who actually owns the right to academic freedom—students, professors, or merely the university itself. It is wholly true, of course, that all universities, public or private, have a certain right, indeed mission, to define the curriculum and other aspects of higher education as they see fit. For example, in the case of *Lovelace v. Southeastern Massachusetts University* (1986), the United States Court of Appeals for the Fifth Circuit noted that "[M]atters such as course content, homework load, and grading policies are core university concerns."

In general, to prevail on a First Amendment academic freedom claim, students and professors must usually join academic freedom with another claim based in some other constitutional doctrine. It is important to keep in mind that when a university obstructs academic freedom, it usually has violated some other constitutional right (or rights), so that joining these claims is not usually a difficult task. In addition, as a practical matter, academic freedom arguments exercise a strong power in university communities, which tend to think of themselves as devoted to this value (whether such a self-image is true or false). On more than one occasion, FIRE has persuaded administrators to lift speech restrictions or end oppressive practices by arguing that those policies or behaviors impair academic freedom. At a time when offi-

cials are all too ready to turn their backs on the First Amendment, the concept of academic freedom can still have an enormous effect on them. Even the most totalitarian professors and administrators will often pay lip service to academic freedom, and they can be called to task and, indeed, shamed when their actions do not match their words.

Also, universities may give students and faculty *legal rights* to academic freedom when they enact policies guaranteeing academic freedom. Many campuses have adopted the 1940 Statement of Principles on Academic Freedom and Tenure, issued jointly by the American Association of University Professors (AAUP) and the Association of American Colleges and Universities. This statement, generally known as "the AAUP Guidelines," reflects widely shared professional norms within the academic community. Such norms, when adopted by universities, are almost always legally binding—a contract, in effect— thereby making academic freedom the legal right of faculty members and students (whose right to reasoned dissent in a classroom, without penalty whatsoever, is also guaranteed by the Guidelines). As a general rule, such academic freedom policies relate to speech in the classroom or to areas of academic study. If you believe that your classroom speech is being stifled or if your scholarly efforts are being suppressed, you immediately should check your student handbook or the university website for an academic freedom policy. Many

mistakenly believe that only faculty members, or only tenured faculty, are protected strongly by campus academic freedom policies. Since, as noted, the AAUP policies apply to students also, you would do well to assert academic freedom whenever censorship looms.