FIRE'S GUIDE TO
RELIGIOUS LIBERTY ON CAMPUS

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FIRE'S GUIDE TO

RELIGIOUS LIBERTY ON CAMPUS

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FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
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INTRODUCTION

Consider Tufts University, Grinnell College, Williams College, Ball State University, Whitman College, Middlebury College, Randolph-Macon Women's College, the State University of New York at Oswego, Wichita State University, Castleton State College, and Purdue University. This roll call of colleges and universities is merely a partial list of schools that have sought to either ban outright or heavily regulate the activities of religious students or religious student groups. These institutions have charged students and student groups with, among other things, violating school policies on the inclusion of gays and lesbians, violating school regulations of speech, and, ironically, "discriminating" on the basis of religion. In the modern university, it is now considered improper for religious groups to use religious

principles to make religious decisions about their religious missions.

Many students accustomed to being in an active reli-

All friends of liberty must stand against this kind of oppression, and doubly so when it is selective. Selective repression is particularly dangerous, of course, because when repression is applied across the board and equally to all groups, everyone recognizes and begins to work against it. When repression is selective, too many just stand by. The free marketplace of ideas—where individuals and groups may peacefully and without coercion follow their own consciences—nurtures a true civil society capable of peaceful change.

Universities, as we shall see in the pages that follow, have a moral—and often legal—obligation to their students' freedom of conscience and freedom of thought. Religious liberty—including the freedom to disbelieve—is a fundamental freedom. Universities are places where ideas should be exchanged, discussed, analyzed, and debated. They should not be centers of a one true, politically acceptable agenda, let alone of such an agenda enforced by secret tribunals. Universities that promise academic freedom and pluralism may not in good conscience banish this or that orthodoxy or heterodoxy from their public arenas.

This guide is a major step in the battle for religious freedom and the rights of conscience on campus. Its purpose is to educate students, faculty, administrators, and the public on the origins and nature of religious liberty in our society and, more particularly, on our campuses. The first section of this guide defines the scope of

religious liberty generally. The second section explains religious liberty and the rights of conscience in the public and private university. The final section outlines the most common threats to basic religious liberty and provides basic guidance for those who seek to respond to such threats.

RELIGIOUS LIBERTY: A BASIC PRIMER

The Right To Religious Liberty

America is a nation that, from its founding, has proclaimed the rights of religious liberty and religious diversity. In the eighteenth century, after hundreds of years of religious wars, persecutions, and hatreds in the west, the deepest minds of our civilization, religious and secular, asserted the need for religious liberty and its consequence, religious pluralism. For James Madison and so many of the American Founders, religious liberty was an inalienable right.

Before it even addresses freedom of speech and of the press, the First Amendment of the United States Constitution recognizes freedom of religion. It declares, "Congress shall make no law . . . respecting an establishment of religion or prohibiting the free exercise thereof." This simple phrase fulfills two vital purposes, as the

U.S. Supreme Court explained in its celebrated decision in *Cantwell v. Connecticut* (1940). First, the "Establishment Clause" of the First Amendment "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship." In other words, freedom of conscience and the freedom to choose and to belong to a religion or religious organization, or to none at all, cannot be restricted by law. The government may not establish a religious orthodoxy, nor advance a specific religion, nor promote religion in general. This principle—that the government must be neutral on the subject of religion—has been confirmed many times by the Supreme Court, most recently in the case of *Zelman v. Simmons-Harris* (2002). In its decision, the Court affirmed the constitutionality of school voucher programs in which the state gives funds for tuition assistance to individual citizens who then may choose to spend it at either secular or religious schools. The Court held that such programs are constitutional because they have neither the "purpose" nor the "effect" of "advancing or inhibiting religion." The program, said the Court, "is neutral in all respects toward religion." Second, the "Free Exercise Clause" protects the freedom of religious citizens to practice a

The *Establishment Clause* of the First Amendment prevents the state from forcing any form of religion or religious creed on the individual.

them to admit gay scouts and scout leaders. The U.S. Supreme Court, however, ruled that the Scouts have a right to determine the nature of their own voluntary association, social message, and organizational mission. The issue, of course, is not whether governmental authorities, a majority of citizens, FIRE, or strong minorities agree or disagree with the Scouts, but whether private groups like the Scouts, including gay political or social groups, may determine their own mission and membership.

Most recent confusion about religious liberty has arisen from the issue of an appropriate legal "test" for government action. Obviously, the government may restrict religious practices that include murder, theft, and other felonies, but where do we draw the line? What uniform standard will be used to judge the legality of government limitations on religious practice? This standard has changed twice in the last forty years.

In 1963, the Supreme Court decided the case of *Sherbert v. Verner*. In *Sherbert*, as it is known, a woman challenged a state's decision to deny her request for unemployment benefits. The state's decision was based on her refusal to work on Saturday, the Sabbath Day of her faith. The Supreme Court held that the state violated the Free Exercise Clause of the First Amendment when it required, in exchange for a government benefit (unemployment compensation), a change in religious practice (nonobservance of Sabbath rest).

This decision, by itself, was unremarkable. What set *Sherbert* apart, however, was the legal standard that it introduced. Justice William Brennan, writing for the Court, stated that if a government action imposes a significant burden on religious practice, that action could be justified only if

1) it advances a "compelling state interest"; and
2) "no alternative forms of regulation" would suffice. *Unless both requirements of that test could be satisfied, the government's action would be unconstitutional and invalid.*

This standard is known, among lawyers and in courts, as "strict scrutiny." It is not sufficient for the state to wish to regulate religion to achieve this or that "good." Rather, to overcome the powerful presumption in favor of religious liberty, the state must have the most urgent—that is, "compelling"—need to act, and it must show that this need could not be satisfied by some other more narrowly tailored and less intrusive regulation. Further, the regulation may not be simply a disguised attempt to interfere with a religious practice.

The standard set by *Sherbert*—although the Supreme Court occasionally, but rarely, departs from it—marked a very significant advance in "free exercise" jurisprudence and provided vital protection for religious liberty. It was very difficult for the government to prove that "compelling" governmental interests justified specific regula-

not specifically targeting religion, but was simply enforcing a law equally applicable to all. (By such reasoning, some argued, the state could have banned sacramental wine in Catholic and other masses during Prohibition.)

In the controversy that followed this decision, many governmental bodies, in a rush to regulate religious practice, chose to ignore the clear force with which many aspects of the Supreme Court's ruling preserved certain strict standards. First and foremost, the Court had stated emphatically that state action toward religious organizations must be *neutral*. In other words, the government—although freed from the "compelling state interest" standard—did not have the right to enact laws designed primarily (or even partially) to suppress the practice of religion. For example, in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (1993), the Supreme Court overturned the City of Hialeah's attempt to ban ritual animal sacrifice, finding that the purpose of the statute was the suppression of Santeria religious worship (practiced by some Caribbean-Americans).

Religious individuals and groups can *enhance* the level of constitutional protection by combining their First Amendment *free exercise* rights with other constitutional rights—such as *freedom of speech* and *freedom of association*.

While *Smith* weakened the force of free exercise claims, religious individuals and groups could strength-

en those claims by "coupling" or "bundling" them with other constitutional rights. If religious individuals were confronted by a government policy that restricted their religious practice, they often argued rightly that the policy violated *not only* free exercise rights, but also rights to free speech and free association. If, indeed, state actions affect other constitutional rights while regulating religious practice, then the standard changes, and "strict scrutiny" again will often apply to official actions, thus reestablishing the the

Freedom of association protects your right to form organizations, to advance particular viewpoints, and to associate with others of like mind. Courts have ruled that free association rights apply to religious individuals and groups.

tion's Bill of Rights. Indeed, there exists an explicit Constitutional right to free assembly. The First Amendment protects "the right of the people peacefully to assemble," a self-evident protection for private organizations.)

Those standards—government neutrality and strict scrutiny when other constitutional rights are involved—critically limit the state's regulation of religious practice. Administrators, faculties, and student judiciaries at public colleges and universities—eager to impose their secular orthodoxies on campus—often view the *Smith* decision as granting them a free hand to regulate religious practice on campus. Nothing could be further from the truth. *Campus policies that inhibit religious practices almost always inhibit the rights of free speech, association, and assembly*.

Furthermore, and this has affected more recent Court rulings, the *Smith* decision produced a very intense and critical response from the public, from Congress, and from both mainstream and minority religious groups. Indeed, Congress passed and President Bill Clinton signed legislation to correct what they saw as the serious ills of *Smith*, but the Supreme Court judged such

attempts to be unconstitutional on grounds of the separation of powers. (The Court found that Congress did not have the power to expand or to contract constitutional rights.) Nonetheless, the Court began to understand that it had entered dangerous territory in limiting the religious rights not only of Native American Church members, but also of *all* Americans. In subsequent cases the Court has pulled back dramatically, narrowing the application of the *Smith* doctrine and keeping much of "strict scrutiny" intact. For example, in the *Hialeah* case mentioned above, Justice Kennedy's opinion reads as a virtual "how-to" guide for lawyers who wish to circumvent *Smith* and apply strict scrutiny to government decisions. *Hialeah* restores strict scrutiny to many situations: when a law specifically mentions religious practice, when there are hints of antireligious motives by the government, or when the law affects religious practice alone.

In the wake of the *Hialeah* case, it is now unclear whether the

good chance that *Hialeah* would offer the religious individual or group the protection of strict scrutiny. If the government action implicates more than just religious rights (such as rights to free speech or free association), then religious individuals or groups will be able to "bundle" their religious rights with these other rights and again be protected by strict scrutiny.

For many first-rate legal minds, then, the test established by *Sherbert*, that of "compelling state interest," is still unsettled in its scope, and may still apply to a broad range of cases. What is wholly clear, however, is that for the state legally to regulate religious practice, the restriction in question must, at the very least, be neutral *and* must not inhibit the exercise of other, related constitutional freedoms. *If a public university discriminates among viewpoints by limiting specific religious practices or by denying to one religious group or individual a benefit that it offers to other religious groups or to secular organizations, then its actions will almost certainly be deemed unlawful.*

What Does It Mean, Legally, To Be "Religious"?

The right to religious liberty is not limited to members of mainstream churches, or to fundamentalist Protestants, or to observant Catholics, or to Orthodox Jews. Indeed, the rights of religious liberty are not the exclusive realm of those who would define themselves as particularly "religious." It is a common misperception

that only those individuals who attend church, mosque, or synagogue regularly either care about or are affected by issues of religious liberty.

The right to the free exercise of "religion" is not limited by conventional or orthodox understandings of the nature of "religion" or "religious practice." Indeed, the Free Exercise Clause protects both the beliefs and practices of those whose religion may not be based upon belief in God (nontheists) and those whose religion is founded upon belief in a Supreme Being (theists). The Supreme Court has made clear that freedom of religion includes a wide variety of deeply held nontheistic beliefs that play a role in someone's life similar to that played by the belief in God in the life of a more traditionally religious person. The religion clauses of the First Amendment are best understood as guardians of *everyone's* freedom of conscience—and of *everyone's* particular ideas of ultimate meaning and ultimate spiritual authority, including the freedom of those who disbelieve.

The *Free Exercise Clause* protects both the beliefs and practices of those whose religion may not be based upon a belief in God (*nontheists*) and those whose religion is founded upon a belief in a Supreme Being (*theists*).

Although the Supreme Court has never precisely defined "religion," it has given religious liberty stun-

ningly broad scope. First, as noted, one does not have to define oneself specifically as "religious" to receive constitutional religious protections. In *United States v. Seeger* (1965), the Court held that a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God" could be classified as religious.

In the groundbreaking case of *Welsh v. United States*

Second, if individuals do define themselves as religious, they do not have to belong to a theistic religion to receive the protection of the religion clauses of the Constitution. The Supreme Court specifically rejected any limitation of "religion" to theistic religions in

Fourth, individuals can assert religious liberty claims even if their views differ from those of their church or from other members of their religion. In *Thomas v. Review Board of Indiana Employment Security Division* (1981), the Supreme Court reversed Indiana's decision to deny unemployment benefits to a Jehovah's Witness who quit his job because his religious beliefs forbade participation in the production of armaments. Indiana courts had upheld the decision to deny benefits, finding that Thomas's views regarding the production of tank turrets differed from those of other Jehovah's Witnesses and were not those of "his religion." The Supreme Court emphatically disagreed with such a requirement of conformity, holding that "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."

These decisions may be seen as the Supreme Court's recognition that not only are minority religions entitled to constitutional protection (a doctrine that has long been established), but that quite unconventional religions, and even what might be called "substitutes" for religion, are entitled to the same protection. The doc-

trine of protected religious diversity has taken profound hold in constitutional jurisprudence.

Religious liberty, thus, exists for all individuals—believers and unbelievers—who hold sincere and meaningful beliefs about ultimate issues in life. Such beliefs are of transcendent importance to many individuals. State actions that strike at those beliefs, that offend one's

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.

from interference by *private* organizations, such as corporations or private universities. For example, while a state could never create a Christian academy or mandate attendance at Bible classes and chapel services, voluntary private organizations have a right to do precisely such things. Thousands of church-based schools and colleges exist in America, and these private, religious organizations are free to mandate religious practice, to forbid what they judge to be immoral behavior, and to restrict speech. Private organizations have freedoms denied to government—the freedom to impinge on constitutional liberties that are protected from governmental interference. Indeed, the Constitution guarantees the "free exercise" of those liberties, because we could not have a free and pluralistic society if private organizations did not enjoy this freedom of belief and practice.

The case of private universities serves well to illustrate this distinction. Despite their theoretical freedom to restrict speech, private, secular universities once prided themselves on being special havens for free expression—religious, political, and cultural. Indeed, many of America's great private educational institutions have tra-

ditionally chosen to allow greater freedom than public universities, even permitting forms of expression that public universities could legally prohibit. Until recently, few places allowed more discussion, more diverse student groups, and more cutting-edge expression than America's elite private universities.

Unfortunately, that now has changed. Even America's best private, secular, and liberal arts colleges and universities are becoming centers of censorship and repression on behalf of campus orthodoxies. Speech codes, sweeping "anti-harassment" regulations, and broad and vague anti-discrimination policies increasingly have stifled discourse. More and more, vaunted Ivy League and similar universities are becoming places where a vast number of religious traditions and ideas are simply not welcome. Many secular, private schools appear as committed to their anti-religious orthodoxy as Bob Jones University is to its fundamentalist Christianity and anti-secularism.

Freed from Constitutional restraint, some of America's best private, secular, and liberal arts colleges and universities are becoming centers of censorship and repression on behalf of campus orthodoxies.

Although these private institutions are not bound by the First Amendment, there still are limits to what harm they may do to those who seek to exercise their religious liberty. Contrary to the wishes of many administrators

Private universities do not have unlimited power over their students. They still must comply with a complex web of federal and state laws that provides considerable protections for the religious rights of individuals and groups.

and faculty members, private organizations do not possess unlimited power over the lives of members of those communities. Beyond the Constitution, we still live in a society of both common and statutory law. Here, a complex web of federal and state statutes and state common law provides considerable protections for the religious rights of individuals and groups.

For example, Title VII of the Civil Rights Act of 1964 is a federal statute that prohibits private employers from discriminating against any employee "because of such individual's race, color, religion, sex, or national origin." ("Titles" are parts or sections of an Act.) While someone may be fired from a job for loudly criticizing a supervisor, a person may not be fired or otherwise discriminated against simply for being a man, or a black, or a Methodist. This provision is the legal source of workplace sexual harassment laws and regulations.

Statutes are laws written by legislatures—both state and federal—that often limit a university's ability to act against the interests of its students.

Another sort of protection arises from conditions that Congress may place on private organizations that choose to accept and use federal funding for various programs. Title IX, for example, famous for its impact on collegiate athletic programs, prohibits sexual discrimination at any school (private or public) that receives federal funds: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." (Here, however, Congress recognized the necessity of not interfering with the free exercise of religion by exempting from the act "educational institutions of religious organizations with contrary religious tenets.") Title VI prohibits discrimination on the basis of race and ethnicity: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Since virtually every university in America receives some amount of federal funds, they are almost all bound by these restrictions. Further, individual states have passed their own

phrase “common law” is an ancient term for legal rules that are created, adapted, and applied not by legislatures or city councils but by juries and judges over a long period of time. Most arose from the rules that worked in keeping the peace and fairness of civil society. The com-

it is difficult to talk about "student rights" as if they were the same for everyone, everywhere. Students at Brown University in Rhode Island have common law rights substantially different from students at Harvard University in Massachusetts or at Vanderbilt University in Tennessee. Different states have different legal doctrines.

To understand your rights as a student, therefore, you must ask the following questions: 1) Is my college or university a public institution? If so, its actions are limited by the First Amendment and by federal and state statutes and state common law. If it is a private institution, it still will be limited by federal and state statutes and state common law. Thus, you will need to know 2) what are my statutory rights? and 3) what are my state common law rights? To help answer the third question, concerning your common law rights, it will be useful to know what the school itself says in its student handbooks, catalogues, and disciplinary codes. In these, you will find its promises to its students, many of which may be legally binding. In the pages that follow, this guide will explain in more detail the significance of these questions and will provide some universal, generalized guidance that will help you to identify some of the primary threats to religious liberty on the modern campus and to plan responses to potential persecution, oppression, or unequal treatment.

RELIGIOUS LIBERTY IN THE UNIVERSITY

This section is subdivided into two distinct parts: 1) a discussion of religious liberty in the public university, where the Constitution applies and provides comprehensive protections; and 2) a discussion of religious liberty in the private university, where state statutes and the rules of common law govern.

Religious Liberty in the Public University

For the public university student concerned with religious liberty, the Free Exercise Clause of the Constitution is much more critical than the Establishment Clause. (It is very unlikely that a public university will attempt to establish Lutheranism as an official religion, for example. It is more likely that it will seek to restrict the free practice of a religion.) As

explained earlier, the Free Exercise Clause protects religious individuals and groups from specifically targeted, anti-religious state action. In other words, a public university may not institute any policy designed primarily (or even partially) to suppress the practice of religion.

That means, among many other things, that no public university may restrict freedom of religion indirectly, by adopting some official campus secular political orthodoxy—"multiculturalism" or "diversity," for example—which it then uses to restrict religious beliefs and practices that supposedly betray the "official" campus ideology. Directly restricting religion and insisting that all students adhere to some official campus orthodoxy are two sides of the same coin and are unlawful for the same reason: they violate the First Amendment.

Recall that the Constitution permits religious groups to "couple" their free exercise rights with other constitutional rights. This means that if religious individuals or groups are confronted with a university policy that discriminates against their religious message, then they may not only claim a violation of their free exercise rights but also of their rights to free speech and to free association. In such a circumstance, it becomes much more difficult for the university's policies to prevail.

Because of the mutually strengthening and sustaining relationship of free speech, free association, and the free exercise of religion, public universities are severely limited in their ability to regulate campus religious practice.

Public universities are severely limited in their ability to regulate campus religious practice. The key word that governs a public university's obligations is *neutrality*. If its behavior offers a benefit to individuals or organizations with a particular viewpoint or religion, then it must offer that same benefit or access to other individuals or organizations with different viewpoints or religions.

The key word that governs a public university's obligations is *neutrality*. If its behavior offers a benefit to individuals or organizations with a particular viewpoint or religion, then it must offer that same benefit or access to other individuals or organizations with different viewpoints or religions. Because they are agents of the government, public colleges and universities may not engage in *viewpoint discrimination*.

You should know that there is a long-standing controversy between two different views of the proper application of the Establishment Clause. As discussed earlier, the Supreme Court has made it clear—as recently as in its "school vouchers" case (*Zelman v. Simmons-Harris*) in 2002—that the government must remain "neutral in all respects toward religion" and may not enact laws "that have the 'purpose' or 'effect' of advancing or inhibiting religion." The controversy is over the meaning and scope of state "neutrality," and, in particular, over cases

in which government seems to "advance" religion by such things as putting up Christmas trees in public places or paying chaplains, with public funds, to open legislative sessions and other public events. Some individuals see such acts as violating the Establishment Clause. Other individuals view such cases as either trivial or, at their core, secular and not at all in conflict with the Establishment Clause.

This Guide does not seek to resolve the controversy as to precisely where the line should be drawn to define state neutrality. Rather, it seeks to give students practical advice about how they can protect their own right to believe and practice their own chosen religions—or none at all—without official interference or penalty—except in the face of compelling social and governmental interests that justify restrictions on practice, though never on belief. For the state, given the doctrine of "neutrality," neither religion nor irreligion enjoys any advantage over the other; they are of equal status in their rights and freedoms. Religious students often look, above all, to the Free Exercise Clause ("don't stop me from practicing my religion"). Nonreligious students often look, above all, to the Establishment Clause ("don't try to influence me to believe in or practice a religion or any belief system"). Both believers and nonbelievers often agree, however, that separation of church and state is vital to civic and to religious life, many believers concluding that such separation protects religion from the secularism inherent in

government. The Supreme Court, at any rate, insists on the concept of state neutrality in matters of religion. For nonbelievers, this arms them to argue that public universities may neither favor nor promote religion over irreligion or secularism. For religious students, this arms them to argue that public universities may not interfere with their religious belief and practice, even if such prac-

Under the authority of *Widmar*

of facilities, but also to the use of university funds. In *Rosenberger v. University of Virginia* (1995), the University of Virginia authorized payments from a Student Activities Fund for the printing costs of publications by certain student groups. This payment program was utilized by a wide variety of student groups to print a great diversity of publications espousing political, social, and even religious views. Although the university supported a wide range of groups, including Jewish and Shinto publications, it refused to support the publication of a Christian magazine.

In response, the Supreme Court found that the university was guilty of unconstitutional viewpoint discrimination: "Having offered to pay the third-party contractors on behalf of private speakers who convey their own

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held that those rights were not being violated *as long as the university allocated the funds on a neutral basis*. In Justice Sandra Day O'Connor's words: "Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected."

Just as public universities must offer religious groups equal access to campus

In sum, public universities that offer benefits to nonreligious "expressive organizations" on campus (an "expressive organization" is one that exists, at least in part, for the purpose of expressing a particular viewpoint) may not deny the same benefit to other students or groups simply because their viewpoint happens to be religious. This is a valuable application of the general principle—one might dub it the "Golden Rule" of constitutional decision-making—that citizens are entitled to equality before the law. That principle is one of the essential foundations of our liberty. It is what the drafters of the Fourteenth Amendment meant when they wrote that no state may "deny to any person within its jurisdiction the equal protection of the laws."

Campus religious organizations do face one form of legal jeopardy that, some have argued, makes the "neu-

trality principle" inapplicable. Most contemporary legal

policies that were designed to benefit everyone *except* religious organizations. The viewpoint discrimination was clear. Most campus anti-discrimination policies are designed to apply to everyone, *including* religious organizations. In such a case, there appears to be no viewpoint discrimination whatsoever.

Prior to the Supreme Court's recent decisions in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) and in *Boy Scouts of America v. Dale* (2000), it was unclear whether an expressive or religious organization's constitutional rights to freedom of association would "trump" the state's generally applicable anti-discrimination policies. If not, then the consequences for religious groups that exclude legally "protected" individuals for religious reasons could be disastrous. Sincere scriptural objections to certain behaviors could be swept aside in the interest of "tolerance" and "diversity," and religious student groups could be required to conform to contemporary campus policies or be forced to disband.

Boy Scouts addressed this issue quite directly. It

Historically, public accommodation laws were adopted for the beneficial purpose of making it possible for members of racial minorities, particularly black Americans, to travel from state to state and to be able to purchase services—hotels, restaurants, and the like—that were previously available only to white citizens. Recently, however, public accommodation laws have been used to ban discrimination even in private clubs. New Jersey's public accommodation law included a ban on discrimination on the basis of sexual orientation. Expanding public accommodation laws in order to restrict the First Amendment rights of speech and religion is a relatively new phenomenon that has become subject to considerable debate, criticism, and litigation.

In response to New Jersey's use of public accommodation law to force the Boy Scouts to alter its policies, the U.S. Supreme Court reaffirmed its commitment to freedom of association. It stated that "implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends [emphasis added]." This right, the Court proclaimed, is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." Consequently, the Court held that the "forced inclusion of an unwanted person [in this particular case, an openly gay scout] infringes the group's free-

discouraging a disfavored one, however enlightened either purpose may strike the government."

The *Boy Scouts* decision reaffirmed the U.S. Supreme Court's thinking about freedom of association and freedom of expression already expressed in *Hurley*, which had been decided five years earlier. In *Hurley*, the Supreme Court unanimously held that the private sponsors of Boston's annual St. Patrick's Day parade had a First Amendment right to exclude from the parade groups of marchers that insisted on parading with banners identifying them as gay and lesbian Irish. Such an identified group marching under its own banner would dilute—indeed, would conflict with—the conservative social and religious message that the parade sponsors meant (and had a right) to send to the world. The gay Irish group's attempt to brand the parade a "public accommodation" did not impress the Court, which ruled emphatically and without dissent that the parade was an expressive event protected by the First Amendment. Similarly, while a religious student group clearly is not free to do anything it wishes—we live, fortunately, under the rule of law—it surely has the right to define the standards and criteria of its leaders and membership, and it surely has the right to determine the message that the group will disseminate to the campus and to the world. Here, freedom of speech, religion, and association all combine very powerfully. Of course, this same principle

likewise ensures a gay student group's right to define its own message by its own lights and to exclude religious fundamentalists hostile to its message from leadership positions aeven fmembership.

SUMMARY OF RELIGIOUS RIGHTS ON PUBLIC CAMPUSES

If a public university permits expressive organizations to exist at all, then the following basic rights belong to religious 1) Equal access to campus facilities;

2) Equal access to university f
3) Freedom from university ie in the campus religious group's internal governance and composition; and
4) Basic due process of law before any rights or privileges are revoked, even for l reasons.
   ("Due process of law" is a constitutional requirement that governments must provide individuals or organizations with notice, an opportunity to be heard, and fundamental fairness bŦ–Yw.www2w.w,vmc("Due hts

destroy student liberties. They enact speech codes, they apply rules unequally, and they sometimes discriminate against religious individuals and groups at will. However, as increasing numbers of students have fought back

openly declare a sectarian mission, most secular, liberal

limits the extent to which any state may regulate the private universities in their midst, since 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 the individuals at those institutions.

Decent societies have historically found ways to protect individuals from indecent behavior. State law often reflects that tradition of decency, and it is particularly relevant to how a university applies its policies and to how university officials behave toward students (and faculty). For example, some states have formulated common-law rules for associations—which include private universities—that prohibit "arbitrary or 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 be profoundly valuable defenses of liberty in the politically supercharged environment of the modern campus, where discipline without notice or hearing is commonplace.

Because states have diverse legal systems, your rights can vary dramatically from state to state. In general, however, states will protect individuals from *fraud* and other types of *misrepresentation*.

It is not uncommon for students or groups that deviate from campus orthodoxy to be essentially "railroaded" off campus. Campus officials or judicial courts might hold closed, late-night meetings; they might not inform accused students or groups of the charges against them; they might not offer protection from threats and intimidation to "offensive" students holding poorly understood religious views. It may also be the case that, while several other individuals have committed the same offense, or other groups have the same policies, religious groups are the only ones to be prosecuted. In such cases, they may be able to force the university literally to take a step back and to beand

sity. If these promises of "tolerance" or of a place in the community later turn out to be demonstrably false, a university could find itself in serious legal jeopardy.

There are legal doctrines with strange-sounding names, such as "promissory estoppel," "detrimental reliance," and "fraudulent inducement," that prevent real abuses, such as depriving an individual of the promised rights and goods on which he or she relied in accepting someone's offer. If a university promises religious liberty and legal equality, and individuals rely on that promise, causing them to pass up other opportunities, the university may not walk away from its inducement. A university has no right to let a student make a decision based on its enticements and then renege on its obligations. To say the least, it may not promise religious liberty and then put someone on trial for exercising it. Private universities may rightfully be beyond the reach of the Constitution, but they have no license to deceive with false promises. In short, prohibitions against fraudulent inducement to contract and against false advertising can be used to force a change in an administration's behavior. Furthermore, such prohibitions can also be a source of substantial monetary damages for the wronged student, a legal fact that can in turn be used to motivate administrators to protect the rights and dignity of all students equally.

When applying to a college or university, students should ask for its specific policies on religious liberty,

It is very common for religious individuals who dis-

opinion, it does protect individuals from certain kinds of demonstrably false assertions and accusations. State laws prohibit libel, slander, and defamation (although too many of us confuse hurtful opinion with these torts). Further, if a hate campaign turns truly vicious—involving, for example, physical intimidation, threats of violence, harassing phone calls, and improper inquiries into confidential information—one indeed may be the victim of impermissible and punishable acts. Everyone has legal protection from unlawful terrorist threats, intentional infliction of emotional distress, invasion of privacy, or actual harassment. Again, in all of these matters, the rights and protections of religious students, in circumstances of promised legal equality, should be the same as those of all others.

THE ROLE OF UNIVERSITY CATALOGUES, HANDBOOKS, AND DISCIPLINARY RULES

Many of the catalogues, student handbooks, and disciplinary codes of private universities promise non-discrimination on the basis

students are not in a contractual relationship, most of them use other legal theories to require universities to comply with the terms of their own documents. Often, a court perceives an inequality in bargaining power between the university (which drew up the contract) and the student, and it will resolve ambiguities in the language of the publications in favor of the student.

Unfortunately, the contents of these publications are rapidly changing, often upon the advice of lawyers paid to reduce a college's exposure to liability from lawsuits (rather than help the colleges live up to their historic obligations to academic freedom and the rights of conscience). Instead of providing blanket free speech rights to their students, universities now improvise speech codes, usually found in the "verbal conduct" or "verbal behavior" sections of harassment policies. Furthermore,

policies. At Tufts, the Tufts Christian Fellowship was derecognized (essentially banned) after it refused to permit an openly lesbian student to lead the group. The derecognition decision was made—without notice to the TCF—by the tribunal of the Student Judiciary at a secret, late-night meeting.

Tufts' student handbook stated that it was university policy not to discriminate on the basis of religion. It also stated that Tufts respected the freedom of association. It added, however, that student organizations were not allowed to discriminate on the basis of, among other things, religion and sexual orientation. Tufts was remarkably unaware of the profound conflict among these various principles. It is simply impossible for a university to respect freedom of association and religious liberty while simultaneously prohibiting religious groups from using religious criteria as a basis for selecting members, let alone leaders.

Although the handbooks were confusing about the true extent of the TCF's religious liberties, it was clear enough that the Student Judiciary's secret, late-night meeting violated the TCF's rights to fair process. The student handbooks provided for at least two sets of open

ficult legal and political area, namely, the extent of the government's involvement in the financing and governance of a school. If that involvement goes beyond a certain point, it is possible that the school will be deemed, for legal purposes, "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 schools' boards. That fact led these formerly "private" universities to be treated, legally, as "public." In fact, however, this is a very rare occurrence, and the odds of any private school being deemed legally public are very slim, indeed. Unless a school is officially public, one always should assume that the First Amendment does not apply there.

On occasion, colleges that advertise themselves as private are—because of excessive government funding or governmental control—actually public.

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 funds. (The two most prominent conditions

4) You have the right to enjoy all of the rights promised you by university catalogues, handbooks, and disciplinary codes.

IDENTIFYING THREATS TO RELIGIOUS LIBERTY

The Tactics of Oppression

The methods of attacking religious liberty are limited only by the creativity of the oppressors. When guardians of the new orthodoxy sense threats to their campus power and rule, they often will use whatever means are available to them to purge, silence, or punish the "heretic."

Sometimes the attacks on your beliefs and practices will come merely through ridicule and attempts at public humiliation, and you should not confuse these attacks, if they use lawful means, with assaults upon your liberty.

> *"The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."*
>
> JUSTICE ANTHONY KENNEDY
> *Rosenberger v. University of Virginia (1995)*

At other times, however, there will be a formal assault upon your religious liberty and your rights of conscience, with campus power using university "rules" and "courts" in an effort to eliminate the influence or presence of religious students and groups whose beliefs and creeds others find "offensive." Sadly, experience teaches that religious individuals and organizations are most often victimized by university policies that, in theory, were enacted to *promote* tolerance, diversity, and fairness. These are 1) anti-discrimination policies; 2) speech codes; and 3) harassment codes.

The Use of Anti-discrimination Policies

Many if not most campuses have adopted comprehensive anti-discrimination policies. These policies apply not only to hiring, admissions, and academic policies, but also to student life. Often, student organizations will be

instructed to adhere to policies that prohibit discrimination on the basis of "race, religion, gender, ethnicity, nationality, disability, sexual orientation, or marital status." Anti-discrimination policies are introduced and taught at mandatory student orientations that effectively coerce students into re-examining long-held beliefs. Often, student organizations are required to submit constitutions or other documents that contain promises to abide by university anti-discrimination policies. In fact, fidelity to these policies is often a prerequisite to enjoying any university benefit. The anti-discrimination policy is the "loyalty oath" of the modern academy.

Religious individuals and groups are most often accused of violating anti-discrimination policies relating to gender, sexuality, and religion. As noted, several campus religious organizations are under attack because they allegedly have "discriminated" by using religion, religious doctrine, and religious belief as criteria in choosing their members or leaders.

Anti-discrimination codes should not be used to limit the freedom of religious individuals and organizations to make religiously motivated decisions or to engage in religious speech.

A moment's thought will reveal both the extraordinary threat to religious liberty and the utter wrongheadedness of using "anti-discrimination" policies to discriminate against religious belief. The assault upon

the liberty of a religious group usually begins when a student member of a religious organization or, indeed, a student outside the organization feels discriminated against by a religious organization or individual. Perhaps the offended student was rejected for a leadership position in the group on the basis of theological disagreementsg© group reje dis-

and formal charges of discrimination. Frequently, the very students, faculty, and administrators who will be judging the validity of the complaint are participating in protests against the religious group. (Keep track of such a thing: it is a clear violation of any promise of an impartial and unbiased hearing.) When faced with name-calling, an intimidating atmosphere, or formal charges, many religious groups simply collapse and cave in to campus pressure. Rather than fight for their religious

fullest extent possible, religious students must not allow their persecutors to frame the terms of the debate. Even if the other side initiates the charge, students of faith should restate it in their own honest terms: The issue is *not* whether this or that group should be "protected" from "religious intolerance." The issue is whether we preserve or extinguish religious liberty and religious pluralism. The issue is whether a campus can overcome its own political orthodoxy and tolerate the religious traditions of others. In other words, the issue is: Will the university permit *you* to follow the dictates of *your* conscience when you are neither interfering with the legitimate rights of others nor threatening their health or safety? In that context, it is crucial to understand that the "legitimate rights of others" do not include the "right" not to be offended or excluded by the membership criteria, beliefs, and activities of a religious group. There is no such "right." Instead, each student has a right to believe, to practice his beliefs, and to associate with others who are willing to associate with

In response to discrimination charges, do not allow yourself or your religious group to be branded as "intolerant" or "discriminatory." The issue is *not* whether this or that group should be "protected" from "religious intolerance." The issue is whether we preserve or extinguish religious liberty and religious pluralism.

him or her. No one has a "right" to force himself or herself into another's expressive or religious group.

In 1943, the Supreme Court issued one of its most powerful and eloquent decisions—a decision that is as meaningful today as it was almost sixty years ago. In the case of

are subjectively offensive to a member of a protected class be treated as punishable harassment. In other words, if a person feels harassed, then, in the university's eyes, that person *is* harassed.

Harassment regulations should not be used to prohibit any words or conduct that merely are *subjectively* offensive to a member of a protected class.

An example of the kind of harassment charges that religious individuals can face happened recently at Cornell University. In the midst of campus debate about campus gay rights policies and ordinances, a Christian professor posted some material opposing the proposed gay rights policy and outlining an orthodox Christian position on homosexual behavior. Rather than engaging him in any kind of substantive debate (or simply ignoring him), several students charged him with sexual harassment. The professor not only became a pariah on campus but he was summoned to official hearings and faced charges that placed his job and career in jeopardy. It was only after the intervention of a legal foundation devoted to religious liberty that such extraordinary charges were dropped and his career preserved.

For the public school student, the Constitution provides almost absolute protection from the kind of harassment charges faced by the Cornell professor. In fact, a federal Court of Appeals, in the case of *Saxe v. State*

College Area School District (2001), recently struck down a high school anti-harassment policy that—like many university policies—prohibited "verbal or physical conduct based on… race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment." (This language, by the way, is found everywhere in harassment codes on and off campus, and is commonly called the "hostile environment" clause. From a First Amendment point of view, it is vital to understand that the First Amendment protects speech even if someone subjectively decides that another person's expression creates a "hostile environment." Some behaviors indeed may be outlawed as true harassment, but causing discomfort by the mere expression of belief falls under the category of constitutionally protected speech.)

At *public universities*, the Constitution protects individuals or groups from being punished for speech that is merely offensive to a person or group.

In *Saxe*, the Court found that the school district's broad policy, which prevented students from making negative comments about other students' appearance, clothing, social skills, and even values, "strikes at the heart of moral and political discourse—the lifeblood of

constitutional self-government (and democratic education) and the core concern of the First Amendment." In the Court's words, the fact that some speech may offend "is not a cause for its prohibition, but rather the reason for its protection." Simply put, the government cannot prevent you from sharing your religious views just because some students may find those views offensive.

For the private school student, the situation is, again, more complex. You should be extremely familiar with stated school policy on students' rights to an open hearing, and you should know whether your school explicitly promises to protect religious belief and expression. Ironically, the policies of many schools may prohibit religious harassment to the same extent that they prohibit sexual harassment. Anti-religious students sometimes use far more offensive language to describe you than you used to "harass" your "victim." In such a situation, filing a harassment counterclaim can bring the whole proceeding to a crashing halt. Faced with the prospect of censoring anti-religious expression, colleges

Private school students should attack unfair anti-harassment regulations in the same way that they do speech codes—by seeking to apply public pressure and by using, to maximum advantage, other school policies, such as guarantees of academic freedom and the right to a public hearing.

and universities usually rediscover free speech and the desirability of open debate.

There is perhaps a certain bizarre logic in the campus argument that an orthodox Muslim, Christian, Jewish, or other religious student who expresses religiously based criticisms of premarital sex, homosexual conduct, contemporary gender roles, or abortion is thereby "harassing" students with different beliefs or practices. The legal definition of harassment, however, is quite different from what prevails in today's campus codes. Traditionally, "harassment" applied merely to speech has meant speech delivered in a time, place, or manner intended to disturb rather than to communicate. Thus, telephoning someone at three o'clock every morning to say "I hate you" is harassment because of the disturbing time and manner of delivery. Such conduct would also be harassment even if the message were "I love you," unless the listener invited the message and the timing. If someone calls a religious person a "born-again bigot," for example, that is the expression of an opinion, and intolerance is no crime. If someone awakened a religious student every night to say, "I agree with you," preventing him from working or sleeping, that indeed could be harassment.

It is not, for example, harassment for a Catholic group to argue vociferously that abortion is murder. While such an assertion doubtless would be seen as offensive or hostile by pro-choice individuals, or by women who have

had an abortion and do not like to be called "murderers of innocent life," Catholics who express such beliefs are fully protected. It would be wholly different, however, if the Catholic group continually phoned a woman and whispered "murderer" into the phone, preventing her from working, or sleeping, or enjoying a certain peace. The problem, in short, is that many college administrators and students consider speech and expression that upsets a politically favored student in any way to be "harassment." In this respect, "harassment" codes are simply "offensive speech codes" in disguise.

Despite the change of name, then, nothing has changed since the days of openly named speech codes. When religious students are charged with "harassment" for expressing and practicing their beliefs, they can often defend themselves simply by clarifying the muddled thinking of their opponents. Making an analogy on the basis of legal equality (ask, for example, if it is "harassment" when pro-choice activists offend pro-life Catholics by their actions or expressions) is often an instructive and effective argument.

CONCLUSION: FIGHTING BACK

It is easy for persecuted individuals and groups to feel alone. It is extremely rare for a persecuted student to be a part of a religious majority on campus or to be perceived as part of the mainstream of campus life. University officials often feel free to attack religious individuals precisely because such students (or faculty) often have little or no campus support.

This feeling of isolation is compounded when the persecuted individual is instructed repeatedly to keep the dispute "in the community," as if universities were somehow sacrosanct entities that would be corrupted by the knowledge and outrage of "outsiders." Many southern sheriffs defending segregation used to talk that way in the 1950s. The pressure to stay silent is reinforced by "secret" meetings and "confidential," "informal" contacts. Administrators indicate to accused students that

they will receive reasonable treatment if they agree to

theless defend your crucial right to express your views and to live by the lights of your conscience without being charged with harassment. Such supporters will need to know, of course, that the time, place, and manner of your religious expression did not interfere with the rights and safety of others. If they know that you truly are being

oppressors, when forced to explain their actions to the press, to alumni, or to judges, look foolish, hypocritical, and more concerned with advancing their academic careers than with protecting the essential freedoms of their students and faculty.

Realize, too, that you cannot delegate your fight for freedom to like-minded faculty members. If you want to protect your rights, then you must act. Recent court decisions have resulted in *less* academic freedom for professors and administrators. Students generally possess more free speech rights and religious liberties than any other person or entity on campus, and therefore it is stu-

what they do to students within what FIRE's co-founders, Alan Charles Kors and Harvey A. Silverglate, term "The Shadow University." The Foundation for Individual Rights in Education exists to bring oppression to light, and, once it has been exposed, to destroy it. To that end, FIRE sustains a formidable array of media contacts, academic relationships, and legal allies across the broadest spectrum of opinion, all of whom are committed to individual rights. Persecuted members of the academic community—even if they are completely isolated on campus—should not feel alone. Since 1999, FIRE has deployed its resources on behalf of individual students, faculty members, and student groups at schools small and large, public and private. If your individual rights are being trampled, visit www.thefire.org. FIRE will defend you, and, in similar circumstances, it will defend the real rights of your critics. Liberty and legal equality are not merely for this or that individual or group. They are a way of being human that leaves us capable, within the law, of moral choice and personal responsibility. Religious liberty, as the world has learned, is one of the most vital aspects of human freedom and dignity.

The struggle for campus religious liberties has truly begun. After almost four decades of retreat, religious individuals are beginning to draw their own rightful lines and to make their own stands at universities across the country. The stakes could not be higher for those who treasure free expression, who value true diversity, and

who understand that the right to private conscience is the most fundamental and irreducible of liberties. Those of you who have experienced efforts to repress your thoughts, convictions, and souls now must take a stand on behalf of your foundational rights as human beings. For too long, the guardians of campus orthodoxy have been permitted to twist the meanings of "tolerance" and "inclusion," denying both to persons of faith. It is time to name and resist campus leaders who tolerate only those who bow before their chosen gods and who include only those who worship at their particular ideological shrines.

It is no exaggeration to say that the future of American freedom is at stake in the struggle for campus liberty and legal equality. America's students cannot learn to respect freedom if they participate in—or passively tolerate—tyranny. Today's college campus is tomorrow's public, political, educational, and civic culture. By standing against campus persecution, by fighting the tyranny of enforced orthodoxy and legal inequality, religious individuals and their supporters preserve not only their own consciences, but also the liberty of our entire society.

Saxe v. State College Area School District, 240 F.3d 200 (2001).

Widmar v. Vincent, 454 U.S. 263 (1981).

Lamb's Chapel v. Center Moriches Union Free School, 508 U.S. 384 (1993).

Good News Club v. Milford Central School, 121 S.d.xxx:rT–@©S093 (2001).

University of Wisconsin v. Southworth, 529 U.S. 217 (2000).

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A distinguished group of legal scholars serves as Board of Editors to this series. The board, selected from across the political and ideological spectrum, has advised FIRE on each of the *Guides*. The diversity

campuses is one of the defining struggles of the age in which we find ourselves. A nation that does not educate in freedom will not survive in freedom and will not even know when it has lost it. Individuals too often convince themselves that they are caught up in moments of history that they cannot affect. That history, however, is made by their will and moral choices. There is a moral crisis in higher education. It will not be resolved unless we choose and act to resolve it. We invite you to join our fight.

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