PROTECTION OF CONSCIENCE: *West Virginia State Board of Education v. Barnette* (1943)

The concept of the First Amendment's protection of the freedom of conscience and deterrence against official attempts to engage in "thought reform" of its citizens, is best exemplified by the opinion of the Supreme Court in the landmark 1943 case of *West Virginia State Board of Education v. Barnette*.[1]

America was at war with totalitarian powers in 1943. It was not yet clear what the outcome of that war would be, although the Allied Powers were doing better than in the earliest years of the conflict. Still, the fates of the Western democracies, including the United States, were

[1]The authors wish to acknowledge here the discussion of this case in Alan Charles Kors and Harvey A. Silverglate, *The Shadow University: The Betrayal of Liberty on America's Campuses* (The Free Press, 1998; paperback edition from HarperPerennial, 1999), portions of which have been liberally quoted here. We have made liberal use as well of *The Shadow University*'s discussion of other cases.

hanging in the balance. The West Virginia legislature, expressing a desire to aid the national war effort against European fascism, had enacted a statute to require all public and private schools to teach, foster, and perpetuate "the ideas, principles and spirit of Americanism." The state Board of Education ordered a daily flag salute. Refusal subjected the student to dismissal and subjected parents to criminal penalties.

Several members of the Jehovah's Witnesses religion—parents and their children—objected to participating in the flag salute, believing that to pledge to a flag was an act of idolatry, a form of bowing to graven images, prohibited by the Old Testament. They did not object to others pledging, but they refused to do so themselves. In *West Virginia State Board of Education v. Barnette*, the Supreme Court analyzed the constitutionality of such a requirement not solely in terms of religious liberty but, more broadly, in terms of the right of private conscience against governmental coercion of expressions of belief and loyalty. Writing for the majority, Justice Robert Jackson had no quarrel with West Virginia's requirement that certain courses be *taught*, nor with its attempts to *inspire* patriotism by *exposing* students to national history and traditions. However, in the Court's view the Board's flag salute requirement was different, because it *compelled* a student "to declare a belief [and]…to utter what is not in his mind." In matters of belief, the Court saw human beings as essentially distinct;

each was free to find "jest and scorn" where another found "comfort and inspiration."

The Court found that the underlying issue was not any claimed conflict between liberty of conscience and the state's ability to survive in time of crisis. The issue was not weak versus strong government, but, rather, seeing the strength of America in "individual freedom of mind" rather than in "officially disciplined uniformity for which history indicates a disappointing and disastrous end." Enforced conformity, far from teaching the value of liberty, would "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

Justice Jackson explained why even men of good intentions should not possess the awesome power to compel belief. Both the good and the evil had attempted "to coerce uniformity of sentiment in support of some end thought essential." Such goals had been variously racial, territorial, and religious, but each such effort, Jackson reasoned, raised the bitter and profoundly divisive question of "whose unity it shall be." Nothing, ultimately, would divide society more than "finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing." Surely all of human history taught the "ultimate futility of such attempts to compel coherence," as seen in Roman efforts to destroy Christianity, the Inquisition's attempt to ensure religious unity, and "the

Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies." In short, Jackson wrote for the majority of the Court, "compulsory unification of opinion achieves only the unanimity of the graveyard." He concluded: "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."

For the Court, arguments that wartime and patriotism raised singular problems constituted "an unflattering estimate of the appeal of our institutions to free minds." Without the toleration of eccentricity and "abnormal attitudes," we could not have either our treasured "intellectual individualism" or our "rich cultural diversities." It would violate the very spirit of liberty to make an exception for coercion of what society found to be its most important beliefs. The "freedom to differ is not limited to things that do not matter much," the Court wrote: "That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."

Justice Jackson concluded with a particularly eloquent refutation of claims for the value of enforced orthodoxy in civic life. His words addressed issues that lie at the heart of the links among the First Amendment, academic freedom, and the right of individuals to define their deepest sense of themselves. "If there is any fixed star in our constitutional constellation," he wrote, "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 words or act their faith" in such orthodoxy. "The purpose of the First Amendment to our Constitution," he concluded, was precisely to protect "from all official control" the domain that was "the sphere of intellect and spirit." Thus was confirmed the primacy of individual conscience over the perceived social benefits of conformity, the need for each individual to enjoy liberty in order for a common liberty to exist, and the intolerability of restricting even one person's liberty in "the sphere of intellect and spirit" in an attempt to create some better world or even a better human race.

CAMPUS ATTEMPTS TO REFORM AND DICTATE BELIEFS AND ATTITUDES

Students entering colleges and universities deserve a rich intellectual environment where they find themselves invited into freewheeling debates, with many, many different voices, on a wide range of important topics. Unfortunately, many colleges today behave, instead, like "enclaves of totalitarianism," a term that the Supreme Court coined to describe violations of free speech in high schools, in the case of *Tinker v. Des Moines Independent Community School District* (1969). If secondary schools, which educate children, are prohibited from becoming totalitarian, colleges and universities, which educate adults, are held to a much higher standard. Unfortunately, these institutions all too often betray their obligation to honor diversity of opinion, freedom of conscience, open debate, and the free marketplace of ideas. As one can see in abundance on the website of the

Foundation for Individual Rights in Education (FIRE), college officials frequently suppress ideas and speakers with whom they disagree, and use coercive tactics that violate the individual rights of students to formulate their own beliefs. (See www.thefire.org.)

Methods of enforcing officially approved points of view go beyond mere censorship. Campuses often adopt an official orthodoxy on matters of politics, values, and worldview, and they try to force students to mouth and even to believe the points of view that the administrators believe to be appropriately progressive or "politically correct." These methods of thought reform include:

- Mandatory diversity "training" that aims to intimidate students into abandoning deeply held beliefs so that they will adopt the university's preferred political stance. The distinction between "education" and "training" or "indoctrination" is important. While it is permissible, indeed valuable, to educate students about controversial issues and views of race, sex, and sexuality in our society, the university has no right to coerce students into adopting only one approved point of view on these issues.
- Ideologically tilted speech codes that privilege one point of view over others. Although civility codes that are neutral among competing viewpoints (that is, codes that control the manner in which a

thought is expressed, but that don't seek to control the content of thought itself) also offend the First Amendment, ideologically biased codes and double standards infringe terribly on freedom of conscience by silencing individuals selectively. (The courts are harsher on censorship that seeks to outlaw a particular point of view than they are on censorship that attacks, instead, the form of the expression, even though the latter is also protected.) One example of such codes is that of Shippensburg University, whose rules FIRE successfully challenged in a 2003 lawsuit. The Shippensburg code stated, "Shippensburg University's commitment to racial tolerance, cultural diversity and social justice will *require* every member of this community to ensure that the principles of these ideals be mirrored in their *attitudes and behaviors*." (Emphasis added.) Similarly, FIRE has criticized professors who compel students to sign statements agreeing to certain viewpoints or behaviors in order to limit debate to "acceptable" viewpoints.

- The use of nondiscrimination policies as a weapon to expel from campus or to suppress certain student groups that dissent from administrative campus orthodoxy, such as (these days) conservative religious groups, who often disagree with the college's stance on social issues such as gay rights and abortion. (At other periods of our history, of

course, conservative religious groups were more in favor, while other more liberal groups were more out of favor. The pendulum of oppression usually swings, which is why it is so crucial to agree to protect individual rights not as a political tactic, but as a way of being human.) Although it is appropriate and important for the university to punish invidious forms of discrimination, it is wrong for the university to transform such neutral antidiscrimination enforcement responsibilities into a set of coercive double standards, an ideologically biased weapon that is applied selectively against certain groups.

- The imposition of mandatory psychological counseling, accountability training, or other forms of counseling as punishments for campus offenses. Often universities will agree to "leniency" for those accused of various campus offenses so long as the accused individuals agree to attend re-education sessions. Too many students agree to attend such sessions, mistakenly believing that it is not a form of "punishment" to sit through hours of coercive indoctrination.

Just as the framers of the First Amendment battled against the establishment of an official state-approved religion, a freedom contained in the First Amendment's religion clause, so does the First Amendment prevent the

state from forcing citizens to believe, or mouth, an officially sanctioned point of view, whether political, philosophical, or personal. Free individuals disagree about and debate such views, and they seek to change each other's beliefs by persuasion and argument, not by coercion and force.

WHAT ABOUT PRIVATE COLLEGES AND UNIVERSITIES? A QUESTION OF ETHICS AND CONTRACT

Private universities and colleges stand in a different relation to the United States Constitution than governmental institutions such as public universities and colleges. The Bill of Rights of the Constitution imposes limits only on *governmental power* and action. Because a private college or university is not a governmental entity, it does not have to obey the First Amendment; it may, in other words, enforce speech restrictions upon its faculty and students that the government would not be permitted to enforce. The fact that a private institution is not bound by the Constitution, however, does not mean that it is not bound by the *rule of law*. Many private schools choose by their own formal and advertised policies to hold themselves to certain standards of freedom of speech, due process, diversity of opinion, and other concepts of academic freedom and protection of individual

conscience. (Most private schools do not want to state that their students enjoy fewer rights of free speech and fairness than students at local public and community colleges.) A private school that enacts such policies may be required under state laws to live up to them. Many state laws exist to enforce contracts or outlaw fraud, appropriately requiring nonprofit institutions and businesses to live up to their own promises and advertised standards. These laws might compel a private school to respect the freedom of conscience of individual students or might prevent a private school from ordering a controversial student group disbanded because the school objects to the views expressed by the group. This model might apply to private universities and colleges that promote no distinct ideological or religious belief system, or, indeed, that promise certain standards of nondiscrimination, legal equality, and academic freedom.

Importantly, some states have laws (or state constitutional provisions) that provide students at private schools with some measure of First Amendment rights. For example, California's "Leonard Law" (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 enjoy the same level of First Amendment rights as students at California's public colleges. The Leonard Law, however, does not apply to students at religious colleges, since the legislature was concerned not to interfere with the practice of religion.

In addition to those rights protected by contract and by statute, 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—all of which are designed to entice a student to attend that institution rather than another—will loudly proclaim the school's commitment to "diversity," "inclusion," and "tolerance." Students will be assured that they will be "welcomed" or find a "home" on campus, regardless of their background or their religious or political viewpoints. Promises such as these might well lead students to say no to opportunities (and even scholarships) at other schools and to enroll in the private secular university. If these promises of "tolerance" or of a place in the community later turn out to be demonstrably false, or are delivered to some but withheld from others, a university could find itself in serious legal jeopardy. While private universities are rightfully beyond the reach of the Constitution, they have no license to deceive with false promise. A car dealer who

deliberately promises six cylinders but delivers four breaks no Constitutional provision, but breaks many provisions of the common law and state statutes. Legal prohibitions against deceptive promises that dupe someone into signing a contract and legal prohibitions against false advertising can be used to force a change in a college administration's behavior.

By contrast, if a private college or university is organized around a specific set of ideological or political beliefs, then, in fact, the First Amendment protects its right to require students to conform to the college's set of beliefs. Students attending a private school established around a clear system of belief have no legal right to demand that the school allow dissenters to express conflicting views on campus. (If one attends an openly advertised Catholic seminary or Mormon college, for example, one has no legal grounds for challenging its specific mission.) The First Amendment's right of association protects the right of those private schools to promote their specific ideological or religious beliefs. Of course, a private college or university may not present itself as a secular liberal arts institution that guarantees a student's right to free expression but then, in practice, privilege and seek to impose a particular ideological or religious agenda by allowing only organizations that promote such an agenda to exist on campus. Such a practice would arguably violate the contractual obligation that the institution undertook when it promised its students a

liberal arts education in which the free marketplace of ideas prevails. When a vendor advertises one product but then offers a different one in its place, that is known as "bait and switch." When a vendor claims to sell you one product but secretly substitutes another, that act is known as "fraud." Colleges and universities, too, may not with impunity engage in "bait and switch" or "fraud."

Moreover, when a private university violates students' freedom of conscience, they may meet all of their *legal* obligations but, in doing so, they violate their *moral* obligations to their students. In that situation, students can use the news media, advocacy organizations such as FIRE, and moral suasion to shame private university administrators into providing the same liberties to their students that they would receive at a public institution.

THE *BARNETTE* PRINCIPLE AND THE UNCONSTITUTIONALITY OF COERCING SOCIAL ATTITUDES

The *Barnette* case involved a situation in which a student, for *religious* reasons, refused to accept a *government* system of belief (or, in that case, the *symbol* of that system, namely the flag). Simply put, the student objected to the state's notion that patriotism, especially in time of war, is a sufficiently important value to be *enforced* in the minds, on the lips, and in the hearts of all citizens. As noted above, Justice Jackson's profound reasoning and powerful language went well beyond religious liberty, resting instead on a citizen's right to freedom of conscience. Indeed, one even has the right to refuse to express a commitment to liberty itself. In 1977, the United States Supreme Court, in the case of *Wooley v. Maynard*, ruled that the state of New Hampshire could not require its residents to display the state's "Live Free or Die" motto

if they disagreed with its message. As plaintiff George Maynard wrote to the court, "I believe that life is more precious than freedom." The import of the court's ruling is that the state does not have the right to force anyone to voice an idea he or she is opposed to, even if that idea is liberty itself.

This approach is at the center of a crucial Supreme Court decision. The Court, of course, reviews cases already decided by lower courts. Normally, when the Court chooses to hear a case, it calls for a full hearing, with new legal briefs and with oral arguments, after which it writes its own opinion. In this case, however, the Court apparently believed the principle at stake in the case to be so clear, and the lower court's decision on the issue so obviously correct, that it did not see a need to hear new arguments or to offer its own analysis. Instead, it simply approved what the lower court did and said. That is a powerful affirmation, and the case is important enough to merit some extensive discussion.

In 1985, Judge Frank Easterbrook, of the United States Court of Appeals for the Seventh Circuit, which is just below the Supreme Court in authority, wrote the appelate court's opinion in the crucial case of *American Booksellers Association Inc. v. Hudnut*. The city of Indianapolis had enacted and enforced an antipornography ordinance that claimed to protect women from "subordination." Judge Easterbrook saw through the ordinance's disguise as a "civil rights" law and described

it as an effort to coerce a change in attitudes. Noting that supporters of the ordinance "say that it will play an important role in reducing the tendency of men to view women as sexual objects," he concluded that it faced an insurmountable constitutional obstacle: It not only sought to alter *attitudes* (which is bad enough), but it did so in a manner that discriminated by *viewpoint*. The law favored, he correctly noted, only "speech treating women in the approved way—in sexual encounters 'premised on equality.'" The First Amendment, he ruled, prohibits the state both from establishing a "preferred viewpoint" for or about a group, and from taking steps to change private attitudes to suit such an ideological preference.

In language that seems directly to address the academics and administrators who draft mandatory campus sensitivity training programs and ideologically biased freshmen orientations, the court concluded that a free society protects the right of individuals to choose, freely and for themselves, those things that affect "how people see the world, their fellows, and social relations." Responding to the city's argument that pornography poisoned the atmosphere for women, the judge rejected any "answer [that] leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us." The First Amendment, Judge Easterbrook and his colleagues ruled, permitted neither "thought control" nor an offi-

cially "approved view of women, of how they may react to sexual encounters [and] of how the sexes may relate to each other."

The city appealed to the Supreme Court, challenging the Circuit Court's ruling that Indianapolis's antipornography "civil rights" ordinance was unconstitutional. The Supreme Court, after accepting the case for review, found the issues so clear that it affirmed Judge Easterbook's judgment summarily—that is, without even calling for further argument. In short, the decision of the Court of Appeals now has the binding and official force of the United States Supreme Court. It is the law of the land. Under the First Amendment, clearly, there can be no "approved view of women" and of "how the sexes may relate to each other." There can be no imposition of regimes aimed at changing the attitudes of free citizens by coercion. Freedom of conscience, in America, is an essential legal and moral value, and it begins with the recognition that we are a nation of free individuals who may define for ourselves the deepest part of our being.

This does not mean, of course, that there can be no laws banning true discriminatory *practices*. However, the First Amendment draws a line between laws that control one's *actions* and laws that seek to control one's speech or, more profoundly still, one *beliefs and attitudes*.

FREEDOM OF CONSCIENCE: A RIGHT FOR BOTH THE RELIGIOUS AND THE SECULAR

Many wrongly believe that freedom of conscience refers only to religious conscience. Such a restriction, of course, itself would constitute viewpoint discrimination. In fact, someone's objection to campus "thought control" need not be rooted in religion in order to be constitutionally protected. This area of law has not been fully explored by the courts, but there seems to be no constitutional rule or doctrine limiting protection to *religiously* based objections to, say, diversity training, but not granting protection to those with *philosophical* or *ethical* objections. *Barnette* specifically concluded, it is worth repeating, "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" in it. (Emphasis added.)

College administrators at public colleges and universities are the ideal example of the "petty" officials to whom *Barnette* applies.

The Supreme Court followed such an expansive approach in interpreting a federal law that exempted religious objectors from the military draft. In *U.S. v. Seeger* (1965), the Court stated that "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition." Thus, to the extent that the law gives an advantage to a person because of his or her religious belief (in this instance, the privilege of not engaging in war based upon a religiously based conscientious objection) the state must accord the same privilege to a person whose philosophical views are comparable in intensity and personal significance to a religious belief. Applied to the issue of thought reform, this principle suggests that the government (including state colleges and universities) may not seek to force a person to adopt a belief that violates either his or her religious or deeply held philosophical values.

THE CONSTITUTIONALLY PROTECTED RIGHT TO CONSCIENCE

The authors of the First Amendment understood full well that people with power have a dark tendency to abuse it, to use coercion, and to suppress competing ideas. With great foresight, the framers erected specific provisions in the First Amendment to prevent such abuses, protecting an individual's right to hold his or her own opinions, to speak or publish them freely in the marketplace of ideas, to join with other like-minded individuals to promote their common viewpoints, and to practice his or her religion without interference from the state. These First Amendment rights, taken together, protect an individual's right to believe, or, in other words, the right to conscience.

Students in today's universities must remember that the Constitution protects their right to freedom of conscience and belief at public universities, and that many

private colleges guarantee such freedoms by their own stated policies, procedures and, indeed, promises and assurances. Students should understand and know why it is important to protect their right to freedom of conscience against such ideological coercion from those in power.

THE RIGHT TO BELIEVE

The freedom to believe, or the right of conscience, is the foundation of all other First Amendment rights. The Supreme Court views the right of conscience as so fundamental that *no* state interest can justify an infringement upon it. (In contrast, speech may be curtailed in the face of a demonstrated "compelling" state interest, and, further, speech is subject to reasonable restrictions in terms of the time, place, and manner in which the speech is delivered. (See *FIRE's Guide to Free Speech on Campus* for an explanation of these limitations.) This view of the essential nature and broad scope of the right of conscience has been articulated in a long series of Supreme Court opinions.

In 1878, in a case rejecting the argument by Mormon polygamists that their right to free exercise of religion exempted them from criminal prosecution for bigamy,

the Supreme Court ruled that the government may not prosecute people for holding disfavored *beliefs*, but can prosecute them for illegal *actions*. The Court put it this way: "Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices" (*Reynolds v. U.S.* [1878]). The Supreme Court has reaffirmed this principle that beliefs are absolutely protected from governmental interference in such important cases as *Cantwell v. Connecticut* (1940) and *Bowen v. Roy* (1986).

For many, as noted, the Supreme Court's most important and comprehensive right of conscience case is the 1943 decision of *West Virginia State Board of Education v. Barnette*, discussed earlier in some detail. What is crucial about *Barnette* is that the Court chose not to decide the case solely on the basis of the religious liberty clauses of the First Amendment (the salute to the flag, recall, was seen by Jehovah's Witnesses as contrary to Biblical teachings against idolatry). Instead, the Court's opinion protected, in broad terms, the freedom not to believe in, or even mouth agreement with, secular and religious orthodoxies approved by those who happen to be in power at any given time.

What is certain is that a state college or university may not infringe on a student's right to believe. However, courts have had few opportunities to rule on precisely how and in what contexts state school officials must respect an individual's right to believe. University offi-

cials would undoubtedly argue that the entire point of a college experience is *education*, being exposed to differing viewpoints, having one's own beliefs challenged so that they are either strengthened or discarded in the crucible of open debate. They would therefore argue that it's perfectly acceptable to force students to be exposed even to views or to an experience or belief that some would consider wicked or harmful.

Although there is a good measure of truth in such an argument, the First Amendment does place limits on what a state university can do to advance learning or to further a student's education. For example, no educational or pedagogical reason would justify a government school forcing students to attend mandatory chapel services, to recite the Pledge of Allegiance, or to pledge to adhere to certain beliefs as a condition of attending or graduating from that school. Such enforced ideological activity or belief quite clearly crosses a line between true education and what might otherwise be deemed "brainwashing," "thought reform," or, the older term, "indoctrination."

Of course, it would be perfectly acceptable for a professor to require students to *study* and even to *memorize* passages from religious documents, the *Communist Manifesto*, or any other ideologically charged materials, but only if it is part of a genuine educational program in which the students are not required to make statements of belief in or agreement with those materials. While the

line between education and coerced ideological conformity is sometimes difficult to decide in close cases, a careful reading of some of the leading Supreme Court cases (especially *Barnette*) can usually help the analysis.

PRINCIPLES OF ACADEMIC FREEDOM: AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

The American Association of University Professors (AAUP) has provided the most authoritative and widely accepted definition of academic freedom in the United States. After having been enlisted to help resolve several high-profile disputes between university administrators and individual professors, the AAUP, in 1915, appointed a committee that drafted guidelines that would define more concretely the views widely accepted in the United States and parts of Europe, but which had proven difficult to specify and implement. The resulting document (the *General Report of the Committee on Academic Freedom and Tenure*) was heavily influenced by the idea that truth was not a fixed absolute, but, rather, a goal continually pursued in a university in which individuals had the "complete and unlimited freedom to pursue inquiry and publish its results." The 1915 report was less intent on

giving specific rights to professors than on ensuring that the pursuit of knowledge and truth by the faculty in general would proceed unhindered by any authority or force. The university was to be a refuge from *all* tyrannies over men's minds—whether exercised by the state, the university trustees, or by public opinion.

The report, in addition to recognizing professors' freedom of unfettered inquiry, also recognized their freedom to teach their particular fields without interference as to content, except when the execution of their teaching duties could fairly be classified as incompetent or neglectful.

There was, however, a notable exception to the professor's freedom to teach whatever he, in his sound professional judgment, wished when dealing with young students. The teacher was admonished to avoid "taking unfair advantage of the student's immaturity by indoctrinating him with the teacher's own opinions before the student has had an opportunity fairly to examine other opinions upon the matters in question, and before he has sufficient knowledge and ripeness of judgment to be entitled to form any definitive opinion of his own."

The 1915 AAUP document was updated and expanded in 1940, and again in 1967. In its *Joint Statement on Rights and Freedoms of Students* (1967), the AAUP addressed the principle of academic freedom as it relates to students: "Students should be encouraged to develop the capacity for critical judgment and to engage in a sus-

tained and independent search for truth.... [They] should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion." *The Joint Statement* also noted that "students should have protection through orderly procedures against prejudiced or capricious academic evaluation." In 2000, the AAUP reaffirmed the necessity of these fundamental rights in its *Statement on Graduate Students:* "Graduate programs in universities exist for the discovery and transmission of knowledge, the education of students, the training of future faculty, and the general well-being of society. Free inquiry and free expression are indispensable to the attainment of these goals."

When a court intervenes in a university's refusal to extend free speech rights to a student, it does so under the legal rubric of enforcing a constitutional or statutory right to free speech rather than enforcing a precept of academic freedom. Courts, after all, interpret and enforce constitutions and statutes, not AAUP policies, unless a professor or student sues the university for a breach of a contract that promised academic freedom. Nonetheless, the concepts of free speech and academic freedom have become intertwined. Courts, in fact, as part of the judicial enforcement of constitutional rights, have come to enforce certain principles of academic freedom as defined by the academic profession. In 1967, in the landmark case of *Keyeshian v. Board of Regents of the*

University of the State of New York, the Supreme Court held that "our Nation is deeply committed to safeguarding academic freedom, [a] transcendent value to all of us and not merely to the teachers concerned." The Court found that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom…[which is] peculiarly the marketplace of ideas."

CAMPUS THOUGHT REFORM: DIVERSITY TRAINING AND ORIENTATION PROGRAMS

Some colleges and universities openly communicate that they operate from a specific set of ideas as essential truths and expressly limit opposing ideas on campus: Conservative religious colleges come to mind, along with military academies. There is nothing wrong, or unconstitutional, with this phenomenon of institutions that operate under a prescribed doctrine, ideology, or discipline. This is because these schools openly proclaim their specific mission. Students who consider enrolling at such schools have clear notice, warning, and understanding of what kind of school they will be attending and what they should expect if they express certain dissenting views. The Constitution permits private schools to promote their own beliefs, because the Constitution protects the right of free association, the right of people to join together with like-minded people to advance a

common set of ideals. Indeed, such institutions contribute to American pluralism and diversity or choice. What the Constitution *prohibits* is the *state* coercing the minds of those who dissent from a state dogma.

The problem—and the conflict with the principles that inform the First Amendment as well as with principles of academic freedom—is with those colleges and universities that claim to welcome debate and dissent, but then impose a secular orthodoxy on their students. One of the main tools they use to accomplish that goal is mandatory "diversity training" for students.

Alan Charles Kors, a professor at the University of Pennsylvania, coauthor of *The Shadow University: The Betrayal of Liberty on America's Campuses*, and a cofounder of FIRE, wrote of the "Orwellian implications of today's college orientation" programs in his article, "Thought Reform 101," published in *Reason* (March 2000) and available on the FIRE website (www.thefire.org). He examines several diversity training programs at various colleges and universities, exposing how each of them violates the rights of conscience and belief, and concludes: "The assault on individual identity was essential to the horror and inhumanity of Jim Crow laws, of apartheid, and of the Nuremburg Race Laws. It is no less inhuman when undertaken by 'diversity educators.'"

In particular, Kors focuses on *Blue Eyed*, a "two-and-a-half-hour exercise in sadism," in which trainer Jane Elliott "divides her group into stupid, lazy, shiftless,

incompetent, and psychologically brutalized 'blue eyes,' on the one hand, and clever and empowered 'brown eyes,' on the other." In the words of her own publicity materials, Elliott "does not intellectualize highly emotionally charged or challenging topics...She uses participants' own emotions to make them feel discomfort, guilt, shame, embarrassment, and humiliation." Kors sees this as appallingly similar to the brainwashing described in George Orwell's *1984*: "In *Blue Eyed*, the facilitator, Jane Elliott, says of those under her authority for the day, 'A new reality is going to be created for these people.' She informs everyone of the rules of the event: 'You have no power, absolutely no power.' By the end, broken and in tears, they see their own racist evil, and they love Big Sister."

Diversity training that seeks to indoctrinate students—intrusively and without the right to question, dissent, and debate—about the supposedly false nature of their beliefs and about the need to change may very well cross the line between education and violation of the constitutional right of conscience. State colleges and universities should allow students who object to such programs the right to opt out of such training sessions or else restructure the events to ensure that students are free to disagree with the viewpoints expressed in sensitivity training. (Thoughtful debates among conflicting viewpoints would be yet better and closer to the spirit of education.) While the very notion of "training" (as dis-

tinguished from "education") is antithetical to both liberty and dignity, an opt-out would take some of the edge from such programs. The state still plays the improper role of "Big Teacher," but at least the student is allowed to avoid the indoctrination and therefore cannot claim a personal injury. Note that in the *Barnette* case the Jehovah's Witness students did not eliminate the Pledge to the Flag being said in the public school classes—and, indeed, they did not even try to do so—but simply got the right to stand silent and opt out of pledging. Of course, the Pledge is not quite the same as "diversity training," since the Supreme Court specifically said that inculcating patriotic values was a reasonable undertaking for a public elementary school, warning, however, against the creation of a state "orthodoxy" on such matters. It is clear, by contrast, that state universities should not seek to "train" adult students to hold certain social and political views.

THE RIGHT OF ASSOCIATION AND MANDATORY DIVERSITY TRAINING FOR STUDENTS

Mandatory diversity training, in its more extreme forms, as it is done on many campuses today, likely infringes unconstitutionally on a student's individual right to believe. Less extreme versions of diversity training may pass constitutional muster, but they should still raise concerns about freedom of conscience.

There has not yet been a direct challenge in a federal court to a mandatory diversity training program on a public college campus. However, there is good reason to believe that the more intrusive of these programs would be ruled unconstitutional. The two critical factors that raise constitutional questions about a diversity training program are (1) required attendance and (2) the goal of changing the individual students' fundamental beliefs to a preapproved set of beliefs, by methods that make clear

to the students that, in certain areas of ideology and belief, dissent or deviance is not acceptable.

The government may announce its own message in the marketplace of ideas, urging people to stop smoking or to buy United States Savings Bonds. People who disagree or decide they just don't want to hear the government's message may take steps to avoid hearing it and certainly are not required to indicate their agreement in terms of their voiced opinions or, most of the time, even their conduct.

When a state university forces people to hear its message by imposing it on a captive audience, however, the requirement to sit and listen to a political and social orthodoxy itself raises constitutional concerns. Mandatory attendance requirements at such an event indicate a constitutional violation of the attending students' rights, forcing unwilling students to listen to a presentation that they would not attend absent the compulsion. This is especially true when the compulsion aims at changing and imposing beliefs. (Unlike a mandatory session of *Blue Eyed*, for example, a required introductory course in World History is governed by all of the rules of academic freedom and of a student's right to dissent and disagree.)

A state university cannot justify coercive forms of mandatory diversity training on the grounds that someone can simply go to school somewhere else. This would not justify mandatory religious chapel services at a state

university, and it does not justify diversity training intended to change a student's beliefs.

Of course, the Constitution protects a person's (such as a professor's) right to *persuade* someone to adopt his or her viewpoint, even when the persuasion is forceful and passionate. The government crosses a line when it forces students to attend and to listen to presentations intended to change their beliefs, and then either requires them to voice agreement or forbids them to disagree openly. Mandatory diversity training is likely unconstitutional if it is presented in an environment where students are not allowed to question the presentation of the "orthodox," official view, where they are not allowed to debate or voice opposing views to the government's views, and where the state sets up the diversity training in a way that requires or strongly pressures students to conform or be silent. In a sense, the line between permissible education and unconstitutional "training" is demonstrated by the very use of the word "training," which implies coercion rather than intellectual choice. One doesn't "train" a pet by intellectual persuasion.

It is not necessarily an adequate defense for the state school to claim that students only have to sit through the presentation and do not have to believe what they hear. The government of West Virginia did not require the students in the *Barnette* case, who were Jehovah's Witnesses, to believe the words of the Pledge of Allegiance; all that was required was that the students

pledge to the flag. The Supreme Court ruled precisely that forced participation in that patriotic ceremony went beyond the state's legitimate powers. Although many presentations and lectures will pass constitutional muster as long as the student is permitted to remain silent (for instance, it is not a constitutional violation if those students who object sit in silence while the rest of the room recites the Pledge of Allegiance), an exceptionally heavy-handed ceremony in which one's mere presence implies belief is probably unconstitutional. (For example, for many religious students, their required presence at religious services of another religion or denomination, even if they are not forced to pray, would violate their religious consciences.)

Courts have not decided precisely what kinds of state programs or exercises violate a student's right of conscience by officially trying to change his or her chosen system of belief. This is a largely unexplored area of law. Nonetheless, there are examples of threats to the right of conscience that would stand a very good chance of being declared unconstitutional if challenged. Examples might be: When a campus official requires students to say a "diversity pledge"; when a campus official pressures students to "show support for the troops" by supporting United States foreign policy; when a campus diversity trainer tells an 18-year-old rural freshman that she must eradicate latent racism or heterosexism from her attitudes; when a student judicial affairs official tells a

Muslim student that his religious beliefs must be changed because they promote subjugation of women; or, indeed, when officials force students to take part in exercises where students must reveal their inner thoughts and moral beliefs before a group of scrutinizing peers, pressuring the student to conform. Identifying students who hold the "wrong" beliefs and subjecting them to techniques to purge them of their ideological errors suggest a gross violation of a student's right to believe.

ACADEMIC DEMANDS FOR IDEOLOGICAL UNIFORMITY

Other ways that supposedly tolerant campuses suppress the freedom of conscience and the freedom to believe include limitations on classroom discussions. The faculty of St. Cloud State's Department of Social Work in Minnesota announced that students could not major in social work if they hold the point of view, regarding homosexuality, that one may "hate the sin and love the sinner." Such a theological view would make them incapable of dealing with homosexuals, the faculty members decided. In doing so, St. Cloud had decided that certain devout people of faith are incapable of benefiting society as social workers unless they renounce and change their deeply held beliefs.

At Citrus College in Glendora, California, a professor teaching a required course in speech compelled undergraduate students to write antiwar letters to President

George W. Bush. To receive the maximum score in the course, students had to write letters to President Bush "demanding" that he not go to war with Iraq. Students who asked to write letters supporting the president were told that this would be unacceptable and that they would not receive extra credit.

At Rhode Island College, the Poverty Institute (a school of social work) required its students to lobby the state legislature—and advocate school-approved positions—regardless of the student's own beliefs. Further, a faculty member responded to a student who challenged the perceived ideological bias of his teachers by telling him that he should perhaps consider another area of study if he did not agree with the ideology of the department.

A Columbia University professor refused to permit a student to dissent from his characterization of Israeli actions during the Israeli army's battle against Palestinian militants in the Jenin refugee camp. Declaring that he would not permit anyone in his classroom to "deny" evidence of "Israeli atrocities," the professor shut down discussion in class and violated that student's academic freedom.

By limiting classroom discussion and silencing dissent, professors violate the rights of conscience of their students. The clear aim is not merely to advocate a point of view but to coerce, if necessary, their students into

believing the professor's or school's version of truth. Such oppressive actions clearly cross the line between education and indoctrination.

PROFESSORS' POLICIES LIMITING CLASSROOM DISCUSSION

Professors violate students' right to believe if they require them to assent to a set of beliefs before they can enter into class discussions. A professor may have ground rules to ensure civility and order, and a professor should insist upon mastery of a subject (while protecting a student's right to reasoned dissent), but a professor has no right to demand ideological uniformity. Similarly, a state school may not constitutionally require students to hold a certain belief in order to complete a specific college major. A student in a political science class may not be required to state approval of the president's military policies. A theology major cannot be required to renounce her atheism, or a social work major to renounce his opposition to legal recognition of nontraditional families, or a labor history major to renounce her allegiance to the free enterprise system or her admiration of

Marxism. That is not to say, of course, that requiring students to work with certain basic assumptions of the discipline, without being forced to voice a true belief in them, would violate their rights to conscience. A "young Earth" Christian fundamentalist (*i.e.*, one who believes, based on Biblical genealogies, that the Earth is 6,000 years old) cannot learn modern geology unless she is willing temporarily or conditionally or at least hypothetically to set aside or compartmentalize her "young Earth" beliefs in order to learn mainstream geological theories. An ardent Communist cannot learn mainstream economics if he is not willing temporarily to set aside or compartmentalize his own beliefs when learning about free market economic theories that are founded on assumptions that contradict his own ideology. What crosses the line is when the Christian fundamentalist or the Communist, despite learning the discipline and meeting all of its academic requirements, is denied his or her degree or given a lower grade purely for refusing to believe or mouth support for the tenets of the discipline that he or she has mastered.

Examples of classroom requirements that cross this line come from the University of South Carolina and the University of Southern California, among many others, where professors required students to agree to a set of viewpoints before they could enter into classroom discussions. At the University of Southern California, students had to "acknowledge that racism, classism, sexism,

heterosexism, and other institutionalized forms of oppression exist" as a precondition for enrolling in one professor's class. Students also had to "agree to combat actively the myths and stereotypes about our own groups and other groups so that we can break down the walls that prohibit group cooperation and group gain." In a class at the University of South Carolina, students had to agree that "everyone [in the world] does his or her best." The words "acknowledge" and "agree" are clear signs of coercion.

Universities that claim to inculcate and encourage independent, critical, and inquiring minds in students cannot turn around and force students to conform to a set of ideas, or to suffer for expressing views deviating from the party line. In higher education, there is no official orthodoxy to which a student may be forced to voice his or her agreement.

IDEOLOGICAL REQUIREMENTS FOR STUDENT GROUP RECOGNITION

Many universities require all campus organizations to sign nondiscrimination statements in order to meet on campus and to gain official recognition by the school. While it is a good thing, in fact, that the chess team, for example, cannot exclude members by race or national origin, campus administrators are increasingly using the nondiscrimination statements as weapons to try to drive certain disfavored student groups off campus.

Rutgers and the University of North Carolina-Chapel Hill attempted to ban Inter-Varsity Christian Fellowship chapters from their campuses because this Christian organization required its leaders to be Christian and to profess adherence to fundamental Christian beliefs. The chapters claimed that their whole purpose was for like-minded students to promote their Christian beliefs, so to allow an atheist or some adherent of a non-Christian

religion, or even a Christian who refuses to accept certain fundamental tenets, to lead their group would undermine their entire reason for being. Both universities backed down or at least compromised in the face of withering criticism from inside and outside the university. Just as the campus Gay, Lesbian, Bisexual, and Transgendered organization has a right to organize around expanding the rights of and respect for its members and their ways of life, so do students of faith have a right to organize about their common beliefs and purposes.

Other campuses punished student groups for holding the "wrong" views, or at least officially disapproved views. Tufts University attempted to exile a student Christian group from campus by withdrawing official recognition because the group enforced its views on "traditional marriage" by refusing to permit a lesbian who disagreed with the group's position to seek selection as its leader. (Homosexuals were allowed to be *members* of the group, but were disqualified from being *leaders* if they took the position that participating in a homosexual activity was not sinful.)

The student government of the Washington University School of Law in St. Louis, Missouri refused to recognize a student pro-life group because student government leaders decided that the group was inadequately "pro-life." The student government decided that the group needed to oppose the death penalty in order to

have a consistent pro-life philosophy and not just advocate "pro-life principles as applied to abortion, euthanasia, and assisted suicide" as the student group had originally intended. When the student governmental entity told a private organization what beliefs it had to espouse, Washington University School of Law triggered a firestorm of protest, including criticism from liberal editorial pages and from the ACLU. The student government changed its mind and allowed the student group to meet on campus and to determine for itself what beliefs it would espouse.

Although this particular abuse of antidiscrimination regulations has at present been applied most commonly to conservative Christian groups, it could easily be applied to others. What if, for example, a left-wing, pro-Palestinian campus group that permitted only anti-Zionists to join was accused of excluding Jews? These principles protect the right of association for all groups, regardless of the changing winds of campus politics, and people from all ideological points of the compass should cooperate to protect them, even if they bitterly disagree on other issues. Having a great variety of *different* groups, far from reducing diversity, adds greatly, in fact, to campus diversity and pluralism.

SPEECH CODES

One way in which colleges and universities accomplish a selective censorship that invades the individual's conscience is by ideologically biased campus speech or "harassment" codes that seek to enforce a particular point of view or campus orthodoxy. Those codes prevent students from engaging in speech that might offend others on the basis of sex, sexual orientation, race, and similar criteria, on the theory that the civil rights of minority students or women will be enhanced if they are not put into the position of having to hear words and ideas that they might find insulting. Students are expected to adopt the administrator's point of view that it is better to shut up than to express a belief or point of view, even if truly believed and deeply held, that might offend a minority group member. Even if the student does not adopt or agree with the administrator's point of

view, however, he is required nonetheless to keep his mouth shut rather than express certain ideas.

These codes are an example of a particularly ideological form of censorship, since, by their very terms, nearly all of them seek to censor speech that might offend members of "historically disadvantaged groups," typically defined by sex, race, ethnicity, or sexual orientation. These speech codes help enforce a particular political and philosophical point of view favored by administrators—that members of such defined groups should be treated unequally. (These codes are discussed in more detail in *FIRE's Guide to Free Speech on Campus*.)

In 2001, the United States Court of Appeals for the Third Circuit declared unconstitutional the harassment policy for the school district located in State College, Pennsylvania. While State College Area School District consists primarily of elementary and grammar schools, the court's decision is highly relevant to college and university students and administrators, because findings of unconstitutional restrictions on younger students apply with yet greater force to university students. That policy barred the following speech:

> Harassment means verbal or physical conduct based on one's actual or perceived 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.

The Policy continued by providing several examples of "harassment":

> Harassment can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written material or pictures.

The code went so far as to ban "other harassment" on the basis of one's "clothing, physical appearance, social skills, peer group, intellect, educational program, hobbies or values, etc." This ban on "harassing" people on the basis of their values was particularly telling. Personal values are those aspects of conscience that most truly make a human being an individual. To say that one may not criticize others' values is essentially to say that one may not have strongly held values of one's own, or, at the very least, that one must not mention those values when disagreeing with someone else.

In *Saxe v. State College Area School District* (2001), the United States Court of Appeals, quoting from several United States Supreme Court decisions, wrote the following about these extraordinary provisions:

> [A]ttempting to proscribe negative comments about "values," as that term is commonly used today, is something else alto-

> gether. By prohibiting disparaging speech directed at a person's "values," the Policy 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. That speech about "values" may offend is not cause for its prohibition, but rather the reason for its protection: "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger...'" No court or legislature has ever suggested that unwelcome speech directed at another's "values" may be prohibited under the rubric of anti-discrimination.

The Court of Appeals struck down the policy as "overbroad," that is, it banned too much speech that is protected under the First Amendment, rather than only focusing on unprotected expression. For example, "derogatory remarks, jokes, demeaning comments, slurs, mimicking, innuendo," and so on all could be protected speech advocating controversial views, (e.g., "I think all Christians are hypocrites"; "Saddam should have gassed all American invaders"; "One day, a priest, a rabbi and a lesbian went fishing"; and so on.)

Of course, a college can ban true harassment, but it must carefully draw the lines of its policy only to ban harassing conduct and not pure expression. As the federal Court of Appeals said in *Saxe*:

> There is of course no question that non-expressive, physically harassing *conduct* is entirely outside the ambit of the

> free speech clause. But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs.

A college does not convert protected *speech* into unprotected *conduct* by calling disfavored speech a "verbal act" or "harassment."

As the Court of Appeals in *Saxe* summarized various Supreme Court cases:

> The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.

Therefore, students who are threatened by university officials with punishment for violating a "speech code" might wish to contact a lawyer to determine whether the policy violates the Constitution's protection for freedom of speech. (They also might wish to contact FIRE.)

MANDATORY PSYCHOLOGICAL COUNSELING

A fairly recent and profoundly disturbing trend is the use of mandatory "psychological counseling" as a tool of the judicial affairs office. Students found guilty of wrongs that involve "hateful" or "antisocial" behavior may be required to see a psychologist, or, indeed, a specific social worker, before returning to school. In this way, a violation of a code or rule banning speech that might be perceived as insulting or otherwise unpleasant by members of what are deemed "historically disadvantaged groups" is classified instead as a symptom of a psychological problem on the part of the student.

To designate deviations from campus orthodoxy as somehow pathological is another way of elevating the notion of "political correctness" to the highest moral plane, or, indeed, to the level of psychological health. This technique is not unheard of in totalitarian societies. The former Soviet Union, for example, was infamous for

placing political dissidents in psychiatric hospitals, on the theory that disagreement with the State or the Party constituted a sign of mental illness.

Mandatory psychological counseling can take many forms. Sometimes it does not even involve a trained psychologist or psychiatrist, but rather a series of meetings with an administrator, or the director of the Women's Center, or even a clergyman. Students sometimes accept such "treatment" as an alternative to a harsh penalty, even if they do not believe they are mentally ill or psychologically unbalanced.

It is, of course, up to each individual student charged with a "hate speech" offense to decide whether to defend himself or herself on grounds of principle such as are set forth in this *Guide*, or to accept the compromise of being labeled "troubled" and given "treatment" in order to cure "antisocial tendencies." The decision as to how to proceed, given such a choice, will depend upon the particular student's confidence in his or her ability (and willingness) to fight to the bitter end, versus a desire to "put it behind " and avoid the possibility of a disciplinary record. (Frequently, when the student opts for counseling rather than a disciplinary hearing or trial, the school will agree not to place the counseling on the student's permanent record, an effort by the school to avoid a show-down with the student whose only offense consists of uttering words and ideas the courts would recognize as constitutionally protected.)