

ALL F.I.R.E.'d UP

By Brett A. Sokolow, JD

Here are some post-conference ruminations on FIRE. Many of you know that David French and Greg Lukianoff, FIRE's designated point men, attended the 2005 ASJA conference. They co-presented a concurrent session, and David French shared the stage with Gary Pavela, Lee Bird, and Jennifer Hammat during the Town Hall debate on Free Speech. While that session was worthwhile, it should have been a double session, with more Q&A time. I have interacted with FIRE folks for a number of years now, and if nothing else, I know that they support my absolute right to publish this article. Otherwise, I have very mixed feelings about FIRE.

On one level, I resent their means, and I think that we must consider any organization that methodically litigates against colleges to be adversarial. I find them duplicitous and incapable of compromise. At lunch with Thor Halvorssen, FIRE's first president, several years ago, he assured me that FIRE did not and would not sue colleges. Yet, FIRE was at that time organizing affiliated attorneys to file suit, though at arm's length from FIRE itself. Today, FIRE openly sues colleges and trumpets victories on its website and in press releases. FIRE contends that it is non-partisan, though Thor bragged to me that their backing was from powerhouse conservative philanthropists, such as Richard M. Scaife. The M. is for Mellon, as in Mellon Bank. Greg Lukianoff insists he is a liberal, though I have never been sure whether a Libertarian is the most extreme of Liberals, or the purest of Conservatives. I will take him at face value, and hope his integrity holds up better than Thor's.

On another level, I agree with most of their contentions about free speech. And, I applaud ASJA for being an organization inclusive enough to welcome FIRE. This was Greg's fourth ASJA conference, and while I have no doubt he is taking good notes that may at some time be used against us, I also think he is making a genuine effort to understand us, our goals, and our means. Parenthetically, many of you may have also met Liberatus DeRosa, another example of how big a tent ASJA is. His son was purportedly railroaded by some college's conduct process, and he has now started a watchdog organization whose name was long and complex and something like Guardians of Truth and Justice in Campus Courts. He had neither business cards nor a website to share. Great. Another watchdog. We must be doing significant work if we already have at least three watchdog organizations scrutinizing us. But, I digress. Back to FIRE...

FIRE makes some important points. Many colleges have expanded the concept of harassment to encompass general campus civility. We have elevated the moral value of civility and tolerance above the moral value of free speech. If you are from a public campus, your policies and practices need to honor discourse, and use free and open debate—not conduct hearings—as the remedy for unpopular speech. The moral value of free speech is as important as the moral values of civility and tolerance. As a constitutional right, there is a great argument that free speech is more important, at least legally. We are educators, and when members of our communities engage in repulsive

speech, we need to use that moment to educate, not to punish. By honoring free speech, we will honor the moral values of civility and tolerance. By repressing or chilling speech, we dishonor those worthy values.

Visit www.speechcodes.org. If you are listed, engage your campus in a debate about the desirability of revisions. Here is some practical advice on how to identify a speech code:

- If it is against your rules to demean or disgrace someone, you're overbroad;
- If it is against your rules to be inflammatory, contemptuous or argumentative, you're vague and overbroad;
- If it is against your rules to harass someone generally, and not on the basis of a protected class, such as race or gender, you're risking being vague and overbroad;
- If it is against your rules to insult someone, even if the insult is as vile as "fucking nigger," you're going to have a hard time arguing fighting words unless it leads to a fight, in which case it might be a better practice to process the complaint as an assault or battery;
- If your rules prohibit offensive conduct, even on the basis of gender, as creating a hostile environment, you need to refocus on whether the offense was so severe as to deprive the recipient of educational access and opportunities. If not, it was merely offensive, and offensive speech is protected speech.

Alright, enough agreeing with FIRE. I have a dissenting opinion, too. Not only do I disagree with their methods, I think they want too much. I even think they are overbroad (their favorite argument against us). David French, in his concurrent session, suggested that it would chill free speech for a college administrator to require a student to meet with him/her, as the result of a complaint on the basis of speech, and that requiring such a meeting would be actionable. Huh? Is FIRE now telling us how to conduct our administrative tasks? I don't think so. If a student has engaged in what is obviously protected speech, I think there could be a chilling effect to a required meeting. But, if I receive a complaint, and the content and the context of the speech are at issue, I absolutely reserve my right to call a student to a meeting, so that I can investigate the complaint. If the student engaged in protected speech, I will send them on their way after our meeting. No threats. No sanctions. No recriminations. They were accused, we met, they were cleared. Or, I may find that the speech was not protected. Regardless, I need to meet with them to figure this out, and if they fail to meet with me, I will sanction them. Not for their speech, but for failing to comply with the reasonable directives of a university official. We cannot use our administrative functions to chill speech, but we can and must use them to investigate good faith complaints. If FIRE wants to litigate against our right and need to do so, this is a lawsuit well worth fighting, in my opinion.

FIRE also wants too much from private colleges. The materials from their concurrent session suggest that private colleges owe some nebulous, general right to treat similarly situated students consistently. When I questioned David French about the legal source for applying "equal protection" law to private colleges, he asserted implied covenants of good faith and fair dealing in our handbooks, which he said are contracts. When I pointed out that the question of whether a handbook creates a contract is not settled law

in many jurisdictions, he pointed to unspecified cases holding private colleges to associational rules. Most of these cases are ancient. I have some doubt that a court would readily buy such an expansive argument today. I think this type of rhetoric with respect to private colleges is misleading, and meant to intimidate. Worse, it could lead to cookie-cutter approaches to student conduct that do not respect widely varying campus cultures and values. One size does not fit all. With respect to sanctions, I think there is value in consistency, but any college can vary sanctions with good reason. And, when the college is private, courts are still likely to be very deferential to whatever that reason is. Another danger with FIRE's overbroad assertion is that it could chill a college from a desire to formulate special rules or procedures to address certain types of complaints, such as sexual misconduct. As long as both processes are fair, there is no legal reason why a college *must* address sexual misconduct the same way it addresses hazing, or any other type of violation. Where a reasonable, rational justification exists for special rules or procedures, I think we have an educational interest in insisting upon them.

All information offered is the opinion of the author, and is not given as legal advice. Reliance on this information is at the sole risk of the reader.

Brett A. Sokolow, JD, is President of the National Center for Higher Education Risk Management (NCHERM) in Malvern, Pennsylvania. Mr. Sokolow serves ten colleges as outside counsel, and has served as a consultant to over 650 colleges and universities. Mr. Sokolow holds memberships to the National Association of Student Personnel Administrators (NASPA), the Association for Student Judicial Affairs (ASJA), the American College Personnel Association (ACPA), where he is Vice President for Education of the Commission for Student Conduct and Legal Issues. He is a member of the Council on Law in Higher Education (CLHE), where he also serves as a member of the Board of Trustees. He is Editor Emeritus of the Report on Campus Safety and Student Development. Mr. Sokolow has authored ten books and dozens of articles on campus security, Clery Act compliance, student conduct, risk management, problem drinking, and sexual misconduct. www.ncherp.org