THE HERITAGE LECTURES

371

Defending Academic Freedom

By Michael P. McDonald

The Heritage Foundation

The Heritage Foundation was established in 1973 as a non-partisan, tax-exempt policy research institute dedicated to the principles of free competitive enterprise, limited government, individual liberty, and a strong national defense. The Foundation's research and study programs are designed to make the voices of responsible conservatism heard in Washington, D.C., throughout the United States, and in the capitals of the world.

Heritage publishes its research in a variety of formats for the benefit of policy makers; the communications media; the academic, business, and financial communities; and the public at large. Over the past five years alone The Heritage Foundation has published some 1,500 books, monographs, and studies, ranging in size from the 927-page government blueprint, *Mandate for Leadership III: Policy Strategies for the 1990s,* to the more frequent "Critical Issues" monographs and the topical "Backgrounders," "Issue Bulletins," and "Talking Points" papers. Heritage's other regular publications include the *Business/Education Insider, Mexico Watch,* and *Policy Review,* a quarterly journal of analysis and opinion.

In addition to the printed word, Heritage regularly brings together national and international opinion leaders and policy makers to discuss issues and ideas in a continuing series of seminars, lectures, debates, briefings, and conferences.

Heritage is classified as a Section 501(c)(3) organization under the Internal Revenue Code of 1954, and is recognized as a publicly supported organization described in Section 509(a)(1) and 170(b)(1)(A)(vi) of the Code. Individuals, corporations, companies, associations, and foundations are eligible to support the work of The Heritage Foundation through tax-deductible gifts.

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

The Heritage Foundation
214 Massachusetts Avenue, N.E.
Washington, D.C. 20002-4999
U.S.A.
202/546-4400

Defending Academic Freedom

By Michael P. McDonald

The Center for Individual Rights, the organization which I co-direct, has recently established an Academic Freedom Defense Fund. We provide free legal counsel to students and professors whose freedom of speech and inquiry—academic freedom—is threatened by the forces of "political correctness."

For the many ills that plague academia, we have devised a simple remedy: in the words of public interest eminence grise John Banzhaf, we "sue the bastards."

I would like to share with you my thoughts on what litigation can and cannot accomplish in terms of advancing academic freedom.

We know litigation can accomplish *something*. I'm happy to report that over the past months we have won a string of cases:

We successfully represented Mr. Timothy Maguire, a third year law student at the Georgetown University Law Center who had the effrontery to claim, in an article published in the school newspaper, that Georgetown had a dual racial standard in admissions. Deeply embarrassed over this revelation—Law Dean Judith Areen maintained that race was not a factor in the admissions process—Georgetown instituted disciplinary proceedings against Maguire, trumping up charges that in collecting admissions data for use in his article, Maguire had somehow committed a "breach of confidentiality." We settled the case on terms extremely favorable to Maguire, he graduated and Georgetown was left having to admit, reluctantly, that Maguire was right.

We won a lawsuit against various administrators of the City College of New York on behalf of philosophy professor Michael Levin. Over the objections of its own Faculty Senate, and despite the protests of numerous academic organizations, the College had formed a committee to determine whether politically incorrect statements Levin had made off campus concerning group disparities in IQ could be defined as "conduct unbecoming a scholar," thus constituting grounds for revocation of his tenure. Federal District Court Judge Kenneth Conboy concluded that Levin had "convincingly established his case that the [City College] sought to and did punish him... solely because of his expressed ideas," and enjoined College officials from further harassing Levin.

The Center and others sued George Mason University on behalf of the Sigma Chi Fraternity. The fraternity had been severely punished for the "gross insensitivity" it displayed in staging an "ugly woman" contest to raise money for charity. U.S. District Court Judge Claude Hilton found that GMU had violated the First Amendment when it punished the fraternity because of the contest's expressive content.

We have also represented Professor Linda Gottfredson whose employer, the University of Delaware, dislikes both her and the New York foundation which funds her research on the

---

Michael P. McDonald is the president and general counsel of the Center for Individual Rights. He spoke at The Heritage Foundation on November 21, 1991 in the Resource Bank series of lectures featuring leaders of conservative education and public policy organizations.

Michael S. Greve, CIR's executive director, assisted in the preparation of these remarks.

ISSN 0272-1155. © 1992 by The Heritage Foundation.

implications of individual and group differences in ability. UD believes that this research interferes with its "overriding mission" of promoting cultural diversity. Hence, the university refused to allow Dr. Gottfredson access to the foundation's money to continue her research. As a prerequisite to suing, we went to arbitration on her behalf. The arbitrator ruled in Dr. Gottredson's favor and the ban was voided.

In short, we've been able to help a handful of non-conformist individuals out of career-threatening melees. If, as much of Supreme Court jurisprudence leads one to believe, justice is helping your friends and hurting your enemies, we've also promoted justice.

At the same time, CIR is also protecting the lofty principle of academic freedom. You might say that *we're* the principled fellows; the partisans are all on the other side. This posture is very advantageous as is demonstrated by the standard ACLU refrain that it's not taking any partisan policy positions but merely defending the Bill of Rights (when, say, it opposes the confirmation of a William Rehnquist to the Supreme Court).

We do, of course, stress our principled stance, and not simply for public consumption; we do believe that academia should be a marketplace of ideas and of uninhibited, robust debate. However, foot-stomping insistence on some ostensibly "neutral" principle is too facile and convenient, because it ignores substantive considerations such as political context and practical results. The ready invocatio of "principle" is, if fact, politically suspect: What the ACLU does in the name of certain lofty principles is so wildly unpopular that the organization would rather not talk about it. The principles thus become little more than a smokescreen for a partisan agenda.

CIR proudly defends academic freedom, but it has no intention of hiding behind that principle.

Since I'm among friends, this may be an especially appropriate place to reflect a bit upon the substantive aspects of protecting academic freedom through litigation.

Litigation and Academic Freedom. It's sometimes been suggested to us by the defendants in our cases that we're really no better than the ACLU, whose hundreds of lawsuits against high schools and school districts haven't exactly improved public education. The means—litigation and judicial intervention—are not necessarily conducive to the end of improving academic life. "Academic freedom" suggests robust debate, but it also suggests civilized, rational discourse and a community of scholars. Litigation, on the other hand, is hand-to-hand combat. It is to "academic freedom" what mud-wrestling is to classical ballet, and it's not immediately clear why more exposure of schools and universities to the former would necessarily improve upon the latter.

However, this concern is far too theoretical. The appropriate metaphor for what's going on these days in the name of academic freedom is not classical ballet but the "Gong Show." To cite but one example, *Tenured Radicals*, Roger Kimball's immensely readable, witty, and in the end, depressing account of the politicization of our nation's humanities departments, discusses a certain Professor E. Ann Kaplan from the State University of New York at Stony Brook. Professor Kaplan is one of the new breed of contemporary humanists who claims to be pursuing "developments in modern thought" through her research. According to Kimball, "[Professor Kaplan's] specialty seems to be Hollywood movies...although recently she has branched out into the promising field of rock videos. More specifically, her recent book, *Rocking Around the Clock: Music Television, Postmodernism, & Consumer Culture*, is an investigation of MTV" in which "Professor Kaplan enumerates the five types of rock video she has discerned in the course of her painstaking research...and provides recondite analyses of such landmark works of arts as 'Smokin' in the Boys' Room,' by the rock band Motley Crue, 'Rebel Yell,' by Billy Idol, and John Cougar Mellencamp's 'Hurts So Good,'" which, Professor Kaplan breathlessly informs her

readers, "addresses recent interest in sado-masochism on the part of both young men and women."

The chief merit of *Rocking Around the Clock*, as Kimball wryly observes, is as a sociological document bearing witness to the depths of our cultural decadence. It reminds me of a put-down George Orwell once made in a review of Salvador Dali's autobiography: "If it were possible for a book to give a physical stink off its pages," Orwell wrote, "this one would—a thought that might please Dali," and, perhaps, inspire Professor Kaplan to branch out in yet another direction.

Hundreds of tenured hacks like Professor Kaplan are busy clearing away tracts of the forest that is Western Civilization. That said, our concern with invoking judicial authority is clearly *not* that it might unduly disrupt this delicate environment. Rather, it is that the judicial protection of the *principle* of academic freedom does very little to improve and enhance the quality of what's being done *in the name* of academic freedom.

PC Dictatorship and Double Standards. A somewhat more serious problem with the enterprise of defending academic freedom through litigation is that your victories may come back to haunt you and be used against you.

"Academic freedom" is a singularly ill-defined concept. The first, widely accepted definition is the 1915 Declaration of Principles by the then-new American Association of University Professors (AAUP): "[A university] should be an intellectual experiment station, where new ideas may germinate and where their fruit may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world." This sounds not like a definition but like a commercial. You know, "Archer Daniels Midland—supermarket to the world."

To be sure, we all have a rough idea of what "academic freedom" means: in the individual context, the right of professors to test the conventional wisdom through research, no matter how unpopular and no matter where the results lead; in the institutional context, a university's right to set itself off from the rest of society, an island of retreat for scholars who wish to live "the life of the mind." But, in the end, marking the outer bounds of academic freedom requires good judgment, courage and integrity, and these qualities are in extremely short supply in academia.

Our litigation of the *Levin* matter is a case in point. Between 1987 and 1990, Mike Levin wrote three non-scholarly pieces, which argued, collectively, that (1) white store owners should not be criticized for taking rational steps to avoid being victimized by black criminals and (2) there is a solid body of evidence attesting to the fact that differences in IQ exist among racial groups.

Over 22 years, Professor Levin has taught more than 3,000 students, not one of whom has ever complained to university authorities about unfair treatment on the basis of race. Neither his speech nor conduct in class, nor his grading patterns have ever reflected in any way his social views and opinions on race. Levin is paid to teach philosophy and that is precisely what he does. Nevertheless, because of the expression of controversial, non-PC views off-campus, the City College took a number of punitive steps against him. It asked him to withdraw from teaching one course, set up an investigatory committee to review his writings and recommend disciplinary measures, and it created so-called "shadow" sections—sections running parallel to Levin's classes—in order to steer students away from him.

Focusing for a moment solely on the "shadow sections," College administrators justified this unprecedented action against a tenured faculty member whose on-campus conduct was beyond reproach on the grounds that Professor Levin posed a danger to students and to the College's educational process and therefore needed to be insulated from his students. The College created no such "shadow sections" for Dr. Leonard Jeffries Jr., the chairman of the Afro-American Studies

Department at CCNY. You may have heard about Dr. Jeffries or, as he prefers to be called, "Dr. J."

For years, Jeffries has been distributing booklets to City College students *in class*, arguing that the skin pigment melanin gives blacks intellectual superiority over whites. Jeffries also teaches students that people of European descent are greedy, materialistic so-called "ice people," while people of African descent are loving, communal "sun people." Last July, Dr. J embroidered upon these fantasies a bit further. Speaking at a state-sponsored black cultural festival in Albany, Jeffries accused Jews of financing the slave trade and said that Jews in Hollywood had conspired with Italian mafiosi to denigrate blacks in the movies. More recently, last month, Jeffries was worried that a student who had come to interview him from the Harvard Crimson would write unflatteringly about his hostility toward Jews. (Perhaps it was his statements at the beginning of the interview that the Crimson was a "Jew paper"?) In any event, at the end of the interview, Jeffries is alleged to have leaned over to the student interviewer and sweetly whispered to him: "Now if I see this in print, I'll kill you."

The differences between Levin's case and Jeffries's are both numerous and self-evident. The difference between, on the one hand, controversial views that can be tested by the ordinary standards of logic and evidence and, on the other hand, sheer fantasy is just one of them. Unfortunately, Jeffries and his supporters have raised the banner of academic freedom—and carried the day. City College officials literally waved a copy of the *Levin* decision in the face of those who were demanding that some action be taken against Jeffries and asserted, with appalling but predictable disingenuousness, that "their hands were tied." And so it came to pass that Jeffries, whose reappointment as department chairman was thought to be at risk, ended up being reconfirmed after all.

Such duplicity is common. The very same university administrators who tolerate classroom disruptions, trespass, and physical threats by "oppressed" student groups turn right around and issue restrictive speech codes in the name of "civility," of which there is indeed far too little. Whether litigation and broader judicial protection of academic freedom limits or expands the opportunities to apply double standards is an open question. I have no compelling answers to this concern, only plausible ones.

Politics and Academic Freedom. All of the plausible answers begin with the insight that the protection of academic freedom is an intensely political affair. The PC cadres insist that academic freedom is a "partisan" concept. In some sense, this is true, because the PC people have *made* it true. As Roger Kimball and others have documented, *they* are already running departments with many universities, if not the universities themselves.

Litigation is uniquely suited to engage this political reality. Litigation is never really "neutral," or "non-partisan." You always take sides and, in so doing, you sharpen the underlying legal and policy conflicts; that's the whole point. When we at the Center for Individual Rights defend a particular client, we are not simply defending some abstraction: "academic freedom," but, also and invariably, one of "our guys" against "their guys." "Our guys" are scholars—be they liberals, libertarians or conservatives—who, in the words of the National Association of Scholars' charter "value reason, democracy, and an open intellectual life." They are committed to defending the university's best traditions and are opposed to ideological cant, whether it's coming from the right or the left. "Their guys" are most energetic in attacking Western liberalism and in undermining its tradition of rationality, respect for individual rights, and a recognition of a common good that transcends racial and sexual identity.

It is extremely important to separate "us" from "them" on the question of academic freedom, for a reason that has, again, to do with the political constellation in academia. You can't reform

academia with conservative professors alone; there are too few of them. This means that you have got to separate the liberals with whom, despite all narrow political disagreements, we have at least several things in common—a belief in human reason for starters—from the PC zealots. In other words, you have to split the Left on campus, and academic freedom is the first issue that does that. Litigation brings conflicts over academic freedom to a head. Precisely *because* it is so divisive and forces people to take sides, it may help to build a coalition with the true liberals and thus, somewhat ironically, contribute to a productive political re-alignment on campus.

Social Pressure and Academic Freedom. Finally, dragging "them" into court fulfills another important purpose that is difficult to attain by other means. Institutions of higher learning are very insular. The original purpose of immunizing them against societal pressures and demands was to create breathing room for, well, academic freedom and for unorthodox views. The institutional value of academic freedom is particularly valuable, we believe, in the case of private universities whose choice of educational philosophy, no matter how unorthodox or eccentric, should be immunized by First Amendment academic freedom from state interference. But precisely this isolation from social pressures has now allowed colleges and universities to turn into so many reincarnations of the Philadelphia Zoo. Trustees failed to exercise adequate control when William F. Buckley wrote *God and Man at Yale* four decades ago. They have failed to do so since, and they are failing to do so at the present time. Nor is there much pressure on the demand side—that is, from parents. University administrators, then, play exclusively to constituencies on campus: the "tenured radicals" and an assortment of race and gender zealots. If you want to change these institutions, you have got to drag them into a forum where they have to justify their behavior in front of a different audience. Like, a judge.

Time and again, we have found that the gibberish with which administrators justify their actions in front of campus audiences just doesn't cut it in court. Consider Judge Conboy's interrogation in the *Levin* case of Professor Leonard Roellig, a City College professor who recommended keeping the "shadow sections" in perpetuity:

> **THE COURT**: Did you give any thought to the question of whether or not the creation of shadow sections would create a peer pressure upon those who would not themselves be harmed, but might feel that the expectation of the university, of its officials and indeed the majority of students would be to abandon Dr. Levin and go to the shadow sections? Was any thought given as to that?
>
> **THE WITNESS**: The question was raised and considered...
>
> **THE COURT:** But you didn't gather any data?
>
> **THE WITNESS:** No.
>
> **THE COURT:** You didn't make any inquiries of the students in his class or the shadow section?
>
> **THE WITNESS:** No.
>
> **THE COURT**: Do you think that if the shadow section was viewed as a haven for those who were politically correct in their thinking, irrespective of whether they felt they would be harmed or whether objectively they could be harmed, do you think that the creation of shadow sections might in fact do damage on an overall basis to the educational process of the college?

THE WITNESS: I think the creation of a shadow section . . . is a good thing.

THE COURT: That is not the question. The question is, what about the possibility of shadow sections encouraging people who did not feel intimidated and who were perfectly comfortable in Professor Levin's class but who in the nature of the climate felt, I better get over into that shadow section, because if I stay here I will be seen as a racist?

THE WITNESS: I wouldn't interpret it that way. . . . We had faith in the students . . . .

THE COURT: But that is just speculative.

THE WITNESS: Of course it is.

Of course. Similarly, in the *Sigma Chi* case, George Mason University administrators insisted that the school's "compelling interest in desegregating the student body" justified the suppression of *any* speech. This blather was good enough for internal consumption on the GMU campus; it wasn't good enough for Judge Hilton.

We harbor no illusions that all of the educational ills stemming from the excesses of tenured radicals can be cured through litigation. Litigation is hardly very subtle and it does little to persuade ideologues of the virtues of free speech and reasoned debate. But the threat of litigation, like the threat of an execution, does wonders to concentrate the mind. It forces university administrators and the PC party-liners to justify their actions in court. It brings campus incidents to the attention of the media, and hence the broader public. In short, lawsuits are one very useful tool in the fight against political correctness.

However, change through litigation comes slowly and academia will remain what it is well into the foreseeable future. That being the case, it seems entirely appropriate to end these cursory remarks on litigating for academic freedom with the observation of a group that, if it's in Professor Kaplan's book, undoubtedly ranks right up there with Aristotle: "You can't always get what you want/But if you try some time/You just might find/You get what you need."