Regulations on Harassing Speech Do Not Threaten Free Speech on College Campuses

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Slogans have their place. I have put bumper stickers on my car from time to time, recognizing that they can't treat the full complexity of an issue. But sometimes it is important to make things simple, and a good slogan can do that. "No Speech Codes" is a particularly persuasive slogan. Alan Kors is colorful in uttering it and just as persuasive when he gives his Voltairian advice on how to deal with any campus speech code: "Crush this infamy!"

That got him a lot of amens. And how could any believer in intellectual freedom at the university be for a campus speech code? I never thought of myself as a proponent of "speech codes." Only after I drafted a campus regulation at Stanford did I discover that apparently I had written one. And not surprisingly, once it was seen in that light, once that label was affixed to it, it was a dead duck. A state court recently struck it down.

I'd like to ask you to think a little bit further about the slogan "No Speech Codes," and how its very effective rhetorical force worked out in this case. I don't suppose any of you will say amen to what I have to say, but maybe I can get some of you to see a problem here that is not a matter for slogans or amens on either side.

I'm going to take it as given that there is a legitimate case for universities prohibiting harassment of students on discriminatory grounds, grounds of race or sex. The case is roughly the same as the case for making harassment based on sex and race illegal in the workplace. Some might debate the premise, but I'm addressing myself to those of you who accept it.

Defining Harassing Speech

The problem then is that harassment can be carried out by means of speech. So if you are going to prohibit harassment, you are going to regulate speech, and when you do that you create the danger of suppressing debate, suppressing ideas. My idea is that when that danger arises, we are better off making clear and defining in objective terms what speech can be regulated, what speech can count as harassment.

The alternative, which Alan Kors recommended, is simply to prohibit harassment and leave it to case-by-case determination what conduct shall fall under the prohibition. That's what the slogan "No Speech Codes" leads to—you can't specify in advance what kind of speech may count as harassment, can't specify it by content, because if you do that, you have written a speech code.

A number of courts in campus speech cases have gone the route suggested by the slogan. In trying to protect free debate on campus, they have not looked directly for intolerance of controversial ideas, but rather have used as a proxy for ideological intolerance a university's mention of the content of speech in its harassment regulation. Our own case at

Stanford is the clearest example of this.

But the kind of regulation that specifies what kind of speech counts as harassment is more protective of speech, in my opinion, than is an open-ended ban on harassment that leaves what speech falls under its ban to case-by-case determination. And yet no one is arguing that these open-ended antiharassment rules violate the First Amendment. My school, having been disabled by the courts from defining harassing speech—because to do so is to institute a speech code—is now back to the position of having one of these open-ended bans, and no one is complaining that academic freedom or intellectual freedom is under siege.

So in both debates, the cultural debates on campuses and the legal debates in the courts, the slogan "No Speech Codes" has triumphed. The basic idea behind the slogan is right—that intellectual freedom should be vigorously protected, and that this protection requires adhering to some firm principles. But the slogan, and the associated principle of no content regulation of speech, has in my opinion been less friendly toward free debate on campus than is the alternate principle that regulations touching speech must be clear, objective, and narrowly drawn, rather than vague and open-ended.

Reconciling Policies

Now let me come to cases, or rather my particular case, the Stanford case. Stanford's regulation was an attempt to reconcile two existing university policies: first, our prohibition against discrimination in provision of educational services on racial and other invidious grounds; and second, our guarantee of free speech and free debate on campus. Both of these principles had been articulated and implemented in concrete ways in the recent past—in the case of speech, for example, by prohibiting disruption of campus speeches, a regulation dating from the troubles of the 1970s.

In the case of our antidiscrimination principle, a concrete issue that arose in recent years was harassment. It is clear as a matter of federal law as well as of common sense that one way of discriminating against students in the provision of educational services is to stand by and do nothing while students are harassed on the basis of their race and sex while they are trying to study, go to class, and get their work done. This is now as well-recognized a form of discrimination as denying admission to people or refusing to graduate them or giving them lower grades on the basis of race or sex.

On the other hand, on a university campus as distinguished from an ordinary workplace, if you just prohibit discriminatory harassment without further definition you get yourself into the problem that many of you are aware of and rightly exercised about—the problem that the expression of unpopular ideas can be enmeshed in campus disciplinary processes. If you say something that offends a group, or a cause or an ideology, those who strongly disagree can complain about having to listen to ideas they find offensive. And then if you keep on saying what you know offends people, you can be charged with harassing them by doing so. The excuse of harassment can thereby be used as a way of silencing unpopular views.

The Three Elements of Stanford's Regulation

Faced with this dilemma, we at Stanford thought it best to define in a narrow and specific way what kind of speech could count as harassment, rather than leave the matter to case-by-case determination with the accompanying chilling effect of uncertainty. Our definition had three elements.

First, to count as harassment speech had to contain a racial epithet, or an equivalent expression referring to sex, sexual preference, national origin, or religion. We defined this as a word or other symbol that was "commonly understood" to convey hatred or contempt for the group in question. The idea behind "commonly understood" was to ensure that groups

could not by themselves define what terms would count as epithets—a term had to be understood generally across the society as having this force. We all know these epithets, and if we don't know them as such, they don't meet the test of being "commonly understood." So to count as harassment, speech had to contain one of these words, or an equivalent nonverbal symbol, like a swastika or a burning cross.

Second, and this is very important, to count as harassment the speech had to be directly addressed to an individual to whom the epithet was applied. This completely immunized all public address, speech, writing, and the like on campus. You can carry a placard, you can make a public speech, you can print a pamphlet, you can put something in the student newspaper that uses racial epithets in the most offensive way and you still don't violate the regulation. Harassment is private hassling, not public discourse.

Third, the term has to be used with intent to insult the person addressed. This is meant to deal with the situation where someone uses an epithet to someone, thinking it is okay to do so in jest, or because the speaker has heard members of the group use the epithet among themselves. That might be insensitive, but it wouldn't count as harassment because it was not intended to hurt or insult.

A Workable Regulation Struck Down

We thus defined, admittedly in somewhat legalistic fashion, the kind of speech that could count as harassment. If speech met these three conditions, it was harassment, otherwise it was not. Having defined harassment by speech in these narrow and specific terms, in order to avoid the vagueness and chilling effect of an open-ended ban on harassment, we were said to have written a speech code. And that is basically what did us in. Our regulation was attacked by many civil libertarians as an impermissible content regulation of speech on campus, which is the lawyer's way of saying "Speech Code!" Some civil liberties people did think we had found a reasonable way of dealing with the conflict between free speech and antidiscrimination that arises in the context of harassment. But most ended up buying the "No Speech Codes" slogan, and finally our rule was indeed struck down by the courts.

That came about as a result of a California statute that applied First Amendment standards to private schools and universities. I should say, parenthetically, that I think that statute was a bad idea. I agree with Alan Kors on that point, mainly because I think that people should be free to set up ideologically sectarian private colleges, just as they are free to set up religiously sectarian ones. Then people can go to these colleges, knowing that they ban the expression of ideas at odds with their fundamental commitments—why shouldn't this be allowed?

But that's not my point here. I'm not defending Stanford on the ground of the right of private institutions to have ideological commitments that they enforce through speech regulations. Stanford doesn't purport to be that kind of institution; it is rather a general university open to all ideas. I think the Stanford regulation should have been upheld, but I think the same regulation should be upheld at a public university as well. A number of public universities have regulations roughly like Stanford's, including the University of California system, and the University of Texas, and I hope those regulations will be upheld—I think they should be.

I don't necessarily think every university should adopt Stanford's kind of regulation. It seems to me very much a local matter whether the situation, the history, the conditions of the place make it appropriate to have this kind of regime. But it seems to me that these narrow rules should be accepted as legal, and then it should be debated at the local level whether in policy terms they are right for the place in question.

An Erroneous Ruling

As a matter of technical constitutional law, I do think the invalidation of the Stanford provision was wrong. Nadine Strossen and I can debate this later if you like, but I don't think you are primarily interested in the details of First Amendment law. I'll say only briefly why I think the court's decision involved a misreading of the Supreme Court's decision in *RAV v. City of St. Paul*.

The *RAV* decision struck down an ordinance that made it a crime to utter racially inflammatory and other group-based fighting words. The Court said that governments could prohibit all fighting words, but could not discriminate in speech regulation against group-based fighting words.

But the Court created an important exception for general regulations of discriminatory conduct, like the prohibition of discrimination in employment in Title VII of the Civil Rights Act of 1964. Governments can prohibit discriminatory conduct, and can sweep up discriminatory speech that is included in the relevant category of conduct. If you prohibit discriminatory conduct in employment, and if one form of discriminatory conduct is harassment, and if harassment can be carried out through speech, the fact that harassing speech that is discriminatory gets prohibited as part of the general prohibition of discriminatory conduct does not violate the principle of *RAV*. The Supreme Court was unanimous on that point. But that was exactly what Stanford was doing. We had a general regulation that prohibited discriminatory conduct on campus. Discriminatory conduct includes discriminatory harassment. Speech can harass. But if the speech that can count as harassment is not carefully defined, free debate can be chilled by a prohibition of discriminatory harassment. We took care narrowly and specifically to define the speech that could count as harassment. So when the local state court struck our regulation down, it failed to take account of the important exception the Court had made in *RAV*.

But I don't mean to debate the legal question here. What you are interested in is the policy question. The basic policy point is that the Stanford way of doing it is more speech-protective than the alternative. The alternative is what we are back to now.

Prohibit Harassment, Not "Speech"

Once the Stanford rule is struck down, what does the university do? As a lawyer, I would take account of the climate that has been created in the courts and the larger society by the success of the slogan "No Speech Codes." I would advise campus administrators to drop all references to speech in their regulations. Don't mention speech. That is what triggers the invocation of this most effective slogan.

Of course you have to prohibit discrimination, both as a matter of basic morality and as a requirement of federal law. And discriminatory harassment is universally understood as a form of improper discrimination, both in law and more generally as a matter of social morality. But of course discriminatory harassment is just a subset of harassment generally. So to avoid all appearance of ideological partisanship, the prudent thing to do is just to prohibit harassment generally. And that is what Stanford has now done, in the wake of the court decision invalidating the narrower regulation I drafted.

What does harassment include? The kind of conduct that has most readily been recognized as requiring prohibition as unlawful harassment over the last couple of decades is stalking. This is a general problem in society, and a problem on university campuses. Someone gets romantically obsessed with someone else who does not reciprocate, and starts following the person around, makes phone calls, leaves notes that may or may not have an explicitly threatening character—and yet the overall course of conduct is certainly threatening, experienced as threatening by the victim, and reasonably so. In that situation, the law steps in and says "you can't do that, you can't do that kind of thing." Unfortunately it is a little hard to define in precise terms what "that kind of thing" is, but on the other hand there is widespread agreement that core cases of stalking are a problem that is appropriately addressed by the law and prohibited. This is so even though much of the conduct that constitutes stalking—phone calls, notes, approaches on the street—involves speech. Most people

agree that it is not a violation of values of free expression to punish this kind of speech when it is part of a course of conduct that amounts to harassment.

Now let us bring that prohibition to the campus and see what might be done with it if the overlap of harassment with speech and debate is not addressed explicitly. Let me try a hypothetical case on you. Suppose an African-American undergraduate at a major university protests that a number of white students in his dormitory are going out of their way to talk about *The Bell Curve* in his hearing, expressing their admiration for its methods, its findings, and its thesis. He has made clear that he doesn't want to hear this, that it is offensive to him, but they keep on talking about it so that he can hear. He regards this as an assault on his beliefs and on himself, and he considers it harassment.

A controversy blows up on campus over this episode—not too hypothetical, right? The campus newspaper interviews the white students and they say that they indeed agree with *The Bell Curve*, accept its critique of affirmative action, and think it means that the complaining student doesn't really belong at the university. If he doesn't like what they are saying, and he leaves as a consequence of having to hear it, that is fine with them.

That could lead to the white students' being charged with harassment of the African-American student, could it not? There is at least a plausible case. They have admitted that they know they are annoying him, and it could be concluded that they are doing so with intent to drive him out. In colloquial terms, they could be said to be harassing him. And under a campus regulation that simply prohibited "harassment," without further definition of what that means when the harassment is carried on by means of speech, such a charge would not be obviously invalid.

By contrast, under the former Stanford regulation it would be clear there was no actionable harassment here. No racial epithet had been used; that would be the end of the matter as a disciplinary case. Incidentally, the rule would have equally readily put an end to any attempt to discipline the white student at Pennsylvania who used the term "water buffalo" in reference to black students. This, too, is not a commonly recognized racial epithet, and that would have been the end of the case.

So that's the basic thrust of my argument to you. The old Stanford rule clearly protected these politically incorrect conservative students against campus discipline for their unpopular speech. Now that we are back to a general prohibition of harassment, things are not so clear. That is the famous victory that was won by the application of the very effective slogan "No Speech Codes."

I would just ask you to think again about that slogan before you next apply it. It has clearly appropriate applications. There are many explicit speech regulations on campuses that should be struck down by courts, and there are many more that should be gotten rid of by internal processes. But there are also explicit and content-based regulations of speech that are appropriate to protect students against discriminatory harassment, and that are better than vague prohibitions of "harassment" at protecting the right to free expression of unpopular ideas.

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