Campus Speech Codes Do Not Violate Free Speech

Censorship , 1997

"Hate-Speech Codes That Will Pass Constitutional Muster" by Lawrence White, *Chronicle of Higher Education*, May 25, 1994; adapted from his paper read at the Stetson University College of Law's National Conference on Law and Higher Education, DeLand, Florida, 1994. Reprinted by permission of the author.

Speech codes have been implemented on various college campuses in an attempt to combat derogatory speech. In the following viewpoint, Lawrence White, university counsel at Georgetown University in Washington, D.C., reports that such codes have come under attack in the courts because they have used vague terminology and have been overbroad. White contends that despite these problems, speech codes are a defensible means of protecting the rights of victims of discriminatory harassment. He believes that colleges should adopt new codes that are tailored to withstand challenges in the courts.

As you read, consider the following questions:

1. What four factors should be considered by the authors of the new speech codes, according to Lawrence?
2. According to the author, what message would administrators be sending if they abandoned the effort to create constitutionally acceptable codes?

It has been a trying few years for the drafters of hate-speech codes on college and university campuses. The University of Pennsylvania jettisoned its controversial speech code in the fall of 1993 after President Sheldon Hackney, during his confirmation hearing to be Chairman of the National Endowment for the Humanities, questioned whether such codes were the right approach to achieving civility on campus.... At Wesleyan University, the University of Michigan, and numerous other institutions, administrators have given up and repealed their codes.

Due largely to the court decisions, we now understand the arguments against campus speech codes: They use inherently vague terminology; they are overbroad, sweeping within their regulatory ambit not only pernicious language, but also language that enjoys constitutional protection. "It is technically impossible to write an anti-speech code that cannot be twisted against speech nobody means to bar," concluded Eleanor Holmes Norton, a former Georgetown University law professor who is now the District of Columbia's Delegate to Congress.

A Noble Endeavor

Despite the problems raised by speech codes, however, we must not forget that there are salutary purposes underlying the effort to draft codes banning derogatory and hurtful epithets. Such codes were intended to serve, and still serve, an important educational purpose: They are expressions of an institution's commitment to the victims of a pernicious and destructive form of behavior. Whenever anybody commits an act or utters a remark that is motivated by hatefulness, it causes harm to a real, flesh-and-blood victim. Hate-speech codes designed to protect victims are a noble endeavor. If institutions abandon the effort to draft policies against hateful speech, they are abandoning the victims the policies were meant to protect.

Campus administrators can learn important lessons from the court cases against the first generation of speech codes. In every instance, the codes that provoked court challenges were ambitiously, almost sweepingly, worded. Several of them, including those at the University of Michigan and the University of Wisconsin, were modeled on the Equal Employment

Opportunity Commission's guidelines on sexual harassment. They used concepts and terminology—"intimidating environment for education," "expressed or implied threat to an individual's academic efforts"—awkwardly borrowed from employment law. They treated the university campus as a single, undifferentiated "workplace."

The language they used seemed almost deliberately provocative to civil libertarians—phrases such as "expressive behavior" (University of Wisconsin) and other wording that equated physical behavior with verbal behavior (Central Michigan University)—as though there were no distinction under the First Amendment.

What we have come to refer to as "hate speech" takes many forms on the nation's college campuses. The most prevalent involves remarks by students addressed to other students. For every high-profile case involving a campus speech by Khalid Abdul Muhammad of the Nation of Islam, there are literally dozens, maybe hundreds, of incidents that occur behind the closed doors of dormitory rooms, in dining halls, or in the corridors outside student pubs. We know, regrettably, that a strong correlation exists between hate speech and alcohol abuse.

A Second Generation of Codes

Colleges and universities must now craft a second generation of codes that will serve the important institutional objective of protecting the victims of hateful acts and utterances without violating constitutional principles. These codes would:

- Differentiate between dormitories and classrooms. In an article that appeared in the *Duke Law Journal* in 1990, Nadine Strossen, president of the ACLU, observed that the right to free speech applies with different force in different parts of a college campus. That right, she wrote, "may not be applicable to ... students' dormitory rooms. These rooms constitute the students' homes. Accordingly, under established free-speech tenets, students should have the right to avoid being exposed to others' expression by seeking refuge in their rooms." A policy that disciplined students for hateful acts or utterances against other students in residence halls would probably bring three-quarters of all hate-speech episodes within the regulatory purview of college administrators without offending traditional free-speech precepts.
- Be tailored to the Supreme Court's decision in *R.A.V.* v. *St. Paul, Minn.* This 1992 decision suggests that anti-discrimination codes are on shaky ground constitutionally if they proscribe some hateful acts or utterances but not others. Any policy that prohibits categories of speech "because of" or "on the basis of" a specific factor—such as race, gender, or sexual orientation—runs the risk of violating the Court's stricture in *R.A.V.* that laws must not single out particular categories of hateful speech for penalties. As ironic as it sounds, the safest hate-speech code may be one that makes no mention of the very groups it is designed to protect.
- Use words emphasizing action and its effects, instead of speech. First Amendment jurisprudence recognizes an important distinction between speech and action and allows a greater degree of latitude when action is being regulated. The first generation of campus speech codes used vocabularly emphasizing speech, which virtually doomed them in advance—for example, they barred certain "comments" or "expressive behavior." By fostering the impression that these policies regulated pure speech, they made an easy target. The receptiveness of courts to arguments that the codes were overbroad—prohibiting speech that should be constitutionally protected along with utterances that deserve no protection (such as yelling "Fire!" in a crowded theater)—requires campuses to be more careful than they were in the past to draft constitutionally acceptable speech codes.

The second generation of codes should favor "action" vocabulary—prohibiting hostile conduct or behavior that might "incite immediate violence" (the latter being the exact phrasing used in the Supreme Court's half-century-old "fighting words" case, *Chaplinsky* v. *New Hampshire*). Instead of calling them "hate-speech codes," colleges and universities should refer to the new policies as "anti-hate" or "anti-discrimination" codes.

1. Enhance the penalties for alcohol-related hate mongering. Most campus conduct codes allow the imposition of disciplinary sanctions for disorderly conduct or violations of drug and alcohol policies. It would be constitutionally defensible to treat hateful acts or utterances as an additional factor to be taken into account when meting out punishment for code violations. For example, a student found guilty of public drunkenness could be sentenced to attend

a program designed to treat alcohol abuse, but the same inebriated student could be suspended or expelled for hurling racial epithets or threats at fellow students.

Supporting the Victims of Hate

Drafting a new generation of campus codes to curb hate mongering, codes that zero in on areas of highest risk (dormitories, drunkenness) while avoiding the vagueness and overbreadth that doomed the first generation of codes, is an exercise worth undertaking. Colleges and universities began attempting to regulate hate speech a decade ago for an important reason—to communicate a message of support to the victims of hate. That reason is still compelling today. If institutions abandon the effort to implement constitutionally acceptable codes, they will be sending a message chillingly and accurately expressed by the Stanford University law professor Charles Lawrence in an article that accompanied Ms. Strossen's in the 1990 *Duke Law Journal*:

"I fear that by framing the debate as we have—as one in which the liberty of free speech is in conflict with the elimination of racism—we have advanced the cause of racial oppression and have placed the bigot on the moral high ground, fanning the rising flames of racism."

We all understand civil libertarians' concerns when universities approach the delicate task of regulating certain forms of expressive conduct. But civil libertarians in turn should appreciate the message that is communicated when the rights of insensitive, viciously motivated members of college and university communities are placed above victims' rights to an education untainted by bigoted animosity. By trimming their drafting sails to incorporate the lessons of the first round of court cases, college administrators can satisfy constitutional concerns and at the same time curb the most egregious forms of hate mongering on campus. Then they can send an appropriate message to perpetrator and victim alike: Hateful utterances and behavior are repugnant forms of conduct that colleges and universities will not tolerate.

Further Readings

Books

- Ellen Alderman and Caroline Kennedy. *In Our Defense: The Bill of Rights in Action*. New York: William Morrow, 1991.
- Stephen Bates. *Battleground: One Mother's Crusade, the Religious Right, and the Struggle for Control of Our Classrooms*. New York: Poseidon Press, 1993.
- George Beahm, ed. *War of Words: The Censorship Debate*. Kansas City, MO: Andrews and McMeel, 1993.
- Francis J. Beckwith and Michael E. Bauman, eds. *Are You Politically Correct? Debating America's Cultural Standards*. Buffalo, NY: Prometheus Books, 1993.
- Mary Caputi. *Voluptuous Yearnings: A Feminist Theory of the Obscene*. Lanham, MD: Rowman & Littlefield, 1994.
- J.M. Coetzee. *Giving Offense: Essays on Censorship*. Chicago: University of Chicago Press, 1996.
- Ronald K.L. Collins. *The Death of Discourse*. Boulder, CO: Westview Press, 1996.
- Cynthia DiLaura Devore. *Kids and Media Influence*. Minneapolis: Rockbottom Books, 1994.
- Jonathan W. Emord. *Freedom, Technology, and the First Amendment*. San Francisco: Pacific Research Institute for Public Policy, 1991.
- Stanley Eugene Fish. *There's No Such Thing as Free Speech, and It's a Good Thing, Too*. New York: Oxford University Press, 1994.

- Patrick Garry. *An American Paradox: Censorship in a Nation of Free Speech*. Westport, CT: Praeger, 1993.
- Kent Greenawalt. *Fighting Words: Individuals, Communities, and Liberties of Speech*. Princeton, NJ: Princeton University Press, 1995.
- Franklyn S. Haiman. *"Speech Acts" and the First Amendment*. Carbondale: Southern Illinois University Press, 1993.
- Marjorie Heins. *Sex, Sin, and Blasphemy: A Guide to America's Censorship Wars*. New York: New Press, 1993.
- Nat Hentoff. *Free Speech for Me—but Not for Thee: How the American Left and Right Relentlessly Censor Each Other*. New York: HarperPerennial, 1993.
- Edward S. Herman. *Beyond Hypocrisy: Decoding the News in an Age of Propaganda*. Boston: South End Press, 1992.
- Carl Jensen and Project Censored. *Censored: The News That Didn't Make the News and Why*. New York: Seven Stories Press, 1996.
- Claudia Johnson. *Stifled Laughter: One Woman's Story About Fighting Censorship*. Golden, CO: Fulcrum, 1994.
- Robert Wheeler Lane. *Beyond the Schoolhouse Gate: Free Speech and the Inculcation of Values*. Philadelphia: Temple University Press, 1995.
- Walter Laqueur. *Breaking the Silence*. Hanover, NH: University Press of New England, 1994.
- Val E. Limburg. *Electronic Media Ethics*. Boston: Focal Press, 1994.
- Martin London and Barbara Dill. *At What Price? Libel Law and Freedom of the Press*. New York: Twentieth Century Fund, 1993.
- Catharine A. MacKinnon. *Only Words*. Cambridge, MA: Harvard University Press, 1993.
- Wendy McElroy. *XXX: A Woman's Right to Pornography*. New York: St. Martin's Press, 1995.
- Media Institute. *Speaking Freely: The Public Interest in Unfettered Speech*. Washington, DC: Media Institute, 1995.
- Arthur J. Mielke. *Christians, Feminists, and the Culture of Pornography*. Lanham, MD: University Press of America, 1995.
- Newton N. Minow and Craig L. LaMay. *Abandoned in the Wasteland: Children, Television, and the First Amendment*. New York: Hill and Wang, 1995.
- Paul Monette. *The Politics of Silence*. Washington, DC: Library of Congress, 1993.
- Marcia Pally. *Sex and Sensibility: Reflections on Forbidden Mirrors and the Will to Censor*. Hopewell, NJ: Ecco Press, 1994.
- Richard Peck. *The Last Safe Place on Earth*. New York: Delacorte Press, 1995.
- Lucas Powe Jr. *The Fourth Estate and the Constitution: Freedom of the Press in America*. Berkeley and Los Angeles: University of California Press, 1991.
- Jonathan Rauch. *Kindly Inquisitors: The New Attacks on Free Thought*. Chicago: University of Chicago Press, 1993.
- Henry Reichman. *Censorship and Selection: Issues and Answers for Schools*. Chicago: American Library Association, 1993.
- Casey Ripley Jr., ed. *The Media and the Public*. New York: H.W. Wilson, 1994.
- Barry Sanders. *A Is for Ox: Violence, Electronic Media, and the Silencing of the Written Word*. New York: Pantheon Books, 1994.

- Lynne Segal and Mary McIntosh, eds. *Sex Exposed: Sexuality and the Pornography Debate*. New Brunswick, NJ: Rutgers University Press, 1993.
- Jefferson P. Smith. *Ambition, Discrimination, and Censorship in Libraries*. Jefferson, NC: McFarland, 1993.
- Rodney A. Smolla. *Free Speech in an Open Society*. New York: Knopf, 1992.
- Adele M. Stan, ed. *Debating Sexual Correctness: Pornography, Sexual Harassment, Date Rape, and the Politics of Sexual Equality*. New York: Delta, 1995.
- Nadine Strossen. *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*. New York: Scribner, 1995.
- Cass R. Sunstein. *Democracy and the Problem of Free Speech*. New York: Free Press, 1993.
- Samuel Walker. *Hate Speech: The History of an American Controversy*. Lincoln: University of Nebraska Press, 1994.

Periodicals

- Jonathan Chait. "Backfire on Campus," *American Prospect*, Summer 1995. Available from PO Box 383080, Cambridge, MA 02138-3080.
- Richard Delgado. "Hateful Speech, Loving Communities: Why Our Notion of 'a Just Balance' Changes So Slowly," *California Law Review*, July 1994.
- Bonnie Dricson. "Banned in U.S.A.: Reference Guide to Book Censorship in Schools and Public Libraries," *English Journal*, January 1996. Available from NCTE, 1111 Kenyon Rd., Urbana, IL 61801.
- Dave Gentry. "Full Circle for the Berkeley Free Speech Movement," *New York Times*, December 2, 1994.
- Scott Gottlieb. "There's No Such Thing as Justice on Campus," *USA Today*, March 1995.
- Debra Gersh Hernandez. "Censorship in the Schools," *Editor and Publisher*, September 16, 1995. Available from 11 W. 19th St., New York, NY 10011.
- Franklyn G. Jenifer. "Hate Speech Is Still Free Speech," *New York Times*, May 13, 1994.
- Michael J. Laird. "The Constitutionality of Political Correctness," *Communications and the Law*, September 1994.
- John Leo. "Campus Affirmatively Favors Censorship," *Conservative Chronicle*, January 1, 1996. Available from PO Box 29, Hampton, IA 50441.
- James L. Payne. "Education Versus the American Way," *National Review*, September 25, 1995.
- Joannie M. Schrof. "The Costly Price of Free Speech," *U.S. News & World Report*, May 16, 1994.
- Harvey A. Silvergate. "P. C. Gags Fair Harvard," *National Law Journal*, January 8, 1996.

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