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Speech Codes: Alive and Well at Colleges ...

By HARVEY A. SILVERGLATE and GREG LUKIANOFF

Five years ago, a higher-education editor for *The New York Times* informed one of us, Harvey Silverglate, that Neil L. Rudenstine -- then president of Harvard University -- had insisted that Harvard did not have, much less enforce, any "speech codes." Silverglate suggested the editor dig deeper, because virtually any undergraduate could contest the president's claim.

ALSO SEE:

... but Litigation Is the Wrong Response

A mere three years earlier, the faculty of the Harvard Law School had adopted "Sexual Harassment Guidelines" targeted at "seriously offensive" speech. The guidelines were passed in response to a heated campus controversy involving a law-student parody of an expletive-filled *Harvard Law Review* article that promoted a postmodernist, gender-related view of the nature of law. In response to an outcry by outraged campus feminists and their allies, a law professor lodged a formal complaint against the parodists with the college's administrative board.

When the board dismissed the charge on the technicality that the law school had no speech code that would specifically outlaw such a parody, the dean at the time appointed a faculty committee to draft the guidelines, which remain in force today. The intention was to prevent, or punish if necessary, future offensive gender-related speech that might create a "hostile environment" for female law students at Harvard. As far as Silverglate (who lives and works near the Harvard campus and follows events there closely) has observed, there has not been a truly biting parody on hot-button issues related to gender politics at the law school since.

Last fall, officials at Harvard Business School admonished and

FIRE initiated, in April, a litigation project aimed at abolishing such codes at public colleges and universities, beginning with a lawsuit charging that various policies at Shippensburg University are unconstitutional. Shippensburg promises only to protect speech that does not "provoke, harass, demean, intimidate, or harm another." Shippensburg's "Racism and Cultural Diversity" statement (modified by the university after FIRE filed suit) defined harassment as "unsolicited, unwanted conduct which annoys, threatens, or alarms a person or group." Shippensburg also has "speech zones" that restrict protests to only two areas on the campus.

In a recent *Chronicle* article, Shippensburg's president, Anthony F. Ceddia, complained that FIRE had "cobbled together words and expressions of different policies and procedures." That is true; it found unconstitutional provisions in many different places -- the student handbook and the university's Web site, to cite just two -- and is challenging all of them.

FIRE has been developing an online database of policies that restrict speech on both private and public campuses. Given the longstanding assumption that academic freedom at liberal-arts colleges protects offensive and unpopular speech, the number and variety of such policies are startling. FIRE's still-in-progress survey and analysis demonstrates that a clear majority of higher-education institutions have substantial speech restrictions and many others have lesser restrictions that still, arguably, infringe on academic freedom.

Some codes, of course, are worse than others. Some are patently unconstitutional; others, artfully written by offices of general counsels, seek to obfuscate their intention to prohibit or discourage certain speech. However, there is no excuse for a liberal-arts institution, public or private, to punish speech, no matter how impolite, impolitic, unpopular, or ornery.

No one denies that a college can and should ban true harassment -- but a code that *calls* itself a "racial-harassment code" does not thereby magically inoculate itself against free-speech and academic-freedom obligations. The recent controversy over "racial harassment" at Harvard Law School has been replicated on campuses across the country, often with outcomes as perilous to academic freedom. For example, in 1999, a professor at the Columbia University School of Law administered a criminal-law exam posing a complex question concerning the issues of feticide, abortion, violence against women, and consent to violence. Some women in the class complained to two faculty members, who

then told the law-school dean that the professor's exam was so insensitive to the women in the class that it may have constituted harassment. The dean brought the case to Columbia's general counsel before concluding -- correctly of course -- after a dialogue with FIRE that academic freedom absolutely protected the professor.

Such examples demonstrate the persistence of the notion that administrators may muzzle speech that some students find "offensive," in the name of protecting civil rights. Further, the continuing existence of these codes relies on people's unwillingness to criticize any restriction that sports the "progressive" veneer of preventing racial or sexual "harassment" -- even when the codes themselves go far beyond the traditional boundaries of academic and constitutional freedom. Fortunately, some see these codes for what they are and recognize that there is nothing progressive about censorship.

It should be obvious that allowing colleges to promulgate broad and amorphous rules that can punish speech, regardless of the intention, will result in self-censoring and administrative abuses. Consider the case of Mercedes Lynn de Uriarte, a professor at the University of Texas at Austin. In 1999, after filing an employment grievance, she received notice that the campus's office of equal employment opportunity had chosen to investigate her for "ethnic harassment" of another professor in her department. Both de Uriarte and the accusing professor were Mexican-American. The facts suggest that the ethnic-harassment accusation was little more than an excuse for the university to retaliate against de Uriarte for filing the grievance. After nine months of pressing de Uriarte to answer personal questions about her beliefs and why she disliked the other professor, the EEO office concluded that there was no evidence of "ethnic harassment" but scolded de Uriarte for "harboring personal animosity" toward the other professor and for not being sufficiently cooperative with the investigating dean.

In 2001 at Tufts University, a female undergraduate filed sexual-harassment charges against a student publication, citing a sexual-harassment code and claiming a satirical cartoon and text made her a "sex object." A vocal member of the Student Labor Action Movement, she was offended when the paper mocked "oh-so-tight" slam tank tops (amid other jokes about Madonna and President Bush). Hearings were initiated. FIRE successfully persuaded the hearing panel to reject the attempted censorship.

Those are just two examples among dozens that FIRE has seen recently where speech codes are used against students or faculty members. They illustrate not only that these codes are enforced, but that they are

enforced against speech that would be clearly protected in the larger society.

Moreover, virtually none of the cases that FIRE has dealt with have followed the paradigm that "hate-speech codes" were supposedly crafted to combat: the intentional hurling of an epithet at a member of a racial or sexual minority. Overwhelmingly, speech codes are used against much milder expression, or even against expression of a particular unpopular or officially disfavored viewpoint.

The situation of Steve Hinkle, a student at California Polytechnic State University, is another case in point. In the fall of 2002, he posted fliers for a speech by C. Mason Weaver, the author of *It's OK to Leave the Plantation.* In his book, Weaver, an African-American writer, argues that government-assistance programs place many black people in a cycle of poverty and dependence similar to slavery. The flier included the place and time of the speech, the name of the book, and the author's picture. When Hinkle tried to post a flier in one public area, several students approached him and demanded that he not post the "offensive" flier. One student actually called the campus police, whose reports note that the students complained of "a suspicious white male passing out literature of an offensive racial nature." Hinkle was subjected to administrative hearings over the next half year and was found guilty of "disruption" for trying to post the flier.

Unless one considers posting a flier with factually accurate information a "hate crime," it is clear such speech codes are used to punish speech that administrators or students simply dislike. That should not come as a surprise to any student of history. When broad powers and unchecked authority are granted to officials -- even for what are claimed to be the noblest of goals -- those powers will be abused. Indeed, the Supreme Court has ruled unequivocally that "hate-speech laws," in contrast to "hate-crimes laws," are unconstitutional. Yet most of the speech prosecuted on college campuses does not even rise to the level of hate speech.

Some argue that speech codes communicate to students the kind of society to which we all *should* aspire. That is perhaps the most pernicious of all justifications, for it makes unexamined assumptions about the power of administrators to reach intrusively into the hearts and consciences of students. There is nothing ideal about a campus where protests and leaflets are quarantined to tiny, remote "speech zones," or where being inoffensive is a higher value than intellectual engagement.

Yet even if one agrees with such "aspirations," it is antithetical to a liberal-arts college to coerce others into sharing them. The threat of sanctions crosses the clear line between *encouraging* such aspirations and *coercing* fealty to them, whether genuine or affected. An administrator's employing the suasion of the bully pulpit differs crucially from using authority to bully disfavored opinions into submission.

Some people contend that the codes are infrequently enforced. The facts demonstrate otherwise, but even if a campus never enforced its speech code, the code would remain a palpable form of coercion. As long as the policy exists, the *threat* of enforcement remains real and will inevitably influence some people's speech. In First Amendment law, that is known as a "chilling" effect: Merely by disseminating the codes in student handbooks, administrators can prevent much of the speech they disfavor. Students, seeing what is banned -- or even guessing at what might be banned as they struggle with the breadth or vagueness of the definitions -- will play it safe and avoid engaging in speech that, even though constitutionally protected, may offend a student or a disciplinary board.

arguments made in memorandums and letters. However, speech codes have proved remarkably impervious to reasoned arguments, for while FIRE often can snatch individual students from the jaws of speech prosecutions, administrators rarely abandon the codes themselves. (A happy exception was when in 1999 the Faculty Senate of the University of Wisconsin at Madison voted to repeal the longstanding code that restricted faculty speech.) FIRE thus initiated its litigation campaign.

Shippensburg is the beginning. In cooperation with FIRE's Legal Network, attorney Carol Sobel in May challenged a speech code at Citrus College, in California, where students were allocated three remote areas -- less than 1 percent of the campus -- for protest activities. Even if they were to protest within the ironically named "free speech area," students had to get permission in advance, alert campus security of the intended message, and provide any printed materials that they wished to distribute, in addition to a host of other restrictions. Further, this free-speech area was open only from "8 a.m. through 6 p.m, Monday through Friday." Citrus's student-conduct code banned "lewd, indecent, obscene or offensive conduct [and] expression," and included a number of other highly restrictive provisions. Just two weeks after the lawsuit was filed, the administration yielded and rescinded all of the provisions listed above. It is unfortunate that it took a lawsuit to demonstrate that restrictions on words have no place on the modern liberal-arts campus.

Colleges must recognize that growth, progress, and innovation require the free and occasionally outrageous exchange of views. Without speech codes, students are more likely to interact honestly. Having one's beliefs challenged is not a regrettable side effect of openness and intellectual diversity, but an essential part of the educational process. And, in fact, liberty is more than simply a prerequisite for progress; it is, at the deepest level, a fundamental and indispensable way of being human.

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