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## The Chronicle Review

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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.

A mere three years earlier, the faculty of the Harvard Law School had

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Last fall, officials at Harvard Business School admonished and threatened with punishment an editor of the school's student-run newspaper for publishing a cartoon critical of the administration. He resigned in protest over the administration's assault on the paper's editorial independence.

At virtually the same time, after a controversy in which a law student was accused of racially insensitive speech, a cry went up for adopting "Discriminatory Harassment Guidelines" to parallel the code that outlawed gender-based insults. As the controversy progressed, some students accused two professors of insensitivity for trying to discuss the issues in class. Soon after the Black Law Students Association demanded that one of those professors be disciplined and banned from teaching required first-year classes, he announced that he would not teach his course for the rest of the semester. The other professor insisted on continuing to teach, but the dean's office announced that all of his classes had to be tape-recorded so that any students who felt offended being in his presence could instead listen to the recorded lecture.

All of that at a university that, as President Rudenstine supposedly assured *The New York Times*, did not have, much less enforce, a speech code.

Today, many in higher education still share Rudenstine's apparent belief that a speech code exists only if it is prominently stamped SPEECH CODE in the student handbook. To them, any speech code is an anachronism, a failed relic of the 1980s that has disappeared from all

conduct.

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



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

Plantation.



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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<http://chronicle.com>  
Section: The Chronicle Review  
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