ABSTRACT

The Controversies of Campus Speech Codes: A Law Review

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INTRODUCTION

In the late 1980s and the early 1990s, many college and university campuses adopted, or at least considered adopting, student conduct codes to prohibit discriminatory harassment. The most prominent court cases evolved among *Dartmouth Review*, Dartmouth College, the American Civil Liberties Union (ACLU), the University of Michigan, and the University of Wisconsin. By the summer of 1992, such codes were brought to a halt after the Supreme Court announced its ruling of a cross burning case in the City of St. Paul. This article will explore the social and legal reasoning to establish and not to establish speech codes, and will analyze the legal cases that ended their implementation. It will conclude with the implications these cases have on college and university housing programs.

SOCIAL REASONING

Racial Conflict On College Campuses and Administrators' Responses

By the end of the 1980s, there had been a surge of campus racial incidents. At the University of Massachusetts, the white Boston Red Sox fans fought against the black New York Mets fans; at the University of Michigan, a radio talk show caller mocked African American students (PBS, 1989); at the University of Wisconsin, a social fraternity held a mock slave auction; at Duke University, two black students received death threats in their residence hall room (Walker, 1994); at Brown University, a student shouted racial slurs (May, 1990); and at the University of Connecticut, an Asian American student put up signs on her residence hall room door listing the people that she thought should be "shot on sight." The list included "preppies," "bimbos," "men without chest hair" and "homos" (Adler, 1990).

In a National Association of Student Personnel Administrators publication, another nine prominent racial cases were reported. They included colleges and universities in Alabama, California, Illinois, Indiana, Maryland, Pennsylvania, South Carolina, and Texas (McHugh, Dalton, Henley, & Buckner, 1988). Palmer (1993) reported in her study on violence in campus residence halls that in the total of 1,626 cases reported, 444 cases victimized women, 673 cases were racially related, and 336 cases involved gay/lesbian students. There have been student protests on campuses demanding that college and university administrations establish protocols to eliminate such hostile situations.

Under these circumstances, colleges and universities struggled to examine ways to deal with these demands. One of the approaches was to discipline students who created a hostile learning environment. Many colleges and universities adopted student conduct codes to restrict offensive actions and speech on campuses.

LEGAL REASONING

Supporters' Views for the Speech Codes

The proponents of these policies argued that according to the equal protection clause in the Fourteenth Amendment in the U.S. Constitution all students should be protected so that they have equal access to a nonhostile educational environment. According to *The College Students and the Courts* (1986), the Fourteenth Amendment prohibits different treatment of students based on arbitrary classifications, such as race or gender. A "strict scrutiny" test will be applied if institutions attempt to treat students differently according to these arbitrary classifications. This test seeks to determine if there is a "compelling state interest" to establish such classification. The burden is on the state to prove this interest.

The supporters of this student discipline policy believed that public institutions bear the responsibility to educate diverse student bodies who will then become the leaders of the states as well as the country's future. It is in the states' "compelling interest" that a diverse educational environment should be preserved and hostile behaviors that threaten the success of such endeavors should be disciplined.

Advocates also argued that student conduct

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codes do not violate the First Amendment (which protects students' freedom of speech, expression, and assembly) because the courts have allowed the denial of such rights when a "clear and present danger" is presented. Therefore, this policy falls under the legitimate limits of free expression. The U.S. Supreme Court recognized that certain speech is exempt from First Amendment protection. In Chaplinsky v. New Hampshire (1942), the Supreme Court Justice pointed out that certain well-defined and narrowly limited classes of speech were not protected by the Constitution, such as profanity and "fighting" words.

It is argued that if profanity can be restricted, demeaning language should be restricted as well. The supporters believed that this case indicates that freedom of speech is subordinate to equal protection under the law because discriminatory conduct threatens the safety and security of students and abridges the victims' rights to equal education.

Supporters also underscored the importance of the recognition of ethical, moral, conventional, and community standards. Elliott (May, 1990) stated that colleges and universities are communities in which some conventions that restrain expressions are established by tradition and by the nature of governing boards, faculty, and students who live in the community. It is the responsibility of the community to examine whether or not individuals committing "hate" speech intend to humiliate, vilify, or degrade minority members.

Opponents' Views Against the Speech Codes

Opponents argued that the speech codes violated the First Amendment guarantee of free speech. They believed that such policies have stifled free discussion, thus infringing upon the true meaning of learning. President Frederick Starr of Oberlin College argued that college leaders who believe in diversity should encourage the expression of a wide range of opinions. Unfortunately, in many cases, "diversity now means subscribing to a set of political views" (D'Souza, 1991). Dean Donald Kagan of Yale University pointed out that "I was a student during the days of Joseph McCarthy, and there is less freedom now than there was then" (D'Souza, 1991). Professor Theodore S. Hamerow of the University of Wisconsin-Madison stated that it is dangerous for higher education institutions to restrict "hate" speech and to promote the so called "politically correct" speech (Mooney, 1990). Campus cartoonists started to ridicule the "Politically Correct Movement" (Shesol, 1991).

On April 24, 1991, the National Association of Scholars (NAS) published a full-page statement in *The Chronicle of Higher Education*. It demanded that "Higher education should prepare students to grapple with contrary or unpleasant ideas, not shield them from their content" (NAS, 1991).

Court cases also have affirmed the freedom of speech. In West Virginia State Board of Education v. Barnette (1943), the Justice believed that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ." Justice Hugo Black wrote in a dissenting opinion in Communist Party v. SACB (1961) that " . . . freedom of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." In Street v. New York (1969), the Supreme Court claimed that "it is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."

TESTING CASES IN COURT

In the midst of this controversy, there were three prominent court cases involving colleges and universities. All three produced a consistent result and effectively terminated the adoption of "hate" speech codes at public institutions.

Dartmouth Review v. Dartmouth College (1989)

In this case, white staff members of the student newspaper *Dartmouth Review* brought charges against the college, alleging that they had been discriminated against on the basis of race. They were suspended for varying lengths of time by the college after being accused of harassing a black music professor, William Cole. The students were alleging that the college violated 42 U.S. C. Section 1981. The *Review* published an article entitled "Dartmouth's Dynamic Duo of Mediocrity" criticizing a non-Western requirement music course, African-American Music, instructed by Professor Cole. The article expressed the opinion that some minority students were admitted, not because of their qualifications, but because of

their race. There was an open confrontation between four white members of the *Review* staff and Professor Cole in the classroom after one of his classes.

The District Court pointed out that the students must prove that the action the College brought against them was "intentionally discriminatory and racially motivated" (Dartmouth Review v. Dartmouth College, 1989). The court ruled that the defendants were not guilty because the students failed to demonstrate that their race was the reason for the College's sanction against them.

The students appealed. The Court of Appeals affirmed the District Court's decision. It also noted:

> Although plaintiffs may have been penalized for their speech and ideas—a matter which we do not address (underlined by the author)—the aggregate facts described in the complaint fail to sustain a reasonable inference that they were victims of race-based discrimination. Whether the defendants treated the students fairly or unfairly is not the question in this case. (1989)

It is interesting to note that the Court of Appeals made a special effort to hint that the students picked the wrong allegations against the college. It implied that the students might have been sanctioned for their speech and ideas, which would have been a violation of the students' First Amendment rights and the students might have won the case. However, because the students did not sue the school for this reason, the court did not have to address it.

The College also insisted that the students were sanctioned because of their disruptive behavior in a classroom. A clear distinction was made that they were after the students for their *actions*, not necessarily for the *content* of their speech.

Doe v. University of Michigan (1989)

Doe was the first court case to directly address the free speech code. After a series of racial incidents, the University of Michigan adopted the "Policy on Discrimination and Discriminatory Harassment of Students in the University Environment." Students were subject to discipline for any behavior, verbal or physical, that "stigmatizes" or "victimizes" an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status (Doe v. University of Michigan, 1989).

With the support of the ACLU, this policy was challenged by a psychology graduate student. He feared that certain theoretical controversies regarding gender and race differences might be perceived as "sexist" and "racist." He felt that this policy "chilled" the academic atmosphere in the University (Doe v. University of Michigan, 1989).

The court ruled that the policy was indeed vague and broad. It could be interpreted in many different ways under various circumstances, and it violated constitutional guarantees, especially the First Amendment. The court cited the case of Broadwick v. Oklahoma (1979), saying that the policy was so vague that "men of common intelligence must necessarily guess as to its meaning." The court struck down the policy and concluded that "the University had no idea what the limits of the Policy were and . . . was essentially making up the rules as it went along" (Walker, 1994).

UWM Post Inc. v. Board of Regents of the University of Wisconsin System (1991)

On September 1, 1989, the University of Wisconsin System adopted a revision in its administrative code Chapter UWS 17, in which a student would be in violation if he or she "intentionally made demeaning remarks" or "placed visual or written materials" to a specific individual or a specific individual's living quarters or work area "based on the person's ethnicity, such as name calling, racial slurs, or 'jokes'; and his or her purpose in uttering the remarks was to make the educational environment hostile for the person to whom the demeaning remarks were addressed" (University of Wisconsin System, 1989).

Although the Wisconsin policy was much more carefully and narrowly drafted than the Michigan one, the ACLU brought charges against the University for the same reason that the Doe v. University of Michigan case received: the policy was overly broad and vague so as to violate the students' First Amendment rights.

In UWM Post Inc., the court struck down the defendants' claim cited from Chaplinsky v. New Hampshire (1942) that offensive speech was covered by the fighting words clause. It ruled

that the policy exceeded the scope that the Chaplinsky case allowed because it did not just limit the words which breach peace and it might be interpreted to limit the content of the speech. The court also rejected the University's claim under the Fourteenth Amendment that it is of the "state's compelling interest" to promote a diverse student body when the claim was placed under the "strict scrutiny" test. The court stated that the University failed to prove that it was not providing equal education. The policy also was found to be unconstitutional because it was overly vague.

Another way to explain the defeat of the University of Michigan and the University of Wisconsin is to review the three-step procedure for the plaintiffs who accuse the defendants of violating the First Amendment, established by Mt. Healthy City School District Board of Education v. Doyle (1977). The three steps are that a court must determine whether: (1) the plaintiff has established enough evidence that his or her activities are protected; (2) the plaintiff has shown proof that his or her activities are the only reason for the actions to be taken against him or her; and (3) that the defendant has shown enough reason that the actions are not related to the plaintiff's protected activities at all.

The above two cases involving the University of Michigan and the University of Wisconsin clearly illustrate that the plaintiffs successfully demonstrated steps (1) and (2), while the defendants failed to establish step (3). In both cases, the ACLU demonstrated that the policy could infringe upon free academic discussions and research that were protected activities. The ACLU also proved that students could be disciplined based on what they said. On the contrary, both Universities failed to provide the Court with a clear articulation about the scope under which the policies could be applied.

R.A.V. v. St. Paul (1992)

Finally, the non-university related Supreme Court case R.A.V. v. St. Paul (1992) made most of the public institutions abandon their campus speech codes, according to the City of St. Paul's Bias-Motivated Crime Ordinance "which prohibits the display of a symbol which arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The ordinance specifically banned burning crosses and use of a Nazi swastika (R.A.V. v. St. Paul, 1992).

Robert A. Viktora and his friends burned a cross on the lawn of a black family. He was charged under the ordinance. He sued the city and the Supreme Court struck down the ordinance as unconstitutional. Justice Scalia wrote the majority opinion that the ordinance prohibiting speech and expression based on its content was precisely what the First Amendment forbade. Justice Scalia made it very clear that the action of cross burning should not have been punished by this ordinance, but that it could have been punished under any of a number of other types of laws (R.A.V. v. City of St. Paul, 1992).

This ruling, combined with the Michigan and Wisconsin cases, was detrimental to the campus speech codes in public institutions because the Supreme Court's decision suggested a public entity could not establish codes and ordinances to limit people's speech (Kaplin & Lee, 1995). Although cross burning was a hateful act, the city of St. Paul should have charged the accused with vandalism, damaging of property, and causing disturbance. Therefore colleges and universities should not punish students for their expressions, but punish them for the physical damage and injury that might have been caused by their actions. After the R.A.V. v. City of St. Paul ruling, most public institutions decided to withdraw their campus speech codes.

CONCLUSION

Although the controversy of the speech codes on American campuses has seemingly come to an end, more issues are appearing and waiting to be addressed by colleges and universities, especially in student living quarters. There is subtle racism on campuses—the tension among different student groups and the self-imposed segregation among them. The aged myth of "minority students always eat together in dining halls" is still surfacing constantly among residence hall students. Residence hall staff must have a solid grasp of the ever changing dynamics among their students so that they can provide more proactive education instead of reactionary responses.

Kaplin and Lee (1995) pointed out that hate speech "is not limited to face-to-face confrontation or shouts from a crowd. It takes many forms." College and university residence hall staff are confronting students about inappropriate behaviors, such as sexist door decorations and racially hostile graffiti. Although the above court cases have indicated that college students should not be disciplined for their content-based discriminatory remarks, when these incidents

occur, it is important for residence hall adjudicating officers to address the actions of students, not their ideas.

There have been discussions among campus judicial officers whether a student should receive a stronger sanction if the student's actions were motivated by his or her prejudice against the victim's race, gender, sexual orientation, religion, and so on. For example, a Brown University student was expelled after he yelled racial slurs and anti-Semitic remarks in the residence hall courtyard. The rationale was that he was intoxicated at the time and was unruly (Dodge, 1992). Then the question becomes whether all students who are intoxicated and yell in the residence hall courtyard should be expelled. If the answer is negative, there will appear an inconsistency in the policy enforcement. Thus, one can draw the conclusion that the students whose action reflected their prejudices are indeed punished *not only* by their actions *but also* by their ideas.

In fact, most institutions have rarely used the speech code to penalize students. Administrators tried to work out complaints with informal discussions between the student who used the remark and the one who was offended (Dodge, 1992). Therefore, it is important for residence hall staff to use the teachable moment to re-emphasize community standards by having students state what is and what is not acceptable. It also is essential to establish a comfortable environment where educational discussions are conducted and students freely exchange their ideas without fearing repercussions.

Many residence halls today have data connectivity in student rooms. The information superhighway has posed another challenge: How should housing staff deal with harassment complaints concerning the electronic bulletin board discussion groups in cyberspace? Should students be disciplined because they have made racially or sexually discriminatory remarks toward other network users on the internet? Is access to the network a right or a privilege (Ouimette, 1995)?

When decisions are made about these questions, it is imperative that college and university housing administrators remember that higher education represents the value and tradition of the society. It is also the academy of truth. Sue Wasiolek, Dean of Student Life at Duke University, stated: "Our mission is to facilitate the exchange of differences and different opinions—not to brainwash people" (Dodge, 1992). It takes a lot of courage for one to possess freedom of mind while endeavoring to eliminate hostilities on campuses. Policies alone will not help. Only through long-term and persistent education and exchange of thoughts can people change their attitudes and create a true understanding of humanity. One must remember that residence halls are the best places for such education to happen.

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