Harvard Law Caves In to the Censors

by Harvey A. Silverglate

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Repression at American universities continues apace and has reached the mighty Harvard Law School.

The faculty, in a move that received surprisingly little attention, voted overwhelmingly this past April to adopt a set of "Sexual Harassment Guidelines." Weighing in at 11 single-spaced pages of substantive text, and bolstered by eight pages of enforcement procedures and a 15-page "appendix of related materials," the guidelines contain a provision that critics contend violates the rights of free speech and academic freedom. It punishes, among other things, "any . . . speech . . . of a sexual nature that is unwelcome . . . abusive . . . and has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, demeaning, degrading, hostile, or otherwise seriously offensive working or educational environment at Harvard Law School."

Even though the guidelines were adopted with only one dissenting vote (not counting those professors who absented themselves from the faculty meeting), there are signs that some of the brighter lights at the institution had qualms.

For one thing, the faculty inserted a -- wishful clause that declares "no speech . . . shall be deemed violative of this guideline if it is reasonably designed or intended to contribute to legal or public education, academic inquiry, or reasoned debate on issues of public concern or is protected by the . . . First Amendment."

Putting aside the faculty's elevation of public discourse above private communication, one marvels that such an august group of legal scholars and teachers has adopted a speech code so ambiguous that they find it necessary to assure those under its authority that if charged with uttering words that an American (non-Harvard) citizen would be free to speak, they may argue the First Amendment in their defense. How many students, however, are likely to take the risk of being prosecuted for their "speech of a sexual nature" and rely upon the law school's good faith and good sense in accepting this defense? Indeed, can this exception for constitutionally protected speech really cure the chilling impact that the guidelines will surely exert on speech at Harvard Law?

Harvard Law students (as well as many faculty members, for that matter) are not widely known as risk-takers when their careers are at stake. Furthermore, there is already a perception that the decks are stacked at the disciplinary tribunals.

Although adopted in April, the guidelines did not go into effect until October. The six-month delay was occasioned by the requirement that the guidelines be vetted and approved by Harvard's

Office of the General Counsel. Here we have the specter of some of the nation's leading constitutional law scholars being second-guessed by the university's staff of 13 in-house lawyers.

Why did the faculty see fit to adopt such a speech code? Was there an epidemic of gross sexual misconduct that provoked curtailment of speech? Dean Robert Clark, queried on the subject in a letter I wrote him in April, said little to justify the code, but what he did say was pregnant with meaning:

"Thank you for your letter . . . about your thoughts on the Harassment Guidelines. Your sentiments have been echoed in the faculty chambers along with many others. This discussion is a sign of the times, as is the need perceived among students that we have to discuss this or be seen as uncaring of their concerns."

What Dean Clark pointedly failed to claim was that there was a demonstrated need, rather than merely a perceived occasion for curtailment of speech. He also failed to explain why the faculty had to follow up "discussion" with actual censorship, lest it be seen as "uncaring." Finally, let the record reflect that the law school did not dare to have a referendum (preferably by secret ballot) among the students to see if a majority really needed or wanted such "protection" at the expense of their free-speech rights.

Indeed, to my knowledge, no academic institution has ever dared to put restrictive speech codes to a vote to see if students really feel the need to be "protected" by a sacrifice of their liberties. As far as one can tell, these codes are simply another example of the university's unilaterally acting in loco parentis -- a distant but direct relative of the rules of prior decades, imposed from the top, that prohibited the sexes from visiting each other's dormitory rooms.

Some administrators have sought to defend speech codes by claiming that federal Department of Education guidelines require universities to take unspecified steps to prevent and deal with "harassment" of "vulnerable classes," and that failure to do so invites lawsuits. However, it is clear that no bureaucrat has the power to force a university to curtail free speech, since the Constitution trumps a mere regulation every time. In any event, none of these academic bureaucrats have demonstrated sufficient integrity to launch a court challenge to these alleged governmental censors.

Of course it could have been worse, according to Dean Clark. An earlier proposed version of these guidelines proposed banning "sex-based harassment by personal vilification," which would have included speech directed to individual members of the law school community that is "intended to insult or stigmatize . . . on the basis of their gender or sexual orientation" and conveys "visceral hatred or contempt." Faced with the prospect of this near-total ban on any kind of personally discomforting gender-based speech, Dean Clark and some faculty members appear to feel that the code actually adopted is the lesser of evils. Certainly Dean Clark's letter makes that appear to be so, dubbing the "harassment by vilification" language to be a "hate speech" ban.

Yet it is hard to understand how and why the current "hostile environment" language is any less restrictive of or threatening to free speech and, for that matter, how it differs from a "hate speech" ban. Further, if experiences on other campuses are a guide, any speech ban at Harvard

will be applied with the all-too-familiar double standard, where only students with politically incorrect views will be charged and convicted.

A 1992 incident at Harvard Law makes one pause over the meaning and scope of the speech ban, notwithstanding the faculty's assurance that nothing violative of the First Amendment will be penalized.

The March 1992 issue of the Harvard Law Review, setting aside what the editors called "traditional editorial policy," published "an unfinished draft" of an article by Mary Joe Frug, a feminist legal scholar tragically murdered the year before. The manuscript, an example of the kind of controversial politicized scholarship that traditional legal scholars do not consider scholarship at all, was parodied the following month by a group of students in what was denominated by them, in a "warning" on the cover, as admittedly "highly insensitive."

The publication provoked a storm of outrage from many faculty members and administrators, some calling for the disciplining of the offending students and the wrecking of their legal careers. Ultimately, the students survived, as it became clear that their attempt at parody, though perhaps in abysmally poor taste, should be protected.

However, when at least one faculty member asked the drafting committee -- whether the Frug parody would be viewed as nonprotected hate speech under the guidelines, the committee failed to deal with this crucial question. Had the guidelines been in effect in 1992, it is thus not at all clear whether the law school parodists would have been punished. What is clear is that students with a sharp tongue (or perhaps just an independent mind) walk on egg shells at Harvard Law School these days. To quote Dean Clark (who appears to have used the phrase more with resignation than enthusiasm), this is "a sign of the times."

To make matters worse, it appears that in caving in to the authoritarians, the faculty has not ended its agony, and the administration has not guaranteed itself "no trouble on this watch."

A first-year law student wrote in the Dec. 8, 1995, issue of the Harvard Law Record, the official student-run newspaper, that it was "tragic and ultimately short-sighted" for the faculty to adopt a policy that "seeks to protect students from offensive behavior or dialogue on the basis of sex, yet failed to adopt a comparable policy on the basis of race." Ominously, but instructively, what the student columnist was complaining about was the showing of a film in his criminal law class, which depicted a debate between a prosecutor and defense attorney over an encounter between a black college student and a white police officer who used a racial epithet.

"I became miffed, confused, and ultimately offended as the film progressed," wrote the student. Showing the film in class without giving students "proper warning" of its offensive content constituted racial harassment, he argued in all seriousness.

Dean Clark and the faculty are about to learn that once principle is sacrificed in the name of expedience, there is no end to the demands from ever-proliferating groups of self-described victims seeking to cleanse the campus -- and the classrooms -- of unpleasant speech, not to mention uncomfortable ideas.