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## BOOK REVIEW

### CAMPUS HATE SPEECH ON TRIAL

TIMOTHY C. SHIELL

UNIVERSITY PRESS OF KANSAS, 1998

*Reviewed by Melanie Jacobs<sup>1</sup>*

The tension between freedom of speech and protection of civil rights is increasing on university campuses. Academia is a bastion of the marketplace of ideas. No where else is thought for thought's sake so valued. College is a place to share ideas, expand knowledge, and discover one's true identity.

But the effects of racism, sexism, and homophobia can undermine the learning process and permanently damage self esteem. University officials, aware of the negative effects of racial slurs and sexist epithets, have implemented hate speech codes to combat bigotry and misogyny on college campuses. Hate speech codes, however, may not only deter hateful and offensive speech; codes often have a "chilling effect" on constructive discourse. How then, do university officials protect the civil rights of students while preserving the integrity of First Amendment jurisprudence?

This is the subject of Timothy Shiell's "Campus Hate Speech on Trial." The author presents a broad overview of the nascence of hate speech codes and the litigation arising from their implementation. Shiell introduces us to many of the leading figures in the hate speech code debate and causes us to re-examine our view of censorship and the premium that each of us places on free speech. Shiell writes that his continued research and exploration of the hate speech code debate has taken him on a journey, from defending speech codes to criticizing them. Ultimately, he seeks to balance free speech and equality doctrine.

Certainly, the moral, ethical, and academic reasons to enact speech codes are compelling. Shiell discussed incidents in which a black student was referred to as a "fat-ass nigger" during an argument with another student, an Asian American student was told that it is "people like you - that's the reason this country is screwed up," and a woman was harassed by a male student who yelled in pub-

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<sup>1</sup> Columbia University, B.A., 1991; Boston University School of Law, J.D., 1994; domestic relations attorney, Witmer, Karp, Warner & Thuotte, LLP; Instructor, First Year Writing Program, Boston University School of Law.

lic, "You've got nice tits!" How can the victims of such targeted speech feel comfortable in an environment in which they may be harassed for skin color, ethnicity, gender or sexual orientation? If, as Shiell presents, legitimate reasons for speech codes exist, for what reasons should we not enact speech codes?

Shiell's criticism of speech codes is overt, yet subtle. He presents a balanced and thoughtful overview of the hate speech code debate and devotes full chapters to the arguments of both supporters and opponents of speech codes. Furthermore, as a philosophy professor, Shiell offers a unique perspective into the philosophical underpinnings of free speech. The book's greatest feature is as a reference for those interested in the topic. The reader is free to fully consider the arguments for and against speech codes and draw her or his own conclusions. For students and nonstudents alike, this book provides a good introduction to the hate speech code debate.

During the 1980s, in response to disturbing and multiple incidents of bigotry, college and university officials developed speech codes which were designed to prohibit "offensive" speech. Shiell examines the three main arguments proffered by speech code drafters to support the codes. First, speech codes are necessary to deter offensive speech. Advocates pointed to studies which catalogued the harmful effects of offensive speech—humiliation, self-hatred, high blood pressure, and increased hypertension—as evidence that offensive speech has severe emotional and physical repercussions for victims and should be censored. As more women and minorities matriculate at American universities, speech code advocates argue that in the absence of codes that proscribe offensive speech, bigots may erroneously believe that universities sanction their speech and will grow even bolder in their demonstrations of their beliefs. Only a specific speech code which prohibits and sanctions hate speech will send a clear message to bigots that their speech is not tolerated on campus.

Second, hate speech, properly identified, has little or no First Amendment value, and thus, is not protected under free speech doctrines. Relying on First Amendment exceptions such as the "fighting words" exception and group libel or group defamation exceptions, proponents argued that hate speech should similarly be censored. Since the Supreme Court has upheld restrictions on speech under the fighting words and group libel models, hate speech code advocates believe that codes which are constructed to censor such speech is not violative of the Amendment.

Third, the university's mission is served by implementing hate speech codes. Universities are a marketplace of ideas, and they should be empowered to make rules which promote legitimate aims for learning and punish those who engage in offensive speech. It is this overriding concern that reinforces the position of campus hate speech code advocates.

Just as there are compelling reasons in support of speech codes, there are an equal number of reasons to oppose such restrictions. Shiell points out that critics of hate speech codes are not supporters of offensive speech. Rather, they empathize with the supporters of the codes and the victims of offensive speech. Their criticism of speech codes is rooted in constitutional jurisprudence. First, they argue that the speech codes indeed violate the First Amendment because

speech codes are overbroad, unduly vague, and content-biased, and thus do not pass First Amendment muster. Furthermore, critics maintain that speech codes will chill legitimate speech—that individuals may refrain from engaging in discourse that they fear will result in punishment under a code.

After presenting arguments both for and against speech codes, Shiell next examines cases in which hate speech codes or ordinances were challenged. In all six cases, the courts struck down the codes, for many of the reasons articulated by the opponents of speech codes. Despite the attempts of drafters to narrowly define offensive speech, courts found that codes were overbroad on their face, in their application, and in the manner of enforcement. Furthermore, the speech codes did not contain a bright line test as to what speech was punishable under the codes and what speech was permissible. Thus, the codes were unduly vague and unenforceable. Finally, the codes were often drafted to prohibit words which would undermine racial and gender equality, but did not specifically prohibit speech used by egalitarians versus bigots. In their efforts to promote equality, drafters were too often focused on prohibiting speech that is not “politically correct” and the courts found the codes to be content-biased.

Advocates did not abandon their support for speech codes in response to the court decisions above. Instead, they shifted their focus to Title VII, and recent developments in the emerging body of case law regarding hostile environment harassment, as their guide for a new way to draft codes which would pass constitutional challenge. The 1964 Civil Rights Act opened a floodgate of civil rights litigation. In the context of workplace equality, the Equal Employment Opportunity Commission (“EEOC”) promulgated guidelines to assist employees and employers in determining what constitutes workplace harassment. These guidelines were seized upon by speech code drafters, as a means to better draft codes that would not be struck down as overbroad, unduly vague, or content-biased.

The most significant Title VII analogy to a hate speech case is *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). In *Harris*, the Court held that verbal harassment, with no accompanying conduct, can constitute a hostile environment. The Court further stated that, “[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive . . . there is no need for it also to be psychologically injurious.”<sup>2</sup> Finally, speech code advocates had the basis upon which to draft their codes—the Supreme Court recognized that mere words could create a hostile environment and could be actionable.

Since Title VII applies to the employer-employee context, and not the educational arena, Title VII decisions do not automatically apply to the speech code debate. Advocates draw comparisons between the workplace and educational environments, advancing the application of Title VII principles to universities. Advocates argue that both employees and students regularly encounter the same people, engage in discrete activities, share common experiences and goals, and apply for specific places or positions. Reviewing several Title VII speech codes,

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<sup>2</sup> *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

Shiell proposes that any code modelled on Title VII should contain the following. In order for the speech to be sanctioned, the speech must: 1) be directed at a captive audience; 2) be intended to harm or otherwise interfere with the education or employment of the targeted individual or identifiable small group; and 3) be judged by a reasonable person, considering the totality of the circumstances, to be severe or pervasive enough to constitute a hostile or abusive environment.

Opponents of speech codes are not placated by the new reliance on Title VII. They argue that Title VII should not be applied to the educational context because differences between the workplace and university are more significant than their similarities. For instance, students at academic institutions should be entitled to greater freedom of speech than employees in private companies. Furthermore, critics emphasize that courts have developed harassment law differently in Title VII (employment) cases and Title IX (educational institutions) cases.

Opponents also point out that statutory provisions do not supercede constitutional guarantees of free speech, and may still have difficulty passing constitutional challenge. Finally, opponents argue that speech codes fail administrative requirements, because they fail to provide for an accused's due process. For example, "offenders" are frequently sanctioned without first having a hearing regarding their alleged offense. Also, complainants are permitted to file complaints in general terms—"dirty jokes," "racial slurs," "sexist remarks,"—rather than the specific words used. A requirement of specificity in complaints would allow frivolous or meritless complaints to be weeded out.

Shiell draws five lessons from his review of the speech code debate. First, the most plausible basis for regulating speech is to model speech codes using standards articulated in Title VII cases. Unlike now defunct and/or stripped down First Amendment exceptions such as fighting words and group libel, Title VII is "good law." The Supreme Court has ruled that verbal harassment may constitute a hostile environment; thus, hate speech should similarly be prohibited on college campuses. Title VII and EEOC guidelines provide drafters with a better framework for their codes and surer legal footing.

Despite the appeal of Title VII to speech code advocates, however, Shiell recognizes that there are still constitutional challenges to Title VII. Thus, Shiell's second lesson is that constitutional requirements supercede statutory ones. Even if speech codes comport with Title VII norms, they may still violate the First Amendment.

Third, Shiell argues that speech codes are too often enforced by individuals whose institutional role is not to protect free speech but to protect civil rights. Frequently, affirmative action officers are charged with enforcing speech codes despite little or no training in First Amendment principles. The enforcer's goal is not to protect free speech but to punish speech that is offensive to a minority or protected group. Because of the bias in enforcement, speech codes frequently fail.

For his fourth lesson, Shiell points to the judiciary's commitment to protect free speech, even if it appears to infringe on civil rights. He writes, ". . . freedom of speech really is our first freedom and the greatest ally of equality." Shiell points to 1900s labor union activists, 1960s civil rights advocates, 1970s

Vietnam War protesters, animal rights supporters, radical feminists, gay-and-lesbian studies advocates, and other minority groups. By censoring speech we deem "offensive," we risk banning speech that may, in fact, have tremendous value even though offensive to the majority. If free speech is as important as the judiciary maintains, Shiell's fifth lesson is that universities "should be bastions, not bastardizers, of free speech." Free speech is special on campuses to permit the free exchange of ideas and to promote equality.

Shiell concludes his book with a proposal for combatting hate speech. Although he is critical of restrictions on speech generally, and recognizes the potential difficulties of enacting a Title VII speech code standard, he seeks to strike a balance between free speech and equality. Shiell defends his moderate position as the only appropriate response to the issue.

First, Shiell encourages universities to educate not only their students, but all Americans regarding the importance of tolerance and respect for each others' differences. Rather than focus on formal proceedings and sanctions for perpetrators of hate speech, universities should direct their energies on educational and economic measures. Shiell posits that academia bears a responsibility to teach all people the value of equality and free speech. For example, Shiell suggests that instead of spending hundreds of thousands of dollars prosecuting someone under a speech code, universities should spend the money on community outreach programs, campus educational forums, and scholarships for minorities or the financially needy.

Second, Shiell advocates that those persons responsible for protecting free speech must not only promote equality, but vigorously support free speech generally. As Shiell noted in his lessons, many persons charged with policing speech on campus do not possess a comprehensive understanding of free speech jurisprudence. He proposes instead that a diverse group of university officials educated in free speech doctrine be charged with enforcing university speech codes.

Third, Shiell argues that universities must design policies that focus on offensive conduct, not speech. Although freedom of speech doctrine may cause us to tolerate ideas that we hate, Shiell maintains that we need not tolerate conduct that violates our rights. Mechanisms exist to combat offensive conduct. For example, continuous sexual harassment targeted at a specific individual invades the victim's privacy and may give rise to a restraining order. Hateful graffiti is not only a speech code violation but may be an offense of trespass, vandalism, or other tort. Shiell reminds us of the demarcation between speech and conduct.

Shiell does not abandon the notion of regulating some speech, however. As Shiell describes what he considered an appropriate speech code under Title VII, he again asserts that the only speech which should be regulated is speech that is targeted at a specific individual (or individuals) in a captive-audience context, is intended to cause harm to the individual(s), is unrelated to any legitimate academic purpose, and is repeated or done in conjunction with illegal conduct. Such a targeted, focused policy should not chill any legitimate speech. Students will be free to engage in heated debate, organize protest, and invite controversial

speakers on campus. They will not, however, be permitted to target a specific student for ridicule and harassment.

Shiell further argues that his proposal is content-neutral, because no type of speech is singled out as offensive. Incidents of hate speech are reviewed on a case by case basis. Also, although some critics may argue that no speech should be regulated, Shiell counters that *Harris* allows for the sanctioning of pure speech. Speech that falls within the regulations noted above can properly be sanctioned under current Supreme Court precedents.

In recognition of the difficulty of regulating speech, Shiell does not provide us with specific guidelines of what may actually constitute speech requiring regulation. Instead, he relies upon a diverse group educated in free speech principles who will make the ultimate determination as to the worthiness of the speech.

While Shiell presents a broad overview of the hate speech debate, his criticism of speech restrictions is not hidden in the text. He believes that it is only through freedom of speech that we can ultimately attain true equality. Without the ability to share our ideas, no matter how offensive, we cannot continue to grow and expand and evolve. If civil rights activists were prohibited from opposing segregation, for instance, we might not have enacted a civil rights act or embarked on a concerted effort of desegregation.

Since Shiell opposes restrictions on speech, how is he able to justify his proposal? He defends his position as the only appropriate balance of free speech and equality doctrines. Although free speech is considered paramount, equality doctrine cannot be ignored. Shiell's code takes into account the current state of free speech and equality case law and bridges the two. His policy would most often punish speech that accompanies sanctionable conduct. He does not seek to chill legitimate speech, but to punish only that speech which the Supreme Court has already said may properly be punished.

"Campus Hate Speech on Trial" is a useful resource for anyone interested in the hate speech debate. The strength of the text is its comprehensive treatment of a difficult and often emotional subject. Shiell provides the reader with a thorough overview of free speech and equality doctrine and the public policy concerns behind each. He navigates a path for effective speech code implementation. His proposal is appealing because he effectively strikes a balance between the often diametrically opposed concepts and does so within the current framework of Supreme Court precedent.

"Campus Hate Speech on Trial" is the evolution of Timothy Shiell's thoughts and impressions on a topic that affects us all. By presenting multiple viewpoints and positions on the hate speech debate, we, too, are able to engage in an exploration of our own views on the topic and conclude our journey better informed and better able to defend our own positions regarding hate speech and speech restrictions.