SEARCH THE SITE

SITE MAP

SECTIONS:

Front Page

Today's News

Information Technology

Teaching

Publishing

Money

Government & Politics

Community Colleges

Science

Students

Athletics

International

People

Events

The Chronicle Review

Jobs

FEATURES:

Colloquy

Colloquy Live

Magazines & Journals

New Grant Competitions

Facts & Figures

Issues in Depth

Site Sampler

CHRONICLE IN PRINT:

This Week's Issue

Back Issues

Related Materials

THE CHRONICLE OF HIGHER EDUCATION

Students

From the issue dated May 23, 2003

War of Words

Advocacy group says campus speech codes are unconstitutional; many colleges say their policies are being distorted

By BETH McMURTRIE

A lawsuit filed against Shippensburg University of Pennsylvania last month has rekindled a debate about whether policies designed to protect students from harassment violate the First Amendment.

ALSO SEE:

Major Rulings on Speech Codes

Two undergraduates, backed by a national campus free-speech-advocacy group, sued the state institution, arguing that its policies governing student conduct are unconstitutionally vague, too broad, and discriminate on the basis of religious and political viewpoints.

The lawsuit is the first volley in a new campaign by the Foundation for Individual Rights in Education, the advocacy group, to eliminate all speech codes at public colleges and universities. On the basis of its own research, FIRE says that more than two-thirds of public institutions have policies on their books that it believes are unconstitutional.

In the late 1980s and early '90s, dozens of colleges enacted hate-speech codes that threatened to punish students if they made racial slurs or other offensive comments on their campuses. The codes were designed to stem what some educators saw as an alarming increase in racist incidents. Instead, for many, they became a symbol of political correctness run amok. Detractors on both the left and right criticized the policies as a form of thought control, and state and federal courts struck down several of the codes for violating students' First Amendment rights. Consequently, many colleges threw out the policies, and the debate over the wisdom of regulating speech seemed to wane.

FIRE, however, says colleges never fully removed speech codes, but simply shifted the regulations into sexual-harassment policies, diversity statements, e-mail policies, and student codes of conduct. The result, according to the group, is that many students continue to feel oppressed by an atmosphere of political correctness.

To demonstrate how widespread such codes are, FIRE is building a Web site that will specify and rate the severity of policies at nearly 300 public and private colleges across the country. While private colleges are not bound to the First Amendment in the same way public institutions are, FIRE is including them on the Web site because, it says, it wants to show that most of them restrict academic freedom even as they claim to uphold it. The site, which is expected to become active late this month, is the result of three years of research, FIRE says. The goal is to catalog student-conduct policies that affect speech at every college and university in the country (http://www.speechcodes.org/).

Some university lawyers and First Amendment experts are skeptical of FIRE's analysis. They say the group has taken campus policies out of context and has misrepresented what the courts have said about regulating speech.

It will be up to the courts to decide. FIRE plans to sue public colleges in all 12 federal appellate circuits in the country, hoping for definitive rulings in each region that would eventually bind all public colleges to the same strict standard.

"It is a scandal beyond scandal that for 25 years now, this nation has been educating students in public institutions with codes that violate the First Amendment," says Alan Charles Kors, president of FIRE. "And we are going to put an end to that."

Starting at Shippensburg

Mr. Kors says one reason that Shippensburg was chosen as the first case is that its policies are representative of those of many colleges. FIRE's lawsuit charges that the college's student code of conduct, its sexual-harassment policy, and its racism and cultural-diversity policy threaten constitutionally protected free speech.

The student code of conduct, for example, states that speech that is "inflammatory, demeaning, or harmful toward others" is not deserving of protection. The policy statement on racism and cultural diversity proclaims that the university's "commitment to racial tolerance, cultural diversity, and social justice will require every member of this community to ensure that the principles of these ideals be mirrored in their attitudes and behaviors."

That amounts to thought control, says Mr. Kors.

Shippensburg also defines sexual harassment in such broad terms, he says, that even the mildest joke could get a student kicked off the campus. The policy on sexual harassment that was on the university's

Web site at the time the lawsuit was filed lists "suggestive comments" and "humor/jokes about sex or gender-specific traits" as examples of actionable speech.

Anthony F. Ceddia, Shippensburg's president, says the lawsuit is baseless: "FIRE has cobbled together words and expressions of different policies and procedures and has said that we have a speech code that inhibits speech and expression, and nothing could be farther from the truth."

The group used outdated information when compiling its evidence against the university, he says, noting that the university's policies on sexual harassment and on racism and cultural diversity were updated in the fall of 2001 and no longer include some of the language that FIRE found objectionable, such as the examples of sexual harassment.

While the former polices can still be found in some university documents published before the changes were made, Mr. Ceddia says, the current versions have been widely disseminated.

He also notes that the university has not punished any student for inappropriate speech in recent memory. "When we have had students who have used expressions or words that have caused difficulty with other students, our practice is to have them sit down together and talk things through," he says.

Mr. Kors finds those arguments disingenuous. The old policies remained on the university's Web site until after the lawsuit was filed and were included in at least one catalog published after the revisions were made, he says. And even though no students have been punished, he argues, they doubtless have censored themselves for fear of being charged with an offense.

The two anonymous plaintiffs at Shippensburg -- known in the complaint as John Doe and Jane Doe -- say they have been afraid to speak up. In telephone interviews, both portrayed themselves as conservatives who believe that their views wouldn't sit well with much of the rest of the campus. As a result, the students say, they have rarely voiced their opinions in class or around students whom they don't know well, for fear of being charged with violating some campus code. The female student, a senior, says the university's requirement that students' attitudes "mirror" the college's beliefs is particularly galling.

"The school doesn't uphold freedom of speech first," she says. "They uphold sensitivity and political correctness first."

Critics are simply misreading the intent of Shippensburg's policies, Mr. Ceddia says. "We're not talking about anything more here than respect

of self and respect of others. We're not trying to be thought police. We're not trying to control how people think or act. We're suggesting that this is a standard we hope they aspire toward. If they don't, that's their choice."

Several First Amendment experts say the Shippensburg case is more complicated than either FIRE or Mr. Ceddia portrays it. In judging the constitutionality of speech policies, courts typically want to know what effect they have had on a campus, and what the intent was in drawing them up. Observers say that an instance of punishment is not necessary for a policy to be found unconstitutional. But they also say that general statements outlining a college's values are not viewed as critically by courts as policies banning specific behavior.

The history of litigation over speech codes shows how nuanced the issue can be.

In a series of federal and state court cases in the late 1980s and '90s, judges ruled that codes banning certain kinds of speech -- racist or sexist remarks, for example -- violate the Constitution because they amount to viewpoint discrimination. Other codes prohibiting offensive or derogatory speech were struck down as vague and overly broad.

At the same time, however, courts have ruled that verbal abuse directed at an individual can be punishable under federal antidiscrimination laws, provided that it is severe and pervasive, discriminates against a person on the basis of race, gender, or other protected classes, and creates a hostile environment.

The case that put the final nail in the speech-code coffin on most campuses actually had nothing directly to do with colleges. In 1992, the U.S. Supreme Court ruled that a city ordinance in St. Paul, Minn., that led to the arrest of a teenager for burning a cross in a black family's yard was unconstitutional because it prohibited certain expressions of hate and not others.

In addition to pressure from the courts, colleges began turning away from using speech codes as a method of curtailing bad behavior after a few high-profile incidents made clear the difficulty of determining what defines offensive speech. The most publicized incident occurred a decade ago at the University of Pennsylvania, which charged a freshman with violating the campus speech code for calling a group of noisy, black female students "water buffalo." The university was widely criticized by academics, columnists, and politicians for its seeming hypersensitivity. (The student said his comments were not racist in intent; the charge was eventually dropped.) As a private university, Penn was not bound by the First Amendment. But the bad press spurred it to replace the policy with one that does not punish offensive speech.

Vague Policies Remain

Even with such strong guidance, some free-speech experts say, many colleges have antiharassment policies that are so vaguely worded that they could easily be applied incorrectly. Gary Pavela, director of judicial programs at the University of Maryland at College Park and an expert on student-conduct issues, believes that FIRE is on target with its claims about speech codes. "I've visited a fair number of campuses and seen them," he says. "You find [the language] in sexual-harassment policies or statements on respect for diversity. They all read fine until you read the section on prohibiting or censoring offensive or insensitive speech."

When he raises his concerns with administrators, Mr. Pavela, who opposes such codes, says he is consistently told, "Well, we don't enforce that." They know that such codes aren't legal, he says, but they keep them on the books for political reasons. "If you're a college president, imagine saying, 'We have to protect racist expression.' That is going to engender a firestorm of controversy, and it takes a very unusual or courageous administration to take this on."

Some unconstitutional policies may also result from confusion over what the law allows. The legal definition of a "hostile environment," Mr. Pavela says, can seem ambiguous. "What administrators want to do, some of them, is to punish the kid who flies the Confederate flag or puts on an offensive skit, hoping the speech code will cover it." But such actions, however offensive, are clearly protected under the First Amendment, Mr. Pavela says.

He cites a 1993 case in which a federal appeals court ruled that George Mason University violated the First Amendment by placing a fraternity on probation for staging an "ugly-woman contest."

Besides being unconstitutional, such codes end up hurting the cause they're designed to promote, Mr. Pavela says. "By resorting inappropriately to punishment to silence offensive expression, we end up creating First Amendment martyrs who are likely to win their case. And in all the din about First Amendment issues, the real issue about what's wrong with the [offensive] idea gets lost."

FIRE provided *The Chronicle* with samples of policies it says violate the First Amendment. At the University of California at Los Angeles, the Lesbian Gay Bisexual Transgender Resource Center, which is part of the department of student and campus life, posts on its Web site examples of sexual-orientation bias. Among them are "not challenging anti-LGBT statements or comments" made by others in the classroom.

In an e-mailed response to a request for comment about this and other statements gathered by FIRE, Pamela Corante, a UCLA spokeswoman, says, "We are investigating the matter, as UCLA prides itself on being a forum for rational discourse."

'Symbolic Measures'

While Mr. Pavela applauds FIRE's efforts, other First Amendment scholars question the group's claims.

True speech codes are rare these days, says Robert M. O'Neil, a longtime opponent of such policies, who is director of the Thomas Jefferson Center for the Protection of Free Expression and former president of the University of Virginia. Even at their apex, more than a decade ago, only about 200 colleges adopted policies directed specifically at hate speech, he says. "I just can't believe there are anything like that number of genuine speech codes," he says of FIRE's claim of two-thirds of all public institutions. "If all they're talking about are policies focused on harassment which could conceivably be applied to student speech but never have been, that really is rolling out the cannon to shoot a mouse."

Jon B. Gould, an assistant professor who teaches law at George Mason, says FIRE's research is flat-out wrong. Mr. Gould, who is working on a book about the rise of hate-speech regulation, has conducted what he says is the only statistically significant study of speech policies at both public and private colleges. According to his figures, only about 10 percent of colleges have unconstitutional speech policies.

Those codes, says Mr. Gould, are "almost exclusively symbolic measures" and are rarely enforced. While he agrees that they can still have an effect on campuses, he thinks that pursuing a remedy through the courts is pointless. "Policies that are never invoked are rarely dangerous," he says. "If all of these schools in the 10-percent category were using their policies regularly and squelching speech, then I'd be concerned."

Officials of FIRE counter that they know of dozens of instances in which students have been punished under such codes during the past three years, and that those cases are rarely made public.

Mr. Gould, who says he is ambivalent about the value of speech codes, criticizes FIRE for not distinguishing between enforceable rules and general guidelines. He also says the organization takes the policies out of context by failing to acknowledge statements elsewhere in campus policies that support free speech.

The University of Michigan at Ann Arbor says that's exactly what FIRE

has done with its policies.

In one example, FIRE highlighted a university document that urges people to "avoid jokes, words, phrases, and gestures with sexual connotations or that demean or trivialize any group of people." Two lawyers for the university, Jonathan R. Alger and Dan Sharphorn, argue that the highlighted sections come from campus guidelines and thus are voluntary and not legally enforceable. Michigan's actual sexual-harassment policy, they say, adheres closely to federal guidelines.

Thor L. Halvorssen, chief executive officer of FIRE, says courts aren't necessarily going to see a distinction between guidelines and enforceable policy. Past court cases, such as the ones that struck down speech codes at Michigan in 1989 and at the University of Wisconsin in 1991, he notes, examined both the speech codes and their interpretive guides.

FIRE also notes that Michigan refuses to post materials on kiosks and bulletin boards that "contain language or illustrations that could reasonably be construed as offensive to any portion of the university community." Mr. Alger and Mr. Sharphorn respond that such a ban is allowable because it refers specifically to paid advertisements in designated places. They compare it to a newspaper's right to refuse certain advertisements.

Will FIRE prevail in its campaign? Richard Delgado, a law professor at the University of Colorado at Boulder and author of the Wisconsin code that was struck down, says courts have long recognized the damage that verbal harassment can create in the workplace. The challenge, he says, is to persuade them to extend that protection to college campuses.

Although they sit on opposite sides of the fence, Mr. Delgado agrees with FIRE's claim that many colleges continue to try to regulate hateful speech. But unlike FIRE, he finds that inspiring. "That's the most telltale thing you have in the entire current debate," he says. "Universities seem to believe that it's vital to regulate the most odious hateful form of interpersonal one-on-one discourse. And I think they're right."

Mr. Kors is unmoved by the argument that codes are needed to maintain campus civility. And while some wonder whether FIRE is chasing after phantoms, he insists that nothing less than the future of America is at stake.

"You're teaching a whole generation of American students it's OK what the U.S. government or the Justice Department or Shippensburg does: Just go along. Don't make waves. They have the right to go after your free speech and your conscience and your First Amendment rights. If

people learn to sacrifice their freedom in college, they will not defend it in the larger society."

MAJOR RULINGS ON SPEECH CODES

In the 1980s and '90s, several universities were sued over their speech codes. Following are some of the cases that have had the most influence:

University of Michigan

The Issue: Michigan's antidiscrimination policy prohibited verbal or physical behavior 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." To be subject to discipline, the violator's behavior had to be threatening, or interfere with the victim's activities, or create a hostile environment. Examples included commenting in class that "women just aren't as good in this field as men," and inviting to a dormitory party everyone on a floor except someone suspected of being a lesbian.

The Ruling: A federal district judge ruled in 1989 that the policy was unconstitutional because it was so broad and vague.

University of Wisconsin

The Issue: The Wisconsin system's antidiscrimination policy prohibited comments directed at a specific person if the remarks demeaned the person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age, and created a hostile environment. Examples included telling racist jokes and posting "demeaning" material where someone lives or works.

The Ruling: In 1991, a federal district judge found the policy unconstitutional because it attempted to regulate the content of speech and thus violated the First Amendment.

Central Michigan University

The Issue: The university's antiharassment policy defined racial and ethnic harassment as "any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile, or offensive educational, employment, or living environment by ... demeaning or slurring individuals ... through written literature because of their racial or ethnic affiliation; or ... using symbols, [epithets,] or slogans that infer negative connotations about the individual's racial or ethnic affiliation."

The Ruling: In 1995, a federal circuit-court judge declared the policy unconstitutional because it was overbroad and constituted content discrimination by focusing on specific characteristics, such as race.

SOURCE: *Chronicle* reporting

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