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17.245 The Supreme Court, Civil Liberties, and Civil Rights
Fall 2006

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17.245, The Supreme Court, Civil Liberties, and Civil Rights (Fall 2006)

Discussion 16: Civil Liberties vs. Civil Rights (guest lecturer Harvey Silverglate)

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"The marketplace of ideas": a phrase from one of Justice Holmes' opinions reflecting the view that in a free society, conflicts are dealt with through peaceful discourse. Though often regarded as one of the most fundamental of our constitutional rules, there seems to be an exception for college campuses; students can be thrown out of school for saying things that they could legitimately say anywhere else.

Speech Codes: codes of speech conduct enacted in the early 1980s to restrict speech. Three of them were struck down by the Supreme Court (Stanford, U-Wisconsin, U-Michigan). They were then replaced in the early 1990s with codes protecting individuals who were the target of "harassing speech" on the basis of gender, race, or religion. 98% of campuses now have these types of speech codes.

Why can the Supreme Court rule on Stanford's speech code, a private university?

Stanford is private, but in California there is something called the "Leonard Law" whereby private universities have to give their students the same free speech rights as public universities.

Common Law definition of harassment: relates to the manner in which you address someone, not the content of the address. Ex.: calling someone at 3am repeatedly to say that you hate them is harassing. In determining whether speech is "harassment", the important point is that it does not depend solely on the content of the speech, but rather on the time, place, and manner in which it is conducted.

- Administrators have destroyed free speech on campuses across the country.

    - Universities have interpreted harassment to mean a type of speech that deeply bothers the student and makes the student feel unwelcome and unappreciated, preventing him or her from taking advantage of all the activities the university has to offer. The equal protection argument is that where speech has these effects, the students who are the targets of such speech are being denied an equal opportunity at education, and the speech must therefore be regulated.

    - The premise of these speech codes is that students are hyper-sensitive brats and can't take any offensive speech. Students shouldn't expect to go through their college years unchallenged and free from offense.

These notes were taken by an MIT undergraduate student enrolled in 17.245. They have been reviewed but only lightly edited by the instructor. The notes reflect a combination of teacher and student comments and questions, and are not a transcript or verbatim rendering of class discussions.

- There is a growing obsession with protecting students from speech that disturbs them. A Columbia Law School exam included a hypothetical that was offensive to some of the women in the class. The women filed a sexual harassment complaint, and the school launched an investigation. The investigation determined that the hypothetical was actually based in fact, and the Dean ultimately held back the investigation. (Full story at www.thefire.org and www.harveysilverglate.com)

- The First Amendment protects vicious parody

  - Ex.: Jerry Falwell sued Larry Flynt for publishing a vicious parody on grounds of defamation, invasion of privacy, intentional infliction of emotional distress. The district court gave Falwell $100,000, but the verdict was overturned in a unanimous decision. The Court concluded that the First Amendment protects the right to parody.

Supreme Court's stance on free speech and academic freedom:
Supreme Court has held that in grade school, the school has an almost unlimited authority to provide moral education and to prevent offense. In high schools, they have less authority, but still some authority. In colleges, academic freedom kicks in. In a truly free society, we should prefer to accept the potential hurt free speech can cause for the sake of having free speech. The regulation of free speech is worse than the hurt it can cause.

HS's stance on academic freedom:

- In a free society, people need to develop a thick skin. Learning to live together requires learning to deal with offense. From a practical point of view, these codes are disastrous for preparing students for the real world.
- One objection is to freshman orientation programs that indoctrinate students into believing that race, gender, and sexual orientation are deterministic. This is an attempt to convince students that speech codes are necessary to protect students from criticism and harm relating to characteristics they cannot control (racial slurs, epithets, etc.).
- Stopping free speech in the interest of public safety is essentially the heckler's veto, and should not be permitted. Free speech is free speech, and the audience may not determine the acceptability of speech.
- A school will not do in public what they do in private. This is how you enforce public laws against private universities.

How do we determine when the protection of rights is a state matter and when it is a matter of the federal constitution?

States can always extend rights beyond the scope of the federal constitution. For example, the original Massachusetts constitution protected citizens from cruel or unusual punishment.

Clearly there are still issues of race in our society; why doesn't our history require us to rectify mistakes of the past with greater protection today such as affirmative action?

Affirmative action is a problem for equal protection, but probably won't be solved by litigation. We should engage in a Marshall plan to improve education from age 2 onward. Have the state pay for education, 3 meals a day, and tutors for students who fall behind. The problems start long before college admissions.

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How do you feel about the current definition of assault as applied by colleges in the "date rape" context?

2 types of assaults:

- Cases where there is actual assault and there is evidence that the woman turned away the assailant.
- Cases of drunkenness where the woman is presumed the victim if she was drunk at the time. This is degrading to women, and unfair to men.

The former case is punishable by law, but the latter is not. It may only be punishable within the disciplinary system of the school. This raises questions as to its legitimacy.

Why did the speech codes appear in the early 1980s?

It coincided with the beginning of the opening up of the university. Universities, which had been historically very non-diverse, felt it was necessary to adopt these rules to prevent student conflicts. The idea that they need this kind of protection is a bad way to start out such an experiment.

[Follow up discussion]

Discussion of Harper v. Poway

Student wanted to wear a T-shirt reading "Be ashamed, our school has embraced what god has condemned, homosexuality is shameful," citing a biblical passage, but was stopped from wearing the shirt by the school.

The court holds that the high school has a right to regulate Harper's speech. The court limits its holding to circumstances under which the offense is based on a core identifying characteristic:

"[Footnote 27]… Our colleague ignores the fact that our holding is limited to injurious speech that strikes at a core identifying characteristic of students on the basis of their membership in a minority group. The anti-war Tshirts posited by the dissent constitute neither an attack on the basis of a student's core identifying characteristic nor on the basis of his minority status." (Majority Decision in Harper v. Poway)

Is this equivalent to the heckler's veto?
No. The majority says that the obvious outcome of Harper's T-shirt would be to disrupt the learning process.

There are certain issues that the Constitution removes from the sphere of debate. For example, the government may not establish a church. Formal racial disparity is regarded as a suspect classification, but sexual orientation has not yet been defined as such by the Court.

The dissent would say that the Constitution does not prevent you from the hurt you might feel from someone else's exercise of free speech.

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The majority says it does not take a stand on the politics of the matter; rather, the issue is the school's right to restrict speech to preserve the educational atmosphere.

There seems to be a problem with standing and remedy in school cases because students graduate. How do the courts deal with this?

This is continually a problem with school cases because students graduate and a remedy is often no longer relevant. The Court has traditionally protected standing and will often pick up a set of similar cases and issue a broad ruling.

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