

*A Legal Newsletter
For Independent
Higher Education*

Lex Collegii



Contents

Student Civility	1
Interrogatories: Coaches and Sexual Conduct	7

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Student Civility

After giving an exam, a sociology teacher at Virginia Tech comes back to his office and finds the following message on his answering machine from a student: "You fat f— with yellow teeth! You hump!" The reason for the student's rant: she is unable to resell her sociology textbook. A student at Washington State University challenges his history teacher to a fight because the student is upset with his grade. At a Duke-Maryland basketball game, Maryland students wear T-shirts applying the f-word to Duke's team and chant expletives at J.J. Redick, a Duke player.

One can define civility most easily by showing what it is not: it is the opposite of the behaviors exhibited by the students in the above situations. These incidents are indicative of the increasing amount of uncivil behavior by students at institutions around the country. While the above are extreme examples, other more subtle instances of levels of politeness further reveal the growing culture of rudeness on campus. Professors complain that students disrupt class by carrying on running conversations, reading the newspaper, eating, not turning off their cell phones, and bringing portable televisions into class. When asked to stop the offending behavior, many students refuse, in some cases forcing their professors to call security to escort these disrupters out of class.

The Duke lacrosse scandal is the most recent and notorious example of student

incivility, this time in relation to the surrounding community. The men's lacrosse team threw a party at an off-campus house, hired two strippers, and three members of the team allegedly raped one of the strippers. The lacrosse players also reportedly shouted out racial slurs to at least one passerby the same night. In the time leading up to the party, members of the lacrosse team regularly exhibited drunken, boorish behavior such as public urination. They committed other uncivil acts, some of which resulted in criminal charges.

While the Duke scandal, as an example of behavioral incivility, has received front page coverage in most national newspapers, another aspect of civility involving student and faculty expression has been percolating in legislatures and in academia for a number of years. The issue of freedom of expression, sometimes referred to as intellectual diversity, takes many forms. Depending on which side of the debate you are on, it has different definitions. Conservatives, alarmed at the perceived liberal academy, cast intellectual diversity as an indispensable companion of academic freedom in the university. Specifically, this group calls on colleges and universities to give equal exposure to all points of view, even those which may conflict with conventional wisdom, so as to avoid the imposition of any orthodoxy. This group argues that such exposure is the cornerstone of academic freedom.

Liberals believe that if such thought were enacted into law or university policy, it would require them to present alternative

views lacking in intellectual merit. They further believe the real goal of the conservative group is to indoctrinate students into right wing theories by recognizing the legitimacy of these theories and requiring institutions to hire conservative scholars.

The most obvious application of the intellectual diversity debate comes within the classroom itself. The group, Students for Academic Freedom, is collecting stories about political bias on campuses from the student perspective. Meaghan McCarty, a student at the University of Colorado-Boulder, reported a story to the group that

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is typical. She tells of a professor in a class called “Social Problems” who spoke over her and discredited her conservative arguments during class discussion of social issues. When she confronted the professor, he told her that no one agreed with her, and that she should consider taking a course with a more conservative professor.

Other students complain their professors routinely make comments disparaging President Bush in classes like Physics and English, where politics are not relevant to the subject matter. Such stories have led David Horowitz, a former liberal turned conservative, to push state legislatures and the U.S. Congress to pass an “Academic Bill of Rights.” Such an enactment would attempt to promote intellectual diversity by encouraging equal exposure for varying viewpoints and would require college governing boards to develop and delineate processes for resolving student complaints about bias.

Institutions have responded to the perceived lack of civility in behavior and discourse by enacting speech codes and civility codes. Some have even enacted Bills of Rights. This article provides examples of such codes and details the likely response

from courts if institutions enact these measures. While universities can clearly regulate the boorish disrespect of students toward their professors and toward the community at large, the issue of whether a professor can present only one side of an issue and exclude discussion of alternative viewpoints during class discussion is a tougher question.

Speech and Civility Codes

Colleges and universities have responded to the rise in incivility between students and each other, students and professors, and students and the outside

community by developing speech codes meant to encourage students to treat others with respect and anti-harassment codes ostensibly meant to protect students from harassment.

Speech codes, which many allege no longer exist, still are prevalent in major

U.S. universities. These codes broadly prohibit conduct, including speech that would intimidate or harass people with certain characteristics. These codes often explicitly provide that violators will be subject to the school’s disciplinary process. The University of Miami in Florida has a typical speech code found in the student handbook under the university’s “Harassment or Harm to Others” policy. It prohibits:

Any words or acts, whether intentional or a product of the disregard for the safety, rights, or welfare of others, which cause or result in physical or emotional harm to others, or which intimidate, degrade, demean, threaten, haze or otherwise interfere with another person’s rightful actions or comfort is prohibited.

This policy is especially broad in its scope as it may prohibit almost anything that hurts another’s feelings.

Speech codes often include language indicating that students are subject to sanction if they disrupt class. The University of Southern California’s *Disruptive Classroom Behavior*, a guideline for faculty, states that disruptive behavior may be a

student who persistently arrives late or leaves early, a student who talks incessantly while a professor is delivering a lecture, or a student who becomes belligerent when confronted about his or her behavior. The guideline allows for professors to take disciplinary action when such behavior “interferes with the learning process for other students, inhibits the ability of instructors to teach most effectively, diverts energy . . . away from the education mission, and indicates a significant level of personal problems . . . on the part of the disrupter.”

General civility codes are a more modern creation and have sprung up in great numbers over the last few years. The language of these codes speaks to a respect for the diversity of opinions and a respect for the rights of others in general. These codes do not explicitly prohibit any behavior as the Miami code does, but are often aspirational in nature. These codes often focus on the abuse of alcohol and its consequences. For instance, Coe College adopted a campus civility statement intended to advance the “safe, mutually supportive, academically encouraging, egalitarian, and tolerant” nature of the college. Among the expectations are the following:

- We expect a campus free of incidents that create a hostile living environment.
- We expect that intoxication will not be an excuse for incidents that occur while under the influence.
- We expect that diversity of opinion should be cultivated and encouraged as well as respected within our community.
- We expect all campus community members to respect the rights of other persons regardless of their . . . age, color, creed, disability, gender identity, national origin, race, religion, sex, or sexual orientation.

The University of California-Berkeley also issued a statement on civility expectations for students. It states that campus life will only flourish with courteous and dignified interactions between all individuals who are marked by consideration and tolerance of others’ ideas. Other schools such as Catholic University and Johns Hopkins have civility projects with courses on



civility and regular presentations to students that focus on civility.

Duke is the most recent university to join the civility assessment. In the aftermath of the lacrosse scandal, Duke President Richard Brodhead detailed a new campus culture initiative in a letter to the Duke community. Brodhead's goal is to try to improve "the way Duke educates students in the values of personal responsibility, consideration for others, and mutual respect in the face of difference and disagreement." Brodhead makes clear that the goal is not to tell students "'what to think' in some . . . doctrinaire way."

Many institutions have both harassment and civility codes. For instance, the civility code at the University of California-Berkeley states that it expects students to consult the student code for specific regulations regarding respect and civility. The Berkeley student code includes sections on "Protected Group Harassment Policies" and regulations setting up designated areas for free expression. The harassment policy allows the school to impose discipline for, among other acts, harassing activities such as "the use, display, or other demonstration of words, gestures, imagery, or physical materials . . . that has the effect of creating a hostile and intimidating environment sufficiently severe or pervasive to substantially impair" a minority's participation in the university.

Judicial Invalidation of Speech Codes

Courts have been largely unfriendly to public university codes of conduct that proscribe certain types of speech and harassment. In *Doe v. University of Michigan* (1989), the University of Michigan's anti-harassment policy came under the scrutiny of a federal district court. The policy prohibited verbal or physical behavior "that stigmatize[d] or victimize[d] individuals on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status." The university could discipline any individual who harassed in this way if such behavior threatened, interfered with the victim's activities, or created

a hostile environment. The university issued a guide clarifying this policy which made someone a harasser if that person laughed at a joke about a classmate who stuttered or excluded someone from a study group on the basis of that person's sex, race, or ethnic origin.

The district court in *Doe* took exception to the stories of two students. The university forced one student to submit to a disciplinary hearing because the student had stated in his Social Work class that homosexuality was a disease that needed to be cured, and that he had counseled his gay patients in this manner. The second case involved a business student who read a homophobic limerick during a class public speaking exercise and was persuaded by the university to attend a gay "rap session" and write an apology to atone for his conduct. The judge indicated that serious comments such as these made in the course of class discussions should be exempt from the harassment policy because the First Amendment protects such speech. Even though the hearing panel did not sanction the student in the first case or force the second student to resolve his case, the court found the university exposed both to possible discipline for making protected speech. The policy's overbroad restriction of protected speech along with unprotected speech made it unconstitutional.

Further driving a nail into the coffin of university harassment codes, the U.S. Third Circuit Court of Appeals further found a Pennsylvania School District's anti-harassment policy unconstitutionally overbroad in *Saxe v. State College Area School District* (2001) due in part to the court's reliance on prior cases like *Doe*. The policy defined harassment using similar language to the University of Michigan's anti-harassment policy and included examples similar to those given in *Doe*. The plaintiffs, a father and his two children, brought suit because they feared that the school district would punish the children under the policy for voicing their religious views about moral issues, including the harmful effects of homosexuality.

Then U.S. federal appellate Judge Samuel Alito, writing for the majority, stated that a fundamental principle underlying the First Amendment is that the government may not prohibit the expression of an idea because society disagrees with it. This decision is important to those in higher education because the Supreme Court has ruled that primary and secondary schools can regulate speech more broadly than institutions of higher learning. If such a policy is unconstitutional in primary and

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secondary education, then it would likely be unconstitutional in the higher education context as well.

Until February 2004, Shippensburg University's student code of conduct stated that speech that was "inflamatory, demeaning, or harmful toward others" was not deserving of protection. The code went on to say that acts of intolerance on the basis of ethnic, racial, gender, sexual orientation, physical, lifestyle, religious, age, and political characteristics "would not be condoned." Next, the Community Regulations portion of the Code stated that "the expression of one's beliefs should be communicated in a manner that does not provoke, harass, intimidate, or harm another[;]" and "no person shall participate in acts of intolerance that demonstrate malicious intentions toward others."

Applying the earlier cases to the Shippensburg speech code, a Pennsylvania federal district judge ordered Shippensburg to stop enforcing the above provisions of the code in *Bair v. Shippensburg University* (2003). The challengers were students who feared that discussion of their social, cultural, religious, and political views would be sanctionable under the speech code.

The court found the provisions listed in Shippensburg's code of conduct policy clearly prohibited speech protected by the First Amendment. These sections, stated

the court, “suggest that a student’s beliefs should not be communicated in a way that arouses interest or stimulates a response,” which is inconsistent with the tradition in our nation of safeguarding the interplay of competing views in academics. That tradition is evident in both *Sweezy* and *Doe*. The court concluded it had invalidated parts of the policy because these parts were not aspirational and subjected violators to the university disciplinary process. In February 2004, Shippensburg agreed to change its policies to include only aspira-

Amendment in *Sweezy v. State of New Hampshire*. The court held that such freedom is “almost self-evident” because of the “vital role in a democracy that is played by those who guide and train our youth.” The court clarified the nature of academic freedom by focusing on the social sciences “where few, if any, principles are accepted as absolutes” and thus teachers and students must remain free to inquire and gain new understanding to avoid the stagnation of our civilization. The principle of academic freedom requires that institutions

be free from outside interference so as to encourage the exchange of ideas between university teachers and students.

Even though the contours of the principle of academic freedom remain amorphous, courts and commentators have

attempted to clarify it. On the threshold, First Amendment protections related to academic freedom only apply in full force to public institutions because courts consider them arms of the state. Private institutions are free to regulate the content of a professor’s speech in keeping with the mission of the school.

Secondly, academic freedom does not give faculty the right to say or do whatever they want in the classroom. Specifically, academic freedom does not protect a faculty member who compromises a student’s right to learn in an environment free of hostility or engages in controversial speech unrelated to the course. On the latter point, a 1940 statement by the American Association of University Professors (AAUP) posited that academic freedom does not allow professors the use of “uncontrolled expression at variance with established curricular contents” As a result, courts have held that professors have no right to use profanity in class unless it is germane to the subject matter and that they have no First Amendment right to determine what they will teach in the classroom if it is counter to university policy.

The application of academic freedom to college students is unclear as the Supreme Court has not yet ruled on postsecondary

students’ freedom of expression rights. The court held in *Tinker v. Des Moines Independent Community School District* (1969) that secondary students have the right to freely express their ideas and views unless such expression would lead to a substantial and material disruption of the educational environment. A federal court of appeals applied this standard in *Salehpour v. University of Tennessee* (1998) where a dental student sued the University of Tennessee for violating his First Amendment right to protest a classroom rule that prohibited first-year dental students from sitting in the last two rows of some classes. The court found that this protest was not protected activity because this expression had “no intellectual content” or purpose other than to disrupt class, but that the ruling should not deter “legitimate debate” even though the expression may be inconvenient.

The AAUP’s 1967 Joint Statement on Rights and Freedoms of Students states that “students should be free to take reasoned exception to the data or views offered in any course of study . . .” and that “students should have protection through orderly procedures against prejudiced or capricious academic evaluation.” The possible conflict over “reasoned” speech and the lack of Supreme Court precedent present an unclear picture as to how to reconcile student and faculty academic freedom in the university context.

The Rise of the Academic Bill of Rights

One interesting aspect of the debate over campus speech and civility codes is that it seemingly pits conservatives as the defenders of free speech against liberal academia as the speech censors. Conservatives attack vague harassment policies and speech codes as violations of academic freedom because these policies will squelch debate over hot-button issues and will impose a liberal orthodoxy on unwilling students. The Supreme Court in *Sweezy* was similarly concerned with the promotion of intellectual dialogue, especially in the area of the social sciences, when it stated that rigid adherence to orthodoxy in such areas could lead to societal stagnation.

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tional statements in order to comply with the district court’s ruling.

Uncivil Student Speech in the Classroom

No constitutional barrier seemingly exists when a professor employs disciplinary action to deal with classroom disruption. The University of Southern California’s Policy on Expression and Dissent employs the exact language that the Supreme Court has endorsed. The use of such a policy by professors to deal with students who fail to treat a professor with a modicum of respect and thus inhibit the learning of others is constitutionally permissible. This policy would also allow for the discipline of students who threaten their professors outside of class as in the examples given at the beginning of this article. The policy would be unconstitutional if the university transformed it from a device for classroom management to a document which allowed for the screening out of certain viewpoints. Independent institutions, however, could develop a policy that is more or less restrictive.

Academic Freedom

In 1957, the Supreme Court endorsed the idea of academic freedom in American universities as a byproduct of the First



David Horowitz, the founder of the Center for the Study of Popular Culture, spearheads this movement. His parents were members of the Communist Party and until 1974, Horowitz called himself a Marxist and allied himself with the Black Panthers. Horowitz, now called a fascist by those on the Left, has been lobbying state legislatures and the U.S. Congress for a number of years to pass his Academic Bill of Rights. This document states that academic freedom is based on “. . . the idea that human knowledge is a never-ending pursuit of the truth, that there is no humanly accessible truth that is not in principle open to challenge, and that no party or intellectual faction has a monopoly on wisdom.” Therefore, academic freedom requires “an environment of intellectual diversity that protects and fosters independence of thought and speech.” This bill of rights states that it protects the intellectual independence of professors and students and requires that no orthodoxy be imposed on either group. It also states that its principles apply only to public universities and private universities that are committed to academic freedom.

Horowitz’s Academic Bill of Rights lists a number of principles that he argues universities should apply. They include:

- All faculty shall be hired, fired, promoted, and granted tenure on the basis of their competence and appropriate knowledge in the field of their expertise and, in the humanities, the social sciences and the arts, with a view toward fostering a plurality of methodologies and perspectives. No faculty shall be hired or fired or denied promotion or tenure on the basis of his or her political or religious beliefs.
- Students will be graded solely on the basis of their reasoned answers and appropriate knowledge . . . not on the basis of their political or religious beliefs.
- While teachers are and should be free to pursue their own findings and perspectives in presenting their views, they should consider and make their students aware of other viewpoints. Academic disciplines should welcome

a diversity of approaches to unsettled questions.

- Faculty will not use their courses for the purpose of political, ideological, religious, or anti-religious indoctrination.

Members of the academy counter that certain types of thought are essentially not intellectual by their very nature and therefore should not be a part of academia, especially ideas that can cause others great discomfort. Their concern is that they will have to present alternative views on controversial subjects like the Holocaust and evolution if legislatures enact the Academic Bill of Rights. They are also concerned that the faculty hiring section of this bill of rights could lead to a requirement that institutions hire a quota of conservative faculty members and that the bill in general would lessen their control over classroom debate.

No state has adopted the Academic Bill of Rights, but the Pennsylvania legislature is currently conducting bipartisan hearings to determine whether a liberal bias exists in academia and what actions the state should take. Critics attack such hearings as unnecessary because they say that the stories of discrimination against conservative students are exaggerated. Such attacks on the allegedly small scope of the problem led Students for Academic Freedom, a group affiliated with Horowitz, to ask students to send in stories of oppression. As of May 6, 2006, students had posted 392 stories of alleged ideological discrimination in the three years since the group started requesting such stories. Congressional representatives have introduced various bills incorporating parts of the Academic Bill of Rights but Congress has not enacted any of them into law.

Universities are adopting their own student bills of rights. Princeton University undergraduates recently supported a scaled-down version of the Academic Bill of Rights that they call the Student Bill of Rights in a campus-wide referendum. It currently awaits action by the university. The Princeton version expresses concerns as to fairness in grading, the indoctrination

of students, hiring and promotion of faculty, and dedication to intellectual pluralism.

Even though Horowitz has been unsuccessful to date in getting legislatures to enact his bill of rights, the academic community, in an apparent effort to occupy the field and minimize outside interference, took preemptive action in June 2005. The American Council on Education, along with 29 other education organizations, issued the “Statement on Academic Rights and Responsibilities” in an attempt to address the intellectual diversity debate.

The council’s policy statement states that institutions should encourage debate

If a private institution adopts a version of the academic bill of rights, courts might side with students in suits alleging that a professor failed to provide diverse viewpoints.

over complex and difficult issues about which individuals disagree, a debate characterized by tolerance and civility. It also says neither students nor faculty should be evaluated on the basis of their political views; that academic decisions should be solely based on considerations that are intellectually relevant to the subject area; and that grievance procedures for violations of these provisions should be clear. The statement ends by affirming accepted notions of academic freedom; reasserting the independence of colleges and universities from governmental interference; and asserting the need to measure academic ideas, theories, and beliefs against relevant intellectual standards.

Academic Bills of Rights for Independent Institution

Independent institutions could be opening themselves up for continual challenge if they adopt an academic bill of rights. Students at private universities may resort to contract claims against universities to challenge an academic bill of rights. Courts recognize the contractual relationship between students and their universities exists through university codes and student

handbooks. Students have been unsuccessful in bringing breach of contract claims because they have been unable to point to particular services that their schools have promised and not delivered. If a private institution adopts a version of the academic bill of rights, courts might side with students in suits alleging that a professor failed to provide diverse viewpoints, for example, because this would be an identifiable contractual promise. Courts may abandon their deferential view of private institutions and evaluate the adequacy of all aspects of the educational experience as a result of rights-granting codes. The same is true of public universities and thus such enactments would provide students another avenue of relief against state institutions as well.

Preventive Planning

A university that adopts a civility code with broad language that would restrict certain types of protected speech should make sure that it employs aspirational language. The code should not subject students to the university disciplinary process for a violation of the code.

A university desiring to educate its students in civility should consider developing a civility initiative such as presentations on civility to incoming classes during student orientation, regular symposia on tolerance and diversity, and classes on the topic of civility.

A classroom management policy for professors can allow a professor to initiate disciplinary proceedings against a student for failure to treat a professor with respect. The policy should use language prohibiting substantial and material disruptions that hinder the academic freedom of others. It should also explicitly state that it in no way inhibits a student's right to express a dissenting opinion on an issue germane to the subject matter.

A university should encourage professors to resolve conflict with belligerent students by building respect through relationships. Calling security or the student development office to deal with such students should be a last resort.

An institution enacting a harassment code that subjects violators to the school's

disciplinary procedure should make sure the policy addresses behaviors and threatening words and not pure speech. The institution should avoid employing language that would sanction actions that merely cause others discomfort.

A university should consider the consequences of enacting a student bill of rights or other policy expanding nationally accepted standards of academic freedom rights for students. An expanded policy could open both private and public universities to challenges in areas where courts have yet to venture.

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—Joel David Eckert

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