The National Law Journal 1/8/96 p. A19

plicant to pass the bar exam and the MPRE in the same calendar year.

Mr. Brennan, an attorney licensed in Virginia in 1992, is working as a law clerk in Seattle while studying for the Washington Bar and completing another character assessment.

hostile to a licensed lawyer with fewer than five years' experience. In all but two jurisdictions (Washington, D.C., and Colorado), such a lawyer must start from scratch if he or she chooses to relocate—take the state bar, pass the character test and retake the professionalism exam.

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CIVIL LIBERTIES *By Harvey A. Silverglate*

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AFTER HOLDING OUT for a number of years, the faculty and administration of Harvard Law School have finally adopted guidelines that seek to obliterate from that hallowed institution various forms of perceived sexual harassment.

Behavior banned under this code includes any "speech of a sexual nature" that is "unwelcome" is "abusive or unreasonably recurring or invasive," 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."

It is worthy of note that one of the nation's leading law schools, home to some of the country's pre-eminent constitutional scholars, has seen fit to make its campus a more pleasant place for women by suppressing speech—this at a time when restrictive speech codes have been coming under increasing fire from commentators, writers, scholars and the courts because of the extent to which these formulations run afoul of constitutional free speech guarantees and the fundamentals of academic freedom.

After all, in 1989 the federal court in Wisconsin threw out the speech code, embodying "hostile environment" theory, at the University of Michigan. *Doe v. University of Michigan*, 721 F. Supp. 852. Two years later, a similar ruling doomed the speech code at the University of Wisconsin, *UWM Post Inc. v. Board of Regents of University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis.).

Similarly, an effort by a public university in Virginia to instill chivalry by force of law ran aground when the 4th U.S. Circuit Court of Appeals, in 1993, held that George Mason University could not, consistent with the First Amendment, punish a campus fraternity for sponsoring an "ugly woman contest" just because the students' message "ran counter to the views the university sought to communicate to its students and the community." *Iota Xi Chapter v. George*

[SEE 'HARVARD' PAGE A20]

HLS faculty has crafted speech restrictions that undoubtedly trample age-old ideas of academic freedom.

Mr. Silverglate is a bimonthly NLJ columnist and a partner in the Boston firm of Silverglate & Good.

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Harvard's Liberals Turning Crimson

['HARVARD' FROM PAGE A19]
Mason University, 993 F.2d 386.

Freedom of Expression

Of course, Harvard, being a private institution, is not bound by the First Amendment, unlike its unfortunate (or—depending on one's point of view—fortunate) sister schools in Virginia, Wisconsin and Michigan. Nonetheless, as former Harvard President Derek Bok said when he issued a formal statement in 1991 in response to demands that the university require several students to remove Confederate flags from their dorm windows (on the ground that they were offensive to blacks), "I have great difficulty understanding why a university such as Harvard should have less free speech than the surrounding society—or than a public university, for that matter."

> 'Universities should be at least as concerned with protecting freedom of expression as the rest of society.'

Because of the "nature of their mission," Bok stated without equivocation, "all universities should be at least as concerned with protecting freedom of expression as the rest of society."

What, then, has happened at Harvard, that suddenly its law school has succumbed to the coercive trend that has infected our campuses—the effort to produce officially sanctioned results through the suppression of speech?

For one thing, there have been changes in the administration. The dean of the law school, president of the university and general counsel are all relatively recent appointees. But also, the law school faculty appears to have tired of resisting the vociferous demands of certain student groups and faculty members that the school fall in line with trends in the workplace, where federal Equal Employment Opportunity Commission guidelines subordinate free speech to the goal of a more "comfortable" work environment for women and racial minorities.

Despite the occasional court decision seeking to remind universities that an academic environment, unlike a place of business or commerce, is quintessentially a milieu where intellectual discourse is supposed to produce a certain amount of discomfort, the Harvard Law faculty decided, in the words of Dean Robert C. Clark, that it could not appear to be "uncaring" about the "concerns" expressed by the protesting students.

Legal Doublespeak

Perhaps the faculty was helped toward this decision by the fortuitous realization that some nifty legal doublespeak would allow it both to appear responsive to the concerns of its student activists and, at the same time, to avoid what Mr. Bok had warned against—protecting free speech rights at Harvard to a lesser degree than they are protected on state college and university campuses. The ingenious device, apparently the product of the faculty's expertise in constitutional law, appears at the end of the guideline that squelches offensive speech:

"[N]o speech or combination of speech and conduct 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 Massachusetts Civil Rights Act or the First Amendment."

Thus, while the faculty has crafted speech restrictions that very likely would violate the First Amendment if adopted by a state university and which, in any event, undoubtedly trespass upon age-old notions of academic freedom (from which Harvard, even as a private university, has never claimed to be exempt), it has provided a "savings clause" of sorts by declaring that free speech principles trump in any contest with the guidelines.

The constitutionalists and academic freedom advocates on the faculty might sleep better because of this clause, but there are two practical problems.

First, the very presence of the restrictions serves to chill free speech. Who at the law school will risk his or her position in the student body or on the faculty merely for the privilege of using disfavored words?

Second, since Harvard is a private institution, nobody disciplined for uttering offensive but constitutionally protected speech would have the ability to seek judicial review of his or her claim that the offending speech was constitutionally protected, since any such lawsuit would be dismissed instantly on jurisdictional grounds. The savings clause, in other words, may salve the conscience of faculty members, but it can hardly save anyone's free speech rights.

So what lesson is to be learned from the fact that one of the most prestigious and learned law faculties in the nation has adopted the "shut up, he reasoned" approach to intellectual discourse?

One lesson appears to have been learned by the administration of the University of Massachusetts campus at Amherst. Shortly after the adoption of the Harvard Law School code, the UMass. chancellor disclosed his intent to promulgate an anti-harassment speech code on his campus. The UMass. code had been under "study" since 1989, but the chancellor picked this time to announce his intention to implement it.

Coincidence? Or could it be that with the fall of the mighty bastion of constitutionalism at Harvard Law, other campus administrators are picking up signs that it's OK to try to achieve tranquility on campus by resorting to censorship?

Of course, since UMass. is a state-run institution, a constitutional attack in the courts is very likely and, indeed, has been threatened by the American Civil Liberties Union of Massachusetts (of which I am a member of the board of advisors, but had no role in this action). Perhaps the chancellor will hire a few law professors at Harvard to defend his (and their) handiwork.

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'Public Use' Takings Don't Always Benefit P

['HAWAII' FROM PAGE A19]
A taking benefiting the local economy, however private its primary beneficiaries, has historically passed muster as "public use." Contrary to prevailing myth, this notion was not concocted by the Warren Court in *Berman v. Parker*, 348 U.S. 26 (1954), but is of venerable 19th-century vintage. It was thus a short step for the Supreme Court to say in *Midkiff* that if the Hawaii legislature concluded that redistribution of land titles from private lessors to private lessees

La Croix and Rose also point out that—surprise, surprise!—the Land Reform Act was voted in not just by Democrats, but by Republicans. After all, there are many more tenants than landlords, and it doesn't take a rocket scientist to figure out where the votes are.

Ironically, the landowner in *Midkiff* was the Bishop estate, a charitable organization administering the lands of the last member of Hawaiian royalty, Princess Bernice Pauahi Bishop, for the benefit of the Kamehameha Schools,

The Japanese (who traditionally take a long-term view of investment and therefore tend to shun limited-duration leasehold estates) descended on the newly created post-*Midkiff* freehold estates like bees on a honey pot. As the dollar fell against the yen, pricey Kahala Beach land became a bargain for the Japanese, who eagerly paid seven figures for ordinary suburban homes that they then tore down and replaced with huge, lavish houses that were then marketed in Japan as vacation homes.

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