

CIVIL LIBERTIES *By Harvey A. Silverglate*

Teach at your own risk

THE UNTHINKABLE has finally happened in these politically correct, hypersensitive times: A highly-reputed professor at Columbia Law School has been criticized by students and faculty, and investigated by his dean and general counsel, for upsetting a couple of female law students. He did this by posing a hypothetical in his first-year criminal law exam involving violence against a woman in which the victim expressed thanks to her attacker.

It was, perhaps, only a matter of time before the highly tendentious "sensitivity training" and "offensive language" and "sexual harassment" speech codes, rife on the student side of campus life for the past 15 years, crossed into curricular issues.

Professor George Fletcher, in the spring of 1999, gave a hypothetical question titled "Revenge of the Big Monkey." A composite based on actual cases, it involved a female assault victim who had unsuccessfully sought a late-term abortion. The defendant, following the dictates of a religious cult that preached feticide, attacked the woman and killed her fetus, for which she expressed thanks.

The question, as anyone with any knowledge of criminal law had to realize, raised difficult questions of intent and consent as well as the law of homicide. Yet when a couple of women in the class complained to a couple of women faculty members, the professors complained to Dean David Leebron.

Given the trendy notion con-

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tained in student conduct and speech codes that students in "historically disadvantaged groups" are entitled to protection against offensive speech that might create a "hostile educational environment," the complaint was not surprising, even in a law school. What was surprising to Prof. Fletcher, however, was that his dean, instead of dismissing the complaint out of hand, took it seriously and commenced an investigation.

"Several faculty have apparently read your exam and expressed serious concerns to me about it," Dean Leebron wrote ominously to Prof. Fletcher.

"Whether or not the faculty will be asked to take up the matter in any form is at this point speculative," the dean continued, "but given the strong views voiced by some, it is not beyond the realm of possibility." Dean Leebron went on to state that while, from time immemorial, teachers could freely challenge and even "shock" students with pedagogical techniques, "that does not legally justify creating an environment which will negatively affect one group's performance more than another."

Offense taken

Dean Leebron went on to term the exam unacceptable "in terms of the standards of our community" because "it makes light of a profound social problem, namely violence against women." He informed Prof. Fletcher that the women's complaint constituted "a plausible suggestion of liability an(d) unlawfulness," as a result of which "I am required to consult with the University's office of legal counsel."

In response to Prof. Fletcher's argument that academic

freedom protects such an exam, Dean Leebron wrote that Prof. Fletcher "may be right that the content of an exam falls within the protection of what we in our community regard as academic freedom," but the consultation with university counsel remained on track.

Not unnoticed

The case has become the subject of considerable controversy. The Foundation for Individual Rights in Education (FIRE), of which I am an officer, wrote Dean Leebron a letter of protest. The *Wall Street Journal* ran a lead editorial mentioning the case.

Nadine Strossen, a faculty member at New York Law School and current president of the American Civil Liberties Union, wrote in the introduction to the second edition of her book on censorship, *Defending Pornography*, that if this standard were to apply, it would sharply curtail discussion in law school. But, she added, the dean's approach packs a double whammy: "At stake in this situation are not only free speech and academic freedom, but also women's dignity and equality."

In a recent letter to FIRE, Dean Leebron, who earlier had written Prof. Fletcher that "General Counsel's office suggested this was perhaps a plausible [civil rights] claim, although they didn't know the precise precedent," now says general counsel concluded that there was no violation. Dean Leebron refused to further clarify the point by issuing a formal public statement. Prof. Fletcher's criminal law exam, and academic freedom at Columbia Law School, remain under a cloud until further notice. ■