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By Alan Charles Kors
and Harvey A. Silverglate

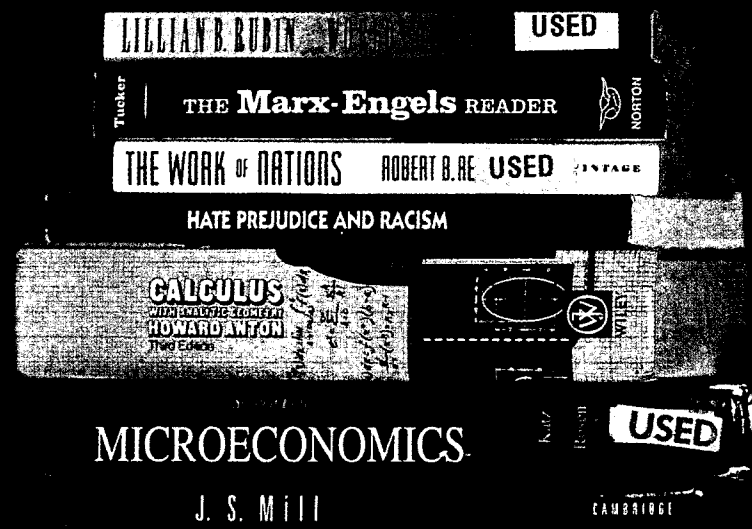
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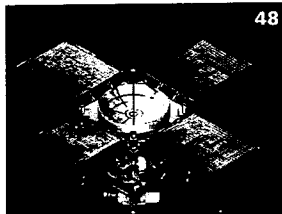
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CODES OF SILENCE

Who's gagging free speech on campus—and why by Alan C. Kors and Harvey A. Silverglate

In Carnegie-Mellon University's "Policy on Free Speech and Assembly," originally adopted in 1988 and republished periodically in the faculty and student handbooks, the university says it "encourages freedom of speech, assembly and exchange of ideas. This includes the distribution of leaflets and petitions, as well as demonstrations or protests involving speaking, discussion or the distribution of information." CMU's policy statement then sets forth content-neutral restrictions on the time, place, and manner of speech, applied equally: "The enforcement of these restrictions will not depend in any way on any subject matter involved in a protest or demonstration."

Going even further, CMU's "Statement Concerning Controversial Speakers," issued by its trustees at the height of the Vietnam War protests in 1967, reaffirmed in 1979, and republished annually, offers a ringing endorsement of academic freedom and free speech: "The assumptions of freedom are that men and women will more often than not choose wisely from among the alternatives available to them and that the range of alternatives and their implications can be known fully only if men and women can express their thoughts freely."

The CMU statement warns that the exercise of academic freedom, essential to the university's mission, will not always be pleasant to experience, but that such unpleasantness does not change the need to protect it: "It is inevitable that such an environment will from time to time appear to threaten the larger community in which it exists. When, as they will, speakers from within or from outside the campus challenge the moral, spiritual, economic or political consensus of the community, people are uneasy, disturbed and at times outraged.... But freedom of thought and freedom of expression cannot be influenced by circumstances. They exist only if they are inviolable."

That was then. This is now. In 1991 CMU promulgated its "Policy Against Sexual Harassment." While

reiterating in the first paragraph the university's dedication "to the free exchange of ideas and the intellectual development of all members of the community," suddenly, with barely a transition, CMU proceeded to outlaw, among other things, "verbal conduct of a sexual nature [when it] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment."

Now CMU places the need for "the free exchange of ideas" in the same sentence as the need to promote "the intellectual development of all members of the community." Because the truly unfettered exercise of free speech can create a "hostile environment" that deprives a category of "historically disadvantaged" students (in this case, women) of being able to participate in the life of the university, such speech must be restricted. One student's freedom has to be restricted in order to assure another's.

The notion that one person's freedom must be restricted to protect another's is hardly controversial in itself. "Your right to throw your fist ends at the tip of my nose" is a common formulation in law and ordinary life. Yet the notion that *speech* may be restricted, particularly on an academic campus, is new and very different. The notion that the tip of one's nose defines

the limit of a physical assault has been transformed into the notion that the tip of one's ego defines the limit of a verbal "assault." Equally significant, this protection against a "hostile environment" and certain other consequences of speech is restricted, by the explicit terms of university policy, to certain categories of "disadvantaged" students identified by sex, race, sexual orientation, and disability.

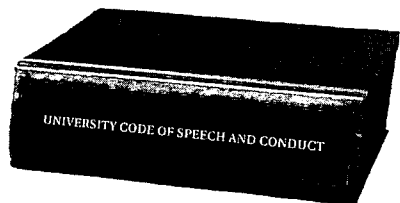
It seems surprising, at first glance, that the most potent and far-reaching assault on the First Amendment's central principal—content neutrality—has come not from politicians protecting power or reputations, nor from government agencies protecting their notions of decency or security, but from America's universities, where academic freedom has been thought to require more liberty and tolerance than in "the real world," not less. More startling yet, this assault comes above all from the political and cultural left, which, since World War I, has been the prime beneficiary of the move toward near-absolute constitutional protection for speech. Indeed, the legal doctrine of free speech has focused crucially on the rights of revolutionaries, counterculturalists, antiwar protesters, visionaries, prophets of doom, progressives, and, generally, dissidents from Western capitalism. How is it, then, that today's most vocal critics of the First Amendment are in the academy and on the left—the heirs, in fact, of the generation that, 35 years ago, gave us the Berkeley Free Speech Movement?

The contemporary movement that seeks to restrict liberty on campus has its roots in the provocative work of the late Marxist scholar Herbert Marcuse, a brilliant polemicist, social critic, and philosopher who gained a following in the New Left student movement of the 1960s. Marcuse developed a theory of civil lib-

prevailing attitudes and opinions of those who held wealth and power. Such "indiscriminate" or "pure" tolerance, he argued, effectively served "the cause of oppression" and the "established machinery of discrimination." For Marcuse, as long as society was held captive by militarism and by institutionalized, pervasive social and economic inequality—what he characterized as "regressive" practices—"indiscriminate tolerance" necessarily would serve the highly discriminatory interests of regression.

The holders of power, Marcuse argued, maintained their control by keeping the population "manipulated and indoctrinated," so that ordinary people "parrot, as their own, the opinion of their masters." In such circumstances, "the indiscriminate guaranty of political rights and liberties" is actually "repressive." The "class structure of society," Marcuse wrote, creates "background limitations of tolerance" that necessarily limit true democratic tolerance even before the courts create whatever explicit limitations they devise (such as "clear and present danger," threat to national security, heresy"). He believed that "within the framework of such a social structure, tolerance can be safely practiced and proclaimed" by those in power because dissenting—even radical—voices were powerless to change that structure.

Marcuse did not directly assail the notion that ideas for societal change should be, in his words, "prepared, defined, and tested in free and equal discussion, on the open marketplace of ideas and goods." Rather, he asserted that the current "marketplace" was rigged because of its "background limitations." Before a true marketplace of ideas could be established, allowing genuine democracy to flourish, current inequities would have to be eliminated, and this could not be done while equating the rights of dominant regressive expression and of marginalized progressive words and ideas. If the powerful and the weak were required to play by the same rules, Marcuse argued, the powerful always would win, and this would have dire consequences, since the



The contemporary movement to restrict liberty of the late Marxist scholar Herbert Marcuse, following in the New Left student movement o

erty that would challenge the essence and legitimacy of free speech. Although he repeatedly declared his belief in freedom and tolerance, Marcuse built on the work of Rousseau, Marx, and Gramsci to articulate an alternative conception of liberty, placing him at odds with the Free Speech Movement, the U.S. Supreme Court's First Amendment doctrines, academic freedom, and the values of most liberal democrats. This alternative framework, which used some traditional terms but assigned them new meanings, became the foundation of academic speech codes.

In a 1965 essay entitled "Repressive Tolerance," Marcuse concluded that America's supposedly neutral tolerance for ideas was in reality a highly *selective* tolerance that benefited only the

powerful supported an agenda of war, cruelty, and repression.

According to Marcuse, the indoctrinated had to be given the tools with which to see the truth. How were people to be freed from the bonds that keep them prisoners under a purely illusory tolerance? Marcuse responded that "they would have to get information slanted in the opposite direction, [which] cannot be accomplished within the established framework of abstract tolerance and spurious objectivity." He posited that there was a true and superior species of "tolerance which enlarged the range and content of freedom." This tolerance, however, "was always partisan," because it was "intolerant toward the protagonists of the repressive status quo." For Marcuse, tolerance was moral and real only when harnessed to the cause of "liberation."

Given the current structure of society, a nominal freedom that allowed the expression of “false words and wrong deeds” to work against the attainment of “liberation” and of true “freedom and happiness” became “an instrument for the continuation of servitude.”

For a revolutionary theorist, Marcuse was refreshingly frank. The “reopening” of the channels of true toleration and liberation, now “blocked by organized repression and indoctrination,” must be accomplished sometimes by “apparently undemocratic means.” Marcuse suggested that these would include “the withdrawal of toleration of speech and assembly from groups and movements which promote aggressive policies, armament, chauvinism, discrimination on the grounds of race and religion, or which oppose the extension of public services, social security, medical care, etc.”

“Liberating tolerance,” Marcuse wrote, in contrast to “indiscriminate tolerance” or “repressive tolerance,” would be “intolerance against movements from the Right, and toleration of movements from the Left.” This duality “would extend to the stage of action as well as of discussion of propaganda, of deed as well as of word.” It was important that intolerance apply to regressive words as well as to regressive deeds, because, for Marcuse, words had real consequences, and if the consequences were to be avoided, the words must be silenced.

Marcuse’s premise, which separated his political philosophy fundamentally from First Amendment jurisprudence, was that liberty, in the current stage of historical and social development, is a zero-sum game: “The exercise of civil rights by those who don’t have them presupposes the withdrawal of civil rights from

and one had to take steps to wrench students from the regressive channels into which society had cast their minds. “The pre-empting of the mind vitiates impartiality and objectivity,” he wrote. “Unless the student learns to think in the opposite direction, he will be inclined to place the facts into the predominant framework of values.” Marcuse mocked the “sacred liberalistic principle of equality for ‘the other side,’” because “there are issues where...there is no ‘other side’ in any more than a formalistic sense.”

Indeed, Marcuse confidently posited that it would not be difficult to determine “the question as to who is to decide on the distinction between liberating and repressing, human and in-human teachings and practices.” The distinction between these two poles, he assured his readers and students, “is not a matter of value-preference but of rational criteria.” Once the rational criteria were identified, truth was easy to determine. With this certainty, Marcuse believed that he could describe the means by which the academy should bring about this “reversal of the trend in the educational enterprise.” Ultimately, such a reversal should “be enforced by the students and teachers themselves, and thus be self-imposed, the systematic withdrawal of tolerance toward regressive and repressive opinions and movements.” In the short term, Marcuse proposed that the academic shock troops of this revolution “prepare the ground” for effecting such changes, even if that might involve a resort to violence. Marcuse was not troubled by this, because “there is a difference between revolutionary and reactionary violence, between violence practiced by the oppressed and by the oppressors.”

In short, to produce conditions in which freedom could flourish first on campus and then in the greater society, re-education in a progressive university was essential. Revolutionary thinking then could break the stranglehold of the powerful on the minds of students and citizens. This re-education alone could

**yon campus has its roots in the provocative work
of a brilliant polemicist, social critic, and philosopher who gained a
reputation in the 1960s with his writings on “repressive tolerance.”**

those who prevent their exercise.” For Marcuse, the application of these “anti-democratic notions” would foster a society that promoted universal tolerance and true freedom. To achieve a society of universal tolerance, one could not tolerate reactionary ideas.

Marcuse focused on the education of the young: “The restoration of freedom of thought may necessitate new and rigid restrictions on teaching and practices in the educational institutions which, by their very methods and concepts, serve to enclose the mind within the established universe of discourse and behavior.” Because students already were so heavily brainwashed to think in the manner that established power had ordained, true “autonomous thinking” was virtually impossible,

create a “progressive” society, where true freedom and democracy would reign. Once this had been achieved, Marcuse promised, there would be no further need for “anti-democratic” expedients that were, after all, aimed simply at redressing the imbalance between “oppressor” and “oppressed.” Censorship during this “reversal” was essential, because ubiquitous, dangerous, and regressive notions were too quickly translated into practice. Indeed, censorship, for Marcuse, must be deeply pervasive, although historically temporary. The result, he promised, would be to restore *real* freedom, and the words *freedom* and *liberty* once again could attain their “true meanings.”

Marcuse’s prescriptions for a progressive society have not noticeably taken root in the “real world” outside the academy.

Most of the trends toward greater free speech for all—trends that he so abhorred—have accelerated in the three decades since he published his essay. Nevertheless, Marcuse's prescriptions are the model for the assaults on free speech in today's academic world.

Drafters of college speech codes almost invariably begin by setting out the core principle of any self-proclaimed liberal arts institution of higher learning—that the pursuit of teaching, learning, and research relies on academic freedom and on freedom of speech and inquiry. They posit the necessity of including

all members of the academic community in this pursuit and proceed to take steps purportedly aimed at making these social and educational opportunities available to all. To ensure these benefits to groups of students perceived to be “historically underrepresented” or “historically disadvantaged,” the codes severely limit the speech rights of individual students by prohibiting the utterance of certain unkind and, they claim, destructive words.

We have studied hundreds of these codes. While some definitions of banned speech are extremely broad and others sub-

SUPPRESSION 101: A Quick Tour of Campus Speech Codes

The speech-code provisions of harassment policies are merely symptoms of the willful assault on liberty on our campuses: the suppression and punishment of controversial and unpopular ideas; the banning of terms that offend listeners invested with special rights; and the outlawing of discourse that, in the eyes of the defenders of the new orthodoxies, “creates a hostile environment.” The essential purpose of a speech code is to repress speech. Many codes explicitly encourage charging a student with sexual harassment even if his intent is innocent.

■ At the University of Puget Sound, there is no obligation even to hint to a speaker that his speech is unwelcome, for “whether conduct is unwelcome depends on the point of view of the person to whom the conduct is directed. [While] it is generally better for the person harassed to make it clear that the conduct is unwelcome,” the conduct may be found to be unwelcome even if the person did not manifestly object to it.

■ The City University of New York warns that “sexual harassment is not defined by intentions, but by impact on the subject.” As Herbert London, a dean and a professor of humanities at New York University, notes, “accusations are based on ‘impact,’ not intention, therefore, the accused is guilty, if the accuser believes him to be guilty.”

■ Bowdoin College has a broad definition of

harassing speech, which includes “telling stories of sexual assault which minimize or glorify the act.” (So much for reading the epics aloud!) This formulation would appear to bar a male from stating to a female that there are worse things in life than “date rape”—a view that might irritate some but that clearly is core political opinion. Should a man be held liable for expressing such views to a woman who might “experience” it as harassing? Also proscribed are “leering, staring, catcalls, vulgar jokes, language, photographs or cartoons with sexual overtones” and even “terms of familiarity.” Despite the extraordinarily broad range of prohibited speech, the speaker at Bowdoin is obligated to discern when speech will be perceived by the listener as harassing. “No one,” warns the code, “is entitled to engage in behavior that is *experienced by others* as harassing,” regardless of the speaker’s intentions or the unreasonableness of the victim’s assumptions. This creates a world where speakers must walk, in a fog, on the edge of a cliff.

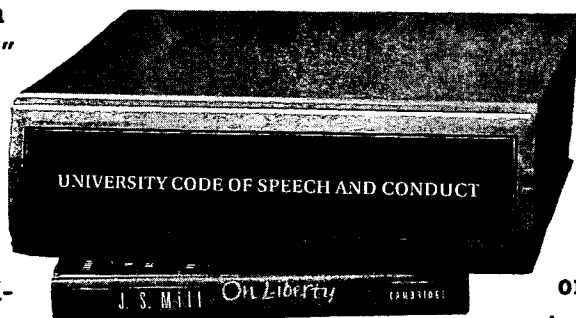
■ At the University of Connecticut, the code bans “treating people differently solely because they are in some way different from the majority...imitating stereotypes in speech or mannerisms...[or] attributing objections to any of the above actions to ‘hypersensitivity’ of the targeted individual or group.” Henry Louis Gates Jr. has labeled this hypersensitivity provision “especially cunning” because “it meant

stantially narrower, differences from one code to another are matters of degree rather than of kind. A suspension of belief in the ordinary meanings of words is required to accept the contradictions so often contained within the same code, frequently within the same paragraph, and sometimes within the same sentence. On the one hand, the codes claim to cherish free speech and academic freedom, including the freedom to express even the most challenging and offensive ideas; on the other, certain categories of "offensive" speech are banned in order to create a "comfortable" and "inclusive" learning atmosphere.

that even if you believed that a complainant was overreacting to an innocuous remark, the attempt to defend yourself in this way would serve only as proof of your guilt."

■ Syracuse University's sexual harassment code explains why sexual harassment, which includes "leering, ogling,...sexual innuendoes, [and] sexually-derogatory jokes," is such a serious violation: "What these behaviors have in common is that they focus on men and women's sexuality, rather than on their contributions as students...in the University." Syracuse's admonition—that "sexual harassment is not about voicing unpopular ideas" but, rather, is "a form of intimidation," and therefore that some types of speech are forbidden—is contained not in the code's definition section but in its section on "academic freedom." The Orwellian justification for this placement is that harassing speech "can silence some members of the University community," so banning offensive speech actually promotes rather than limits academic freedom.

■ The conflict between the highly individualistic nature of academic freedom and the anti-individualism of group protection figures prominently in Columbia University's "Policy



The ability of a university to endorse two contradictory policies can perhaps be explained as simple hypocrisy. Indeed, this does appear to be part of the answer on many campuses, where administrators have agendas far removed from the common pursuit of knowledge. Whether hypocritical or sincere, however, the drafters of these codes feel a need to justify the seemingly contradictory goals of free speech and free inquiry, on the one hand, and limitations on speech to achieve equal access to educational opportunity, on the other. Reconciliation of these opposing concepts is achieved primarily by Marcusean logic.

Statement on Discrimination and Harassment." Adopted by the University Senate in 1990, the policy begins by proclaiming that "Columbia University prides itself on being a community committed to free and open discourse and to tolerance of differing views." This being so, as "a community, we are committed to the principle that individuals are to be treated as human beings rather than dehumanized by treatment as members of a category that represents only one aspect of their identity." Yet the policy then allocates special treatment to individuals precisely on the basis of a single aspect of their identity. Students considered, because of their group identities, to be "most vulnerable to discrimination and harassment" are given more protection than others, ostensibly to allow them to be individuals. As the pigs said in Orwell's *Animal Farm*, "All animals are equal, but some animals are more equal than others."

These codes share a common premise: that to effectuate freedom on campus, so that "disadvantaged" students participate in the campus community equally with "advantaged" students (all defined by blood and history), speech must be restricted. Freedom is highly valued in theory, but providing equal access to it requires its destruction.

—A.C.K. and H.A.S.

The attempt to balance the right of free speech with the “right” to be free from harassment deeply reflects Marcuse’s notion of “freedom” and “tolerance.” It is a fundamentally Marcusean idea that tolerance must be redefined to advance a positive social and moral agenda. The codes express a deep commitment to freedom of speech and inquiry, but when they express an equal commitment to a group member’s right to be free from verbal harassment, it leads, in the name of positive freedom, to the wholesale banning not only of speech and other traditional modes of expression but even of looks, body language, and, in some cases, laughter. It leads, in short, to progressive intolerance.

with that [derided] trait.” Because the speaker of such epithets is expressing a “widely shared prejudice,” he or she has ceased to speak as an individual or to express merely his or her own thoughts, and has become a living symptom and symbol of societal oppression.

In Grey’s view, such statements “make the atmosphere more difficult for [members of targeted groups] on a campus and hence deny them a level educational playing field with students not so stigmatized.” A “difficult atmosphere” is, thus, the deprivation of rights and opportunities. It is therefore appropriate, by this theory, to halt the speech of individuals (and to deny their status as discrete, autonomous beings) in order to combat this

At the time of McCarthy, many were intimidated into silence by protect the speech of a Red if you are not a Red?” The issue, or that person’s rights by our subjective criteria of who deserves

A window into the thinking of some speech code crafters is found at Stanford University. The initial draft of Stanford’s code was strongly influenced by professor Thomas Grey of the law school, who has posited that, under certain circumstances, constitutional commitments to freedom of expression, and to civil liberties in general, conflict with the nation’s commitment to providing equal access to educational opportunities, and to civil rights in general. In a 1991 article in the *Harvard Journal of Law and Public Policy*, Grey expresses discomfort at the collision but considers the conflict “inescapable.” In his view, the tension between academic freedom and equal educational opportunity arises from an inherent conflict between civil liberties and civil rights, between liberty and social equality.

This premise is problematic. Freedom of speech is a “liberty interest,” and it deals solely with an individual’s ability to express himself or herself as he or she desires. In contrast, civil rights legislation is largely protective and egalitarian, expressing the broader societal concern with how citizens are faring in comparison to other citizens. Put another way, the First Amendment protects the individual from the oppressive exercise of government power, whereas civil rights jurisprudence offers the individual recourse to the government for assistance in obtaining the necessary tools and opportunities to reap the benefits of equal participation in economic, social, and cultural life.

To bridge the perceived gap between libertarian and egalitarian interests, speech code drafters accept the dramatic thesis that individual speakers express not only their own individual views, but also those of their entire gender or ethnic group. In Stanford’s speech code, banned epithets reflect “a widely shared, deeply felt, and historically rooted social prejudice against people

cumulative effect. The traditional formula—that free speech is allocated equally to all and is not to be limited in terms of content and viewpoint—perpetuates majority dominance. Individual equality before the law must be sacrificed in the name of equal opportunity for the members of groups.

Grey justifies the unequal application of speech restrictions by making an analogy between the campus and the workplace. Grey recognizes that traditional First Amendment jurisprudence prohibits the government from restricting speech on the basis of content and viewpoint, except in very limited and long-recognized areas, such as defamation, obscenity, and threats. In Grey’s mind, however, special circumstances created by unequal power relationships between management and labor justified differential allocation of speech rights in the workplace, including constraints upon certain categories of speech and viewpoints. Thus, he finds that American labor laws could sanction an employer for stating, during a union organizing election: “If I have to pay union rates, I doubt I’ll be able to keep this plant open.”

That, argues Grey, is treated as a threat to the workers and prohibited as an unfair labor practice directed at discouraging union organizing. On the other hand, the government would not be able to punish an employee for saying, in the same context, “Employers who resist unionization often find a less cooperative work force afterwards.” The reason for such different treatment is based, Grey concludes, on the power differential between employer and employee. From this, he moves to the proposition that the insults “nigger” and “whitey” are not equivalent because “American society and its history have created the asymmetry [between the black and white races]; a regulation cannot attempt to redress that asymmetry without taking it into account.” Grey denies that it is “patronizing to students of color” to restrict insults hurled at them without restricting insults hurled at others. The vulnerability of black students and

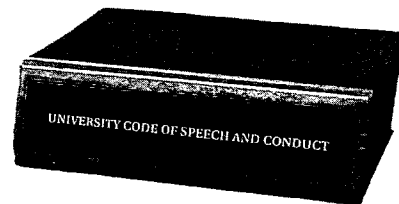
their lesser ability to “take care of themselves in verbal rough-and-tumble”—in short, their status as a “protected group” that is “in need of official protection”—is a product of history.

University administrators seem unconcerned by the double standards and differential allocation of rights fostered by such policies. Speech codes mandate a redefined notion of “freedom,” based on the belief that the imposition of a moral agenda on a community is justified by, in Marcuse’s words, “the historical calculus of progress,” in which every enlightened and rational person naturally strives to reduce “cruelty, misery and suppression.” Since the reduction of “cruelty, misery and suppression,” in this view, requires less emphasis on individual rights and more

ber of anecdotes have been recycled to create the appearance of systematic repression, would be met with incredulous (and justifiable) outrage by the left.

Human history teaches that those who wield power rarely see their own abuse of it. This failing pervades the entire ideological, political, cultural, and historical spectrum. It is an issue not of left and right but of human ethical incapacity. Those who exercise power, in any domain, tend to compare their actual power to their ultimate goals, usually concluding that they have barely any power at all and, certainly, that they are not abusing what little they have.

Further, most of us sadly develop the capacity to treat the



Why the question “Why would you want to
then and now, is not the protection of this
freedom but the protection of freedom itself.

on assuring “historically oppressed” persons the means of achieving equal rights, liberty must, for now, take a back seat.

The whole notion of individual liberty becomes subordinated to redressing historical wrongs against groups. Codes dismiss free speech rights in favor of a predetermined notion of historical moral responsibility, commanding students and faculty to censor themselves and one another in the paramount interests of the educational community and historical justice. Restrictions on speech are justified by the assertion of a compelling need to promote freedom for some by limiting freedom for others. To the code writers, as to Marcuse, freedom is a zero-sum game.

Many in the academy insist that the phenomenon labeled “political correctness” is a fabrication by opponents of “progressive” change. They argue that political correctness does not exist as a systematic, coercive, repressive force on American campuses. They claim that critics of universities have questionable motives and offer merely recycled anecdotes, not hard evidence, of abuses of power.

Such views seem odd to those—students, faculty, and close observers—who dissent from prevailing campus orthodoxies and experience the unremitting reality of speech codes, of ideological litmus tests, and of sensitivity and diversity “training” that undertakes the involuntary thought reform of free, young minds. One charge of verbal harassment casts a pall over everyone’s “thought crimes,” producing systemic self-censorship. Yet defenders of the current academic regimes list that charge merely as “one” instance of what may be, in their view, constraint. A climate of repression succeeds not by statistical frequency but by sapping the courage, autonomy, and conscience of individuals who otherwise might remember or revive what liberty could be. The claim that McCarthyism was a myth, and that a small num-

suffering, oppression, or legal inequality of individuals or groups whom we see as obstacles to our own goals or visions—or even with whom we merely feel little affinity—as abstractions or exaggerations without concrete human immediacy. By the same token, most of us experience the suffering, oppression, or legal inequality of individuals or groups with whom we identify, or to whom our own causes are linked, as vivid, intolerable, personal realities. It is precisely to neutralize this grievous tendency of human nature that societies establish formal law, equal justice, and the prohibition of double standards.

Our colleges and universities do not offer the protection of fair rules, equal justice, and consistent standards to the generation that finds itself on our campuses. They encourage students to bring charges of harassment against those whose opinions or expressions “offend” them. At almost every college and university, students deemed members of “historically oppressed groups”—above all, women, blacks, gays, and Hispanics—are informed during orientation that their campuses are teeming with illegal or intolerable violations of their “right” not to be offended. Judging from these warnings, there is a racial or sexual bigot, to borrow the mocking phrase of McCarthy’s critics, “under every bed.” At almost every college and university, students are presented with lists of places to which they should submit charges of verbal “harassment,” and they are promised “victim support,” “confidentiality,” and sympathetic understanding when they file such complaints.

What an astonishing expectation (and power) to give to students: the belief that, if they belong to a protected category, they have a right to four years of never being offended. What an extraordinary power to give to administrators and tribunals: the prerogative to punish the free speech and expression of people to whom they choose to assign the stains and guilt of historical oppression, while being free, themselves, to use whatever rhetoric they wish against the bearers of such stains. While the

world looks mainly at issues of curriculum and scholarship to analyze and evaluate American colleges and universities, it is the silencing and punishment of belief, expression, and individuality that ought to most concern those who care about what universities are and could be.

Despite the profound importance, symbolic and substantive, of speech codes, we should not view their presence or absence as the yardstick of freedom. Freedom dies in the heart and will before it dies in the law. Speech codes merely formalize the will to censor and to devalue liberty of thought and speech. Even without invoking codes, universities have found ways to silence or chill freedom of opinion and expression.

Supporters of free speech at colleges and universities become tarred by the sorts of speech they must defend if they wish to defend freedom in general. No one who defends trial by jury over

to assume our own infallibility"; 2) the opinion, though erroneous, might—indeed, most probably would—"contain a portion of truth," and because prevailing opinion is rarely, if ever, the whole truth, censorship denies us that possible "remainder of the truth" that might be gained only by "the collision of adverse opinions"; 3) even if prevailing opinion were the whole truth, if it were not permitted to be "vigorously and earnestly contested," it would be believed by most people not because of "its rational grounds" but only "in the manner of a prejudice"; and 4) if we were not obliged to defend our belief, it would stand "in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct," becoming a formula repeated by rote, "inefficacious for good, . . . and preventing the growth of any real and heartfelt conviction, from reason or personal experience."

What is popular speech in one time and place becomes unpopular in another. That is why none of us enjoys more freedom of speech than is accorded the least popular speaker.

popular justice in a murder trial is called a defender of murder; such a person is seen, by all, as a defender of trial by jury. The defender of free speech on American campuses, however, is forever being told that he or she is seeking, specifically, to make the campus safe for "racism," "sexism," or "homophobia." That is true if what one means is that the defender of free speech seeks to make the campus safe for the expression of all views, and for the clash of visions, ideas, and passions. At the time of McCarthy, many were intimidated into silence by the question "Why would you want to protect the speech of a Red if you are not a Red?" The issue, then and now, is not the protection of this or that person's rights by our subjective criteria of who deserves freedom but the protection of freedom itself.

Protection of free speech is not needed for inoffensive, popular speech with which all or most members of a community agree. Such speech is not threatened. Freedom is required precisely for unpopular speech, the toleration of which is one of the marks of a free society. What is popular speech in one time and place, of course, becomes unpopular in another. That is why, morally and practically, none of us enjoys more freedom of speech than is accorded the least popular speaker.

John Stuart Mill said it best. In *On Liberty* (1859), Mill noted that everyone claims to believe in freedom of expression, but everyone draws his or her own boundaries at the obviously worthless, dangerous, and wrong. Why should we tolerate speech that offends our sense of essential value, security, and truth?

To that question, Mill replied that there were four compelling reasons: 1) the opinion might be true, and "to deny this is

Mill also addressed the argument that even if one conceded these points, one could fairly insist that debate "be temperate, and . . . not pass the bounds of fair discussion." He noted that such "boundaries" are impossible to define objectively, and would be drawn by all in a manner favorable to themselves. If one took the notion of "temperate" and "fair discussion" seriously, Mill observed, what ought to be banned would be arguments that stigmatized one's opponents "as bad and immoral men." Indeed, he argued presciently, "With regard to what is commonly meant by intemperate discussion, namely invective, sarcasm, personality [ad hominem attacks], and the like, the denunciation of those weapons would deserve more sympathy if it were ever proposed to interdict them equally to both sides; but it is only desired to restrain the employment of them against the prevailing opinion."

Ultimately, Mill concluded, it should be left to public opinion, not to "law and authority," to determine "in whose mode of advocacy either want of candor, or malignity, bigotry, or intolerance of feeling manifest themselves." In short, it was "imperative that human beings should be free to form opinions, and to express their opinions without reserve." The struggle for liberty on American campuses is, in its essence, the struggle between Herbert Marcuse and John Stuart Mill. ♦

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