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## Harvard's Sad Censorship Campaign

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Poor, poor Harvard. The prestigious institution has once again found itself in the embarrassing position of defending a push for campus censorship. This round's sad irony: student leaders are now the ones trying to throw the First Amendment out the school bus window.

The Harvard *Law Review*, a student-edited publication claiming President Barack Obama and four current U.S. Supreme Court justices as alumni, recently endorsed a major screw up on its own pages after it ran an eight-page factually-void analysis of the nation's latest First Amendment case law.

The piece, authored and edited by unnamed students (consistent with the journal's policy of group authorship and editing), specifically took issue with *DeJohn v. Temple University*, a 2008 3rd Circuit Court of Appeals case striking down Temple University's broad sexual harassment policy as unconstitutionally overbroad. In addition, the piece argued that campus administrators should be afforded broad latitude, similar to that provided to high school principals or employers, in their ability to shut down controversial speech.

While acknowledging that the Temple policy "may properly raise constitutional questions," the article's authors still backed the policy, saying its chilling effect did not reach to a level of causing a "deterrent effect on legitimate expression," as required to strike down a campus harassment policy.

This conclusion was made in spite of the exhaustive speech prohibited, which included, "[A]ll forms of sexual harassment...including the following: an unwelcome sexual advance, request for sexual favors, or other expressive, visual or physical conduct of a sexual or gender-motivated nature when...(c) such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status, or (d) such conduct has the purpose or effect of creating an intimidating, hostile or offensive environment."

Imagine life as a Temple student under this policy, where attempting to get a date, benign eye contact with a stranger, or an honest classroom dialogue about heated political issues could land you in hot water with the speech police.

Proving their status as legal novices, the student authors also threw in the possibility of a “limiting instruction” as a way to address concerns about the policy’s broad prohibitions. But for those sanctioned under the policy, such an addition would offer little comfort, as a tyrannical majority of administrators would still have the power to determine whether the “purpose” of questioned speech was sufficiently evil to constitute a violation.

Shaky in terms of its philosophical conclusions, the journal’s argument is also legally flawed -- connecting dots where none could have been properly drawn. The saddest part is the argument’s source: young legal scholars, ideally the world’s leading litigators of tomorrow, who believe law students and faculty are so weak they must be shielded from adverse viewpoints.

Constitutional experts quickly pounced on the journal’s analysis. According to the Foundation for Individual Rights’ Kelly Sarabyn, “the [Harvard] analysis does not acknowledge that any case law on speech codes exists, let alone the fact that prior to *DeJohn*, eight different federal courts struck down speech codes as unconstitutional.” In fact, courts have been united in their push to strike down censorship in higher education. In addition to *DeJohn*, seven of the eight cases on point threw out “harassment” policies similar to the one at issue in *DeJohn*, with the eighth case going a step further by articulating the actual harassment eligible for prohibition. As Sarabyn concludes, defining offensive speech under a “harassment policy” does not magically render it constitutional.

As much as they might want to, private institutions cannot run from First Amendment protections simply because of their private status. While all colleges accepting federal funding must ban legitimate harassment under the 1964 Civil Rights Act, they are not entitled to make such restrictions overbroad. “As the Supreme Court has made clear, true harassment in the educational context is conduct ‘so severe, pervasive, and objectively offensive’ that it effectively bars the victim’s access to an educational opportunity or benefit,” Sarabyn recently wrote.

The Harvard analysis, meanwhile, rejects even the minimal protections afforded under *DeJohn*, where the court concluded that university speech or harassment codes must

only provide students with the same free speech rights of younger students in primary or secondary schools. And while the Harvard analysis also suggests that college students could also be properly censored under a broader framework utilized to prohibit workplace harassment, such a comparison is improper, given both its lack of legal basis and a elementary misunderstanding of the vastly different atmospheres, and thus free speech standards that should be applied to the two environments.

Harvard's harried relationship with speech goes back for at least two decades, notably punctuated by its creation of a speech code in 1996, a move coming in response to a growing push for political correctness. An inflammatory parody by conservative students mocking radical feminism a few years earlier only provided fuel to the fire. In addition, Harvard also earned the scorn of radical feminists in 2007 after then-Harvard President Larry Summers sparked outrage for discussing a hypothesis that biological differences between men and women played a role in scientific abilities and interests. In response, MIT's Nancy Hopkins led an emotional charge against Summers, seemingly unaware that her behavior only furthered a thesis that women might be just a little more emotional than men. In the end, Hopkins won and Summers was booted off campus.

Ultimately, law schools should be first in line to defend even the most offensive speech. But they're not, and sadly, Harvard isn't alone in its continued censorship campaign. In 1994, it took a ragtag team of crusading law students, including my husband, Robert J. Corry, Jr., to litigate into extinction Stanford's own speech code, which had provided severe punitive sanctions for any speech failing to meet political correct standards of acceptability.

Today's law students should be very concerned. "Law schools are supposed to teach us to analyze and understand opposing perspectives, but they don't achieve this when they attempt to shield us from any viewpoints with which we might disagree," said Bresee Sullivan, a third year student at the University of Denver, which is also my alma mater.

Sullivan was outraged earlier this year when her school's dean sent out a campus-wide email warning students and faculty about a student-initiated display containing offensive material. The source of outrage: pro-life materials provided by a small coalition of Christian law students. There were no mutilated fetuses or proclamations of abortion-seekers as murderers. Instead, students quietly displayed posters and distributed leaflets documenting benign scientific images explaining fetal

development.

Still, the dean's message was clear: certain perspectives are unwelcome and should be shunned. While the campus frequently serves as host to liberal student groups condemning "blood" diamonds, supporting radical feminist viewpoints, or promoting safe abortion access, administrators apparently believed students were too weak to handle viewpoints allegedly not shared by the majority.

"In the real world, we're going to have way more at stake than just our fragile feelings and we should be prepared for the prospect of our perspective losing out to other arguments," said Sullivan, who is both pro-choice and Republican. "Otherwise, we're doing a disserve to our clients and to our judicial system as a whole." Fortunately, Denver's dean has since been replaced by a new leader -- one who has proven unwavering commitment to a diversity of viewpoints.

Sullivan is right. Without exposing law students to true diversity -- diversity of thought -- we have failed them before they ever even step foot in a courtroom for the first time. Harvard may lead the national rankings in terms of its formal reputation, but when it comes to free speech, it definitely earns an "F".

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