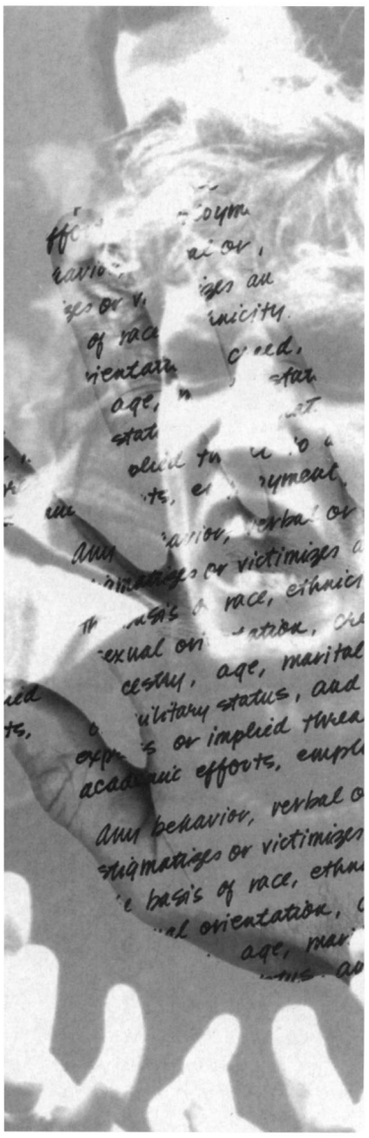
Speech CODES

ACADEMIC FREEDOM AND THE FUTURE OF THE UNIVERSITY

Truth or Consequences: Putting Limits on Limits



HENRY LOUIS GATES, JR.

It is by the goodness of God that in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them.
—Mark Twain

THESE ARE CHALLENGING times for First Amendment sentimentalists. After decades in which the limits of expression were steadily pushed back, the pendulum, to switch metaphors, is beginning to swing the other way. Legal scholars on the left are busily proposing tort approaches toward hate speech. Senator Jesse Helms attaches a rider to a bill funding the National Endowment for the Arts that would prevent it from supporting offensive art—the terms of offense being largely imported from a Wisconsin hate speech ordinance. What Robin West calls the feminist-conservative alliance has made significant inroads in municipalities across the country, while the Canadian Supreme Court has promulgated Catherine MacKinnon's approach toward pornography as law of the land. And the currently fashionable communitarian movement has given the impression that it believes that excessive deference has been given to the creed of free speech. In short, over the past few years, a new suppressionist alliance seemed to betoken the declining significance of liberalism.

ACADEMIC FREEDOM AND THE FUTURE OF THE UNIVERSITY

Third in a series

First Amendment absolutism has never entailed absolute devotion to free expression; the question has always been where to draw the line. The salient exceptions to First Amendment protection do, however, all involve the concrete prospect of significant—and involuntary—exposure to harm. For example: speech posing imminent and irreparable threat to public order or the nation; libel and the invasion of privacy, and the regulated domain of "commercial speech," encompassing, for instance, "blue sky" laws governing truth in advertising. (Obscenity is the notable deviation from this norm.) I like to describe myself as a First Amendment sentimentalist, because I believe that the First Amendment should be given a generous benefit of the doubt in contested cases; but I also know that there are no absolutes in our fallen state.

Let me admit, at the onset, that I believe some figures on the academic/cultural left have too quickly adopted the strategies of the political right. Here, I'm thinking principally of that somewhat shopworn debate over "hate speech" as a variance from protected expression, and it may be a topic worth reviewing briefly.

As Michael Kinsley has pointed out, most college statutes restricting freedom of expression were implemented by conservative forces in the early 1970s. Under the banner of "civility," their hope was to control campus radicals who seized on free speech as a shield for their own activities. (Remember the Free Speech Movement? Dates you, doesn't it?) Ironically, however, the very ascent of liberal jurisprudence in the 1960s finally made the free speech banner less appealing for left and oppositional intellectuals, who viewed such formal civil liberties as a subterfuge and rationale for larger social inequities. The sort of intellectual contrarians and vanguardists who would have rallied behind the ideology of freedom of expression in the days before its (at least partial) ascendance are now, understandably enough, more disposed to explore its limits and failings. And so the rubric of "free speech," in the 1960s an empowering rubric of campus radicals, has today been ceded to their conservative opponents as an ironic instrument of requital. As a result, the existence of speech ordinances introduced by conservatives in the early 1970s can today be cited as evidence of a marauding threat from the thought police on the left. Well, at the very least, I think the convergence of tactics from one era to another ought to give us pause.

Let me be clear on one point. I am very sensitive to the issues raised in the arguments for hate speech bans. Growing up in a segregated mill-town in Appalachia, I thought there was a sign on my back saying "nigger," because that's what some white folk seemed to think my name was. So I don't deny that the language of racial prejudice can inflict harm. At the same time—as the Sondheim song has it—I'm still here.

The strongest arguments for speech bans are, when you examine them more closely, arguments *against* arguments against speech bans. They are often very clever; often persuasive. But what they don't establish is that a ban on hate speech is so indispensable, so essential to avoid some present danger, that it justifies handing their opponents on the right a gift-wrapped, bow-tied, and beribboned rallying point. In the current environment of symbolic politics, the speech ban is a powerful thing: it can turn a garden- variety bigot into a First Amendment martyr.

So my concern is, first and foremost, a practical one. The problem with speech codes is that they make it impossible to challenge bigotry without creating a debate over the right to speak. And that is too great a price to pay. If someone calls me a nigger, I don't want to have to spend the next five hours debating the fine points of John Stuart Mill. Speech codes kill critique: For me, that's what it comes down to.

Henry Louis Gates, Jr.

The speech ban is a powerful thing: it can turn a garden-variety bigot into a First Amendment martyr.

GIVEN THE FACT THAT VERBAL harassment is already, and pretty uncontroversially, prohibited; given the fact, too, that campus speech bans are rarely enforced, the question arises: do we need them? Their proponents say yes—but they almost always offer *expressive* rather than *consequentialist* arguments for them. That is, they do not say, for instance, that the statute will spare vulnerable students some foreseeable amount of psychic trauma. They say, rather, that by adopting such a statute, the university *expresses* its opposition to hate speech and bigotry. The statute symbolizes our commitment to tolerance, to the creation of an educational environment where mutual colloquy and comity are preserved. (The conservative sociologist James Q. Wilson has made the argument for the case of obscenity when he writes of his "belief that human character is, in the long run, affected not by occasional furtive experiences than by whether society does or does not state that there is an important distinction between the loathsome and the decent."

Well, yes, tolerance and mutual respect sound like nice things to symbolize. What we forget is that once we have retreated to the level of symbolic, gestural politics, you have to take into account all the other symbolic

considerations. So even if you think that the free speech position contains logical holes and inconsistencies, you need to register *its* symbolic force. And it is this level of scrutiny that tips the balance in the other direction.

But there's a larger issue involved: Is the regulation of verbal expression among the laity the right place to begin, if your concern is to redress broad-gauged injustice? Can social inequity be censored out of existence?

As an English professor, I can report that our more powerful "discourse theories"—focussing on the political dimension of the most innocent seeming texts—can encourage this dream. But social critique allies itself with its natural antagonist, the state apparatus of law enforcement, at its own peril. There are states—and Islamic ones are the most obvious in their vigilance—that do engage in the widespread censorship of public representations, including imagery in advertisement, television, and entertainment. Their task is not to censor misogyny and perpetuate sexual equality, but to cover the elbows and ankles of females and discourage blasphemy, prurience, and other such illicit thoughts.

Social critique allies itself with its natural antagonist, the state apparatus of law enforcement at its own risk.

A RELUCTANCE TO EMBARK ON ANY such exercise of massive state coercion does not wed one to the *status quo.* To defend the free speech right (or even, as *Miller v. California* requires, the cultural "value") of racist or misogynistic material is not to defend racism or misogyny—nor is it to shun, silence, or downgrade social critique of these things. To insist that expression should be free of state censorship is not to exempt it from critical censure. This is a point that both Kimberlè Crenshaw and I have argued elsewhere in connection with the Broward County prosecution of Luther Campbell and company.

To be sure, the distinction would mean little to some critics of First Amendment expansionism. On the one hand, Catharine MacKinnon would observe that we do not find it sufficient to "critique" rape; we punish it. Since, for her, expression degrading or hostile to women is as much an act of violence as other crimes of violence against women, such expression should be the subject of criminal and civil sanctions aimed at its abolition. On the other hand, the conservative legal philosopher Alexander Bickel has told us, "To listen to something on the assumption of the speaker's right say it is to legitimate it...Where nothing is unspeakable, nothing is undoable."

And I think there's an important point of convergence there: Bickel's precept, that to "listen to something on the assumption of the speaker's right to say it is to legitimate it," underlies much of the contemporary resistance to unfettered expression in the academic setting.

Nor has the literary or cultural realm been held to be exempt from these strictures. Suzanne Kappeler has argued that there are "no sanctuaries from political reality, no aesthetic or fantastic enclaves, no islands for the play of desire." It's a charge that Federal Circuit Judge Richard Posner (a former Brennan clerk) has neatly turned on its head. If so, Posner rejoins, "the vilest pornographic trash is protected." After all, "ideological representations are at the center of the expression that the First Amendment protects." (This also highlights the contradiction between modern obscenity law and MacKinnonism: according to liberal jurisprudence, the obscene has, by stipulation, no significant political content according to MacKinnonite jurisprudence, it's precisely the significant political content of obscenity that *makes* it obscene.)

Content-based restrictions abound in other countries. In Britain, it is illegal to foment racial hatred; literature propagating such attitudes is subject to prosecution and suppression. (By custom, only egregious examples are subject to scrutiny.) In this country, I can buy scores of racist tracts. And yet, granted the unhappy condition of our society, perhaps we shouldn't have it any other way: the possibilities of abuse are too clear and present.

As the political philosopher Josh Cohen writes: "In a society in which there are relatively poor and powerless groups, members of those groups are especially likely to do badly when the regulation of expression proceeds on the basis of vague standards whose implementation depends on the discretion of powerful actors."

A tort approach toward hate speech, which would allow the recovery of damages in the event of hurtful expression, would be difficult to reign in. Tort approaches toward hurtful expression propose to allocate costs of communications in a way that assigns the risk to the producer instead of the consumer. How you feel about this depends on your feelings about freedom of expression *per se* as a moral value, or a social good; in general, I would find unattractive the degree of paternalism involved in restricting speech on the basis of a few unreasonable even if foreseeable reactions, when these do not constitute a significant threat to the social order. Moreover, while these approaches would compel actors to in-

ternalize costs of "risky" speech, we do not allow it to reap the equally fortuitous benefits. The net result of this asymmetry would be to discourage speech.

There's also the possible model of "hostile environment." Thus (to choose a fairly recent example) a student walks into a classroom at the University of Michigan and reads, chalked anonymously on the blackboard, the motto "A mind is a terrible thing to waste...especially on a nigger." Arguably, remarks of this sort create what civil rights law has called, with respect to sexual harassment, a "hostile environment"—an environment inimical to the aims and objectives of university education. Similarly, a professor who seems to promulgate racist or anti-Semitic doctrines in the classroom might appear to contravene the education mission of the university in important ways.

So I want to take the issue of offense seriously. But it is only one of many considerations that must weigh in the balance. One recalls Justice William O. Douglas's 1973 remarks, "One of the most offensive experiences in my life was a visit to a nation where bookstalls were filled only with books on mathematics and books on religion.

ANOTHER PLANE OF ANALYSIS would recognize not simply formal equity and formal freedom, but also imbalances and inequities of access. In an old slogan, freedom of the press belongs to those who own the press. So there are issues about freedom of expression that subtend issues of democracy. Some of these surfaced in the debates over the NEA in the years of Republican control of the White House. The legal scholar Geoffrey Stone has argued to the effect that the disbursement of government funding to the arts, though not constitutionally required, does involve constitutional questions (to do with "government neutrality in the field of ideas") once implemented. I admit I find Stone's argument more ingenious than persuasive. At the end of the day, there's a distinction worth preserving between not supporting and suppressing. And, as many have pointed out, there's something bathetic about the avowed dependence of oppositional art upon subsidy from the executive branch. "My dance exposes your greed, your hypocrisy, your bigotry, your philistinism, your crass vulgarity," says one of Jules Feiffer's cartoon monologists. "Fund me!"

Was the NEA "politicized"? Of course. But the charge of "politics" isn't one we can fling with good conscience, save in the spirit of *tu quoque*. If art is political, how can judgment not be? The fig leaf of formalities fools no one, and the tidy distinction between the "artistic" and "political" ought to be left for the genteel likes of former NEA chair John Frohnmayer. For art that robustly challenges the distinction is poorly served by stealthy recourse to it.

I said just now that there's a useful distinction between not supporting and suppressing. Of course, there is a sense in which the distinction counts for little: if I can't make my film, what does it matter whether I was prevented by poverty or prohibition? But in that impact-oriented sense, we have no free speech anyway, since access to a mass audience is hardly democratically distributed. In that sense, we should worry more about NBC than NEA. More important than our unendowed National Endowment would be to have governmental agencies only, the Public Broadcasting System or Voice of America.

No effective defense of relatively unfettered colloquy can presume the inertness of speech. Speech is not impotent, but listeners are not impotent either: they are not tempest-tossed rag dolls blown about by every evil wind. Any unconscious assumption of the passivity of reception neglects the fact that resistance begins with reaction. That the attempt to filter the environment of offense itself reeks of condescension and paternalism. As the legal scholar David Richard has written, "It is a contempt of human rationality for any other putative sovereign, democratic or otherwise, to decide to what communications mature people can be exposed."

The limits of intellectual expression may turn out to limit intellectual expression. But freedom of expression is too important a value to sacrifice to the vainglory of a professor Tony Martin or Leonard Jeffries or William Shockley. So it's important to remember that obscenity and hate speech alike only *become* free speech issues when their foes turn from censure to censorship. When we decided to let a thousand flowers bloom, we always knew that some of them would be weeds.

Speech is not impotent, but listeners are not impotent either.