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in the Humanities & Social Sciences

Timothy C. Shiell. *Campus Hate Speech on Trial.* Second Edition. Lawrence: University Press of Kansas, 2009. xii + 256 pp. $35.00 (cloth), ISBN 978-0-7006-1647-3; $16.95 (paper), ISBN 978-0-7006-1648-0.

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Published on H-Education (June, 2010)
Commissioned by Jonathan Anuik

Tension between Freedom of Speech and Equality on Campus

Timothy C. Shiell, professor of philosophy at the University of Wisconsin-Stout, has written a must-read book for anyone interested in gaining a balanced understanding of the legal status, recent history, and legal and philosophical arguments of supporters and critics of hate speech codes on campuses in the United States. It will also be of value to students, scholars, and policymakers interested in the broader relationship between freedom of speech and equality. In the preface to the first edition of *Campus Hate Speech on Trial* (1998), Shiell states that when he began his research in 1991-92 it was his suspicion that universities were legally and morally justified in restricting campus hate speech. However, as he explored the area and interacted with critics, he writes, "I began to back off from my original proposals" (2nd. ed., p. xi). In addition to his ability to change positions, he cautions the reader that the law is not static and that "any serious student of free speech knows that what was once protected may not be in the future, and that what was once unprotected may well become protected at some future point" (2nd. ed., p. 9). Therefore, one can anticipate that whatever "verdict" Shiell comes to will be presented as an improvement and not a solution to the conflict over the existence of speech codes on campus.

Without sacrificing any complexities, the book presents, in clear and nontechnical language, Shiell's intellectual struggle with the arguments on both sides of the speech code issue. Briefly, advocates of such codes believe that speech, at least under certain conditions, creates serious harm and is not protected by the guarantees of the U.S. Constitution and federal laws. Critics tend to argue that even such speech is guaranteed by the U.S. Constitution. Instances of hate speech are racial or sexual insults or epithets, threats, demeaning jokes, or degrading stereotypes (p. 2). The second edition (2009) contains chapters 1-7 of the first edition, and a new chapter depicting the status of the debate for the period 1998-2008. For readers who wish to go beyond the material presented, the second edition contains an expanded bibliography and list of legal decisions. The second edition also includes pre-1998 items that were not provided in the first edition as well as two hundred post-1998 items. Shiell cites many of these cases to ground his philosophical analyses in judicial decisions.

The national push for campus hate speech regulations began in the late 1980s when universities, including Stanford, the University of Michigan, and the University of Wisconsin System, adopted such regulations in response to growing problems of bigotry and racial prejudice on campuses. By 1992 more than 300 universities had similar codes. A 1994 survey of 384 universities indicated that 60 percent ban verbal or abuse harassment, 14 percent ban speech causing emotional distress, 23 percent ban libel, and 28 percent ban advocacy of offensive or outrageous viewpoints (p. 47). Although students were the subjects of the original codes, they soon included faculty and staff. The data stimulated my interest in understanding the diffusion of these codes. Based on this book, it appears that they originated with the protests of victimized students and were soon adapted or adopted by cautious administrators at colleges and universities throughout the United States.

Advocates viewed the codes as a tool to help minorities and women attain equal access to and equality on campus. This was part of the larger civil rights and women's rights movements in the United States. Supporters cited the equal protection provided by the Fourteenth Amendment of the U.S. Constitution and recently enacted equal opportunity provisions in education and employment federal legislation, such as the Civil Rights Acts of 1964 and 1990. At the same time, critics of such codes argued that they conflicted with the First Amendment right of free speech. Shiell refers to the tension and the dialectic between the two fundamental rights as "this

uniquely American dilemma" (p. 5).

In summary form, the arguments of early code defenders (chapter 2) fall into one or more of the following categories. The Deterrence Argument maintains that campus hate speech causes serious harm that constitutes a violation of the Fourteenth Amendment's equal rights guarantee. The First Amendment Argument indicates that properly understood hate speech does not deserve protection as free speech. Such speech does not contribute to public discussion but rather to public disorder (i.e., "fighting words") or supports "group libel" or "defamation." And the University Mission Argument claims that universities have a special mission to welcome and protect women, minorities, and previously excluded groups.

A theme of the two editions of Shiell's book is that neither university codes nor court decisions are inevitable; they are reactions to political forces and individual decisions. As individuals and as groups, critics of campus speech codes fought back. Once again, in summary, the critiques on a constitutional foundation were based on the argument that hate speech codes violate accepted standards of First Amendment jurisprudence (i.e., they are overly broad, unduly vague, and content based) and are, therefore, unconstitutional (chapter 3). The critics' position was: "not that that there should be no speech regulations on campuses at all, but rather that the codes that have been adopted are seriously flawed" (p. 61). Given the lack of predictability of court decisions, critics attempted to establish that speech codes were unwise even if they are deemed constitutional. This Consequence Argument focuses on the harm of speech regulation. Examples are the chilling effect on legitimate speech and expression by minorities and encouragement of attitudes of victimization rather than empowerment on the part of minorities. In sum, whatever benefits may occur as a result of speech codes will be more than offset by the costs in loss of freedom of speech and equality.

Given the proliferation of speech codes, and the constitutional issues raised, it is understandable that the conflict would be brought to the courts. Shiell explores in some detail six major court cases beginning with a case in 1989 involving the University of Michigan. Five of these cases involved universities and one the city of St. Paul, Minnesota. And, "in every case, the court ruled that the regulation abridged the plaintiff's right to freedom of speech" (p. 73). The codes were arbitrarily enforced and deemed overly broad, unduly vague, content- (and viewpoint-) biased, and "not essential to the legitimate aims they are intended to further" (p. 87). Defenders then turned to their strongest argument, the Hostile Environment Argument. Hostile Environment regulations had developed in the federal courts and the Equal Employment Opportunity Commission to guarantee the civil rights of employees and students by Title VII (employment) and Title IX (education) of both the 1964 and 1990 Civil Rights Acts. The hope was that a balance could emerge between free speech and equality. Although critics of the Hostile Environment Argument suggest that these arguments ultimately fail to address the guarantees of the First Amendment, they also point out that they do not address underlying attitudes and may be used to silence rather than enhance minority speech.

Shiell's contribution or "verdict" in the debate is presented in chapter 7–the last chapter in the first edition and the penultimate chapter in the second edition. He recognizes that there is no satisfying resolution to this "American dilemma." However, he does present a modest proposal for practical ways of resolving the tension between freedom of speech and equality. "I propose that universities design policies that focus on conduct rather than speech, limiting their speech restrictions to appropriately narrow and recognized legal categories, in particular, targeted, intentional, repeated, or egregious verbal abuse that lacks academic justification" (p. 159). The proposal should form a solid basis for universities in the formulation of speech codes that might be accepted by the courts. Shiell also proposes that rather than speech codes with punishments attached, universities should stress educational and economic programs to further equal opportunity. The educational programs should include students, faculty, and staff as well as members of the broader society.

Shiell brings the story of the tension between freedom of speech and equality on campus up to date (1998-2008) in his final chapter. The courts have not changed their legal standing of speech codes despite "four more speech code cases … [and] four more judicial rejections of broad campus speech restrictions" (pp.160-161). However, given the present composition of the Supreme Court of the United States and the "War on Terrorism," citizens should not be complacent about future rejection of either broad or narrow restrictions.

Of the three arguments used to support broad speech codes, First Amendment Argument, University Mission Argument, and Deterrence Argument, it is only the last that has experienced any major developments during the 1998-2008 period. For instance, some have argued that social scientists support the view that offensive speech harms the individual subject (physical and psychological

symptoms), the perpetrator (failure to develop a universal moral sense), and society (failure to live up to universal ideals). Deterrence suggestions range from criminalization to social pressure. However, Shiell convincingly points to the many unanswered questions with which citizens are left to contemplate. For instance, who defines what is to be punished? Who enforces the punishment? And will this not lead to a "tyranny of the majority" in which minorities self-censor what they believe the majority might find offensive? Historically, this has been the norm in race relations in the United States. In addition, recent developments have continued to cast doubt on the fighting words and group libel or defamation justifications for offensive speech codes, and recent critics of the Hostile Environment Argument have failed to persuade Shiell to modify his view that universities should support a narrow rather than a broad argument as described already.

A justification for speech codes that received only passing attention in the first edition is the International Argument; the United States should have such codes because there appears to be a growing international consensus concerning the legitimacy and value of such codes. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Convention on the Elimination of All Forms of Racial Discrimination restrict racist speech as do laws in many Western European countries, India, Canada, South Africa, New Zealand, and a number of Caribbean countries. Shiell points to the "bandwagon fallacy" (p.190); because others are doing it, the American federal government should do it, and suggests that there can be no international consensus on the nature or value of free speech in general or hate speech in particular. Given legal traditions, national experiences, and cultures, all countries are exceptional. For example, the United States places great weight on the belief that good ideas will push out bad ideas and less weight on government solution to issues, the government of Canada weighs equality over free speech, and the government in Germany places great weight on personal honor and human dignity. There is no best approach, however. In the case of the United States, "at the end of the day, permitting offensive speech under the bright sunshine of free speech is preferable to banning offensive speech under the cold, dark cloud of censorship" (p. 197). A compelling closing statement for a compelling book.

Campus Hate Speech on Trial reminds the historian of education that an internalist perspective on developments within the university may be necessary, but it is not sufficient. Students and administrators may have originated the movement toward hate speech codes. However, this movement took place within a broader civil rights movement, federal legislation, and court decisions.

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Citation: Mark Oromaner. Review of Shiell, Timothy C., *Campus Hate Speech on Trial.* H-Education, H-Net Reviews. June, 2010.
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