Opinions on Current Reading

The Case for Permitting Hate Speech on Campus

Speaking of Race, Speaking of Sex

by Henry Louis Gates Jr., Anthony P. Griffin, Donald E. Lively, Robert C. Post, William B. Rubenstein, and Nadine Strossen, with an introduction by Ira Glasser.

(New York: New York University Press, 299 pages. $26.95)

Reviewed by Ellen Paltiel

A WHITE STUDENT calls a black student "nigger" on a college campus. Skinheads congregate on the quad and hand out leaflets advocating white supremacy. Someone hangs a large swastika from a dorm window. Racist incidents are becoming increasingly common on American campuses. During the last seven years about one third of American universities have adopted campus regulations prohibiting speech that insults or demeans individuals on the basis of their race, sex, religion, or other such criteria. For example, in 1990 Stanford University established a campus policy prohibiting "harassment by personal vilification." Harassment was defined as speech "intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin."

Speech codes aim to eradicate the use of demeaning or degrading epithets on campus in order to promote a positive educational atmosphere in which all students can thrive. *Speaking of Race, Speaking of Sex* is an anthology of articles by a group of professors and advocates who think that censoring campus speech, even racist speech, is a bad idea. The regulations are usually drafted by well-meaning law professors who try to find a way to censor hate-driven expression without violating the First Amendment's guarantee of freedom of speech. That freedom is not an absolute — we all know that the law does not allow a person to yell "Fire!" in a crowded theater. But First Amendment jurisprudence holds that speech cannot be censored simply because of its content or viewpoint. Speech regulations must also avoid any vagueness or sweeping language that might lead to the unwarranted punishment of expression.

A number of judicial rulings have cast serious doubt on the constitutional viability of hate-speech codes. Regulations similar to those adopted by many universities have been invalidated by courts in Michigan and Wisconsin. In the face of a threatened lawsuit in 1990, the University of Connecticut chose to rewrite its code, which had originally gone so far as to proscribe "inappropriate laughter." Although the Supreme Court has not yet ruled on any of these codes, it did overturn the City of St. Paul's hate-speech law in 1992, for reasons that would seem to doom the campus codes as well. Even the Stanford code, applauded by Richard Post in *Speaking of Race* as a serious attempt at limited speech regulation, was subsequently struck down by a California court in February of this year. While the invalidation of Stanford's code may represent, as Sheldon Steinbach and Nat Hentoff put it, "the final nail in the coffin of speech codes," the debate about hate-speech censorship is still relevant because of the rift it has opened within the community of scholars concerned with issues pertaining to race.

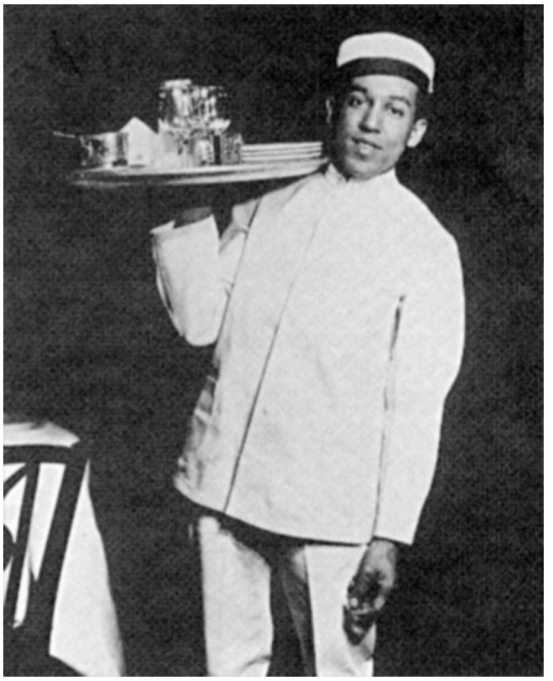
First Amendment cases draw a distinction between speech and conduct, permitting regulation only of the latter. Critical race theorists say that if yelling "Fire!" can be punished because it is harmful conduct, then yelling "Nigger!" should be subject to regulation on the same grounds. They claim that the current liberal position, which rejects censorship, disregards the harms caused by racist speech. The authors of *Speaking of Race* insist that while they recognize those harms, they reject the codes because they do not and cannot work, adding that the protracted scholarly battle over the codes is a dangerous diversion from more serious work that needs to be done to combat racism both on and off campus.

The book presents the many arguments advanced in favor of speech codes, refuting each one on legal and pragmatic grounds. Post and Strossen give fairly dense analyses of legal standards and arguments. Griffin uses a story-telling format. Gates manages to be both scholarly and funny, presenting all the legal issues in enjoyable prose without boring the reader

The Glory That Was the Harlem Renaissance

Steven Watson's new book, *The Harlem Renaissance: Hub of African-American Culture, 1920-1930* (New York: Pantheon Books, 224 pages, $22.00) is a glorious tribute to the African-American literary and artistic figures of the era. This charmingly illustrated volume presents the lives and works of the leading African-American writers of the post-World War I period including Langston Hughes, Zora Neale Hurston, Jean Toomer, and Countee Cullen, as well as portrayals of dozens of black artists, musicians, and entertainers. Watson captures the electrifying atmosphere and culture that was the Harlem Renaissance of the 1920s, a period of unsurpassed African-American achievement in literature, poetry, music, and the arts. In this delightful book, Watson shows that the Renaissance was not only a cultural rebirth for African Americans but a social movement of progressive politics, racial integration, and image building for members of the black race.

Left: Poet laureate of the Harlem Renaissance Langston Hughes, as a young boy.



Langston Hughes as a busboy at the Wardman Park Hotel in Washington, D.C., in 1925.

with legalese or a tiresome barrage of footnotes. The authors agree that the codes operate in the superficial realm of etiquette, reaching only the most blatant epithets while doing nothing to address more subtle and certainly more dangerous forms of institutional racism. In Gates' words, "the grip of this vocabulary has tended to foreclose the more sophisticated and multivariate models of political economy we so desperately need. I cannot otherwise explain why some of our brightest legal minds believe that substantive liberties can be vouchsafed and substantive inequities redressed by punishing rude remarks."

Minorities have historically borne the brunt of the enforcement of laws restricting freedom of expression. *Speaking of Race* asks black students to question whether they should trust college authorities, almost never members of minority groups, to enforce the rules in a way that will benefit minority students. During the year before the University of Michigan's code was struck down, it was invoked 20 times by white students against black speakers. The only two Michigan cases that led to punishment involved racist speech by or on behalf of blacks. A black student was punished for using the phrase "white trash." Not one case of racist speech by whites was punished.

Some theorists have proposed that campus codes not be used to protect "persons who were vilified on the basis of their membership in dominant majority groups." Lively criticizes this proposal as establishing the kind of double standard that the Court is generally unwilling to recognize, and Strossen underlines the difficulty of deciding who exactly is part of a "dominant majority." Codes that protect only minority speakers are apt to lead to the political backlash, stigmatization, and aura of legal illegitimacy currently plaguing affirmative action programs, while achieving none of the substantive gains of the latter policy.

Perhaps the most compelling argument advanced in favor of the codes is that hate speech can intimidate minority students, forcing them to drop out of campus discourse and debate, which effectively silences them and excludes them from the educational process. This account holds that the codes will not proscribe any valuable speech, but will encourage minority voices, thereby generating more and better speech. Strossen answers that rather than opening and encouraging debate, however, regulations "probably will add to the silence on 'gut issues' about racism, sexism, and other forms of bias that already impede interracial and other intergroup dialogues." Stanford's president recently boasted that no one had ever

been charged under his university's code. That is not necessarily a good sign. It could mean that the code was not reaching any of the harms it was intended to redress, or, conversely, that it was effectively silencing interracial dialogue.

"It is technically impossible to write an antispeech code that cannot be twisted against speech nobody means to bar. It has been tried and tried and tried."

— Eleanor Holmes Norton

The codes are predicated on the need to enhance the educational process, but Gates doubts that the GPAs or graduation rates of black students actually rise as a result of campus censorship. Nevertheless, advocates of hate-speech regulation feel that when a university adopts a code it symbolically demonstrates its opposition to hate and bigotry. The book demonstrates that black students may actually suffer as a result of this symbolic "protection." It can be insulting, paternalistic, and worse; one of the dangers of ostensibly supportive gestures is exemplified in a footnote to Lively's article. A law school, responding to its low bar passage rate, sanctimoniously announced: "[w]e are committed to our mission, which is one of serving diversity and allowing minorities access to the gateways of legal education, so we would expect a slightly lower Bar pass rate." The punch line to this university's "mission in service of minorities" is the fact that no black graduate of the school had actually failed the exam in question. With support like this, who needs enemies?

Post rejects the notion that the failure of a university to regulate racist speech amounts to an endorsement of the ideas expressed. That accusation repudiates a principle that is fundamental to the First Amendment: If freedom of thought and speech are to be safeguarded, all speech — even the speech we hate — must be permitted. This principle has historically protected minority speakers and prominority speech that the majority has sought to suppress on the grounds that the speech is dangerous or harmful. The book suggests that universities would be better off showing their solidarity by actively proclaiming antiracist positions; such statements would not run afoul of the First Amendment. Hate-speech codes can only drive racist thought underground and fuel resentment against minority groups. They may also create speech martyrs whose racist messages gain credibility by being repressed through a questionable use of power.

The United States may be the only country in the world that refuses to regulate racist speech. But the free-speech victories that have been won here by racist speakers have subsequently been used to protect both prominority speech and minority speakers. Strossen asserts that there is no empirical evidence from the countries that do outlaw racist speech that censorship is an effective means to counter racism. Just one example from the book: Among the first individuals prosecuted under the British Race Relations Act of 1965 were black power leaders. The law has regularly been used to silence speech by, and on behalf of, blacks. In the United States as elsewhere, censorship has generally been used by people who seek to subordinate minorities, not by those who seek to help them.

It has been argued that the Fourteenth Amendment's equality guarantee compels the restriction of hate speech because such speech fosters discrimination and undermines equality. Rubenstein answers that the codes themselves will undermine equality, that a robust freedom of speech is required to combat bigotry, and that the two amendments should not be pitted against one another but rather be used to enhance each other in a common fight against prejudice.

Strossen spends some time in *Speaking of Race* defending the ACLU from accusations that its civil libertarians are insensitive to the harms caused by racist speech. Some of the very scholars who insist that they seek a more "open dialogue" on race have vilified the ACLU and others who refuse to put their faith in speech codes. This illiberal position has divided traditional liberal allies who could be working together to address legal issues of greater moment than the regulation of campus insults.

Although it rejects campus speech regulations, *Speaking of Race* points to other ways in which the law may be used to fight inequality and prejudice. Antidiscrimination laws and affirmative action programs are by no means working optimally. In addition, there are serious racial ramifications to the problems of health insurance, housing, financing of urban schools, and drug arrest laws. The codes have sought to protect, from the harm of words, those minority students hardy enough to have actually succeeded in being admitted to college. It is time for a few words about protecting black children from the poverty and prejudice that keep many of them off campuses altogether, thereby foreclosing their chances of truly participating in society.

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