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Progressive Free Speech and the Uneasy Case for Campus Hate Codes

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PROGRESSIVE FREE SPEECH AND THE UNEASY CASE FOR CAMPUS HATE CODES

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Professor Becker makes a strong argument that the interests of women, including their free speech interests, would be better served by less judicial review. I agree with much of what she says about the limitations of judicial power. In fact, her criticisms are convincing enough that they may apply with equal—or at least sufficient—force to the interests of many groups besides women. I have in mind not only racial minorities but also the mass of white citizens of both genders. Professor Becker acknowledges that some disadvantages may exist when judicial interpretations impinge on the welfare of other groups, but she argues that the problems are greater with respect to women. Therefore, it is tempting for me to spend my time here insisting that her analysis applies more broadly than she believes. This would fulfill my academic obligation to be argumentative, and, moreover, I actually do think that the people of the United States generally would be better off with less judicial review. To me it is sad that insights like those in Professor Becker's paper are so often persuasive only when they emerge from the prism of interest group ideology.

However, to the relief of those who have heard my views on judicial review *ad nauseam*, I will not dwell on this difference between Professor Becker's position and my own. Instead, I want to comment on the very interesting points that she makes about campus "hate codes." What I have to say is not criticism; it is not even inconsistent with Professor Becker's paper. My observations bear on her argument in this oblique way: The full advantages of reducing our dependence on judicial review will not be gained if we only replace one mechanism of intellectual imperialism with another.

Professor Becker says that universities are places where speech is (and ought to be) pervasively regulated according to its content and that restrictions on "hate speech" cannot be distinguished from any of these other forms of regulation.[1] Since courts generally

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1. Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975 (1993).

leave universities free to regulate speech for the sake of educational purposes, so, too, should they leave universities free to design and implement "hate codes."

She takes no direct position on whether it would be wise for a faculty to adopt such codes. Her argument is simply that non-judicial thinking on this question would likely be better and richer than the thinking of judges. This naturally invites us to consider how the advantages of non-judicial decisionmaking would work out when applied to the issue of "hate codes."

Consider the Wisconsin code referred to in Professor Becker's paper. Before being enjoined by the local federal judge, this provision applied to ". . . discriminatory comments, epithets or other expressive behavior directed at an individual . . . if such comments . . . intentionally (1) Demean the race, sex, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual . . .; and (2) Create an intimidating, hostile or demeaning environment for education. . . ."[2] While not asserting that such a rule should be adopted, she argues, not only that it is indistinguishable from other academic judgments, but that allowing such rules might promote democracy by enhancing the status of women and minority group members as members of university communities. Thus, at least conceivably, academic decisionmakers might be correct in concluding that the Wisconsin code would promote both the educational and political interests of (among others) women.

It may be true that academics are more likely to reach such progressive conclusions than are those judges charged with enforcing "conservative free speech" principles.[3] But suppose that academic decisionmakers wanted to make full use of the opportunities presented by being outside the judicial system. What does Professor Becker's discussion suggest about how such people should think about the issue of hate codes?

One of the most arresting features of Professor Becker's analysis is her claim that courts are willing to consider constitutional challenges to academic hate codes because these codes are "visible" content discriminations.[4] They are visible because they protect "new entrants . . . in nontraditional ways."[5] Thus judges tend to label as "suppressive" those regulations that actually pro-

2. WIS. ADMIN. CODE § UWS 17.-06(2) (June 1989) (enjoined in UWM Post, Inc. v. Board of Regents of Univ. of Wis., 774 F. Supp. 1163, 1165 (E.D. Wis 1991)).

3. Becker, *supra* note 1, at 1031.

4. *Id.* at 1040-41.

5. *Id.*

mote the speech interests of outsiders and minorities while hardly noticing the many similar regulations that serve the interests of existing powerful groups within the universities. An academic decisionmaker, of course, would want to avoid this trap. But how?

Perhaps, as Professor Becker suggests, non-judicial decisionmakers will be relatively likely to avoid the problem because they are a more heterogeneous and politically responsive group than are federal judges. Even so, the very fact that academics might be content to label a proposed hate code as an ordinary educational rule suggests the possibility that the code would serve the interests of some powerful (perhaps, newly powerful) group. That is, having satisfied themselves that the code is not suppressive, university decisionmakers may only have established that it does not threaten their own interests. This, of course, could mean that the free speech interests of some other, unobserved out-group might be threatened by the code.

In fact, it is obvious that the enactment of the code would itself be an indication that new out-groups exist and are relatively powerless. Under the Wisconsin code, the new dissenters would include, for example, religious traditionalists who believe that homosexual behavior is sinful, fervent atheists who believe that religious belief is evil, and cultural conservatives who believe that (to use Professor Becker's example) "women are by nature better equipped to be mothers than executives."[6] To some extent, the unpopular views of such dissenters would be stifled by the existence and enforcement of the code. More generally, these dissenting groups would be socially and intellectually marginalized, since their beliefs would have been officially identified as representing a threat to the university's objectives.

Now, progressive non-judicial decisionmakers might determine that the interests of these new out-groups simply must be subordinated. It might be thought, for example, that their beliefs are so unfounded or so destructive to new entrants as to be out-of-place in a university. This is, of course, a dangerous judgment because (as Professor Becker notes in other contexts) there are free speech considerations on both sides of the issue. Although civility and respect are certainly important components of any system of vigorous inquiry and exchange, so also are the variety and sharpness that outrageous dissent can provide. University de-

6. *Id.* at 1038. Note that, according to Becker, the statement would not be subject to the code *if* stated once in class.

cisionmakers might nevertheless conclude that the interests of the "new entrants" deserved protection, but this judgment would come reluctantly to anyone suspicious of orthodoxies. The decisionmakers could be fortified by the knowledge that, as Professor Becker points out, since they are operating outside the judicial forum, other universities are free to come to different conclusions and all such determinations are only experimental.[7]

But, of course, the issue is not this straightforward. If it were, there would hardly be need for the relatively ambivalent, speculative, complex discourse that Professor Becker suggests is a potential advantage of non-judicial determinations.

A second major set of complications is that, while it is true that the protections afforded by the hate code might promote the self-respect and intellectual vigor of members of the protected classes, they might also have the opposite effect. Explicit and official protections might encourage a sense of victimization and dependence. Moreover, the code might actually increase the "new entrants'" sense of rejection. This would be possible because, by highlighting the issue of verbal insults, the protections might increase sensitivity to whatever hostility is expressed. It would also be possible because the new out-groups, being exposed to potential sanctions, might actually begin to feel more disapproval and animosity towards the protected classes. Even if ill-feelings were not increased in fact, by inhibiting critical or hostile comments, the code might create a silence into which the protected groups could pour their worst fears and suspicions.

A third major complication is that academic decisionmakers are in no position to define the collective interests of the "new entrants." In fact, these classes will include some individuals who will be silenced or marginalized by the code. After all, some women are traditionalists, some gays are dissatisfied with their orientation, some blacks oppose affirmative action or integration, and so on. A self-assured progressive decisionmaker can, of course, deny that such people exist or that their status and beliefs are worth protecting. But, as Professor Becker notes about the interests of women, one reason to favor a non-uniform, experimental approach is that there is no consensus on what kind of world would represent progress.[8] I would go a step further: there is no reason to assume that women (or any other class to be protected by hate codes)

7. *Id.* at 1045.
8. *Id.* at 991.

have unified interests. Hence the definition of "progress" for "new entrants" is not only contested now, it will always be contested and it will always be in flux. Academic decisionmakers who value a vigorous intellectual climate would be extremely hesitant to prejudge ultimate questions of self-definition by undervaluing the beliefs of dissenting members of the "new entrant" groups. These beliefs may seem wrong today, but they could be vindicated tomorrow. Even if they are never vindicated, dissenting views, of course, can contribute in useful ways to the modification of currently dominant conceptions of "progress." Black separatists have had something to teach integrationists. Cultural traditionalists, I believe, have had an effect on the thinking of some revisionist feminists.

Thus, even if the academic decisionmaker can justify subordinating the interests of the new out-groups in favor of the "new entrants," the speech interests of the favored groups may well argue against the hate code. I do not say that such considerations are necessarily decisive—they certainly would not apply with equal force to all hate codes or in all circumstances. But they demonstrate how perverse and uncertain the matter becomes outside the courts. It is one thing to say there are advantages to resolving the hate code issue in a non-judicial forum and another to utilize those advantages. Little will be gained if the rigidity and small-mindedness that can characterize "conservative" judicial thinking is replaced by the rigidity and small-mindedness that can characterize "progressive" academic thinking.