

Presentation by Malcolm Sherman, chair of CAFFECOR, at the April 16 forum on UAlbany freedom of expression policies (with some introductory and concluding remarks omitted)

CAFFECOR's concern was prompted by the "red light" or unacceptable rating given our campus by a national organization, the Foundation for Individual Rights in Education, or FIRE. Albany is far from alone in getting a red-light rating from FIRE. In fact three of the four SUNY university centers are on FIRE's red light list.

As an example of the kinds of incidents that have occurred elsewhere: at a campus of Indiana University (Indiana University-Purdue University Indianapolis or IUPUI), a student, Keith Sampson, who was also an employee, was reading a book while on a break from his campus job. The book's cover showed white-robed members of the Ku Klux Klan against a background of the Notre Dame campus. A fellow employee was offended. Sampson explained that the book was a historical account of how Notre Dame students had defeated the Ku Klux Klan in the context of a 1924 riot. The fellow employee was not satisfied, which eventually led to Sampson being accused by the school's affirmative action officer of racial harassment. In the view of the office of affirmative action it was racial harassment for Sampson to continue to read a book on a "historically and racially abhorrent subject in the presence of black co-workers." Sampson was threatened with sanctions. It took several months and the intervention of FIRE and the American Civil Liberties Union, before IUPUI apologized and admitted the entire proceeding against Sampson had been unjustified.

There has been no similar incident here, but current campus policies on harassment may still be cause for concern.

UAlbany policies on harassment are ambiguous, if not contradictory. On the one hand the office of affirmative action/diversity recognizes that actions must be "severe, persistent and pervasive" in order to constitute harassment. But elsewhere the requirement that actions be persistent is ignored.

Affirmative action documents give examples of sexual harassment which are so disparate as to confuse the issue. Their examples of harassing behavior include "lingering or intimate touches, sexual jokes or innuendoes, graphic comments about a person's physique and sexually suggestive objects or pictures displayed in areas of common viewing." Everyone agrees that "lingering or intimate touches" are objectionable when unwelcome, and indeed, a single instance may constitute sexual assault, a more serious charge than harassment. But a sexual joke or innuendo in a social situation might well be a social offense, but it should not subject anyone to official sanctions.

Affirmative Action rules also include as punishable offenses, "telling jokes that reinforce ... false stereotypes" and "displaying signs or posters that denigrate gays and lesbians." Who gets to decide which stereotypes are false and which may contain an element of statistical truth? Even false statements that do not libel specific individuals are protected speech. Opposition to legalization of same-sex marriage may well denigrate gays, but the right to express this view is protected by the Constitution.

Have harassment rules been stretched on this campus? Not as far as we know. But it is conceivable the published rules from the offices of Conflict Resolution and Affirmative Action could be used to intimidate a student, who would otherwise have challenged a disciplinary action.

In a similar vein The UAlbany Statement of Community Rights & Responsibilities prohibits "sexually explicit derogatory statements which are offensive or which cause the recipient discomfort or humiliation or which interfere with the recipient's work, academic performance or living conditions." Courts have held again and again that speech cannot be prohibited just because it causes discomfort or is offensive, "even gravely so." The quoted statement would appear to make single offenses punishable. But harassment, it bears repeating, must be "severe, pervasive, and persistent." The Community Rights and Responsibilities statement cannot be changed without approval from the UAlbany Council.

Another area of concern: According to our Responsible Use of Information Technology policy, one must "respect the Principles of a Just Community when using [one's] university e-mail account," etc. The Principles of a Just Community are very broad, stating that "In a just community, the dignity of the individual and respect for diversity are fundamental." Does this mean that any e-mail that wounds an individual's dignity or that shows a lack of respect for diversity can be censored or punished? Could arguments against illegal immigration be deemed assaults on the dignity of Hispanics? As far as we know no one has ever been disciplined for such statements, but this policy on its face would appear to violate First Amendment rights.

UAlbany also prohibits "behavior or . . . language that demonstrates hatred or bias against other persons because of national origin, race, age, religion, gender, sexual orientation, disability, veteran status, color, creed or marital status." This would seem to mean, for example, that a holocaust denier can be prosecuted as an anti-Semite. Holocaust deniers are indeed anti-Semites, but the First Amendment gives them the right to express their views. Our policy would also appear to mean that a student group alleging that homosexuality is a sin or even offering help to gays who wished to go straight could be prosecuted for their beliefs. Could an intemperate verbal attack on Catholic "right-to-lifers" be prosecuted as a hate crime?

The first amendment protects not only freedom of speech, but also freedom of conscience, which includes the right not to be pressured or forced to publicly espouse views that one privately opposes. At the University of Delaware a few years ago the residential life staff was given an explicit mandate to psychologically "treat" and correct allegedly incorrect thoughts, attitudes, values, beliefs, and habits of the students. The ResLife staff considered students too intolerant of one another, too "consumerist," and in dire need of reeducation to become responsible world citizens who could meet the planet's environmental crisis and the requirements of social and economic "justice."

The issue of course is not whether students really are too "consumerist," but whether students can be pressured to publicly pledge allegiance to views they may not hold. Freedom of conscience is protected by the First Amendment.

The freshman orientation part of this program involved one-on-one sessions with dorm resident assistants during which intrusive personal questions were asked, such as "When did you discover your sexual identity?" A student who resisted ("none of your business") was reported for violating the U of Delaware's zero-tolerance policy for "hate speech," as if only bigots would wish to resist questions designed to uncover their personal, political and social views. ResLife Staff members kept individual files on students and their beliefs –which were to be archived after graduation. RAs were required to report their "best" and "worst" one-on-one sessions to their superiors, including students' names and room numbers.

When accounts of the program were publicized off campus, Delaware's president terminated it. ResLife made cosmetic changes and resubmitted the program, which was voted down by the U of Delaware faculty. A second resubmission was also voted down, though a third version was finally accepted. The main effect of the controversy has been that Delaware Res Life has been forced to admit the program is voluntary and, contrary to what students had earlier been told, had been voluntary all along.

What is the relevance of the Delaware case to this campus? Does a similar Res Life indoctrination program exist here? No. But Delaware's program was part of a new educational model that has won awards from the American College Personnel Association's Commission for Social Justice Educators. We should not be surprised if similar programs are proposed here.

We do have "Freshman Year Experience" courses, one of which, "University Seminar" has a course description that reads in part as follows:

"Students will gain a greater understanding of themselves and of what it means to be a member of a diverse University community and will gain an appreciation of both the advantages and the responsibilities that accompany their membership..."

Do Freshman Experience courses like this violate students' freedom of conscience? If teaching a student "what it means to be a member of a diverse University community" means teaching him/her that only sanctioned political beliefs are acceptable then perhaps they do.

Before turning to the panel let me emphasize that the subject tonight is rights guaranteed by the First Amendment, including freedom of speech and freedom of conscience, and not the related issue of academic freedom. The Supreme Court has spoken in general terms of academic freedom as a "special concern of the first Amendment," but it would be a stretch to say that academic freedom – whose meaning is disputed – is a constitutional right.

To illustrate the difference: one sometimes hears complaints that some faculty mock conservatives or their values in class. Even when such complaints are factually accurate, students do not have a first amendment right to have their views treated respectfully in class. When faculty demean their students' beliefs or values, it is a violation of their professional responsibilities as faculty, not a violation of students' first amendment rights.

But a first amendment issue did arise a few years ago at the University of Missouri, when students in one course were required as a course assignment to write a letter to their state senator supporting a bill that would permit homosexuals to adopt children. The point, of course, is not whether one agrees or disagrees with such legislation. The issue is rather that students' freedom of conscience was violated by the requirement to take a particular stand.

Another speaker, Susanna Fessler, a senator and member of CAFFECOR, analyzed FIRE's letter of last November to acting President Phillip and the response by a SUNY Central lawyer. This correspondence was made available to us by UAlbany Counsel John Reilly, who had been invited to be part of the forum panel, but who had a conflicting obligation. Professor Fessler noted FIRE's critique was answered only with a general denial that our policies were in any respect illegal or unconstitutional. She convincingly argued our policies were almost identical to those at Temple University, which were struck down last year by a U.S. Appeals court (3rd Circuit). The main issue was a failure to stipulate that harassment charges must be based on persistent behavior, not on single or isolated events.