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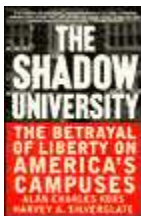
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Read excerpts from
The Shadow University by Alan
 Charles Kors &
 Harvey A.
 Silverglate.

November 12, 2002

Dean Robert Clark
 Harvard Law School
 Cambridge, MA 02138

Dear Dean Clark:

The Foundation for Individual Rights in Education ("FIRE") is a non-profit civil liberties organization dedicated to the promotion of academic freedom, free speech, and fair procedures in American higher education. As you can see from our Board of Advisors, listed on this letterhead and on our Website (www.thefire.org), FIRE is non-partisan and enjoys the advice, support, and respect of public intellectuals, academics, journalists, and others who have in common their concern for these crucial areas of American public life.

We are writing to you because of our concern that the Harvard Law School may consider adopting a racial speech code, disguised as a racial harassment policy. Such a speech code would be devastating to the intellectual vibrancy of a community that should thrive on free speech. We want to write you now before consideration of such a policy becomes sufficiently advanced so that it takes on an air of inevitability. Further, we want our arguments to be considered as the matter is further debated. In addition, we note with alarm some recent initiatives already underway at the Law School that appear to be aimed at inducing and perhaps pressuring faculty members and students to adopt a particular pedagogy, or, indeed, a particular point of view with respect to certain intellectual, social, and political issues that are hotly disputed throughout the society. All of these initiatives contain nascent or potential threats to academic freedom, free speech, and freedom of conscience.

We are writing not only on behalf of FIRE, but also on behalf of a number of students at Harvard Law School who have communicated to us their concerns about these issues



Read *Thought Reform 101* by Alan Charles Kors.



Read *Memo to Free Speech Advocates* University of

Wisconsin-Madison by Harvey A. Silverglate.

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and their essential agreement with what we say in this letter.

Hence, we write in the role of outside observers, but also on behalf of the concerns of current members of the HLS community. (Furthermore, one of the signatories to this letter, Harvey A. Silverglate, is a member of the HLS Class of 1967 and has been active at Harvard in various capacities since his graduation, including a semester in which he taught his own course during the deanship of the late James Vorenberg.)

Our most fundamental concern is over a potential racial harassment code that would prohibit speech deemed offensive by some. This concern arises from comments that you made in an April 22, 2002 email memorandum, in which you announced the appointment of a "Committee on Healthy Diversity" for the Law School. In the memo, written in the wake of last spring's episodes of racially insensitive speech, you noted that in addition to formulating and conducting a training program on diversity and conducting research about persons of color at HLS, the committee will "analyze and debate certain suggestions that have already been made, such as that the faculty should develop a racial harassment policy." While this indeed might be read as a faint suggestion, we fear, based on your handling of last spring's incidents, and in the context of the circumstances surrounding the adoption of the Law School's Sexual Harassment Guidelines in the late 1990s, that the threat of a racial harassment policy prohibiting speech on the subject and in the area of race—where we desperately need to hear one another—is very real.

* * *

As you will recall, after Matthias Scholl sent an anonymous email last spring that was disrespectful of a black student who had complained about an earlier episode of racially insensitive speech, Prof. Charles Nesson suggested that a section of the first-year class hold a mock trial of Scholl, and he offered to serve as Scholl's attorney.

Following this, the Black Law Students Association (BLSA) wrote a letter to *The Harvard Law Record* alleging that Harvard Law faced a "crisis" of "racial harassment." BLSA demanded that Prof. Nesson and another professor, David Rosenberg, be barred from teaching first year classes and that they receive public reprimands. Prof. Rosenberg ran afoul of the students, it appears, when in the context of the months-long classroom discussion of

theoretical approaches to torts, he shared his view of Critical Legal Studies, namely that "Marxists', feminists', and the Blacks' materialist philosophies have contributed nothing to the theory of torts." Such a judgment, of course, is precisely protected under AAUP Guidelines and under the traditions of academic freedom and open debate.

We are disturbed that the climate at the Law School was (and presumably remains) such that Prof. Nesson chose to forfeit teaching his course for the balance of the semester because of student criticisms of his attempts to use the incident as part of his pedagogy. His suggestion that the class conduct a trial of Scholl appears to have been a good-faith effort to get students talking about a difficult issue. The fact that he chose to withdraw from teaching because some students were offended by his proposal reflects poorly on the health of academic freedom at the Law School.

While we believe that appropriate administrative—and, in particular, decanal—action in support of Professor Nesson could have helped academic freedom emerge from this incident unscathed, you took action that, instead, suggested official disapproval of, and perhaps even a form of punishment for, Prof. Nesson's teaching, and, indeed, for Prof. Rosenberg's teaching as well. In response to immediate and earlier student complaints and demands, you established faculty workshops for the stated purpose of helping to "improve pedagogy regarding sensitive cleavage lines in our society." A school genuinely respectful of academic freedom would not convene workshops to help faculty members "improve" their pedagogy on the basis of student understanding (or misunderstanding) of one professor's scholarly remark and another's attempts to make an ugly episode educational. The institution of these workshops at a time when Prof. Rosenberg's and Prof. Nesson's ability to deal with such sensitive issues had just been publicly criticized suggested your agreement with their critics.

We are also concerned about the "Managing Difficult Conversations" program that you have established for students and which now appears to be in its formative, experimental stage. We will refrain from analyzing or criticizing the specifics of this nascent program, but we most assuredly will monitor its progress and make certain that it receives appropriate public scrutiny. In general terms, however, the proposition on which it appears to be based—that it's the Law School's business to tell adults in its community how to talk to one another—is potentially very troubling. We are concerned that these workshops

easily could lapse or be transformed into a program of required "sensitivity training" or other forms of coercive indoctrination.

* * *

Because of your easy acquiescence to the BLSA's demands regarding student and faculty workshops, we are concerned that you may soon accede to its demand that the Law School "institute a policy, applying to both students and professors, banning racial harassment analogous to the School's sexual harassment policy." Your April 22, 2002 memorandum to "Members of the HLS Community" provided the potential intellectual groundwork or justification of such a policy. You wrote that you and your colleagues were intent on creating "a better climate—an environment of genuine mutual respect and improved behavior patterns" at the Law School. You then stated that "almost everyone agrees on the goal of promoting mutual respect and *detering racially offensive speech* and conduct, even in our culture of great academic freedom and vigorous debate."

The memo posits that it is the business of the HLS administration to engineer, perhaps by resort to coercion, the ordinary relationships and discussions among adults on its campus. The stated assumption is that notwithstanding "our culture of great academic freedom and vigorous debate," it is acceptable for the Law School to take "steps...to create a better climate—an environment of genuine mutual respect and improved behavior patterns," especially when those "behavior patterns" include the use of speech that might offend another student, particularly a student on the other side of one of those "sensitive cleavage lines in our society."

Of course, it was not "behavior" that had started last spring's difficulties, but, rather, words—offensive to some, even to many, but words nonetheless. Your memo, however, conflates "racially offensive speech" and "conduct," as if the two are indistinguishable for analytical purposes. It says that "the challenge is how to achieve the shared goal" of "detering offensive speech," but it does not allow for the possibility that there may well be some people who do not share this goal because of the intense chilling effect that even the most well-crafted speech regulation would impose on debate and discussion in the community. Instead, it speaks of this goal as a kind of accepted orthodoxy, disagreement with which is unthinkable. It does not explain how deterring offensive speech by use of official power can be consistent with

academic freedom. It does not explain why students should be deterred from speaking their minds, frankly, on one of the most important issues facing our society—namely, race.

We believe that codes restricting offensive racial (or, for that matter, gender-related) speech are wrong not only in their use of coercion rather than argument and moral witness, but also because, instead of treating students as individuals, they place them in categories defined by the externalities of race, ethnicity, or sex, curtailing the right to offend members of certain of those categories. A racial speech code at Harvard Law School would take a subject that needs full and frank discussion and make it the subject of prohibition rather than of the kind of dialogue that is necessary for learning. The notion that students should use their years in law school to come to terms with life and with their fellow human beings through a process of mutual enlightenment and education is thus replaced by an authoritarian system that robs students of their liberty to think and speak as they wish.

To restrict the free speech and academic freedom of the entire Harvard Law School community on the provocation of these two students (and perhaps others in the past) whose speech offended others, or even on the provocation of some who would intentionally seek to provoke outrage by the most vile and vicious verbal forays, would be to allow civilized society to be held hostage to its lowest common denominator. Toleration cannot be obtained by intolerant and repressive means, despite President Lawrence Summers's reported quip that "We need to have zero-tolerance for intolerance." One does then give away one's liberty as a gift to the bigot or provocateur.

The fact that you may be considering a speech code for Harvard Law School, and that you have already taken actions that could be seen as potentially curtailing free thought and academic freedom at the Law School, is a matter of the most serious concern to liberty-loving people both on campus and in the wider academic and legal communities. We are speaking on behalf of our own organization and of the students who have voiced agreement with the broad principles set forth in this letter. Further, we believe that we reflect the views and concerns of the supporters of liberty, decency, and academic freedom everywhere, who understand that Justice Brandeis put it best, that "sunlight," not repression, "is the best disinfectant." We hope that you will put an end to any movement towards adoption of a racial speech code and allow the current and future generations of students and

professors to study and teach—and to talk about racial matters—as freely as the last generation. This legacy of liberty is, we hope you will agree, our highest moral and ethical obligation. We must leave the university to the next generation at least as free as it was when we inherited it from the prior generation.

We look forward to hearing from you about these issues, concerning your views on each of them, your plans and intentions, and their current status.

Sincerely,

Harvey A. Silverglate L'67
Vice-President and Co-Director

Alan Charles Kors
President and Co-Director

cc: President Lawrence H. Summers

Because Your Liberty is a Precious Thing
