

IN RE VAGUE PROVISIONS IN CONDUCT CODES

Opinion of the Emory University Senate Standing Committee for Open Expression

No. CFOE-22-2

April 13, 2022

Executive Summary

The Emory University Standing Committee for Open Expression exists to promote and protect the rights to open expression, dissent and protest among Emory Community members. As part of our responsibility to provide advice and counsel regarding the interpretation of Emory’s Open Expression Policy, this opinion discusses the issue of vague provisions in student conduct codes, including “catch-all” (i.e., “not otherwise covered”) provisions.

Various schools at Emory have vague language in their conduct codes. This opinion gives several examples for purposes of illustration—from Oxford College, the School of Medicine, the School of Nursing, and the Candler School of Theology—though similar provisions doubtless exist in other schools’ codes. To the extent that a conduct code is applied against a student’s expression, vague language is problematic for two reasons. First, vague language can chill speech because a student—afraid of prosecution and unable to predict what exactly is prohibited—might steer clear of the forbidden zone and even avoid some protected speech. Second, vague language gives undue discretion to individual university officials and opens the door to illegitimate viewpoint-based discrimination.

While codes cannot be fully specific and there is some role for general provisions, the experience of Emory shows that undue vagueness is unnecessary: the Undergraduate Code of Conduct does not have obvious instances of vague language, and several others policies have recently been amended to eliminate undue vagueness. We encourage University units that have conduct codes to review their codes for vague language.

I. INTRODUCTION

A. *The Open Expression Policy and the Committee for Open Expression*

Emory University’s Respect for Open Expression Policy¹ (“Policy”) “reaffirms Emory’s unwavering commitment to a community that inspires and supports courageous inquiry through open expression, dissent, and protest.”² Under the Policy, the University “affirms the rights of members of the Community to assemble and demonstrate peaceably.”³ The Policy “is paramount to other policies of the University that may conflict, except those grounded expressly in local, state, or national law.”⁴

The Committee for Open Expression serves as “a working group of [Emory University] community members—faculty, staff, and students—who seek to promote and protect the rights and responsibilities of community members related to issues and controversies involving speech, debate, open expression, protest, and other related matters.”⁵

The Committee’s responsibility is to “provide advice and counsel to Community members interpreting the Policy and the rights and responsibilities of individuals and groups under it.”⁶ One way that it does so is by “investigat[ing] alleged infringements of the right of members of the Community concerning speech, debate, open expression, Protest, Dissent, and other related matters, between all members of the Community.”⁷ (Emory community members who believe their open expression rights have been infringed are encouraged to contact the Committee for Open Expression at openexpression@emory.edu.⁸) The Committee “may submit recommendations to the University Senate, the President, the [Dean of Campus Life], or any other appropriate person or governing body for review.”⁹ A student has invoked this authority, asserting that their rights under the Open Expression Policy have been violated by a prosecution under a student conduct code.¹⁰

B. *Student Conduct Codes and Catch-All Provisions*

The various schools of Emory University have student conduct codes that prohibit certain categories of behavior. For examples, undergraduates in the College of Arts and Sciences, the Woodruff School of Nursing, and the Goizueta Business School are subject to the

¹ The Policy is available at <http://policies.emory.edu/8.14>. We have discussed the Policy in greater depth in several recent opinions, which are available at <https://senate.emory.edu/about/committees/open-expression.html>. The Policy was last revised on September 21, 2018, so some quotes in previous opinions may refer to the previous version of the Policy.

² Policy 8.14.1.

³ Id.

⁴ Policy 8.14.2.

⁵ Policy 8.14.3. The members of the Committee are listed at the end of this opinion.

⁶ Policy 8.14.3.2.

⁷ Id.; see also In re ESJP.

⁸ Policy 8.14.4 describes generally the procedure for filing complaints to the Committee.

⁹ Policy 8.14.4.4.

¹⁰ The details of the case are confidential, and in any event are not necessary for the discussion.

Undergraduate Code of Conduct.¹¹ This Code demands that students act “honorably,” “respectfully,” and “responsibly,” and lists various prohibited acts, such as “[d]isrupting the normal operations of the university,” “[m]isuse of computer or network resources,” “[c]ausing physical harm to any person,” “[v]iolating the Sexual Misconduct Policy,” “[v]iolating the Alcohol and Drug Abuse Policy,” and many others.¹² The School of Law, School of Medicine, School of Nursing, Oxford College, Candler School of Theology, and other schools of Emory University have similar policies.¹³

These Codes do not limit themselves to banning specific listed acts. They often contain broad, inclusive statements specifying that some unenumerated acts may also be punishable.

Sometimes, such statements take the form of general introductory language. For instance, the Undergraduate Code of Conduct begins its list of prohibited acts with the following statement: “Although it is neither possible nor necessary to specify every instance of misconduct that could result in disciplinary action against a student, the following are examples of the types of behavior that are considered violations of this Code.”¹⁴

Or sometimes, such statements take the form of “catch-all” provisions inserted at the end of particular sections. For instance, the law school’s Professional Conduct Code contains a section on “Unethical Conduct,” which includes listed acts such as breaches of confidentiality or giving false testimony and ends with the following: “Acting in a manner not otherwise directly covered in this section that shows an intentional disregard for the ethical standards of the legal profession, as embodied by the Model Rules of Professional Conduct.”¹⁵

Of course, these sorts of general statements, by their nature, cannot be fully specific. But the Codes at different schools differ in how vague they are. For example:

- The School of Medicine’s Conduct Code prohibits “[t]he display or distribution of lewd, offensive, threatening or inappropriate material via paper or electronic means. Such material includes pictures, videos, or written content that portray oneself or others in a manner that brings dishonor to the profession of medicine.”¹⁶

¹¹ Policy 8.1. The coverage of this Code is given in the introductory “Authority and Coverage” section.

¹² Policy 8.1.1, preamble & (I)(e), (I)(f), (II)(a), (II)(e), (III)(a).

¹³ See, e.g., Emory Law Professional Conduct Code, printed as Part 5 of the Emory Law Student Handbook, https://law.emory.edu/_includes/documents/sections/student-life/emory-law-student-handbook-2021-2022.pdf; Emory School of Medicine, Conduct Code, <https://med.emory.edu/education/programs/md/student-handbook/academics/professional-conduct/conduct-code.html>; Emory School of Nursing, Student Conduct, printed at pp. 109–23 of the Emory Nursing Student Handbook, available at <https://www.nursing.emory.edu/resources/audience-guide-for-students>; Oxford College Code of Conduct, <https://oxford.emory.edu/catalog/regulations/code-of-conduct.html>; Candler School of Theology, Honor and Conduct Code, <https://catalog.candler.emory.edu/policies/honor-code/>.

¹⁴ Policy 8.1.1.

¹⁵ Emory Law Professional Conduct Code, § I.D(5), p. 70.

¹⁶ School of Medicine Conduct Code, Prohibited Conduct, § 24.

The School of Nursing’s Conduct Code has substantially identical language, only substituting a reference to bringing “dishonor to the profession of Nursing.”¹⁷

- The School of Medicine’s Conduct Code prohibits “[i]nappropriate use of social media.”¹⁸
- The Oxford College Code of Conduct prohibits “[p]articipating in behavior considered to be inappropriate by a college official.”¹⁹
- The Candler School of Theology prohibits “[a]ctions contrary to the standards of Candler School of Theology and Emory University, including actions that are deliberately demeaning to other human beings or that violate the dignity and integrity of other members of the university.”²⁰

As discussed below, we believe that these provisions are excessively vague, and to the extent they are applied to students’ expression, such application is inconsistent with the Open Expression Policy.

II. FREE SPEECH PROTECTION AT EMORY

In past opinions, we have explained the relationship between the Open Expression Policy and the First Amendment of the U.S. Constitution:

Emory University is a private institution; therefore, the First Amendment of the U.S. Constitution does not bind the University of its own force. However, the University has chosen to adopt the Open Expression Policy, which affirms that “Emory University respects the Constitutional rights of free speech and assembly.” We have recognized on several occasions that the Policy incorporates at least the same substantive standards that the First Amendment imposes on public universities. As a result, the Emory Community—a category that includes faculty, students, staff, and others—has at least the same rights as the communities of the University of Georgia or Georgia State University. Indeed, in some ways, the Policy provides broader support for open expression than the First Amendment compels at public universities: in particular, the Policy commits the University to take affirmative steps to encourage protest and dissent.²¹

“[T]he authority to interpret the Policy,” we have written, “rests with the Committee”; nonetheless, “judicial interpretations of the First Amendment in the context of cases supporting the rights of individuals at *public* universities are persuasive authority as to

¹⁷ Nursing Conduct Code, Prohibited Conduct, § 21, p. 114.

¹⁸ School of Medicine Conduct Code, Prohibited Conduct, § 28; see also Emory Nursing Student Handbook, Social Media Guidelines, p. 131.

¹⁹ Oxford College Code of Conduct, Responsibility and Accountability, § 6.

²⁰ Candler School of Theology, Honor and Conduct Code, Student Conduct Violations, § 5.

²¹ In re Emory Integrity Project Chalkboards and Other Limited Public Forums, No. CFOE–17–1 (Sept. 26, 2017), Part III.A, at 4–5 (quoting Policy 8.14.5) (some internal quotation marks omitted) (internal brackets removed) [hereinafter In re Limited Public Forums], https://senate.emory.edu/documents/past_documents/cfoe-palestine-16.02.10-revised2.pdf.

the Policy’s meaning.”²² The same is true of judicial interpretations of the First Amendment in analogous contexts outside of universities.

III. STANDARDS APPLICABLE TO VAGUENESS

Student Conduct Codes do not merely apply to expression. Indeed, most of the conduct they cover (e.g., physical harm, sexual misconduct, or drug abuse) has no particular expressive component. Application of these Codes outside the context of expression is outside this Committee’s jurisdiction, and we express no opinion on such applications.

However, these Codes can also apply to student speech, and such applications can, in principle, raise concerns under the Open Expression Policy. For someone to be penalized as a result of their expression, the rule under which they are penalized must—at the very least—be sufficiently clear as to whether it covers their behavior. Certain expression cannot be forbidden in any event, even under the clearest possible policy. But even as to expression that *could* be forbidden, the Code section forbidding it must do so with sufficient certainty. Otherwise, one would be penalized for one’s expression without adequate notice that the expression is forbidden—and this would have an unacceptable chilling effect on even permitted expression, since one might reasonably fear that some university official might construe the code as forbidding that expression and bring a disciplinary proceeding.

For instance, in the context of speech at universities—including student speech—courts have warned against unconstitutionally vague policy terms. Government policies are unconstitutionally vague when “[people] of common intelligence must necessarily guess at [their] meaning”; policies must therefore “give adequate warning of the conduct which is to be prohibited and must set out explicit standards for those who apply it.”²³ Thus, for instance, a federal court struck down a university disciplinary policy where “it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct.”²⁴ Where “the University never articulated any principled way to distinguish sanctionable from protected speech,” “[s]tudents of common understanding were necessarily forced to guess at whether a comment about a controversial issue would later be found to be sanctionable under the Policy. The terms of the Policy were so vague that its enforcement would violate the due process clause.”²⁵

Federal vagueness cases are consistent on the following points: (1) vagueness concerns are heightened when free speech rights are at issue; (2) vagueness has a chilling effect on speech, because people who are afraid of enforcement—but cannot predict what will trigger enforcement—will steer clear of arguably sanctionable speech, even if this means avoiding some speech that is actually protected; and (3) vagueness delegates substantial

²² In re ESJP, Part I.B, at 3.

²³ Doe v. Univ. of Mich., 721 F. Supp. 852, 866 (E.D. Mich. 1989) (internal quotation marks omitted).

²⁴ Id. at 867.

²⁵ Id.

power to the officials or administrators who enforce the policies, and thus facilitates discriminatory enforcement. This is true whether inside or outside of universities, and whether student, faculty, or staff speech is at issue.²⁶

IV. CURRENT VAGUENESSES IN CONDUCT CODES

With this in mind, consider the policy provisions listed in the bullet points in Part I.B above.

Some prohibitions are clearly permissible: for instance, the School of Medicine's and School of Nursing's Conduct Codes prohibit displaying or distributing "threatening . . . material."²⁷ (Threats are already unprotected under the Open Expression Policy.²⁸) But those Code provisions can also be triggered by displaying or distributing "offensive . . . material."²⁹ The word "offensive" does not put anyone on notice as to what is prohibited: offensive to whom? Can students be prosecuted based on anyone's claim, after the fact, that they were offended? Does this Code establish a "most sensitive reader/viewer" standard (to be determined after the fact, when anyone can claim that they were offended)? Or does it establish a "reasonable reader/viewer" standard—but then how does one determine who the "reasonable" person is and what they would find offensive? The Supreme Court has struck down a municipal ordinance prohibiting assembling "in a manner annoying to persons passing by" on the grounds that the term "annoying" is unconstitutionally vague and does not establish an ascertainable standard;³⁰ the word "offensive" here is similar.

Next, consider the word "inappropriate." The School of Medicine and School of Nursing Codes discussed above can also be triggered by displaying or distributing "inappropriate material";³¹ the School of Medicine's Conduct Code also prohibits "[i]nappropriate use of social media";³² and the Oxford College Code of Conduct prohibits "[p]articipating in behavior considered to be inappropriate by a college official."³³ The Oxford Code explicitly puts any student's behavior at the mercy of any "college official"—but even the

²⁶ See, e.g., *NAACP v. Button*, 371 U.S. 415, 432–33 (1963); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967); *Coates v. City of Cincinnati*, 402 U.S. 611, 614–16 (1971); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Silva v. Univ. of N.H.*, 888 F. Supp. 293, 312 (D.N.H. 1994); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 972 (9th Cir. 1996); *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001).

²⁷ School of Medicine Conduct Code, Prohibited Conduct, § 24; Nursing Conduct Code, Prohibited Conduct, § 21, p. 114.

²⁸ See Policy 8.14.5.5(g).

²⁹ School of Medicine Conduct Code, Prohibited Conduct, § 24; Nursing Conduct Code, Prohibited Conduct, § 21, p. 114.

³⁰ *Coates v. City of Cincinnati*, 402 U.S. 611, 614–16 (1971).

³¹ School of Medicine Conduct Code, Prohibited Conduct, § 24; Nursing Conduct Code, Prohibited Conduct, § 21, p. 114.

³² School of Medicine Conduct Code, Prohibited Conduct, § 28; see also Emory Nursing Student Handbook, Social Media Guidelines, p. 131.

³³ Oxford College Code of Conduct, Responsibility and Accountability, § 6.

other codes are unduly vague on this point, because nobody knows what material, or what use of social media, someone might consider “inappropriate.”

Next, consider the School of Medicine’s and School of Nursing’s Codes that prohibit displaying or distributing “pictures, videos, or written content that portray oneself or others in a manner that brings *dishonor* to the profession of” medicine or nursing.³⁴ “Dishonor,” with its echoes of virtue and chivalry, is an exceptionally slippery term, and one struggles to express what sorts of behavior it does or does not include. For sheer subjectivity, it is reminiscent of some former language in Emory’s “Information Technology Conditions of Use” Policy,³⁵ which (before it was amended in 2017) prohibited “personal use of Emory’s IT resources” in a way that “reflect[ed] poorly on the institution.”³⁶

We do not disapprove of professional schools’ having Conduct Codes that incorporate some of the relevant profession’s standards, but there are ways of doing this that do not involve excessive vagueness. The School of Law’s Professional Conduct Code used to prohibit “[a]cting in a manner not otherwise directly covered . . . that shows an intentional disregard for [1] the ethical standards of the legal profession or [2] *the fundamental values of the Emory Law community*.”³⁷ The current version, however, prohibits “[a]cting in a manner not otherwise directly covered . . . that shows an intentional disregard for the ethical standards of the legal profession, *as embodied by the Model Rules of Professional Conduct*.”³⁸ The new language has two advantages over the old language: first, it avoids the vagueness of determining “the fundamental values of the Emory Law community”; and second, even as to the “ethical standards of the legal profession” section, it gives them additional specificity by incorporating an actual professional conduct code (which has been interpreted quite often in the context of lawyer discipline).

Finally, consider the Candler School of Theology’s Code, which prohibits “[a]ctions contrary to the standards of Candler School of Theology and Emory University, including actions that are deliberately demeaning to other human beings or that violate the dignity and integrity of other members of the university.”³⁹ In the first place, “the standards of Candler School of Theology and Emory University,” like the honor of the medical or nursing profession or the fundamental values of the Emory Law community, are vague. And in the second place, the inclusion of actions that “violate [other people’s] dignity and

³⁴ School of Medicine Conduct Code, Prohibited Conduct, § 24 (emphasis added); Nursing Conduct Code, Prohibited Conduct, § 21, p. 114 (emphasis added).

³⁵ Policy 5.1.

³⁶ A previous version of that Policy can be found in Emory Campus Life Handbook 2012–2013, p. 33, https://www.emory.edu/CAMPUS_LIFE/documents/handbook_2012-2013.

³⁷ A previous version of that Code can be found in Emory Law Student Handbook 2019–2020, p. 64, https://law.emory.edu/_includes/documents/sections/student-life/emorylaw_studenthandbook_19-20_0801_approved.pdf.

³⁸ Emory Law Professional Conduct Code, § I.D(5), p. 70 (emphasis added).

³⁹ Candler School of Theology, Honor and Conduct Code, Student Conduct Violations, § 5.

integrity” is—in the case of expression—troublingly broad. In today’s political climate, a great range of statements about social and political issues are often, rightly or wrongly, characterized as violating other people’s dignity. Many of these statements are likely to come up anywhere in a university where people talk about controversial issues like sexual orientation, gender identity, abortion, Israel/Palestine, and the like—this could include the college, the law school, or (as relevant here) a theology school. But, as we have repeatedly stated, statements of opinion about social or political issues are fully protected under the Open Expression Policy. Therefore, they cannot be made the subject of discipline under a Conduct Code, whether or not someone might consider them “actions . . . that violate [people’s] dignity and integrity.”

IV. EMORY’S EXPERIENCE SUGGESTS THAT EXCESSIVE VAGUENESS IS UNNECESSARY

We do not doubt the need to have some general provisions in conduct codes, because no set of detailed prohibitions can adequately capture everything; every detailed list will leave loopholes. But while vague catch-all provisions eliminate the problem of loopholes, they come with problems of their own: the resulting vagueness can chill permissible speech and can facilitate abuse and viewpoint-based discrimination. There is a tradeoff between the need to avoid loopholes and the need to provide adequate notice.

In theory, this tradeoff could be difficult. However, Emory’s experience has shown that, in practice, these difficulties can be overcome. For instance, the Undergraduate Code of Conduct contains a detailed list of prohibited acts that stretches over two pages of text.⁴⁰ As noted above, it begins with an admonition that “it is neither possible nor necessary to specify every instance of misconduct that could result in disciplinary action against a student” and that the following list consists of “examples of the types of behavior that are considered violations of this Code,” but the list of prohibited acts is reasonably comprehensive and does not itself contain any vague catch-all statements.

The Undergraduate Code does incorporate other policies, like the Alcohol and Drug Abuse Policy or the Tobacco Free Environment Policy,⁴¹ which may themselves have some vagueness. And there is clearly substantial breadth in “[v]iolating university or school rules, regulations, or policies” or “[v]iolating any government laws or ordinances.”⁴² But our understanding is that the Office of Student Conduct does not bring charges unless a student’s behavior falls within a listed item (despite the introductory language stating that the listed items are just examples). This limits possibilities for abuse.⁴³

In addition, as we have mentioned above, in at least two cases in recent years, Emory policies have been revised in response to concerns about chilling protected speech. The first case was the revision of the IT resources policy in 2017 to eliminate a ban on personal

⁴⁰ Policy 8.1.1.

⁴¹ See Policy 8.1.1.(I)(i), (III)(a).

⁴² See Policy 8.1.1.(I)(h), (j).

⁴³ This is not to say that the Undergraduate Code of Conduct (or the other policies that it incorporates) cannot be abused, but any complaints about its application can come to us if and when they occur.

use of IT resources in a way that “reflect[ed] poorly on the institution,” and the second case was the 2021 revision of the Law School Code that banned acting contrary to “the fundamental values of the Emory Law community” and added specificity to the provision on violating “the ethical standards of the legal profession.”

Emory thus has experience with disciplinary codes that provide for student accountability without undue vagueness that can chill speech and facilitate discriminatory enforcement. If administrators encounter a case where they believe that some objectionable student speech falls through the cracks of the relevant conduct code, there are other (non-punitive) options available, such as informal conversations, which (because they have no tangible consequences for the student) do not pose the same threat of chilling speech.

V. CONCLUSION

The Committee favors the recent trend of making conduct codes less vague. But some codes, for instance the ones mentioned in this opinion, still have excessively vague language. To the extent that a conduct code can be applied to students’ expression, vagueness is problematic because it can chill speech and facilitate discriminatory enforcement. We encourage University units that have conduct codes to review their codes for vague language.

Composition of the Committee for Open Expression:

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