

**TESTIMONY OF WENDY KAMINER ON “FIRST AMENDMENT  
PROTECTIONS ON PUBLIC COLLEGES AND UNIVERSITIES” BEFORE THE  
HOUSE JUDICIARY SUB-COMMITTEE ON THE CONSTITUTION AND CIVIL  
JUSTICE**

**SUBMITTED MAY 29, 2015**

I’m a writer, lawyer, and free speech feminist, an adviser to the Foundation for Individual Rights in Education, and a member of the Massachusetts State Advisory Committee to the U.S. Civil Rights Commission. I’ve have been following, participating in and occasionally provoking free speech battles on and off campus for decades. I was a staff attorney in the New York City Mayor’s midtown office, working on 42<sup>nd</sup> street, when the feminist anti-pornography movement emerged in the 1980s. I was briefly involved in the movement in a futile effort to discourage it from seeking legislative remedies for misogynist speech and became a strong opponent of proposed civil rights laws restricting pornography. I was a fellow at Radcliffe College throughout the 1990s when political correctness was taking hold and civility or harassment codes began restricting the freedom to express unsettling ideas.

“Harassment is making someone un-comfortable,” students began asserting some 20 years ago. “That makes me a harasser” I’d respond, “since I strive to make at least a few people uncomfortable everyday.”

Today, students on both public and private campuses are encouraged to fear discomfiting or disturbing language and ideas more than ever, as a quick review of the Foundation for Individual Rights website will confirm.<sup>1</sup> Last fall, I inadvertently ignited a controversy at my alma mater, Smith College, by offering a strong defense of free speech during a panel discussion. I argued for the protection of allegedly hateful speech, offering examples of distasteful, constitutionally protected advocacy. I quoted a few forbidden words instead of referencing them by their initials and discussed the difference between hurling an epithet and quoting a word in context of a discussion of language, literature, and

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<sup>1</sup> <https://www.thefire.org/>

law.

My presentation was characterized as threatening and potentially traumatic, requiring a trigger warning. My speech, part of a polite, academic debate, was condemned as an act of “racial violence.” And, in open letter to the campus community, college president Kathleen McCartney subsequently apologized that “some students and faculty were hurt” and made to “feel unsafe.”<sup>2</sup>

An un-armed, aging 5’2” female, I surely presented no physical threat, but these days, when students talk about threats to their safety and demand access to “safe spaces,” they’re often talking about the threat of unwelcome speech and demanding protection from opposing ideas. It’s not just rape that some women on campus fear: It’s discussions of rape. At Brown University, a scheduled debate between two feminists about rape culture was criticized for, as the *Brown Daily Herald* put it, undermining “the University’s mission to create a safe and supportive environment for survivors.” The paper reported that students who feared being “attacked by the viewpoints” aired at the debate could instead “find a safe space” among “sexual assault peer educators, women peer counselors and staff” during the same time slot.<sup>3</sup> Presumably they all shared the same viewpoints and could be trusted to attack no one with their ideas.

If these excessive fears of academic debate seem frivolous they can have serious consequences, including abuses of government power. At Northwestern University, Professor Laura Kipnis has been charged with “retaliation” and is under investigation by the university’s Title IX coordinator for publishing an article in the *Chronicle Review* about campus sexual politics that challenged some contemporary feminist shibboleths. As Professor Kipnis explains in an account of her “Title IX inquisition”:

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<sup>2</sup> <http://www.smith.edu/president/speeches-writings/new-york-alumnae-panel>

<sup>3</sup> <http://www.browndailyherald.com/2014/11/17/janus-forum-sexual-assault-event-sparks-controversy/>

“I learned that professors around the country now routinely avoid discussing subjects in classes that might raise hackles. A well-known sociologist wrote that he no longer lectures on abortion. Someone who’d written a book about incest in her own family described being confronted in class by a student furious with her for discussing the book. A tenured professor on my campus wrote about lying awake at night worrying that some stray remark of hers might lead to student complaints, social-media campaigns, eventual job loss, and her being unable to support her child. I’d thought she was exaggerating, but that was before I learned about the Title IX complaints against me.”<sup>4</sup>

How did we get here? I’ll offer at least a partial explanation of how a verbal defense of free speech became a virtual hate crime, how safety came to mean protection not from physical assault but from the “attack” of unwelcome words and ideas, and why providing intellectual comfort to students is taking precedence over confronting them with intellectual challenges. While the legality of censorship at public and private institutions differs dramatically, thanks to the First Amendment, the culture of censorship is virtually the same. I hope an understanding of that culture will help you address its consequences.

I’ll focus on censorship campaigns from the left, a dominant force in recent years, but, first, I want to stress that the impulse to censor is a non-partisan vice. Mid 20<sup>th</sup> century campus censorship emanated from the right and, recently, for example, controversies over inappropriate political interference by conservative officials have roiled the North Carolina state university system.<sup>5</sup>

But campus speech and harassment codes incorporating broad, subjective definitions of illicit offensive speech are essentially products of the left (although activists and administrators on the right may and will make use of them.) Progressives who champion these restrictive speech codes at public universities are apt to view the First Amendment itself as a kind of civility code

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<sup>4</sup> Laura Kipnis, “My Title IX Inquisition” The Chronicle Review, May 29, 2015 <http://chronicle.com/article/My-Title-IX-Inquisition/230489/?key=Tj8ilVA8NSStOZnEyMTsVbG4EbHA/OB94YHUYOH5xbltWEQ>

<sup>5</sup> <http://www.newyorker.com/news/news-desk/new-politics-at-the-university-of-north-carolina>

that does not protect allegedly hateful or demeaning speech, especially when it targets presumptively disadvantaged people or groups. (The First Amendment is, in this view, also an equality code that subjects private associational rights to public anti-discrimination rules, as the Christian Legal Society cases show.)<sup>6</sup>

Thus, progressive campus censorship campaigns are, in a way, misguided extensions of the drive for civil rights. In part, free speech has been a victim of relative success in achieving formal legal equality through civil rights laws. That mission more or less accomplished, with some exceptions, the progressive movement turned to the challenge of achieving social equality through law. It began advocating restrictions on speech to eradicate social slights -- as if we could or should require people to respect each other. We don't have the categorical right to act on our biases, but we do have a fundamental right to harbor and express them.

But that is a civil libertarian view not necessarily shared by civil rights activists. Many of them tend to view social slights, "micro-aggressions" in today's parlance, as serious threats to equality -- largely because they regard speech as a form of action. How did verbal offenses become so fearful, so readily likened to physical assaults? New communications technologies obviously arouse new anxieties, not entirely misplaced. Human viciousness has never been disseminated so instantly, broadly, and indelibly. But the normalization of campus censorship, treating words as actions, predates social media and widespread Internet access.

In part, it reflects the confluence of three popular movements dating back nearly 30 years: Feminist anti-pornography crusades of the 1980s; late 20<sup>th</sup> century personal development movements about dysfunction and abuse; and multi-culturalism on college campuses, which accompanied a commendable drive for diversity.

In the 1980s, two impassioned anti-porn feminists, law professor Catherine MacKinnon and the late writer Andrea Dworkin, popularized what became a highly influential view of free speech as a substantial bar to equality.

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<sup>6</sup> <https://www.law.cornell.edu/supct/html/08-1371.ZS.html>

They denied the difference between words and action, framing whatever they considered pornographic speech as an actual sexual assault. (MacKinnon called it a “form of forced sex.”<sup>7</sup>) They devised a novel definition of pornography as a civil rights violation and persuaded the City of Indianapolis to enact their model ordinance, regulating pornography as a discriminatory practice. It was struck down by the 7<sup>th</sup> Circuit Court of Appeals: “Indianapolis justifies the ordinance on the ground that pornography affects thoughts,” the Court noted. “This is thought control.”<sup>8</sup>

But while MacKinnon and Dworkin lost that battle, their successors are winning the war. As the feminist anti-porn movement retreated from the legislative arena, its equation of pure speech with active discrimination gained strength on college campuses. The view of unwelcome speech as a civil rights violation and the conflation of words and actions are at the core of campus speech and harassment codes that have flourished over the past 20 years.

Contemporary mistrust of free speech among campus progressives is also, in part, a legacy of personal development movements that emerged in the late 1980s, alongside feminist anti-porn protests. Popular therapies focused on recovery from the “disease” of codependency and adopted a similarly dire view of unwelcome speech. Best-selling pop psychologists and a proliferation of 12 step groups echoed the anti-porn feminist view that “words wound,” quite grievously. Self-appointed recovery experts declared that virtually all of us were victims of child abuse, in one form or another. They justified this diagnosis by defining abuse down, very broadly, to include a range of common, normal childhood experiences, like being chastised on occasion or treated insensitively by your parents.<sup>9</sup>

As a consequence of this ubiquitous “abuse,” virtually all of us were said to

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<sup>7</sup> MacKinnon, Catharine (1987). *Feminism unmodified: discourses on life and law*. Harvard University Press, 1987, p. 148.

<sup>8</sup> [http://www.bc.edu/bc\\_org/avp/cas/comm/free\\_speech/hudnut.html](http://www.bc.edu/bc_org/avp/cas/comm/free_speech/hudnut.html)

<sup>9</sup> Wendy Kaminer, *I’m Dysfunctional, You’re Dysfunctional*, Addison Wesley, 1992

be fragile, vulnerable and easily damaged by unwelcome speech. So, the self-esteem movement of the 1980s and early '90s advocated nearly constant praise, assuming our extreme sensitivity to insults, slights, (now “micro-aggressions”) and what might once have been considered constructive criticism. These broad views of vulnerability and abuse made censorship seem a moral necessity, as well as an essential path to equality.

Feminism absorbed these lessons over the past several decades. Because it focused on familial abuse, the recovery movement was a natural partner for many feminists involved in anti-violence movements. The result was a popular strain of censorious, therapeutic feminism, which dominates the movement today, especially on campus, infecting contemporary feminism with a strong strain of authoritarianism.

By the 1990's, however, women were only one of several campus groups presumed to be particularly vulnerable to verbal abuses. As campuses diversified, multiculturalists sought to protect a range of historically disadvantaged student groups from speech considered racist, sexist, homophobic, or otherwise discriminatory. Like abuse, oppression was defined down. I remember the first time, in the early 1990s, that I heard a Harvard student describe herself as oppressed, as a woman of color. She hadn't been systematically deprived of fundamental rights and liberties. After all, she'd been admitted to Harvard. But she had been offended by attitudes and remarks.

Did she have good reason to take offense? That was an irrelevant question. Popular therapeutic culture defined verbal offenses by the emotional responses of their self-proclaimed victims. The 12-step/recovery movement had exalted subjectivity in its deference to individual “feeling realities” and the belief that personal testimony was proof of objective truths. Speech and harassment codes tend to reflect this reliance on the feelings of offended listeners, particularly those who are presumptively disadvantaged. Lacking clear, predictable, relatively objective, constitutional standards of unprotected speech, the codes are supposed to ensure equality. Instead they've spawned the soft, arbitrary authoritarianism that now governs many American campuses.

But what happens on campus doesn't stay on campus. Students graduate. They become faculty members, administrators, political candidates, and state or federal regulators. Considering the fact that campus speech restrictions and a culture of censorship date back decades, it's not surprising that some policy-makers and opinion leaders approaching middle age, as well as students, support restrictions on whatever they deem hateful, bigoted, or generally offensive speech. "Free speech doesn't include hate speech," is now a familiar mantra on and off campus. It's also a nonsensical mantra: We don't need free speech guarantees to protect speech that doesn't offend and isn't condemned by some influential person or group as hateful.

So as you consider censorship on public campuses today, keep in mind that support for it has already influenced the wider culture. As you consider campus censorship, consider its possible, far-reaching consequences: Will American constitutional guarantees of free speech established in the 20<sup>th</sup> century survive the 21<sup>st</sup>? Or will we follow the lead of Western European nations in criminalizing allegedly hateful, bigoted speech? It's been regulated on campus for years, producing a generation or two, so far, of potential censors.

What happens when hate speech prohibitions move off campus? The Western European experience is instructive. Penal laws against insults and various expressions of bigotry don't simply ban epithets or threats: they ban the expression of unwelcome ideas, like opposition to immigration or criticism of homosexuality as sinful.<sup>10</sup> These laws may now favor stereotypically liberal beliefs over conservative ones, but the content of speech bans is always subject to change; they reflect the ideology of people and parties in power.

What can Congress do to arrest and perhaps reverse these worrisome campus trends? It can and should monitor the Department of Education's regulatory activity, notably overbroad definitions of harassment and retaliation that virtually obliterate academic freedom and, at public universities, ignore the constitutional rights of students and faculty. Congress can consider legislation

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<sup>10</sup> <http://brendanoneill.co.uk/post/80975874876/how-a-ban-on-hate-speech-helped-the-nazis>

offering affirmative protection of speech rights to try undoing the damage already done, like legislation proposed by the Foundation for Individual Rights in Education.

But perhaps the most important thing for Congress to do legislatively is — not very much. It should be wary of enacting bad law in response to hard and heart-wrenching cases involving “bad” speech. Freedom of speech is freedom from government interference. It depends on official inaction. The history of legislation effecting speech is, in large part, a history of speech restrictions, whether justified by appeals to national security or equality and civil rights, whether aimed at suppressing ideologies presumed particularly dangerous or protecting people presumed particularly vulnerable.

“Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good, as well as by evil, men,” Justice Jackson wrote in his landmark 1943 opinion upholding the First Amendment right of students to refrain from saluting the flag.<sup>11</sup> Speech restrictions are generally well intended. They’re supposed to protect us from language and ideas considered more harmful than restrictions on expressing them. They reflect a wishful belief that censorship can be effectively cabined, a belief invariably proven wrong, as the increasing absurdity of campus censorship regimes demonstrates. Well-intended speech restrictions have unintended consequences. “Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent,” Justice Brandies observed presciently, nearly a century ago.<sup>12</sup>

What should Congress do? It should remember that liberty is a leash on power and free speech is most at risk when people in power restrict it for our own imagined good.

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<sup>11</sup> <https://www.law.cornell.edu/supremecourt/text/319/624>

<sup>12</sup> [https://www.law.cornell.edu/supremecourt/text/277/438#writing-USSC\\_CR\\_0277\\_0438\\_ZD](https://www.law.cornell.edu/supremecourt/text/277/438#writing-USSC_CR_0277_0438_ZD)