

SUPPLEMENTAL COMMENTS 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 June 10, 2015

Thank you for the opportunity to supplement my June 2, 2015 testimony before this committee. I’d like to elaborate on my brief answer to the important question posed by Congressman Franks regarding the influence of campus censorship, dating back 20 years, on American ideals of free speech.

One widely cited poll by Internet tracker YouGov, found that “many Americans support making it a criminal offense to make public statements which would stir up hatred against particular groups of people.” 41% of Americans, including 51% of Democrats, support criminalizing hate speech, with 37%, including 47% of Republicans, opposed.”¹

It’s difficult to gauge the accuracy of these findings, but there is ample anecdotal evidence of a trend toward a Western European approach to regulating and even criminalizing “hate speech.” A dramatic, recent example is the Montana prosecution of David Lenio for anti-Semitic speech, cited by Eugene Volokh in the *Washington Post*.² Lenio’s remarks

¹ <https://today.yougov.com/news/2015/05/20/hate-speech/>

² <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/hate-speech-prosecution-in-montana/>

were vicious, and Volokh notes, could conceivably have been considered threats, but he has been charged with exposing Jews “to hatred, contempt, ridicule, degradation, or disgrace.” There’s no question that a conviction in this case, upheld on appeal, would reverse decades of First Amendment jurisprudence. As Volokh warns:

(T)he prosecutor has interpreted the Montana criminal defamation statute in a way that I don’t think any criminal defamation statute has been interpreted in decades — a way that risks criminalizing derogatory opinions as well as controversial factual statements about religious groups, racial or ethnic groups, either sex, sexual orientations, professions, political movements, and more.

Speech considerably less hateful than the speech at issue in the Lenio case is already apt to be considered harassment, subject to civil regulation, by the Department of Education.³ It has also been the subject of recent anti-bullying campaigns and local policies of breathtaking scope.

The District of Columbia “Model Bullying Prevention Policy,” for example, applies the same degree of protection from “bullying” and the same expansive restrictions on speech to 20 year-old students that it applies to grade school children.⁴ The District’s not atypical, lengthy, model definition of bullying includes any “persistent act or conduct

³ <http://www.cato.org/blog/rule-dear-colleague-letter-time-end-stealth-regulation-department-education>. And see written testimony of Greg Lukianoff before this committee, <http://judiciary.house.gov/cache/files/cb2a2b82-2c21-4fa3-8a94-896c108c6b47/06022015-lukianoff-testimony.pdf>, pp. 10 – 11.

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http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/DCBullyingPreventionPolicy_PressQ_022513.pdf

whether physical, verbal, or electronic,” that may be based on any “distinguishing characteristic” (in addition to a long list of specified characteristics) and can “reasonably be predicted” to “substantially interfere” with the youth’s participation in public services, activities, or privileges. This is, of course, much broader than the Supreme Court’s definition of actionable student on student harassment, as “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”⁵

I don’t mean to dismiss the concerns of parents and educators about the taunting and torments some students endure, in school and online. I do mean to stress the corrosive effect of well-intentioned anti-bullying policies on First Amendment values. These policies carve out broad areas of unprotected insulting, demeaning, or otherwise unwelcome speech, establishing expectations of a general right to be protected from verbal offenses.

Censorship in public institutions of higher education, the subject of this hearing, exists in a cultural and regulatory context, not in isolation. It reflects a mistrust of free speech inculcated early in the educational process; it reinforces and may codify that mistrust as college and university graduates enter and begin to shape the wider world.

⁵ *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999)