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## Review Essay

# Free speech on campus

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### **Free speech on campus**

Sigal R. Ben-Porath

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### **Free speech on campus**

Erwin Chemerinsky and Howard Gillman

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In an era when a Supreme Court Justice accuses conservatives of ‘weaponizing the First Amendment’ (Liptak, 2018) and when a liberal academic berates the left for the ‘narcissism’ of identity politics (Lilla, 2016), Sigal R. Ben-Porath and the duo of Erwin Chemerinsky and Howard Gillman offer nuanced, thoughtful, and balanced books on campus freedom of speech. These authors write not only as accomplished researchers, but on the basis of broader professional experiences: as the chair of the University of Pennsylvania’s campus ‘Committee on Open Expression’ for Ben-Porath, and, in the case of Chemerinsky and Gillman, as co-teachers of an undergraduate seminar on free speech at the University of California, Irvine.

Each of these books is striking for its empathy. No doubt because the authors have dealt with the complicated tradeoffs between protecting free speech and limiting the harms of hateful speech on their own campuses, they are able to understand the multiple stances in these debates extremely well. In the end, the two books stake out quite similar positions, grounded in the American legal conception of robust protections for free speech. They do so, however, without the closed-minded finger-wagging commonly associated with critics of university speech restrictions. Moreover, they supplement their speech-protective positions with



policy suggestions for ‘inclusion’ on campus. Even if you disagree with elements of their free speech advocacy, their empathy with the targets of hate speech invites a dialogue rather than the shouting match that frequently accompanies these discussions.

Ben-Porath’s short book focuses on developing the concept of ‘inclusive freedom’ as a framework within which to overcome tensions roiling many colleges and universities. The inclusive freedom perspective ‘takes seriously the importance of a free and open exchange as a necessary condition for the pursuit of knowledge and as a contributing condition to the development of civic and democratic capacities’ (p. 37). At the same time, it also stresses that respect, recognition, and being heard are critical to realizing the goal of a free and open campus.

On the freedom side of the equation, Ben-Porath comes out strongly against calls for censoring speakers or events. She argues that colleges should encourage all students to express their views and ‘even rebel,’ by teaching students how to ‘productively respond to speech that they find offensive rather than to look for ways to shut it down’ (p. 44). Her logic is grounded in a concern about ‘false equivalencies.’ If speech directed against African-Americans can be restricted, she worries, calls to limit speech viewed as anti-white may soon follow (p. 61).

Ben-Porath acknowledges that some speech can be particularly painful. It can cause ‘harm to dignity’ of the type identified by Jeremy Waldron (pp. 57–59); or it can entrench what Miranda Fricker calls ‘epistemic injustice,’ which ‘occurs when knowledge and perspective are not recognized as valid because the identity of the speaker as a knower is put into question’ (p. 60). Limiting these types of harms is easier within the classroom setting, and harder – but not necessarily impossible – on the broader campus. Ben-Porath gives the example of student protests against racism at the University of Missouri that successfully pressured the president to resign – although one wonders who is empowered to determine whether the harms and injustices are severe enough to justify this kind of pressure. One point Ben-Porath emphasizes strongly is that civility should not be a yardstick for measuring what is permissible; in her view, calls for civility tend to chill speech to an unacceptable degree.

Her concluding chapter presents a few concrete suggestions for how to handle some practical challenges. Perhaps most interestingly, the University of Pennsylvania has developed a system of ‘free speech monitors’ who facilitate expression both by invited speakers and by protestors during potentially contentious events. Training students how to ensure freedom of speech may be quite helpful, even if some events do not go off smoothly. These students can provide information to their peers about institutional policies, supplementing or even bypassing directives from deans, presidents, or other authority figures, who are often seen as out-of-touch with the depth of student concerns about dignitary harms.

Chemerinsky and Gillman’s book strikes many of the same notes as those of Ben-Porath. They see a strong tension developing between those who favor



protecting free speech and others who prioritize an inclusive learning environment. They also believe that both goals are achievable. Yet Chemerinsky and Gillman differ from Ben-Porath by explicitly staking out a free speech absolutist position, which they balance by providing ideas about how colleges and universities can promote inclusion in other ways. They summarize their central thesis as: ‘all ideas and views should be able to be expressed on college campuses, no matter how offensive or how uncomfortable they make people feel. But there are steps that campuses can and should take to create inclusive communities where all students feel protected’ (p. 19).

They rely on the concept of academic freedom as a basis for how to make decisions in individual cases. However, for these authors, academic freedom requires fidelity to the notion that all speech is protected outside of the classroom, subject only to legal limitations such as those against true threats, harassment, destruction of property, as well as time, manner, place restrictions. As Chemerinsky and Gillman assert, ‘Our position is absolute: campuses never can censor or punish the expression of ideas, however offensive, because otherwise they cannot perform their function of promoting inquiry, discovery, and the dissemination of new knowledge’ (pp. 19–20).

Recognizing that they are of an older generation that instinctively venerates freedom of speech, they explicitly aim to highlight its value to today’s students. They provide an accessible historical overview of the legal and academic history of free speech, demonstrating that restrictions tend to curtail the exchange of ideas and risk generating government oppression. They manage to do this without demonizing students, or by simply ordering them to ‘toughen up.’ In fact, they foreground the admirable motivations of undergraduates who oppose hate speech, and situate student resistance within the context of increasingly diverse campuses, the rapid spread of social media, internet trolling, and the US Department of Education requirements mandating equality promotion and nondiscrimination.

Although they acknowledge that hate speech can cause ‘great harm’ (p. 83) and that it inhibits an ‘inclusive learning environment’ (p. 87), Chemerinsky and Gillman take a strong stand against limiting it under almost all circumstances. They note that campus speech codes that were popular in the 1980s and 1990s were deemed impermissibly vague and overboard by courts. For them, granting authorities the power to regulate speech is more dangerous than allowing deeply offensive speech, and assert that ‘advocating the censorship or punishment of harmful or offensive speech inevitably leads groups to try to silence people merely because they have different beliefs’ (p. 73).

The authors devote chapter 5 to a list of ‘cans’ and ‘can’ts’ which lays out their vision of what is permissible on campus. For them, colleges can’t punish offensive speech, but they can punish true threats, harassment, destruction of property, and disruption of classes and campus activities; they can’t prevent protest, but they can impose time, manner, and place restrictions that allow for normal university



functions to proceed; administrators can't prohibit content-specific speech in dorms (such as a student hanging a Confederate flag in his window), but they can impose content-neutral restrictions (such as banning anything attached to a window – including flags of any stripe).

There are subtle differences in these authors' ultimate prescriptions. Both stake out what might be called a 'free speech absolutist plus' position, but Chemerinsky and Gillman emphasize the absolutist element more strongly and clearly than Ben-Porath. Yet the overarching similarities between the arguments outweigh the differences. Each set of authors favors protecting a substantial amount of campus speech. They each distinguish between what Chemerinsky and Gillman call the 'professional zone' of classrooms, scholarly gatherings, and department meetings where responsible speech and conduct can be regulated by professional norms, and the wider 'free speech zone' where all speech should be highly protected on the grounds of academic freedom. They argue that the dignitary harms that arise from hate speech require additional steps to reaffirm a campus commitment to inclusion, and they each rely on the US law as a touchstone for their stances on what campus speech to protect or restrict.

The reference point of the US law, however, is a significant limitation of these books. Chemerinsky and Gillman – both professors of law with a deep knowledge of the Constitution – advocate granting First Amendment protections to almost any speech outside of the 'professional zone' on campus. For example, they oppose the decision by the University of Oklahoma president to expel two students (and to suspend the fraternity) who led a chant among Sigma Alpha Epsilon brothers of 'There will never be a n\*\*\*\*\* at SAE, You can hang him from a tree, But he'll never sign with me.' This position is consistent with their First Amendment absolutism, yet it seems to radically undervalue the effect on African-American students who may be unwittingly assigned by instructors to work in small groups with those fraternity brothers, or who happen to live next to SAE recruits who seek membership in an openly racist organization.

Ben-Porath's reliance on principles embedded in the US law is often more implicit than Chemerinsky and Gillman's, but her use of case examples suggests that her perspective is quite similar to theirs. She criticizes the decision by the Williams College president to stop a speaker engaged in 'hate speech' for not recognizing or accepting that hate speech is protected speech (p. 24) and she denounces the shouting down of Charles Murray at Middlebury College.

Yet Ben-Porath also announces general principles that sit uneasily with her robust defense of free speech protections in individual cases. For example, she asserts that 'when the challenges presented to a student are based not on shaking her beliefs or views but rather on undermining her dignity and questioning whether she belongs in the institution altogether – especially as a member of an identity group – this can damage not only her sense of well-being but also the ability of others to hear her and evaluate her views' (p. 76). Activists engaged in the



Middlebury College protest prevented Murray from speaking to his audience precisely because they believed his presence directly undermined their dignity and questioned whether minorities belonged at the institution. One could easily picture students across the nation quoting some of Ben-Porath's principles to justify a wide array of speech-restrictive actions.

Of course, no single book can map specific solutions to every clash between advocates of maximal freedom of expression and proponents of inclusion that favor greater speech restrictions on campus. Yet by grounding their positions so heavily in an American legal tradition, both of these books miss a chance to explore whether alternative standards that prevail in other liberal democracies might work on the US campuses.

European jurisdictions in particular have longstanding prohibitions against specific forms of hate speech. These arose out of precisely the balancing acts that American campuses are engaged in today; namely, striving to uphold human dignity and maintain community cohesion while preserving freedom of expression. Many European countries' laws restrict insult, defamation, and provocation to hatred on the grounds that protecting these specific forms of hate speech would entail too great a sacrifice of other core values.

In French law, for example, insult is 'any outrageous expression, term of contempt, or invective' that does not involve an assertion of fact. Insult is *not* defined as anything a listener *may* believe is offensive. A typical example of racist insult is an *ad hominem* attack, such as calling someone a 'dirty Arab.' Defamation is 'an allegation or imputation of an act that offends the honor or consideration of the person or group.' It is an assertion of fact that harms an individual or group, such as 'Muslims are all terrorists.' French law also prohibits provocation to hatred against protected classes as it carries a nontrivial risk of discrimination or violence. One concrete case punished the declaration that 'France Culture is a radio station that practically belongs to the Jewish community and that permanently diffuses to Brittany its propaganda about the glory of the Jews and about the physical replacement of the Europeans....'

The authors reviewed here would strongly oppose adapting provisions like these for American campuses. Yet recognizing that these standards have been applied elsewhere for decades calls into question Chemerinsky and Gillman's contention that 'granting governments the power to punish speakers they don't like – creates even more harm' than allowing it (p. 108). European countries have restricted speech that I would prefer be permitted. On the whole, however, they have been relatively speech-protective, while simultaneously prohibiting the aggressive use of hate speech to harm vulnerable minorities.

One might contend that the lines drawn by the US law are simply clearer than those in European jurisdictions. But there is bound to be ambiguity surrounding cases at the margins, regardless of which set of rules is in place. This is true of harassment prohibitions in the United States, just as it is for any European-style



hate speech provision. Chemerinsky and Gillman themselves object to the interpretation of harassment by the University of Oregon, which suspended a faculty member for wearing blackface to a Halloween party on the grounds that it ‘exacerbated racial tensions on campus in a way that had a disproportionate impact on students of color’ (p. 121). The fundamental problem for the US-inspired commentators is thus not that European laws are vaguer than American ones. It is that European provisions permit less (hate) speech on average than the US laws.

That is a reasonable and accurate point. But for students, scholars, and administrators who are struggling to find viable solutions to the daily challenges of upholding academic freedom while minimizing the dignitary harms of hate speech, European provisions may offer an attractive solution. Is it worth spending hundreds of thousands or millions of dollars for campuses to protect hate speech that aims to aggravate racial tensions on campus or that directly targets specific trans students for opprobrium? Does this type of speech advance knowledge and serve the academic mission of higher education any more than harassment or true threats? American laws have not cornered the marketplace of ideas about these difficult questions.

Both Ben-Porath’s and Chemerinsky and Gillman’s books are worth reading and debating. The latter is grounded in a deeper discussion of specific cases that allow students and faculty to test their own internal barometers regarding the speech they would permit, and the additional policy steps toward inclusion that they would endorse. At the same time, each of these books is too narrowly American to engage these pressing issues at the highest level. To truly advance our understanding of how to uphold freedom of speech while simultaneously pursuing the fight against hate speech, it is helpful to look beyond the borders of the United States for fresh ideas.

## References

- Lilla, M. (2016). The end of identity liberalism. *New York Times*, November 18.  
Liptak, A. (2018). How conservatives weaponized the first amendment. *New York Times*, June 30.