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Protected Speech and Harassment Codes on Campus

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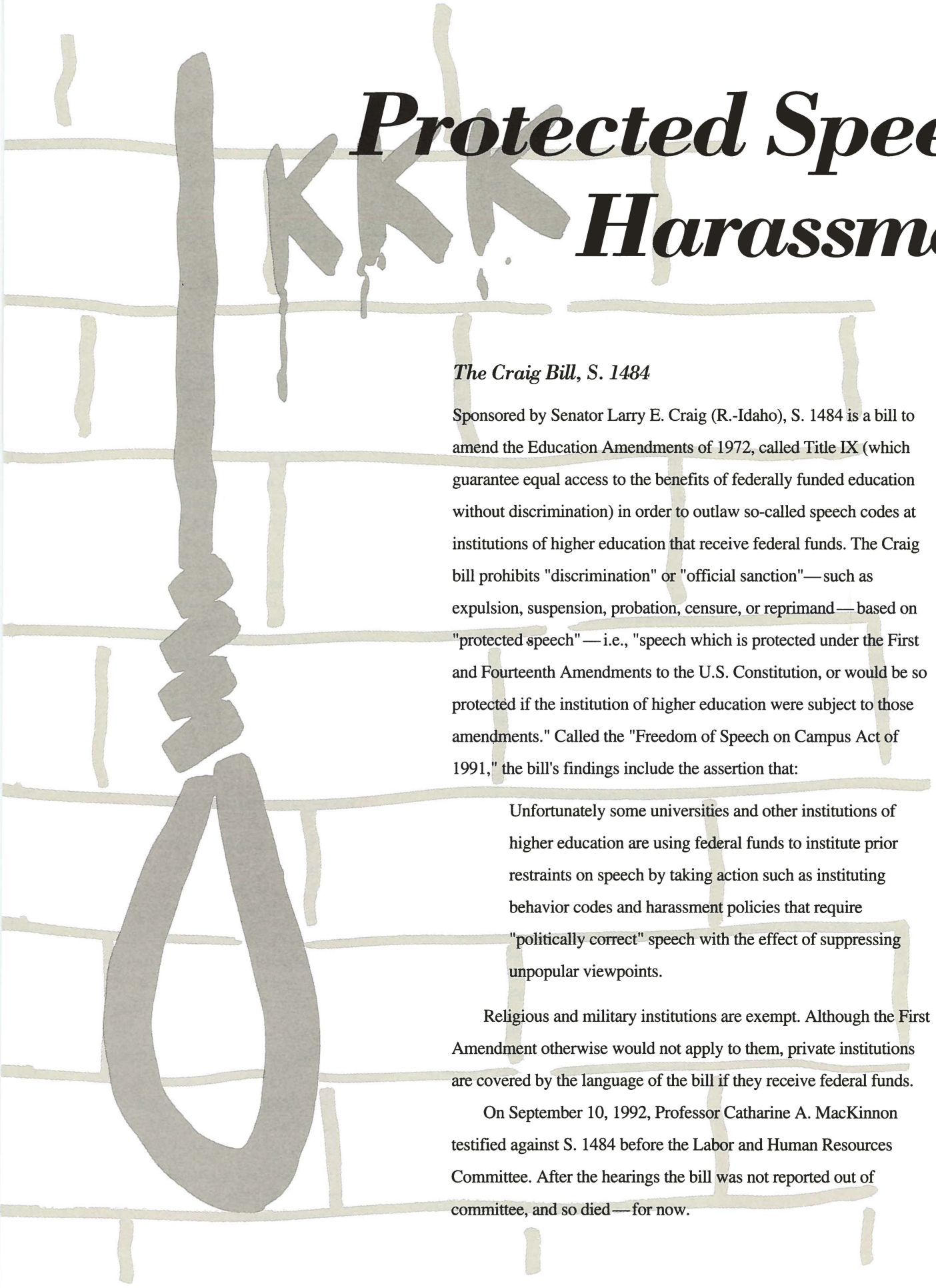


Protected Speech Harassment

The Craig Bill, S. 1484

Sponsored by Senator Larry E. Craig (R.-Idaho), S. 1484 is a bill to amend the Education Amendments of 1972, called Title IX (which guarantee equal access to the benefits of federally funded education without discrimination) in order to outlaw so-called speech codes at institutions of higher education that receive federal funds. The Craig bill prohibits "discrimination" or "official sanction"—such as expulsion, suspension, probation, censure, or reprimand—based on "protected speech"—i.e., "speech which is protected under the First and Fourteenth Amendments to the U.S. Constitution, or would be so protected if the institution of higher education were subject to those amendments." Called the "Freedom of Speech on Campus Act of 1991," the bill's findings include the assertion that:

> Unfortunately some universities and other institutions of higher education are using federal funds to institute prior restraints on speech by taking action such as instituting behavior codes and harassment policies that require "politically correct" speech with the effect of suppressing unpopular viewpoints.

Religious and military institutions are exempt. Although the First Amendment otherwise would not apply to them, private institutions are covered by the language of the bill if they receive federal funds.

On September 10, 1992, Professor Catharine A. MacKinnon testified against S. 1484 before the Labor and Human Resources Committee. After the hearings the bill was not reported out of committee, and so died—for now.

and Codes on Campus

Testimony on S. 1484 Labor and Human Resources Committee September 10, 1992

by Catharine A. MacKinnon

An important statement in the continuing controversy over "protected speech" versus the right to equal access to the benefits of federally funded education.

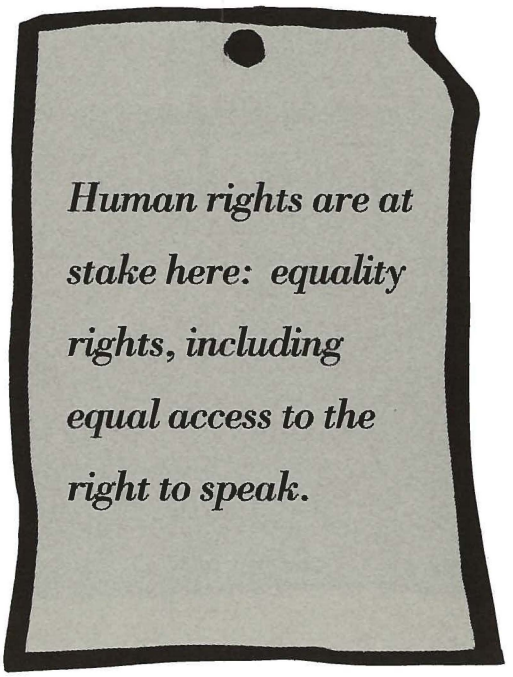
To the extent S. 1484 tracks the First Amendment, it is redundant. It will do nothing not already being done. To the extent it goes further, legislating an interpretation of the First Amendment, it arguably violates and undermines equality rights — Constitutional and statutory — that now exist to eliminate barriers to educational opportunities.

Human rights *are* at stake here: equality rights, including equal access to the right to speak.

The "purposes" section of Senator Craig's bill takes aim at so-called "speech codes" on campuses. In reality, these are policies and procedures regulating discrimination that takes expressive and other forms, voluntarily adopted in response to pressure and education for the purpose of promoting equality in university settings. S. 1484 statutorily defines these anti-discrimination grievance procedures as First Amendment violations.

The operative language of S. 1484 raises serious concern that progress in addressing racial and sexual harassment and anti-gay and lesbian bigotry on campus will be undermined. It is telling that equality — the goal of the Education Amendments of 1972 that this bill would amend — is nowhere mentioned.

Sexual harassment is emphatically construable as a "right to speech" under this bill, an "unpopular viewpoint" against which reprimands or sanctions are forbidden. Nothing in the bill provides otherwise. Suppose the words that Clarence Thomas was alleged to have said to now Professor Anita Hill were spoken by a graduate teaching assistant to an undergraduate in one of his sections and the university intervened under its procedures. This bill could cut off its federal funds. If a TA said to a student, "Sleep with me and I'll give you an A," nothing in this bill keeps these words from being rendered "speech" under this bill, protected from sanction. Pornography festivals, long traditional at some schools but now being addressed by some under discrimination codes, could readily be construed as protected speech under this bill — in spite of pornography's proven connections to devaluation of women, sexual harassment, and rape. If a "White Only" sign were posted, nothing in this bill says it is not First Amendment protected speech. Even *speech* to enforce or encourage



nondiscrimination, speech in the form of a "reprimand" for bigotry, would result in threat of loss of federal funds.

These examples make clear that the distinction between speech and conduct, largely incoherent in general, makes no sense at all in the discrimination context. When the students who spoke earlier today told of being called "fucking faggot," or of being told to "get out of the road, nigger" at school, they were asked if the perpetrators should be thrown off campus. Their schools' procedures do not do that, they responded. But the question seemed to miss the point: these assaults, and others like them, effectively threw *them* off campus and out of class. Legally adequate access to the benefits of an education has not been measured for some time by how much abuse and indignity you can stand.

Frankly, the problem with university responses to harassment has not been their excess of zeal to end this form of bigotry, but getting them to do anything about it at all. Initially, they had to be sued. As a result, Title IX was interpreted, in effect, to require schools to institute procedures to respond to well-founded allegations of sexual harassment or face potential civil litigation by its victims for sex discrimination.[1] The products of these hard-fought advances, extended to race under the aegis of Title VI, are the very "behavior codes" targeted by S. 1484. In other words, schools could face losing federal funds under one part of the Education Amendments for doing what another part requires them to do.[2]

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It was not until the last couple of years that it has even been imagined that sexual harassment, actionable as discrimination since the mid-'70s, might be protected speech. But it is not conjecture that this bill could result in framing as "speech" behavior that has previously been seen as discrimination. Courts that have considered "speech" attacks on discrimination regulations — some in my view inadequately defended by their universities — have rendered discriminatory harassment as protected speech, considering equality virtually not at all, and when they have, giving it no weight.[3] These courts have failed to follow the clear workplace precedents which have recognized the activity the policies cover as actionable for over fifteen years. Most discrimination regulations in university settings simply track the EEOC guidelines prohibiting sexual harassment as a form of discrimination in employment.[4] This bill would leave a noose hanging over a desk and KKK scrawled on the wall as discrimination at work but make it protected speech in school; or, more precisely, it would recognize it as discrimination if the desk is that of a university worker but make it protected speech if the desk is that of a university student.[5]

Courts need direction from Congress that unequal treatment will not be tolerated on the campuses they support with federal funds. This bill casts the balance in the opposite direction, suggesting that if bigoted behavior expresses a bigoted viewpoint — and when does it not? — it is protected speech. Although Senator Craig states he does not intend to restrict the ability of universities to address these problems, this bill would have that effect.

There *is* a real issue of free speech on campus here: the silencing of the disadvantaged and those excluded by the advantaged and powerful. At stake are serious consequences like respect, resources, personal security, and human dignity — issues raised, with all respect, by neither baldness nor height.[6] It is the university choosing to side *with* the relatively disadvantaged and *for* equality that is the real target of this bill.

Partly as a result of existing procedural remedies, we are beginning to hear some non-dominant voices in the academy for the first time. That they are being heard at all seems to be intolerable to vested interests. The resulting critique of "political correctness" is a backlash movement to re-establish the dominance of traditional groups and silence the speech of disadvantaged groups. It is a response of the powerful to losing a

fraction of their power over the terms of public discourse, a move to recover their ability to abuse others with impunity, including with their mouths, promoting exclusion from federally protected rights. If this bill passes, there will be less speech on campuses, not more.

One cannot learn in an atmosphere of bigotry and terror or gain access to speech without equality. Institutions condone and promote inequality when they fail to act against it. The Education Amendments, until now, have recognized this. This bill would undercut university efforts to create an open environment for inquiry and learning free of federally funded hostility, intimidation, and institutionalized privilege.

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1. *Alexander v. Yale University*, 459 F. Supp. 1 (D. Conn. 1977), *aff'd.*, 631 F.2d 178 (2d. Cir. 1980) (suggesting victim who can show an "improper advance" or another claimed injury of sexual harassment may have private right of action against qualified university under Title IX).

2. The Title IX guidelines are unambiguous on this point. "A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part." 34 C.F.R. ch. 1 § 106.1 (7-1-91 Edition).

3. *U.W.M. Post v. Board of Regents of Univ. Wisc.*, 744 F.Supp. 1163 (E.D. Wis., 1991); *Doe v. Univ. of Michigan*, 721 F.Supp. 852 (E.D. Mich., 1989).

4. 29 C.F.R. 1604.11 (EEOC Sexual Harassment Guidelines).

5. For an enlightened recent treatment of such issues at work, see *Harris v. International Paper Co.*, 765 F.Supp. 1509, 1518 (D.Me. 1991).

6. Before Professor MacKinnon began her testimony Senator Craig had been joking with the committee chairman, Senator Paul D. Wellstone (D-Minn), about politically correct speech. Craig said that on campus he could not be described as bald but rather would be "hair disadvantaged," and Wellstone noted in response that he, then, would be termed "vertically challenged" instead of "plain old short."

Professor Catharine A. MacKinnon practices and consults nationally and internationally. An influential and widely respected legal scholar, Professor MacKinnon joined the Michigan Law faculty in 1990. Her fields of concentration include constitutional law, especially sex equality, and political theory, especially Marxism and feminism.