

THE WEEKEND ESSAY

THE FUTURE OF ACADEMIC FREEDOM

*As the Israel-Hamas war provokes claims about unacceptable speech, the
ability to debate difficult subjects is in renewed peril.*

By Jeannie Suk Gersen

January 27, 2024



Illustration by Nicholas Konrad / The New Yorker

On January 2nd, after months of turmoil around Harvard's response to Hamas's attack on Israel, and weeks of turmoil around accusations of plagiarism, Claudine Gay resigned as the university's president. Any hope that this might relieve the outsized attention on Harvard proved to be illusory. The week after Gay stepped down, two congressional committees demanded documents and explanations from Harvard, on topics ranging from antisemitism, free speech, discrimination, and discipline, to admissions, donations, budgets, and legal settlements. Some at Harvard might say this is a crisis sparked by external forces: the government, donors, and the public. But it developed long before Gay became president and won't end with her fall. Over time, Harvard, like many other universities, has allowed the core academic mission of research, intellectual inquiry, and teaching to be subordinated to other values that, though important, should never have been allowed to work against it.

Sometime in the twenty-tens, it became common for students to speak of feeling unsafe when they heard things that offended them. I've been a law professor at Harvard since 2006. The first piece I wrote for *The New Yorker*, in 2014, was about students' suggestions (then shocking to me) that rape law should not be taught in the criminal-law course, because debates involving arguments for defendants, in addition to the prosecution, caused distress. At the very least, some students said, nobody should be asked in class to argue a side with which they disagree. Since then, students have asked me to excuse them from discussing or being examined on guns, gang violence, domestic violence, the death penalty, L.G.B.T.Q. issues, police brutality, kidnapping, suicide, and abortion. I have declined, because I believe the most important skill I teach is the ability to have rigorous exchanges on difficult topics, but professors across the country have agreed to similar requests.

Over the years, I learned that students had repeatedly attempted to file complaints about my classes, saying that my requiring students to articulate, or to hear classmates make, arguments they might abhor—for example, Justice Antonin Scalia saying there is no constitutional right to same-sex intimacy—was unacceptable. The administration at my law school would not allow such complaints to move forward to investigations because of its firm view that academic freedom protects reasonable pedagogical choices. But colleagues at other schools within Harvard and elsewhere feared that their administrators were using concepts of discrimination or harassment to cover classroom discussions that make someone uncomfortable. These colleagues become more and more unwilling to facilitate conversations on controversial topics, believing that university administrators might not distinguish between challenging discussions and discrimination or harassment. Even an investigation that ended with no finding of wrongdoing could eat up a year of one’s professional life and cost thousands of dollars in legal bills. (A spokesperson for Harvard University declined to comment for this story.)

The seeping of D.E.I. programs into many aspects of university life in the past decade would seem a ready-made explanation for how we got to such a point. Danielle Allen, a political philosopher and my Harvard colleague, co-chaired the university’s Presidential Task Force on Inclusion and Belonging, which produced a report, in 2018, that aimed to counter the idea that principles of D.E.I. and of academic freedom are in opposition, and put forward a vision in which both are “necessary to the pursuit of truth.” Like Allen, I consider the diversity of thought that derives from the inclusion of people of different experiences, backgrounds, and identities to be vital to an intellectual community and to democracy. But, as she observed last month in the *Washington Post*, “across the country, DEI bureaucracies have been responsible for numerous assaults on common sense.” Allen continued, “Somehow the racial reckoning of 2020 lost sight of that core goal of a culture of mutual respect with human dignity at the center. A shaming culture was embraced instead.”

Last year, students at Harvard’s public-health school discovered that Tyler VanderWeele, an epidemiology professor and a Catholic, had signed on to an amicus brief in the Supreme Court in 2015, arguing that the Constitution does not contain a federal right to same-sex marriage and that the issue should be decided by the states—a view similar to that of President Barack Obama until 2012. After some students called for VanderWeele’s firing or removal from teaching a required course, administrative leaders at the school e-mailed parts of the community explaining that it seeks “to nurture a culture of inclusion, equity, and belonging,” that everyone has a right to express their views, even though free expression “can cause deep hurt, undermine the culture of belonging, and make other members of the community feel less free and less safe.” In light of the harm and betrayal students reported because of VanderWeele’s views, the school hosted more than a dozen restorative “circle dialogue” sessions, “for people to process, share, and collectively move forward from the current place of pain.” (A spokesperson for the School of Public Health pointed out that students exercised free-speech rights when they demanded VanderWeele’s firing and said that the administration never considered disciplinary action against him.)

In 2021, Carole Hooven, a longtime Harvard lecturer on human evolutionary biology who wrote a well-reviewed book about testosterone, stated in a Fox News interview, “The facts are that there are in fact two sexes . . . male and female, and those sexes are designated by the kind of gametes we produce.” She added that “understanding the facts about biology doesn’t prevent us from treating people with respect,” and that we can “respect their gender identities and use their preferred pronouns.” The director of her department’s Diversity and Inclusion task force, a graduate student, denounced Hooven’s remarks, in a tweet, as “transphobic and harmful.” A cascade of shunning and condemnation ensued, including a petition, authored by graduate students, which implied that Hooven was a threat to student safety. Graduate students also refused to serve as teaching assistants for her previously popular course on hormones, making it difficult

for her to keep teaching it. Hooven found it untenable to remain in her job, and she retired from the department.

Students across the political spectrum, but largely liberals, have told me that they felt it would be foolish to volunteer their opinions in class discussions, or even that they routinely lied about their views when asked. These self-censorious habits became even more conscious with the rise of the #MeToo and Black Lives Matter movements, such that a large range of political remarks—questioning abortion rights, calling a fetus an “unborn child,” doubting the fairness of affirmative action, praising “color-blindness,” or asking who should compete in women’s sports—could be perceived as being on a continuum of bigotry. In this climate, it became increasingly difficult to elicit robust discussions because students were so scared of one another.

In 2021, feeling that the environment for open inquiry was dire, I helped form the Academic Freedom Alliance, a national organization that supports faculty who are threatened with penalties for their exercise of academic freedom. It defends the freedom of thought and expression in research, writing, teaching, and “extramural speech,” and provides funds for the legal defense of faculty who face official reprisals. The people whose rights we’ve defended have usually expressed views that I happen to find objectionable and even offensive. For example, the University of Pennsylvania law professor Amy Wax wrote that “the United States is better off with fewer Asians” and, on a podcast, suggested that “the spirit of liberty” may not “beat in their breast.” I wished she hadn’t said that, but I held my nose and defended her right to not to be fired or otherwise punished, which many at Penn demanded.

A year ago, I became a co-president of a new group, the Council on Academic Freedom, founded to promote “free inquiry, intellectual diversity, and civil discourse” at Harvard. That summer, Gay took office as Harvard’s president, and the group’s leaders soon met with her to press the case that academic freedom desperately needed her attention. In her inaugural speech,

in September, Gay acknowledged Harvard's "long history of exclusion" and "the weight and honor of being a 'first,' " as its first Black president. I was very relieved when she also pointedly said that the goal of intellectual inquiry is knowledge, "not comfort." She stated, "We serve that purpose best when we commit to open inquiry and freedom of expression as foundational values of our academic community. Our individual and collective capacity for discovery depends on our willingness to debate ideas; to expose and reconsider assumptions; to marshal facts and evidence; to talk and to listen with care and humility, and with the goal of deeper understanding and as seekers of truth." At that time, Gay's emphasis on free speech was at odds with the prevailing tone on campus, but she was known as a supporter of D.E.I., which dampened the risk of her words being seen as reactionary or insensitive.

The events of October 7th—and an open letter issued that day with signatures from more than thirty Harvard student groups, holding "the Israeli regime entirely responsible for all unfolding violence"—changed the terms of the academic-freedom debate. In a state of horror that fell over many people following October 7th, I was among thousands who signed a Harvard Hillel letter "unequivocally" standing "behind Israel and the Jewish people." It called on the student groups to retract the "completely wrong and deeply offensive" letter, and on Harvard's administration to condemn Hamas's terror attacks, saying that the "failure to denounce these atrocities unequivocally is a moral stain on the university and its leadership." In the following weeks, hundreds of students marched through the campus chanting slogans such as "From the river to the sea, Palestine will be free," and some protests disrupted classes and events. Students affiliated with Harvard Jews for Palestine occupied University Hall, which houses administrative offices, and which Vietnam War protesters also occupied in 1969. (The *Crimson* reported that multiple students were facing discipline for disruptions and the building occupation.) As members of the Harvard academic-freedom council feverishly shared their thoughts on our Listserv, I

saw a number of faculty—who'd signed up for an organization devoted to the idea that speech that some considered offensive should be protected—endorse the view that the anti-Israel expression we were seeing was antisemitic, and should be treated not as free speech but as harassment, threats, or incitements to violence and declared beyond the pale.

The two sides had effectively flipped: activist students, whose politics overlapped with principles of D.E.I., were engaged in speech that some faculty members, who were supportive of academic freedom, now wanted the university to treat as harmful. As large video screens on a truck in Harvard Square, sent by the right-wing media company Accuracy in Media, displayed names and faces of students and labelled them “Harvard’s Leading Antisemites,” some in my faculty academic-freedom council did not want its début to be speaking on those students’ behalf. Perhaps faculty members reasoned that the exposure was a form of harsh criticism that might be expected as a consequence of provocative speech. I was increasingly concerned about the students’ safety and about my own responsibility to stand up for their academic freedom. By then, it had dawned on me that my signature on a letter calling on the university to condemn the attack in Israel, in a moment when students were being criticized for political speech against Israel, was implicitly—or not so implicitly—urging the university to denounce its own students.

In response to calls to punish the students, Gay said, “Our University embraces a commitment to free expression. That commitment extends even to views that many of us find objectionable, even outrageous. We do not punish or sanction people for expressing such views.” This is what a university president should say. But, to many who believed that Gay would have condemned speech that offended Black or transgender people, the invocation of free speech was an outrageous permission to offend Jews, exceptionally, at Harvard. (She later did condemn the phrase “from the river to the sea.”) A lawsuit filed earlier this month, claiming that Harvard “has become a bastion of rampant anti-Jewish hatred and harassment,” accuses

the university of deliberate indifference to antisemitism, in violation of Title VI, which prohibits institutions that receive federal funding from discriminating “on the ground of race, color, or national origin.” The plaintiffs, a group of Jewish students, want a court to force Harvard to, among other things, suspend or expel students and fire employees for engaging in “antisemitic discrimination and abuse.” Resting on the assertion that “anti-Zionism is antisemitism,” the complaint describes a series of events that allegedly demonstrate that Harvard is hostile to Jews, mostly because it tolerates anti-Zionist speech.

The lawsuit claims, among other things, that Harvard should enforce its own harassment-and-bullying policies to discipline people. Understandably, many people believe that broad definitions of harassment and bullying prevail at Harvard. Yet most of the lawsuit’s descriptions of student protests, even the disruptive ones, do not appear to satisfy Harvard’s current definitions of discriminatory harassment or bullying, especially because the policies are supposed to be interpreted in light of the university’s commitment to academic freedom. The lawsuit describes a Jewish Israeli student being physically surrounded by protesters; the incident was captured in a viral video and is being investigated by law enforcement as a crime. That aside, the lawsuit appears less likely to succeed under federal anti-discrimination law, which makes it exceedingly difficult to prove an institution’s intentional discrimination, than to help move the Overton window on what can acceptably be said at a university about Israel and Palestine. (A pressure campaign against Derek Penslar, a highly respected professor of Jewish history, appears to have a similar goal. Penslar was recently appointed as co-chair of a new Harvard task force on antisemitism. Prominent critics objected, such as the former Harvard president Larry Summers, who called on Penslar to resign from the role, because of his past comments, which include the use of the word “apartheid” to describe Israel’s treatment of Palestinians.)

One reason that the disciplinary policies are drawn narrowly is so they won’t

curtail the exchange of ideas on controversial matters. When Gay was asked by the congresswoman Elise Stefanik at a hearing in December whether “calling for the genocide of Jews” violates Harvard’s policies on harassment and bullying, Gay answered that it can, “depending on the context.” That outraged many people, because there should be no context in which a call for genocide is allowed. Gay could, indeed, have said that calls for genocide are unacceptable. And, as Harvard’s leader, Gay could also have educated Congress and the public about why a university that is devoted to open inquiry must have disciplinary policies that rarely treat offensive slogans or viewpoints as tantamount to actual “calls for genocide,” and even be wary of punishing “hate speech,” which in the U.S. is also constitutionally protected. Imagine if a university had a code of conduct under which expression of the viewpoint “the State of Israel should not exist,” or “Israel’s killing of Palestinians in Gaza is justified,” or, for that matter, “George Floyd’s death had nothing to do with race,” was punishable, rather than merely subject to sharp criticism by those who disagree or feel offended. The treatment of such controversial viewpoints as discrimination, harassment, or bullying would make any semblance of open inquiry on those topics impossible.

In response to congressional demands that Gay be fired following her testimony, I was one of more than seven hundred faculty who signed a letter to the Harvard Corporation, the university’s governing body, urging it to “resist political pressures that are at odds with Harvard’s commitment to academic freedom” and not fire her. The Corporation did, at first, back Gay. What her embattled leadership couldn’t survive in the end was the drip-drip of plagiarism accusations, which allowed the public to question whether academic standards were relaxed for Gay in her rise to the presidency. Having taken office just as Harvard was defeated in the Supreme Court case that eliminated race-based affirmative action in university admissions, she became the university’s first Black president at a moment of predictably gleeful bashing of diversity. And, as the first, she was inevitably going to be associated with affirmative action, as if her presidency were a holdover of a

system that was now legally discredited. Gay was the perfect avatar for universities' alleged abandonment of excellence and meritocracy in favor of efforts to promote diversity in elite institutions. Add to this brew the accusations of antisemitism and plagiarism, and her resignation seemed overdetermined. I don't doubt that, as she wrote in the *Times*, her "inbox has been flooded with invective, including death threats," and that she "has been called the N-word more times than I care to count."

In her resignation letter, Gay wrote that, going forward, she hoped that the university "can navigate this moment of extraordinary challenge with a focus on the institution rather than any individual." Congress's continuing scrutiny of Harvard will surely bring proposals for institutional change. The House Committee on Education and the Workforce is investigating Harvard's "response to antisemitism and its failure to protect Jewish students." The House Committee on Ways and Means wrote to the current presidents of Harvard, M.I.T., the University of Pennsylvania, and Cornell that, "given the disappointing and lackluster responses by your respective universities to Hamas' attacks and your subsequent failure to adequately protect Jewish students from discrimination and harassment," the schools' nonprofit, tax-exempt status may be at risk—which puts at stake billions of dollars. The committee, dominated by Republicans, juxtaposed the alleged inaction regarding antisemitism with Harvard's alleged warning to students in a Title IX training that failing to use classmates' preferred pronouns could constitute harassment, disinvitation of a feminist philosopher for comments on transgender issues, choice not to renew the contract of an instructor who had invited Charles Murray to speak in class, and request that students remove from their dormitory window an American flag printed with an image of a saluting, bikini-clad Nicki Minaj. The point was that Harvard has no credibility in invoking free speech because it has stifled other speech it considers discriminatory.

To demonstrate that it is against antisemitism, Harvard may face pressure to expand its definitions of discrimination, harassment, and bullying, so as to

stifle more speech that is deemed offensive. In order to resist such pressures, the university needs to acknowledge that it has allowed a culture of censoriousness to develop, recommit itself to academic freedom and free speech, and rethink D.E.I. in a way that prizes the diversity of viewpoints. Though some argue that D.E.I. has enabled a surge in antisemitism, it is the pervasive influence of D.E.I. sensibilities that makes plausible the claim that universities should always treat anti-Zionist speech as antisemitism, much in the way that some have claimed that criticizing aspects of the Black Lives Matter movement—or even D.E.I. itself—is always discrimination. The post-Gay crisis has created a crossroads, where universities will be tempted to discipline objectionable speech in order to demonstrate that they are dedicated to rooting out antisemitism and Islamophobia, too. Unless we conscientiously and mindfully pull away from that path, academic freedom—which is essential to fulfilling a university’s purpose—will meet its destruction. ♦



*Jeannie Suk Gersen is a contributing writer to *The New Yorker* and a professor at Harvard Law School.*