

## COMMENT

*Danielle Holley\**

I wish to reframe conversations that we've had today by mentioning that the expressive spaces we have been talking about, whether those at Yale or Georgetown or the University of Oklahoma, or elsewhere, are all, essentially, racially isolated spaces—where Black students and other students of color are a very small part of the community and marginalized. In a racially isolated environment, the language used in these controversies has been both intentionally hurtful and unintentionally unfortunate or inartful. In both cases these are emotional words—speech making others feel as if they should disappear from the space.

Others have mentioned this reality, but I want to make sure that we are focused on the feelings and behaviors that such speech can invoke, especially in places where people are racially isolated, and there is no history of people being welcome in the space. Speech like this will actually lead a person to decide to no longer be in the space. When you disappear from the space, you have been chilled out of existence—the ultimate chilling of speech. Too often we conflate being ostracized for conservative viewpoints with discouragement from existence in a space. Too often we diminish Black students and others who would say that the speech that is delivered is actually a challenge to their existence—existence in the world or existence on a particular campus.

Start with Guido's Wall. My favorite place to study as an undergraduate at Yale was in the Yale Law School library—until we got kicked out because there were too many undergrads studying there. Until that point, we would need to walk by the Wall to get to the study space. When I would walk by the Wall, I would read many comments. Some of these said, "Black students are only here because of affirmative action," and "Black students do not have the intellectual capability to be here at Yale." These comments were protected by the freedom of speech that the Wall conferred, and as I walked on my way to study for my classes I thought, "Yes, they're made by people who have the freedom of speech,

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who I don't think should be punished in any way for that speech. I don't think that it should be unprotected." I do still think that—but we have to stop minimizing the hurtfulness. And it is not just hurtful. It is literally undermining the worth of the institution to students of all different racial backgrounds.

In this respect, I want to turn to reframing some of the examples Kevin Baine offers in his article—especially the Georgetown incident. It has been characterized as “inartful” speech by the professor.<sup>1</sup> If I have professors in the classroom who are saying that they believe that their Black students end up at the bottom of the class every semester, then it really hurts the institutional credibility of what we're trying to do. When a dean like Dean Treanor at Georgetown takes action, I don't think he's coming from this perspective of trying to silence those professors as much as he's trying to protect the institutional integrity of what they do at Georgetown Law.<sup>2</sup>

I'll add to this an example that many of us have read about: Amy Wax, the professor from the University of Pennsylvania Carey Law School (“U. Penn.” or “Penn.”). Professor Wax said that Blacks and other non-Western groups harbor resentment, shame, and envy against Western people for their outsized achievements or contributions.<sup>3</sup> One way to look at her speech is: “Oh, that's terrible that she would say that about our Black students and other students from non-Western backgrounds,” or “That's really hurtful that she would say that.” But what I would say as a dean is, I have a lot of students who no longer have *confidence in their institution* to have what they're entitled to: which is unbiased and fair grading. If I have a professor in the classroom saying that they believe that people who are non-Western are harboring resentments against people who are of a Western background, that is a challenge to the institutional integrity of the school. And we saw Ted Ruger try to do the same thing at Penn. as at Georgetown, so a considerable amount of administrative decision-making about these matters this is about protecting institutional integrity.

Next, I'll turn to organizations the Foundation for Individual Rights (“FIRE”), which supposedly also promotes the idea of freedom of expression on campus. I had a controversy with one of my professors, in which he was disciplined for Title IX. FIRE rushed to his defense, and it

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1. Kevin T. Baine, *Free Speech on Campus: The Attack from Within*, 51 HOFSTRA L. REV. 397, 415 (2023).

2. *Id.* at 413-15.

3. Vimal Patel, *UPenn Accuses a Law Professor of Racist Statements. Should She Be Fired?*, N.Y. TIMES, [nytimes.com/2023/03/13/us/upenn-law-professor-racism-freedom-speech.html](https://www.nytimes.com/2023/03/13/us/upenn-law-professor-racism-freedom-speech.html) [https://perma.cc/VE79-SRF8] (Mar. 24, 2023).

was a decision that I didn't make. It was made at the University level, by the Title IX office. But it was widely publicized in many places, and FIRE came to his defense.

What I received in response were approximately 1,000 emails supposedly defending freedom of expression. Most of them said, "This is the reason why Howard should not have a law school, because Black students and Black faculty are intolerant and unable to do the high-level processing that is needed to run and have a law school." These emails in my view were not sent in an effort to support freedom of expression. These were sent to lodge arguments about freedom of expression to cover for good, old-fashioned racism.

There is a penchant to dismiss the speech of Black students, of students who are a minority, and of LGBTQ as not being *actual speech*. So when discussions of confrontations with law school speakers take place, the frame too often is "This controversial conservative speaker came to class, came to the campus. We fully recognize that as speech." However, the minute that it turns to student protest or student activism, or even a faculty member, saying, "I believe this or that speaker is not worth bringing to campus," that is considered to be low value speech.

Too often you hear simple comments like, "We believe that what this speaker said is racist," or "We believe that what this speaker said is sexist," or "We believe what the speaker said is transphobic or homophobic." What is heard by opponents is: "I want you to stop the speech." A leap is made from a criticism that you can either agree with or disagree with to the characterization of that speech as trying to stop the speaker from speaking. It is okay, and equally valuable speech, for someone to hear a comment of a speaker or someone else in their environment, and then to characterize that speech as racist. That is also speech.

Turn to the summer of 2020 when America experienced perhaps the longest protest period in its history after the killing of George Floyd. Activities and behavior that lie at the heart of the First Amendment were characterized—and I'm now referring to news reports—as intolerant, threatening, scary, and not sophisticated thought. Why? Because that speech was seen as coming from the margins. It was seen by many as coming from marginalized people, and, therefore, less valuable for many people than the speech of Richard Spencer or other conservative speakers who came to campus.

It is important that we recognize that greater than the threat of the idea that some students will want to protest conservative speakers is the real censorship that is happening in many states and not just Florida. Thirteen states have already passed what they are calling, "anti-critical

race theory bills,” which are simply forms of censorship coming from the government: far more suppression of speech is coming from government than from private students asking for a speaker not to speak. In an era in which we are seeing this kind of censorship, it is important for leaders in higher education to focus on this question. It is not that the questions that we focus on here are unimportant, but that as academics, as students, and as supporters of the First Amendment, it would be a mistake not to spend our time focused on challenging outright attempts at censorship and book banning.

There is a professor at the University of Tennessee College of Law who was asked to erase the word “race” from a legal research class syllabus to escape attempts by the State to examine the contents of that class. That is a very serious challenge to our basic person and human values and rights.

In terms of our First Amendment rights, we need to become very focused on the real issues that we are facing at this time.