COMMENT

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Guido has played an outsized role in my life, as a professor when I was a law student, as the judge I clerked for after graduating, as a mentor to me when I decided to become a legal academic and a law school dean, and as a role model for how to integrate a deeply held and deeply informed faith with a career in the legal profession and in the academy. I'm so grateful to him and congratulate him and Norman Silber on the publication of his remarkable oral history, part of which inspired today's panel. I have both volumes at home and recently quoted it to my own senior leadership team at Seattle University.

The three papers I have been asked to discuss lay out a range of views on the question of freedom of speech on campus. One end of the spectrum, articulated by Thomas Healy, argues that those concerned about student skepticism about free speech "betray their own creeping conservatism."[1] The kids are alright, he argues, and their views on the merits of freedom of expression reflects the normal generational skepticism of the young towards the shibboleths of their elders and offers an opportunity for intergenerational engagement.[2] In contrast, Kevin Baine and Frederick Lawrence exhibit more concern about attitudes towards free speech on campus, but they offer somewhat divergent visions of what campus speech is for and what it should look like.[3]

I should say at the outset that, like Healy, I have sometimes been tempted to express skepticism about the gravity of the "speech problem," if only because so much of the noise around campus speech in recent years has reeked of political opportunism. He does a nice job of debunking some stories of supposed speech suppression that—on further

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1. Thomas Healy, *The Kids Are Alright*, 51 HOFSTRA L. REV. 439, 442 (2023).
2. *See id.*
3. Kevin T. Baine, *Free Speech on Campus: The Attack from Within*, 51 HOFSTRA L. REV. 397, 407-08 (2023); Frederick M. Lawrence, *"The Remedy to Be Applied Is More Speech": Rights, Responsibilities, and Obligations of Free Expression at Law Schools*, 51 HOFSTRA L. REV. 419, 428-29 (2023).

inspection—look like excellent examples of the kind of engagement that freedom of speech is supposed to encourage.

In addition to the unfortunate tendency of some campus critics to conflate nondisruptive expressions of disagreement with censorship, it can be challenging to ignore the fact that many of the same critics who—as recently as three years ago—were clutching their pearls over threats to freedom of speech on college campuses are now actively seeking to suppress speech they dislike in the form of bans on so-called "Critical Race Theory."

As alarming as these laws are, the legal theories being used to defend them are more so. Florida's lawyers have been defending the Stop WOKE Act by asserting in court that professors at state universities, as public employees, do not have any rights of academic freedom vis-à-vis the state.[4] They have insisted that there is "no . . . right to academic freedom," and that, in the Stop WOKE Act, the government of Florida "has simply chosen to regulate its own speech."[5]

I think we need to acknowledge that multiple things can be true about campus speech at the same time. It can be true—and I would argue that it is true—that the gravest threats to campus speech currently come from off campus. But, at the same time, it can *also* be true that there are problems with the culture of speech on campus that we should acknowledge and address.

What are those problems? For starters, there are problems with the range of views typically expressed on campus. Specifically, there are very few conservative voices on many university campuses. This phenomenon has the effect of detaching the content of campus discourse from the world off campus in ways that are not particularly healthy for our educational missions, something I will return to again shortly.

Second, there *are* significant voices on campus, primarily from the left, that expressly reject values of free speech and robust intellectual debate, and not just for categories like "hate speech." Last year, a department chair at Williams College said that "[t]his idea of intellectual debate and rigor as the pinnacle of intellectualism comes from a world in which white men dominated."[6]

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4. Defendants' Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 16-18, Pernell v. Florida Bd. of Governors of the State Univ. Sys., No. 4:22-cv-304-MW-MAF, (N.D. Fla. Sept. 22, 2022).

5. *Id.* at 2, 16-18.

6. Michael Powell, *M.I.T.'s Choice of Lecturer Ignited Criticism. So Did Its Decision to Cancel.*, N.Y. TIMES (Oct. 20, 2021), https://www.nytimes.com/2021/10/20/us/dorian-abbot-mit.html [https://perma.cc/G6W9-FUFG].

Third, and perhaps for reasons relating to the first two problems, many universities have failed sufficiently to protect the academic freedom or freedom of expression of students and faculty who have expressed controversial views. And there is an ideological dimension to controversy-aversion. Because of the relatively small numbers of conservatives on campus, conservative views that would be well within the mainstream off campus can prove extremely controversial when expressed on campus. For those of us who care about the survival of a culture of inquiry and debate that is essential to the academic enterprise, we need to avoid the temptation to let ourselves off the hook simply because of the bad faith of people like Ron DeSantis, Tucker Carlson, or Christopher Rufo. But we also need to consider very carefully what the protection of a culture of free expression on campus requires of us . . . and what it does not.

In that spirit, and in the short time that remains for me, I'd like to consider two very different models of campus discourse offered in Kevin Baine and Frederick Lawrence's papers. Kevin Baine describes and endorses aspects of what I take to be the prevailing model of campus speech among free-speech advocates, which I will call the Chicago model.[7] The Chicago model is focused on maximally protecting space for expression and the maintenance of a robust "marketplace of ideas."

One important feature of the Chicago model commits the university and university administrators to exhibit strict neutrality on controversial questions, never allowing them to assert substantive positions except as necessary to maintain the aforementioned marketplace. The quintessential expression of this position was articulated by the 1967 Kalven Committee. As the committee put it, and I quote, "[t]here is no mechanism by which [the university] can reach a collective position without inhibiting that full freedom of dissent on which it thrives . . . . [I]f it takes collective action, therefore, it does so at the price of censuring any minority who do not agree with the view adopted."[8]

Frederick Lawrence presents an alternative—and to my mind, more attractive—model of campus speech and the role of the university, one that takes seriously the university's responsibilities for student formation.[9] I will call this the Calabresi model, in Guido's honor, since Lawrence describes Guido as a proud defender and able practitioner of this approach. Like the Chicago model, the Calabresi model aims to

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7. Baine, *supra* note 3 at 404, 409-10.

8. *Kalven Committee: Report on the University's Role in Political and Social Action*, U. CHI., https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf [https://perma.cc/2XWH-PXWG] (last visited Apr. 1, 2023).

9. Lawrence, *supra* note 3 at 428-30.

robustly protect the freedom of expression for university community members. But—in contrast to the Kalvin Committee/Chicago model—it permits the university and university administrators to use what Guido has called "the Bully pulpit," to express substantive positions on controversial issues, even to the extent of criticizing the speech of community members whose speech the university has nevertheless allowed to occur out of respect for the expressive freedom on which university life depends.

As Guido describes in his oral history, on more than one occasion during his time as Dean at Yale Law School, he refused to suppress controversial speech of which he deeply disapproved, but in those instances he routinely used his bully pulpit to criticize the controversial speech or speakers, and to articulate the harm to community members that he saw their speech as perpetrating.

On more than one occasion, he joined picketers and protesters of the very speeches and speakers he had refused to suppress. Guido's actions drew criticism at the time from Professor Peter Schuck, who—channeling the Chicago model—asserted that administrators should remain silent and neutral, lest they suggest an institutional orthodoxy that might chill the speech of dissenting community members.[10] On this view, Guido's actions in expressing a viewpoint, even as he unequivocally protected the expressive freedom of those he was criticizing, were antithetical to the truth-seeking function of the university.

As the president of a Jesuit university, I have a particular interest in this line of criticism. Like the Calabresi model, the Jesuit model of higher education puts the student's formation at the center of our self-understanding. Although I don't have time to develop this argument fully, I should point out that focusing on student formation and education, in my opinion, justifies constraints on speech that go beyond what the First Amendment would allow. Limitations on hate speech and requirements around civility strike me as defensible in an educational setting and capable of being enforced in ways that still make ample room for free academic inquiry. But I'll limit myself in the short time I have left to the question of the affirmative articulation of substantive values by the university and its leaders.

At Jesuit universities, we understand fidelity to our educational mission to require the institutional articulation of substantive values, including, for example, the dignity of all human beings, our duties to care for our common home, the earth, and our obligations towards our fellow

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10. 2 NORMAN I. SILBER, *Conflict, Community, and Confidence: The Wall, in* OUTSIDE IN: THE ORAL HISTORY OF GUIDO CALABRESI 112 (2023).

human beings, particularly those at the margins. And we understand these values to commit us, institutionally, to taking certain actions, such as fostering a campus environment that is environmentally sustainable and that promotes inclusion and belonging.

Most of the time, those values and the actions by which we manifest them are not sources of controversy. But sometimes—and increasingly in recent years—they can occasionally get sucked into political arguments. Even while Jesuit universities and other mission-driven institutions of higher learning have substantive institutional values, we are also committed to the fearless pursuit of truth, to academic excellence, and to the expressive and academic freedom on which both of those projects depend. Our commitment to seeking the truth requires us to respect the freedom of community members to criticize the university's substantive values as well as the way in which the university's leadership understands, articulates, and attempts to live out those values.

The Kalven/Schuck position suggests this practice of espousing substantive values while purporting to make room for robust freedom of expression is a practical contradiction. But, like Guido, I think the Kalven report's pessimism is unfounded. To understand why, let's consider one example: Seattle University's decision to become carbon neutral and to divest from fossil fuels.

The Chicago Model would seem to rule out the permissibility of these sorts of collective university actions and university statements that defend and promote them. Climate change is a contentious social issue. To be among the first universities to achieve carbon neutrality and to divest our endowment from fossil fuels, both of which we have committed to doing, are ways in which Seattle University expresses our deepest values as a Jesuit university. Do these institutional commitments inhibit the academic freedom of members of the Seattle University community who may disagree about climate change or about the wisdom of fossil fuel divestment? The Chicago Model would say yes, necessarily so.

But I do not think any speech-suppressive harm follows as a matter of logical or practical necessity if, at the same time we take these actions, we consistently and vigorously insist on the freedom of our community members to disagree with us, as the Calabresi Model commits us to do. Peter Schuck worried about the bully pulpit's potential to chill freedom of expression. But, as anyone who has been to a faculty meeting or student protest knows, freedom to dissent is not typically squelched merely by virtue of knowing that one's views do not align with those of "the Administration."

More significant is the chilling effect created by the significant social pressure to go along with the views that enjoy consensus support

among the faculty or among the student body, as Kevin Baine observes.[11] And there is significant empirical support for widespread self-censorship arising from this mechanism. But peer pressure and consensus exists whether or not the University administration decides to express an institutional position around some articulated core value. Rather than administrators or institutions censoring ourselves or turning our backs on our stated values, we should address the problem of peer pressure directly by taking affirmative steps to ensure that a plurality of perspectives are represented and feel free to express themselves within our campus discourse.

Achieving this is easier said than done, presenting its own practical and political challenges. I certainly have thought about the question of how to accomplish it. One easy thing we can do to help create the reality we want to see on our campuses is to talk about the importance of civil disagreement and about the discursive virtues of listening generously and speaking courageously. If we promote the idea that campuses are a place for practicing and teaching civil disagreement, and if we do so early and often, we can soften the soil for the steps we need to take when confronted with calls to de-platform or sanction people merely because of their point of view or the position they have expressed.

One of the hallmarks of Jesuit education and spirituality is repetition. The hope is that the repetition of an important point will help it to sink in. Following that model, I have been talking about different versions of this issue at every opportunity. Even if my remarks on some occasion—such as an admitted student gathering—are primarily about something else, I try to find a way to work in some reference to the virtues of disagreement and the unique role of civil disagreement in the intellectual life of a university.

A second way to help our campuses become more friendly to civil disagreement is to be thoughtful about the speakers we invite. We tend to be attentive to diversity of identity in speaker selection or panel composition, for example. But how often are we attentive to viewpoint diversity? The occasional controversy over conservative speakers on campus points towards a third thing we can do to foster a climate that is conducive to civil discourse on campus, and that is to model civil discourse by building it directly into the format of our programming.

When I was at Cornell, we launched a series on civil discourse that brought to campus distinguished speakers to engage in conversation with one another. We deliberately paired conservatives and liberals we knew disagreed with one another but who also liked or respected each other

11. *Id.* at 107-26.

personally. Robert George engaged in conversation with Cornel West; John McWhorter spoke with Masha Gessen; and Martha Nussbaum spoke with George Will. The conversations were uniformly well attended and well received. Interestingly, no one ever protested or disrupted any of these talks. Students from all backgrounds who attended were guaranteed to experience views they agreed with and disagreed with at these events. They also experienced two people who deeply disagreed with one another, discussing those topics in a very good-natured, respectful way.