

INTRODUCTION: FREEDOM OF EXPRESSION AT AMERICAN LAW SCHOOLS

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The participants in this Symposium Issue disagree about many things—but not about whether the boundaries for permissible expression at law schools today are in a state of flux. Amid challenges both familiar and new, law school deans and administrators are being pressed to reevaluate or reaffirm their traditional policies and practices.

At schools across the country, faculty and students are challenged, chastised, and chilled. Within the past year, the dean of Stanford Law School issued an apology to a Federal Court of Appeals judge for the behavior of students, who heckled him in protest of his anti-LGBT activism, and she also suspended an administrator who spoke at the event.¹ A professor at Georgetown Law School resigned from his teaching position after being investigated by the school’s Office of Institutional Diversity for remarks that were interpreted by students as racist.² A faculty committee at the University of Pennsylvania called for the review of tenure procedures to “balance academic freedom and tenure protections with sanctions” against “faculty misbehaviors,” amid efforts to revoke the tenure of a law professor for her speech uttered both inside and

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1. Scott Jaschik, *Stanford Apologizes After Students Heckle Judge*, INSIDE HIGHER ED (Mar. 13, 2023), <https://www.insidehighered.com/news/2023/03/13/stanford-apologizes-after-students-heckle-judge> [<https://perma.cc/YE6X-MDPC>].

2. *Ilya Shapiro Resignation Letter to Georgetown University Law Center*, June 6, 2022, FIRE, <https://www.thefire.org/research-learn/ilya-shapiro-resignation-letter-georgetown-university-law-center-june-6-2022> [<https://perma.cc/45N8-7Z6W>] (last visited Apr. 1, 2023).

outside of classes.³ Law schools also have been affected by restrictions imposed by legislators, including in Florida where the legislature made politically motivated tenure denials easier at public schools including law schools.⁴

Efforts to restrain speech and expression at law schools are hardly novel. Approximately a century ago, the Tennessee legislature tried to prohibit the teaching of evolution in educational institutions, including law schools; and during the same time period, Professor Zechariah Chafee stood trial at Harvard to defend his tenure against charges of subversive teaching.⁵ Approximately seventy years ago, Vern Countryman, a brilliant Yale Law School faculty member, saw his tenure prospects dim when he criticized “Unamerican Activities” investigations.⁶ Approximately sixty years ago, law school graduates failed admission to the bar or were denied government employment because they engaged in unruly protests or subscribed to allegedly subversive publications.⁷ Approximately half a century ago, protesters at Berkeley and other schools placed their careers in jeopardy by organizing anti-war and civil rights sit-ins and campus-wide strikes that blocked entrances and made it impossible to teach.⁸

The occasion for this Symposium arises from studying free speech controversies that happened at Yale Law School approximately forty years ago, when students argued—at times uncivilly—about matters of

3. Camellia Bui & Elea Castiglione, *Faculty Senate Committee Recommends Review of Policies Related to Tenure Protections*, DAILY PENNSYLVANIAN (Mar. 2, 2023, 11:23 PM), <https://www.thedp.com/article/2023/02/penn-tenure-policies-academic-freedom-amy-wax> [<https://perma.cc/8WWZ-SFQ6>].

4. Divya Kumar, *Review of Tenured Faculty, Accreditation Policy Change Signed into Law by DeSantis*, MIAMI HERALD, <https://www.miamiherald.com/article260550802.html> [<https://perma.cc/Y6FP-PGSK>] (Apr. 19, 2022, 2:46 PM).

5. Peter H. Irons, “Fighting Fair”: Zechariah Chafee, Jr., *The Department of Justice, and the “Trial at the Harvard Club,”* 94 HARV. L. REV. 1205, 1219-20 (1981).

6. VERN COUNTRYMAN, UN-AMERICAN ACTIVITIES IN THE STATE OF WASHINGTON: THE WORK OF THE CANWELL COMMITTEE (1951).

7. Tom Griffin, *Emotions Still Run High Over Red Scare Firings*, UNIV. WASH. MAG. (Mar. 1, 1998), <https://magazine.washington.edu/emotions-still-run-high-over-firings-during-red-scare> [<https://perma.cc/L3MH-QA57>]. See generally COUNTRYMAN, *supra* note 6. Countryman was denied tenure principally because the President of the University disapproved of the book.

8. Karen Aichinger, *Berkeley Free Speech Movement*, FREE SPEECH CTR. <https://www.mtsu.edu/first-amendment/article/1042/berkeley-free-speech-movement> [<https://perma.cc/P28C-K9TQ>] (last visited Apr. 1, 2023).

national and local importance.⁹ Sparks flew over racist and anti-Semitic speakers, and about hateful slurs written on walls.¹⁰ Heated exchanges happened during labor disturbances.¹¹ Confrontations were provoked by a “Potter Stewart” pornography film festival that took place in the law school auditorium.¹²

Instead of addressing disruptions like these as threats to the learning environment at the law school, the sitting dean, Guido Calabresi, approached them as pedagogical opportunities.¹³ To Guido, they presented teachable moments for instilling values—about retaining civility while demanding justice; about hearing unpopular views without giving offense to audiences; about encouraging liberty without endorsing bigotry. Toward this end, Guido set aside a wall in the main corridor of the school to encourage students to instrumentalize the marketplace of ideas, an experiment to institutionalize liberal ideals in service to the mission of legal education.¹⁴

With Guido’s historical narrative in mind, and as a common point of reference, the *Law Review* reached out to deans, legal scholars, and practitioners to address freedom of expression at law schools today. Conferences and symposia have addressed the general subject previously,¹⁵ but few if any have been dedicated, as this one, to legal education in particular.

The format of this published version of the in-person Symposium consists of two sections. The first is published here as “Speech and Civility.” It includes presentations by Kevin T. Baine, Frederick M. Lawrence, and Thomas Healy, followed by comments and reflections about these presentations from Guido Calabresi, Eduardo Peñalver, and Danielle Holley, as well as a book review by Matthew W. Finkin.¹⁶

9. 2 NORMAN I. SILBER, *Conflict, Community, and Confidence: The Wall, in* OUTSIDE IN: THE ORAL HISTORY OF GUIDO CALABRESI 107-26 (2023).

10. *Id.* at 123.

11. *Id.* at 119-20.

12. *Id.* at 120-21.

13. *Id.* at 119-20.

14. *See generally id.* (discussing how The Wall at Yale was used by students).

15. *Academic Freedom Conference*, STAN., <https://cli.stanford.edu/events/conference-symposium/academic-freedom-conference> [<https://perma.cc/C5DS-5TCY>] (last visited Apr. 1, 2023); *Freedom of Expression Scholars Conference*, YALE L. SCH., <https://law.yale.edu/isp/about/initiatives/floyd-abrams-institute-freedom-expression/freedom-expression-scholars-conference> [<https://perma.cc/N2LW-DQJK>] (last visited Apr. 1, 2023) (listing the participants and presentations at the conference for the past ten years); *#SpeechMatters Conference*, U.C., <https://freespeechcenter.universityofcalifornia.edu/programs-and-resources/speechmatters> [<https://perma.cc/LQ34-RGDY>] (last visited Apr. 1, 2023).

16. Professor David Rabban, Distinguished Professor of Law at the University of Texas–Austin, also participated. His remarks are not included here.

In *Free Speech on Campus: The Attack from Within*, Kevin Baine takes the view that although speech controversies on campus are not new, they have grown in recent years as a reflection of “skepticism about the liberal ideal of freedom of speech itself.”¹⁷ This skepticism has arisen chiefly on parts of the American left, he states, with unfortunate consequences including the imposition of “tyranny of the prevailing opinion and feeling” and “the pressure of social conformity,” phenomena that have further weakened law school free speech norms.¹⁸ He designates the worldview he opposes as “critical speech theory,” which “sees speech that conflicts with the goal of social justice and says it should be suppressed,” because it “is not only a means to pursue knowledge and truth, but also a weapon wielded by the powerful to subjugate the oppressed.”¹⁹ Examining particular instances, Mr. Baine rejects the “critical speech theory” construct and concludes that the liberal ideal must be upheld by those who seek social justice: “no argument for social justice can succeed unless it wins the hearts and minds of those to whom it is addressed, [which] can only happen through persuasion—in a climate that is free of censorship, threat of punishment, and fear of social stigma.”²⁰ Mr. Baine is Senior Counsel at the law firm of Williams & Connolly. He began his legal career as a law clerk for Justice Thurgood Marshall of the United States Supreme Court.

In “*The Remedy to Be Applied Is More Speech*”: *Rights, Responsibilities, and Obligations of Free Expression at Law Schools*, Frederick Lawrence takes Guido’s Wall as a point of departure for an inquiry into present controversies and consideration of whether it might still be viable—or whether it is unwise, today—for administrators to try, as Guido did, to chill harmful speech or endorse a favored viewpoint. Professor Lawrence has some doubts.²¹ He also engages with the Supreme Court’s jurisprudence about hate speech to explore how interests in personal safety, freedom of expression, and personal dignity interrelate. Professor Lawrence is the Secretary and CEO of the Phi Beta Kappa Society; a past law dean and university president; and a Distinguished Lecturer at Georgetown Law School.

In his Article *The Kids Are Alright*, Thomas Healy pushes against backlash and “hand-wringing” over unruly law student demonstrations

17. Kevin T. Baine, *Free Speech on Campus: The Attack from Within*, 51 HOFSTRA L. REV. 397, 399 (2023).

18. *Id.*

19. *Id.* at 401-02.

20. *Id.* at 418.

21. Frederick M. Lawrence, “*The Remedy to be Applied Is More Speech*”: *The Rights, Responsibilities, and Obligations of Free Expression at Law Schools*, 51 HOFSTRA L. REV. 419, 420-22 (2023).

and instances of illiberality within law schools. Professor Healy examines the conduct of students in several episodes in which they were accused of flouting their responsibilities, and instead sees reasonable behavior.²² “When conservatives . . . respond to ‘cancel culture’ by engaging in the very same behavior they condemn—in effect indiscriminately ‘canceling’ an entire student body,” he writes, “it is hard to take them seriously [especially] when they make comments indicating that what they want is not debate that is ‘uninhibited, robust, and wide open’ but passivity and acquiescence.”²³ Professor Healy, whose book *The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America* explores the genesis of the Supreme Court’s marketplace of ideas doctrine, is a Distinguished Professor at Seton Hall Law School.²⁴

Comments and reflections on these papers follow. Guido Calabresi recalls the development of the Wall and complexities that attached to envisioning its functioning, for example the problems of defining what would be permissible even beyond First Amendment guarantees, and whether to ban anonymous speech.²⁵ Guido goes on to assert the continuing relevance of the Wall to questions of free expression today. He resists arguments against administrative neutrality based on claims that law schools today are better off eschewing instruction in moral values and sticking to narrower goals promoting career professionalism. He affirms his belief in the right of deans to protect law school communities—“to speak and to chill.”²⁶

Eduardo Peñalver considers the different models of campus discourse presented in the papers of Kevin Baine and Frederick Lawrence. He describes Mr. Baine’s model as of a “Chicago” type: focused on maximally protecting space for expression and the maintenance of a robust “marketplace of ideas.” In contrast to this model, President Peñalver labels the effort to channel expression to nurture a robust and civil and moral learning environment as “the Calabresi model.”²⁷ President Peñalver is deeply concerned about threats to free expression that have come from outside law schools. He urges us to acknowledge both that “the gravest threats to campus speech currently come from off campus,” and

22. Thomas Healy, *The Kids Are Alright*, 51 HOFSTRA L. REV. 439, 448-56 (2023).

23. *Id.* at 441.

24. THOMAS HEALY, *THE GREAT DISSSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* (2013).

25. Guido Calabresi, *Comment*, 51 HOFSTRA L. REV. 459, 460-62 (2023).

26. *Id.* at 462.

27. Eduardo Peñalver, *Comment*, 51 HOFSTRA L. REV. 465, 467-68 (2023).

that nevertheless “there are problems with the culture of speech on campus that we should acknowledge and address.”²⁸

Danielle Holley of Howard University School of Law exposes the collateral experiential damage to third parties that arises from institutionalizing a marketplace for speech and counter-speech, and illustrates her point by reference to Guido’s Wall.²⁹ She highlights several restrictions on law school speech that recently have been imposed by states—for example, “anti-Critical Race Theory” laws. She reminds her listeners and readers that in the context of audiences hearing a controversial speaker “[i]t is okay, and equally valuable speech . . . to characterize [another’s] speech as racist.”³⁰

Finally, this Symposium Issue presents a book review related to its topic. Professor Matthew W. Finkin, a Distinguished Professor of Law at the University of Illinois at Urbana-Champaign criticizes, in an unorthodox manner, a recent book written by Michael Bérubé and Jennifer Ruth, titled *It’s Not Free Speech: Race, Democracy, and the Future of Academic Freedom*.³¹ In their work, Professors Bérubé and Ruth propose that universities should jettison statements of principles of academic freedom contained in documents, including the *Statement of Principles on Academic Freedom of Tenure*, that are often foundational when universities work through controversies about freedom of expression.³² Professor Finkin illustrates by example his view that the results would be unpalatable.³³

The second section of the Symposium is published separately as “Law School Speech and Educational Values” and appears as Volume 51, Issue 3 of the *Law Review*. It includes articles by Professors Len Niehoff, Mary Anne Franks, and Eugene Volokh, along with comments and reflections offered by Francesca Procaccini, Robert Post, Genevieve

28. *Id.* at 466.

29. Danielle Holley, *Comment*, 51 HOFSTRA L. REV. 473, 473-74 (2023).

30. *Id.* at 475.

31. See MICHAEL BÉRUBÉ & JENNIFER RUTH, *IT’S NOT FREE SPEECH: RACE, DEMOCRACY, AND THE FUTURE OF ACADEMIC FREEDOM* 212 (2022).

32. *Id.*

33. See generally Matthew W. Finkin, *An Account of the Deliberations of the Faculty Committee on Academic Freedom and Unacceptable Speech*, 51 HOFSTRA L. REV. 477 (2023) (illustrating the potential results of following the model presented by Professors Bérubé and Ruth).

Lakier, and Erwin Chemerinsky. Their contributions are introduced in that Issue.³⁴

Difficulties setting boundaries for permissible expression at contemporary law schools reflect conflicts outside academia and differences over what legal education is and should be all about. The choice to bring together the authors in these Symposium Issues proves to be a good one if it illuminates the main problems and directs attention to underappreciated dimensions and new approaches to addressing them.

34. See generally Norman I. Silber, *Introduction: Freedom of Expression at American Law Schools*, 51 HOFSTRA L. REV. 577 (2023).