

COMMENT ON FREE SPEECH IN LAW SCHOOLS

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I. INTRODUCTION

As long as there are universities, there will be difficult issues of how to reconcile their educational mission with the desire to safeguard the speech of students and faculty. On the one hand, freedom of expression is essential for education. As the Supreme Court expressed in *Keyishian v. Board of Regents*, “academic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”¹

And yet it also is apparent that speech can interfere with education. Scholars have persuasively demonstrated that hate speech can cause serious injuries, including interfering with the learning of historically underrepresented students.² Simply put, speech is protected because it matters; if it had no effects, there would be little reason to protect it as a fundamental right. The impact can be positive or negative. Expression can advance or hinder education.

In each generation there are new calls to suppress speech on campuses, for reasons that appear noble at the time. During World War I, it was to preserve the draft and win the war. From the 1920s until the 1960s, it was to stop communism. In the 1960s and the 1970s, it was to limit anti-Vietnam War protests. Today, from the left, it is to help create

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1. 385 U.S. 589, 603 (1967).

2. See, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2320 (1989); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 133 (1982); see also NADINE STROSSEN, *HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP* (2018) (arguing for constitutional protection for hate speech).

inclusive learning environments for minority students and, from the right, to stop teaching about Critical Race Theory.

In discussing free speech in law schools, I want to make three points. First, overall free speech is thriving in law schools. Second, while law schools—or other schools or departments—should not as entities take positions, it is appropriate and desirable for individual faculty and school administrators to do so. Third, I worry about a lessening commitment to speech among some of law students and believe it is essential we teach the history of speech from early grades through law school.

II. FREE SPEECH IS THRIVING IN LAW SCHOOLS

I have been a law professor for 43 years and a dean for 15 of them. I see no indication of a crisis—or even a serious problem—concerning free speech in law schools. Rarely do we hear of law faculty or law students being punished for their expression. Events with controversial speakers occur all the time at law schools without incidents. At my law school, Berkeley Law, last semester we had controversial speakers, such as Ilya Shapiro and David Bernstein and speakers on the conflict in the Middle East. They spoke without disruption and no one outside the law school paid attention. And, of course, that is happening at law schools every day across the country.

In early 2022, there were incidents at Yale Law School and Hastings Law School where speakers were shouted down. Both Professor Volokh and Professor Niehoff in their papers mention these occurrences.³ And since this symposium, a nationally reported incident occurred at Stanford Law School. I share their condemnation of the actions of these students. There is no First Amendment—or more generally, no free speech right—to use speech to shout down and silence others. Such behavior is incompatible with a university's commitment that all ideas and views can be expressed.

But it must be remembered that these incidents received headlines precisely because they were extraordinary and disturbing. It would be wrong to generalize from these events and come to conclusions about speech in law schools.

My sense of law schools is that the vast majority have a large number of speakers a year, from across an ideological spectrum. Students

3. Eugene Volokh, *Free Speech Rules, Free Speech Culture, and Legal Education*, 51 HOFSTRA L. REV. 629, 640, 641 n.22 (2023); Len Niehoff, *Terrible Freedom, Ambiguous Authenticity, and the Pragmatism of the Endangered: Why Free Speech in Law School Gets Complicated*, 51 HOFSTRA L. REV. 583, 585, 604 (2023).

and faculty engage in speech in and out of the classroom more than ever before because of the existence of social media to convey ideas.

I do not, though, want to paint too rosy a picture. I have many concerns and will briefly mention two. First, laws that have been adopted in several states that ban the teaching of Critical Race Theory are inimical to freedom of speech. In September 2020, the Trump administration's Director of the Office of Management and Budget, Russell Vought, sent a letter to all federal agencies:

All agencies are directed to begin to identify all contracts or other agency spending related to any training on "critical race theory," "white privilege," or any other training or propaganda effort that teaches or suggests either (1) that the United States is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil.⁴

The memo continued that agencies "should begin to identify all available avenues within the law to cancel any such contracts and/or to divert Federal dollars away from these un-American propaganda training sessions."⁵

Although the Biden administration repealed this, a number of states adopted laws—some of which apply to universities, including law schools—that copy the Trump approach. Idaho, for example, adopted a law, which applies to all public schools in the state including universities, which states that

the Idaho legislature finds that the tenets . . . often found in "critical race theory" . . . exacerbate and inflame divisions on the basis of sex, race, ethnicity, religion, color, national origin, or other criteria in a way contrary to the unity of the nation and the well-being of the state of Idaho and its citizens, and prohibits public schools, including public universities, from teaching that "any sex, race, ethnicity, religion, color, or national origin is inherently superior or inferior,

which, according to the bill, is often found in "critical race theory."⁶ The law further prohibits teachings arguing that "individuals, by virtue of sex, race, ethnicity, religion, color, or national origin, are inherently

4. Matthew S. Schwartz, *Trump Tells Agencies to End Trainings on 'White Privilege' and 'Critical Race Theory,'* NPR (Sept. 5, 2020, 4:31 PM), <https://www.npr.org/2020/09/05/910053496/trump-tells-agencies-to-end-trainings-on-white-privilege-and-critical-race-theor> [<https://perma.cc/BJY8-8KAZ>].

5. *Id.*

6. *What You Need to Know About Idaho's New Critical Race Theory Law*, ABC4 (May 4, 2021, 6:44 AM), <https://www.abc4.com/news/local-news/what-you-need-to-know-about-idahos-critical-race-theory-law> [<https://perma.cc/RUA7-JQ2L>].

responsible for actions committed in the past by other members of the same sex, race, ethnicity, religion, color, or national origin.”⁷

Florida, at the urging of Governor Ron DeSantis, adopted the Stop WOKE Act. The law prohibits

workplace training or school instruction that teaches that individuals are “inherently racist, sexist, or oppressive, whether consciously or unconsciously”; that people are privileged or oppressed based on race, gender, or national origin; or that a person “bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress” over actions committed in the past by members of the same race, gender, or national origin.⁸

These laws are antithetical to freedom of speech and academic freedom. By their very terms, they limit speech. The Florida law expressly outlaws teaching about implicit bias. The statutes are vague, often leaving instructors with little sense of what they can and can’t say.

It is imperative that law faculties across the country speak out against these laws and explain why they are a grave threat to education.

A second, very different concern is how social pressure in law schools inhibits speech. I hear about this from instructors and students all the time. Students are concerned that if they express unpopular views in class discussions they will be excoriated on social media. The result is that those with views contrary to the mainstream choose to remain silent.

I saw evidence of this in teaching constitutional law. In Spring 2021, my constitutional law class was entirely online because of the COVID pandemic. I invited students to participate either by raising their hands and being called on, or by writing in the chat. The chat was set up so that only I could see the comments and I promised to read whatever was written without attribution. I received far more conservative comments, such as criticizing abortion rights or against affirmative action than ever heard in a classroom discussion. When I taught the class in-person in Spring 2022 (and again this semester, in Spring 2023), the quantity and depth of conservative comments was far less.

I do not know the solution to this. I try to address it directly and explain to the students why it is so important that all sides be expressed. I present, as forcefully as I can, the opposing position when there are not students to do so. But these techniques have limited success in

7. *Id.*

8. Katie Reilly, *Florida’s Governor Just Signed the ‘Stop Woke Act.’ Here’s What It Means for Schools and Businesses*, TIME (Apr. 22, 2022, 6:04 PM), <https://time.com/6168753/florida-stop-woke-law> [<https://perma.cc/BJY8-8KAZ>].

countering the group pressure some students feel to refrain from expressing positions that would be unpopular with many of their classmates.

III. SPEECH BY INSTITUTIONS AND SCHOOL OFFICIALS

As a dean, I have thought a great deal about when and whether institutions and school officials should speak out on controversial issues. Professor Volokh says that he would prefer schools and departments generally not take positions, and implicitly extends this to school officials.⁹

I agree with Professor Volokh that departments and schools should not as entities take positions or make statements on “controversial issues.” Faculty members, individually and collectively, can and should express their views, including on controversial issues. They, of course, may make statements and sign letters and use other methods of communication. These can be on behalf of some or even all of the members of a school or a department. But the department or school as an entity should be limited to expressing and explaining its academic policies and procedures.

For my law school, I believe that only the Regents of the University of California can take official positions on behalf of the University of California. Departments and schools are delegated authority to set their academic policies and procedures, but this does not include making statements about controversial issues on behalf of the University or its schools or departments. For example, in the Law School, faculty members may file briefs in courts on behalf of themselves or their clients, but they cannot file a brief on behalf of the University of California Berkeley School of Law or any part of it. Only the Regents can do that. Similarly, the Law School can adopt a policy (as we have) requiring all students to take a course about race and the law in order to graduate and we may explain why we have adopted that requirement. But we should not issue statements as a Law School criticizing a particular Supreme Court case no matter how much most of our faculty disagree with it.

Even if there is authority to make such statements, I think it is unwise because on controversial issues there frequently will be those within a school or department who disagree with the majority. I fear that the process of deciding when and whether the department should issue a statement frequently would be very divisive. Also, it is hard enough, especially for untenured faculty, to disagree with their more senior

9. Volokh, *supra* note 3 at 643-44, 659.

colleagues. But it is much more difficult to disagree with an official department statement on controversial issues.

I, of course, understand that faculty members often hold passionate views and that faculty often regard it as an ethical and professional responsibility to take a stand on such issues. I agree and believe that faculty should take a stand on such issues, but they should do so as individuals or groups of faculty expressing themselves. The department or school as an entity should not be taking positions.

Under First Amendment law, a distinction often is drawn between the speech of individuals and the speech of entities. I strongly support faculty members speaking out, including in jointly signed letters identifying them as members of a department or school. But I do not believe that the department or a school itself should be issuing statements on controversial issues.

By contrast, I think it appropriate for deans, provosts, and university presidents to take positions and express their views. Quite importantly, campus officials can express their commitment to freedom of speech and what that means. As Dean, I send a statement to the law school community each Fall explaining our free speech policy, including that disruptions will not be tolerated, and our commitment that we are a place where all ideas and views can be expressed.

Campus officials and other members of the campus community also have free speech rights, and they can and should condemn hateful speech when it occurs and explain why it is inimical to the desired community. There are many instances where members of the campus community have done exactly this to great success. At Bowie State University, for instance, a swastika was painted on a column on the patio of the Martin Luther King Jr. Communication Arts Center. Campus officials immediately declared,

This imagery symbolizes deep racial hatred and discrimination that go against the core values of Bowie State University. The incident is being investigated as a possible hate crime by our campus police in collaboration with Prince George's County Police. We live in a community at Bowie State that values diversity, civility, vigorous debate and scholarly discussions. The imagery that was left seemed to be hateful and as such will not be tolerated. We do not tolerate hate speech among students, faculty or staff. We support those students who have decided to rally in opposition to hate speech.¹⁰

10. ERWIN CHERMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 147 (2017) (footnote omitted).

TeAna Brown, a senior at the school, told the school newspaper that “the quick response by university officials reassured students that they are safe at Bowie State.”¹¹

“More speech” cannot undo the hurt caused by hateful speech. But a willingness of members of the campus community to speak out on behalf of the university’s core values, and to condemn speech that is inimical to them, is an important component of how campuses should deal with offensive expression. Rather than be tempted toward censorship, campus leaders should focus on strategies premised on more speech.

IV. THE WANING COMMITMENT OF SOME STUDENTS TO FREEDOM OF SPEECH

I have taught freedom of speech at both the undergraduate and law school levels for over forty years. For a number of years, I taught an undergraduate class, “Free Speech on Campus.” My sense is that over time more students have come to question the value of free speech and want to see more regulation, especially of speech they regard as undesirable.

Many factors likely account for this. Current students see the vitriol and misinformation of the internet. They see how speech can be used to bully and harass and create a hostile environment for those who have been historically excluded. Also, these students generally have not faced major efforts by the government to censor or punish speech.

But I have seen so many instances where some students’ skepticism about freedom of speech is evident. To give one example: On Wednesday, November 20, 2019, Ann Coulter spoke on the Berkeley campus. A student group had invited her. She spoke without disruption. Unfortunately, though, those protesting against Coulter harassed those going to hear her. I heard from students and saw videos of those attending being spit at, doused with water, punched, and obstructed.

The next morning, I sent the following message to all of the faculty, staff, and students at Berkeley Law:

I deeply believe that a campus should be a place where all ideas and views can be expressed. The appropriate response to speech we dislike is more speech, not disruption or harassment.

I was dismayed to learn that last night some who chose to attend Ann Coulter’s speech on campus were harassed and subjected to clearly inappropriate behavior. I was relieved that this did not prevent Ms. Coulter from speaking to a large audience, but the harassment of those wanting to attend was unacceptable.

11. *Id.* (footnote omitted).

To be clear, I think it was completely appropriate to protest against Ann Coulter. But as a law school, it is important to also express support for the right to speak and to condemn those engaged in harassment and disruption.

Although some students expressed support for my message, many did not. One student angrily told me that he felt my message was a “slap to the face.” Students posted on bulletin boards throughout the Law School: “Dean Chemerinsky sent an email after Ann Coulter’s visit. And it wasn’t in defense of students affected by hateful rhetoric.”

But I strongly disagree with those who told me that I should have objected to Coulter’s presence on campus. I would not invite her, but others have the right to do so and some on campus did that. I would not go listen to her, but others have the right to do so. And I believe that it is the responsibility of the University to protect her speech and the rights of those who want to hear her. I loathe Ann Coulter. She is hateful and has said countless ugly things about Muslims, immigrants, racial minorities, liberals, and others. In 1998, when we were regularly guests together on a CNBC program to discuss the Clinton impeachment, I told the producer I no longer would appear when she was on the show (and I wasn’t invited back). I found her rude and very unpleasant. I have adhered to that choice for over 20 years and never will appear on anything if she is present. But I will defend Coulter’s right to speak and the right of people to listen to her. I had the occasion to do just that and have taken much grief for doing so.

Actually, the story does not stop there. For a time on the Berkeley Law website, on a “racial justice” page, there was a statement from a group of leaders of some student affinity groups, that said: “this [law school] administration has defended the intellectual acceptability of white supremacist views citing First Amendment arguments.” Of course, neither I, nor anyone in my administration, ever has defended the “intellectual acceptability” of white supremacist views. I, of course, find white supremacist views abhorrent and totally unacceptable. I recognize that hateful speakers cause real harm, but the law of the First Amendment is clear that a public university cannot exclude speakers even when their views are deeply offensive. To say that the First Amendment protects the right to express a view in no way endorses the intellectual acceptability of that view.

I realize that this is not a popular message with some students and faculty right now. There are many who believe that campuses should prohibit hateful speech. But that is not the law and nor do I believe it should be. I wish that hateful messages never would be uttered, just as I

wish that Ann Coulter would just go away and be quiet. But I don't trust the government, including campus officials, to decide what messages to allow and which to prohibit. I know that the only way that my speech will be secure tomorrow is to protect the speech that I don't like today.

I have thought carefully about the students who were upset at the message I sent. I appreciate their being candid with me and sharing their feelings about this. But on reflection, I stand by what I said: a campus must be a place where all ideas and views can be expressed.

In her paper for this Symposium, Professor Mary Anne Franks expressed that law schools could take pains to acknowledge "the reality of how First Amendment doctrine has historically been applied, especially when it has tended to serve the interests of the powerful and the privileged."¹² I agree with her, but I also think it is essential that law schools teach how freedom of speech has been essential for social change, especially to protect historically discriminated against groups. The lunch counter sit-ins and civil rights protests were crucial for helping to bring about the end of Jim Crow and enforced racial segregation. The anti-war protests helped end the Vietnam War. The women's suffrage movement was integral to the adoption of the Nineteenth Amendment. And countless other examples exist of speech spurring positive social change.

V. CONCLUSION

It is important to focus on free speech in law schools, as well as on campuses more generally. Although there are inevitably difficult issues and reasons for concern, it also must be remembered that generally this is a good time for free speech in law schools, as well as in colleges and universities across the country.

12. Mary Anne Franks, *How Law Schools Can Fight for Fearless Speech*, 51 HOFSTRA L. REV. 613, 624 (2023).