

## INTRODUCTION: FREEDOM OF EXPRESSION AT AMERICAN LAW SCHOOLS

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This Issue of the *Hofstra Law Review* publishes the papers and responses that were delivered at the second session of the Symposium on Freedom of Expression at American Law Schools, held in February 2023 at the Maurice A. Deane School of Law. It is presented here as “Law School Speech and Educational Values,” and includes articles by Professors Len Niehoff, Mary Anne Franks, and Eugene Volokh, together with comments and reflections offered by Francesca Procaccini, Robert Post, Genevieve Lakier, and Erwin Chemerinsky. The earlier session, published as “Speech and Civility,” appears in Volume 51, Issue 2.<sup>1</sup>

In *Terrible Freedom, Ambiguous Authenticity, and the Pragmatism of the Endangered: Why Free Speech in Law School Gets Complicated*, Len Niehoff emphasizes “learning how to argue respectfully and persuasively,” and describes the free exchange of ideas as a necessary characteristic of the law school environment.<sup>2</sup> He probes five problems related to free expression arising on American law school campuses, including appearances by controversial guest speakers; events promoted by student groups with ideological objectives; speech uttered by faculty members

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1. The first section of the Symposium, “Speech and Civility,” is published separately in Volume 51, Issue 2 of the *Law Review*. 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, which are introduced in that Issue.

2. 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, 584 (2023).

outside of classes expressing views perceived as racist or oppressive; professors' use of offensive but topically relevant language in class; and the use of student listservs to communicate controversial information.<sup>3</sup> Professor Niehoff is a Professor from Practice at the University of Michigan Law School.

In *How Law Schools Can Fight for Fearless Speech*, Mary Anne Franks draws attention to the suppression of speech by state governments and instrumentalities of the state, and the “dystopian moment of state-sponsored censorship and broad governmental assault on educational institutions” which is the “next phase of the rightwing extremist movement that was legitimized and normalized by the Trump presidency.”<sup>4</sup> Professor Franks contends that so long as the focus of scholarly and popular attention is on “the sins of the illiberal student, the biased teacher, or the coddling administrator,” it is insufficiently trained on “the vast machinery of the State.”<sup>5</sup> Focusing her attention on government repression of speech advocated by some graduates from elite law schools, she challenges law schools to do better at instilling true respect for diversity of viewpoints and calls for them to foster resistance to state suppressions and fearless speech rather than reckless speech.<sup>6</sup> She is a Professor of Law and Michael R. Klein Distinguished Scholar Chair at University of Miami School of Law.

In *Free Speech Rules, Free Speech Culture, and Legal Education*, Eugene Volokh argues that free expression in legal academia should be championed at law schools especially, because it is an essential element in training future lawyers.<sup>7</sup> Professionals, he contends, “must make sure that their moral judgments don’t interfere with their effectively serving their clients.” Law schools, he states, “must train students to constantly consider and confront the best arguments on both sides of the question, whatever the moral merits or demerits of the two sides.”<sup>8</sup> Toward this end, he proposes practices that should be implemented at American law schools, including the execution of law school-sponsored events that model “thoughtful disagreement on controversial topics.”<sup>9</sup> Professor Volokh, a prolific advocate for freedom of speech, is a Professor of Law at the UCLA School of Law.

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3. *Id.* at 584-87.

4. Mary Anne Franks, *How Law Schools Can Fight for Fearless Speech*, 51 HOFSTRA L. REV. 613, 615 (2023).

5. *Id.* at 616.

6. *See id.* at 625-27.

7. Eugene Volokh, *Free Speech Rules, Free Speech Culture, and Legal Education*, 51 HOFSTRA L. REV. 629, 630-31 (2023).

8. *Id.* at 632-33.

9. *Id.* at 645.

Francesca Procaccini, Robert Post, Genevieve Lakier, and Erwin Chemerinsky then offer their reflections and reactions.

Francesca Procaccini appreciates and emphasizes Len Niehoff's observation that at the individual level, "free speech is a mental health issue."<sup>10</sup> Along these lines, she suggests that the difficulty at law schools today is "less one of speech suppression" and more one of "increasing temerity in voicing their opinions in both formal and informal law school settings, even when provided cover to do so, such as through Socratic questioning or mock trial."<sup>11</sup> She can also be understood to argue that student disenchantment with inculcation in the adversarial system of the law may itself be responsible for undermining free speech norms at law schools. She is a Professor of Law at Vanderbilt Law School.

Robert Post strenuously dissents from the prevalent view that the challenges surrounding expression faced at law schools should be framed in terms of freedom of speech.<sup>12</sup> He insists "that the core issue afflicting American law schools is the pedagogical question of how best to achieve our educational mission."<sup>13</sup> Examining doctrines of First Amendment jurisprudence that others consider instructive, Post rejects them all as unhelpful to understanding what the mission of law schools is and therefore how policies should be established. He seeks to demonstrate that constitutional First Amendment principles have "virtually no application to legal education."<sup>14</sup> He inquires, then, into the true nature of education and academic freedom at law schools.<sup>15</sup> While free speech protects individual rights "that are defined by the political project of democratic self-governance," academic freedom serves a very different project: it is about "communal rights."<sup>16</sup> It is to be defined by "the achievement of university objectives, which are characteristically conceptualized in terms of teaching and research."<sup>17</sup> A former dean of Yale Law School, Robert Post is a Sterling Professor of Law.

Genevieve Lakier reflects on the inter-relationship between the evolving norms of free expression and the marked changes in the shared learning environment that she has seen recently at her law school. The historic distinction between norms inside of law schools and outside of them has faded, she observes, and disrupted legal education, which has

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10. Francesca Procaccini, *Comment*, 51 HOFSTRA L. REV. 663, 666 (2023).

11. *Id.* at 663, 665.

12. Robert Post, *Comment on Freedom of Expression in American Legal Education*, 51 HOFSTRA L. REV. 667, 668 (2023).

13. *Id.*

14. *Id.* at 671.

15. *Id.* at 674-75.

16. *Id.* at 673.

17. *Id.*

traditionally flourished in “insulated communities that are different from and operate with quite different norms than the rest of the outside world.”<sup>18</sup> In the current moment, traditional equilibrium has been disturbed by outside intrusions—the “ivory tower” is no more. Law school norms, she contends, also are insufficiently recognized as necessarily two-dimensional: for some pedagogical purposes the cultivation of a marketplace of ideas is essential, while for others a regime of “strong speech discipline” is necessary. Our moment is destabilizing, with implications that are negative and also positive. The creation and transmission of knowledge has become increasingly difficult, but the traditional forms of oppression are also being challenged.<sup>19</sup> Genevieve Lakier is a Professor of Law and Distinguished Teaching Scholar at the University of Chicago School of Law.

Erwin Chemerinsky observes that for historically excluded persons, the elevation of freedom of speech has reinforced a perception of exclusion—by factors including the vitriol that pervades the internet; by bullying and harassment encouraged by extremist speech; and by the role of money to the creation of dominant narratives.<sup>20</sup> Further, the present generation of students has not, until recently, faced major efforts by the government to censor or punish speech. He contends that these historical factors have led law students to question the value of free speech and to support regulation of speech they regard as undesirable. Nonetheless an environment in which unpopular ideas can be advanced is essential at a law school, and Chemerinsky is highly critical of the view that the administration of a law school (as distinguished from administrators acting in their personal capacity) should take sides when controversial speech occurs at a school.<sup>21</sup> He is the Dean of the University of California, Berkeley School of Law.<sup>22</sup>

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The thoughts expressed in the earlier Issue apply equally to this one: the 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

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18. Genevieve Lakier, *Comment*, 51 HOFSTRA L. REV. 679, 681 (2023).

19. *See id.* at 680-83.

20. Erwin Chemerinsky, *Comment on Free Speech in Law Schools*, 51 HOFSTRA L. REV. 687, 693 (2023).

21. *Id.* at 691.

22. *Id.* at 688.

if it illuminates the main problems and directs attention to underappreciated dimensions and new approaches to addressing them.

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