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## Comment

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## COMMENT

### *Remarks of the Hon. Guido Calabresi\**

So, first, let me say that my knowledge about this is very contextual of what I did when I was Dean, and what I saw there, and I'll still be speaking to some extent in that context.

My first thought is that there is a tremendous confusion between speech and civility. We all want civility: in conversation, and in how people talk to each other. We want people to be nice to each other. But we cannot enforce civility. Trying to enforce civility, in fact, is hampering speech.

What is civil, and what is not, is viewed very differently by different people. When somebody says, "Because you are gay, you will burn in hell for eternity," that seems profoundly uncivil to many people who are gay. If a gay person says to the person who said that, "Fuck you!" that is also uncivil. And yet both are protected speech.

A university must protect both, and still try, nonetheless, to have the people talk to each other in a more civil way. That is because, as Robert Post points out in his remarks, the issue is not whether the First Amendment is violated; it is rather how universities can serve their function as places in which truth is searched for.<sup>1</sup> Now, all this is difficult because, as I have said, you can't prohibit—you can only discourage—what is uncivil. At law schools, you often have to invite persons who are uncivil or at least let students invite them, and then create an atmosphere in which they and those to whom they have been uncivil talk with each other—even if uncivilly.

If you look at many of the recent situations where people have been saying that speech has been hampered, it is often because somebody has done something that was viewed by others as uncivil, as terribly hurtful, and was answered in a very uncivil way that didn't, however, close the speech down. Yes, sometimes the objectors made noise, so that the speaker couldn't be heard, but more often the objection of the speaker

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

was, “Oh, those protestors shamed me. They said that I was terrible. They don’t want to talk to me.” Well, that’s alright—the protestors were also making their point. You know, that’s also speech.

This doesn’t mean that the institution shouldn’t try to get the people to talk civilly to each other. Of course, it should. But the issue of incivility isn’t one of freedom of speech.

Look, for instance, at one of the recent things at Yale, where some administrator said, students should be civil to each other and sensitive in what they wear on Halloween.<sup>2</sup> A college Associate Master wrote in reply, “Nonsense. Students have a right not to be civil.” Some students were insulted by that reply, and said, “Damn you!” And they used stronger words than that, to the effect of, “You, Associate Master, shouldn’t have told the other students that they could insult us.”

The Associate Master then said, “Oh, that’s terrible, they shamed me,” and she resigned in a huff, even though the University President had said her job was protected.

None of what went on was an infringement on speech! And we have to know the difference.

In the context of a law school when I was running one, I didn’t even want to be concerned with the difference between what is speech that is protected by the First Amendment and what is not. I didn’t want to get into an argument with a whole lot of law students over whether this was just over the line of pornography or not. It wasn’t worth it. In other contexts, it might be, but in that context, I said, “Anything goes, any speech goes, even when it’s not protected under the First Amendment.” This was so both because it wasn’t worth having an argument over, and because, as Robert Post makes clear, the issue isn’t the First Amendment but the interchange of views in the Academy.<sup>3</sup>

Okay. Now, we should also realize that there will always be a group of students who, because their point of view is in a majority in a school, will try to impose that point of view on others. That is, that a majority will try to forbid the speech of the minority is all too often the case. It’s the case when people in a majority in the outside world say, “You can’t teach this, that, and the other,”—from the Right. And you have a similar attitude among some inside law schools, where you sometimes have a majority of people who are from the Left trying to prohibit what *they* disagree with. That is wrong both ways. But it shouldn’t surprise us that that happens inside, just as it happens outside.

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2. Anemona Hartocollis, *Yale Lecturer Resigns After Email on Halloween Costumes*, N.Y. TIMES (Dec. 7, 2015), [www.nytimes.com/2015/12/08/us/yale-lecturer-resigns-after-email-on-halloween-costumes.html](http://www.nytimes.com/2015/12/08/us/yale-lecturer-resigns-after-email-on-halloween-costumes.html) [<https://perma.cc/QCX4-H78S>].

3. Post, *supra* note 1, at 668.

Again, if you're running a school of that sort, what you should do is say, "Be careful. You may be able to win here—not while I'm Dean, but you may sometimes be able to win here. But remember, on the outside, you're often going to be in the minority, and then you're going to pay when others impose on you what you have tried to impose on them."

And, by the way, as a dean, you also say to the minority inside the school, "Learn something from the fact that you are now a minority. It will make you better people when you get out and are a majority." I used to speak to the Federalists at Yale all the time, and tell them how much I loved them, because they were a minority. And how I hoped, when they got out and perhaps were in the majority, that they would have learned what it was like to be in the minority, from having been a minority at Yale. And they liked that. You know, if you talk that way, people like it.

Now, all this must also take into account that speech does hurt. We often act as if speech does not hurt, as if speech is not effective. Speech has always been extraordinarily hurtful. And I think if you are dealing with situations in which people are talking about speech, you have to admit that when somebody says, "You will burn in hell," that hurts. When somebody says, "Because you are a right-winger, you are [expensive] and we don't speak to you," that hurts. It is harmful.

We allow speech not because it isn't harmful, and not because it is trivial. We allow it, as Robert Post writes, for much deeper reasons.<sup>4</sup> But you have to recognize that people will be hurt, and that speech is in that sense effective.

The notion, that when you speak, it has no effect, is ridiculous. If you go back to Dante, and to Paolo and Francesca, Paolo and Francesca were reading a French novel which is why they went to bed with each other and ended up in hell. It doesn't mean you should prevent people from reading French novels. But of course, it's effective. Of course, television is effective. You have to start out recognizing that and saying, "Nonetheless, we allow it."

The most difficult issue, which has not been talked about today, is that of anonymity. To what extent, in order to protect people from some of the negative effects of their speech, do you allow their speech to be anonymous? And by the way, it is as to that—not as to whether I should have spoken as Dean—that Bob Cover and I disagreed.<sup>5</sup> Bob wanted the Wall to be anonymous. I did not.

I think finding the right answer to this problem is highly contextual. There are situations where you can only protect speakers if you let them

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4. *Id.* at 670.

5. 2 NORMAN I. SILBER, *Conflict, Community, and Confidence: The Wall, in* OUTSIDE IN: THE ORAL HISTORY OF GUIDO CALABRESI 108-09, 121 (2023).

be anonymous. There are situations that are not that way. I judged in the law school that I could convince people that they were sufficiently protected and that by making clear who the speaker was, we would then come to engage in speech which was more civil, when other people replied. I also believed that if speech was anonymous, people would assume that some organizations were the ones which had taken an unpopular position and membership in those organizations would be chilled. I thought then, and still do, that in the narrow context of Yale Law School, requiring people to sign and stand up for what they said, as they would have to do later as lawyers, would work.

Would that work everywhere? Would it work every time? Would it work today? I don't know. At the time it worked. And so I was for it, though Bob told me, "Be very careful because in another situation, you may need to make speech anonymous." I still prefer the position I took, and not only because I think it led to more civility.

Finally, there is the question of what position does the administration take when there is speech that is awful, whoever the speaker is. I took the position that—though Dean—I had a right to speak and to chill speech with which I disagreed profoundly. This was with the understanding that even if my speech chilled, I would not only *not prohibit* but would fiercely protect the rights of people whose speech I was criticizing.

Some Yale Law students invited a person who was a well-known anti-Semite to speak at the School, and the Jewish students were in a state. I joined those students on a picket line saying, "Racism is garbage, no matter who spews it." And that's when Peter Schuck said, "You're chilling."<sup>6</sup> I said, "That's fine, I'm willing to chill on that issue." And it was my position on a picket line that led the Jewish students to be civil in their answer. The students who had invited the anti-Semite were glad to see that the person they had invited was allowed to speak. And, by the way, they were happy, or at least didn't mind—ultimately, didn't mind—me being on the picket line. The same thing happened when some students showed a porn movie. I was in the picket line with a sign saying, "Porn peddlers are scum." But at the same time, I allowed the students to show the movie.

Now, you don't "join the picket line" and make your own views that public often. If you do it too much, then it both cheapens what you're doing, and starts to look as if you are saying that's what has to be followed. But when there is a dramatic situation in which people are speaking in ways that go against what the *school has already taken a*

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6. *Id.* at 112, 122.

*stand on, as a school*, it is important for the person who is in charge to do more than just say, “Oh, gee whiz, this is terrible speech. We have to allow it, but I’m with you. I feel very sorry for you that you’ve been hurt.” That never satisfies the people who have been hurt. They are only satisfied if the person who is in charge does something which is dangerous for that person. That person must stand up with them. That’s why I love what Peter Schuck criticized me for.

By criticizing me, Peter was in fact demonstrating that I had put myself on the line, and that’s what made it work. Too often, people who are in charge just say, “Oh, I feel for you. I feel terribly sorry, but we have to allow it.” That doesn’t do it. Not always, but every once in a while, one has to stand naked and be scorned. And then it works. If you do that, you will, I think, succeed both in having the speech be protected, and having those that have been hurt by the speech feel protected.

I am told that Chicago takes a different approach and holds that Deans and the like should never take public positions on debated issues.<sup>7</sup> I think that is wrong in two ways. First, there are some issues as to which a faculty as a faculty has taken a position. They are few, but they do exist. When a faculty has voted that those who discriminate on the basis of X, Y, Z may not recruit on campus, it has taken a position as to discrimination on the basis of X, Y, Z. Students may nonetheless wish to invite speakers who favor such discrimination. And they have a right to do so. But then the Dean—as Dean—can appropriately join a picket line “shaming” such a speaker.

More often, the school will not have taken a position on a particular issue, and yet some students will feel fiercely about it. If the Dean agrees with them and deems it personally important enough, that Dean can join them on a picket line. But then it should be clear that the Dean is doing that because of *personal* beliefs and is not representing the school. The distinction is not always obvious, but it is an important one.

Allow speech which is vulgar, hateful, and so on, to occur. Yet lead the majority of the students in the school so they are willing to engage with that speech. That is what we must try to do. Yes, law schools are there to get people into the practice of law in exchange for tuition. But our principal job is still *the search for truth*. The fact that even great schools become, to some extent, commercialized is inevitable. But it doesn’t alter what we are about. Once, talking to my nephew (who founded the Federalist Society as a good talking place for

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7. Kevin Baine and Eduardo Peñalver discuss the Chicago Model in their pieces prepared for the Symposium. See Kevin T. Baine, *Free Speech on Campus: The Attack from Within*, 51 HOFSTRA L. REV. 397, 404, 409-10 (2023); Eduardo Peñalver, *Comment*, 51 HOFSTRA L. REV. 465, 467-69 (2023).

conservatives), I said, “Aren’t you sorry that the Federalist Society has become a job seeking thing and that ‘careerism’ is why so many people join it?” He said to me, “Of course I’m sorry, but isn’t that equally true of the Harvard and Yale law schools?” I think there’s something there. Of course, we become career-enhancing places—but that doesn’t mean that that is the essence of what we are about.