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Comment

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COMMENT

*Francesca Procaccini**

Let's start with the antecedent question that both the theme of this conference and all three papers in this session present. That is, before we ask how law schools might better advance the freedom of expression on campus, and even before asking what role law schools play in protecting or suppressing free speech more generally, we must ask the first order question: whether freedom of expression at U.S. law schools is indeed imperiled?

There is an underlying assumption in all three papers that something is amiss, that things are not quite at their optimal, that improvement is needed. And to be fair, each of the papers brings receipts. They correctly mention the rise in academic censorship by state and local governments; catalogue instances in which law school administrators have suppressed speech or speakers; and recount examples of students shouting down or forcing out certain speech and speakers. Professor Franks additionally looks at how powerful graduates of elite law schools are suppressing speech and manipulating public discourse about the freedom of speech, leading her to conclude that something must be rotten in the free speech ecosystems that molded and produced these leaders.¹

But the antecedent question—whether any of this indicates that the state of free expression at American law schools is unhealthy—better illuminates the pathology we are studying, and ultimately lends good support for several of the suggested correctives these papers propose.

In these brief comments, I want to address these two points. First, I want to recast the “free expression problem” we are experiencing at U.S. law schools as less one of speech suppression and more one of speech temerity. Second, I want to respond to that problem by highlighting the proposed correctives in these papers that are most likely to encourage creative and searching dialogue amongst students and within the law school community more generally.

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1. Mary Anne Franks, *How Law Schools Can Fight for Fearless Speech*, 51 HOFSTRA L. REV. 613, 619-22 (2023).

First, recasting the problem. Two notes on this: first, speech suppression in law school is perhaps not as problematic as it might seem; and second, a more pervasive and insidious free expression problem lies in students' rising temerity to speak.

On the first point, speech suppression in law school is not necessarily bad or antithetical to the law school mission. My plea here is not to judge the health of a free speech environment just by how much speech there is nor even by the quality of the speech that is present, but also by the capacity and thoughtfulness with which students are able to listen and receive the speech in that space. In a time of over-saturation of information, we should not be singularly focused on whether speech has been suppressed or even on the quality of the speech let in, but equally, if not more so, on the retentiveness and impact of the speech delivered to our students. Is it responsive, compelling, memorable? Put briefly: in an over-saturated speech environment, less is often more.

It is also not clear that less speech—or being selective about what speech enters a law school environment—hinders a law school's mission to train excellent lawyers. It's certainly true, as Professor Volokh argues, that lawyers need to work with and represent and appear before those they disagree with and that they also must have the skills to handle controversial issues on behalf of clients.² But excellent lawyers also need to be moral human beings. We as law professors are not just in the business of teaching students law; we are in a profession of instilling ethics, civics, and morals. And just like when we teach law, we do not require students to agree or disagree with our moral lessons, but we should expect them to learn, challenge, and evolve from those lessons.

To train excellent, moral lawyers, it is not enough for us to simply present varying ideas and viewpoints; we must hold those ideas up to a moral mirror. We (or at least I) demand that our students have an opinion about the law—we should too. And it's quite alright that we may—in fact, probably will—get it wrong a lot of the time. We will be in good company. The vast majority of lawyers and law professors before us have gotten much, if not most, wrong from a moral standpoint. Law, in this country, has long operated and continues to operate as a vehicle of oppression in myriad ways. And yet we are the reason it persists. We propagate it in courtrooms and classrooms. We seek for our students and our justice system alike to engage in the supremely conservative (small-c conservative) task of analogical reasoning—of applying settled

2. Eugene Volokh, *Free Speech Rules, Free Speech Culture, and Legal Education*, 51 HOFSTRA L. REV. 629, 633-40 (2023).

precedent to new facts. I can't think of a more quintessentially conservative project than lawyering.

The moral lawyer must therefore walk a very fine tightrope in deciding how to use the law and what law to carry forward when advancing her position. In so doing, she must shed immoral ideas, arguments, and even laws all the time. It seems perfectly in sync with a law school's mission to train excellent lawyers for us to model this behavior from the beginning.

If speech suppression/selection is not a dire problem (indeed, is sometimes productive) in law school, then is all well with the freedom of expression in these institutions? Clearly tensions over the proper bounds of free expression at law schools are rising, bubbling to the surface most eruptively on occasions of perceived speech suppression. If the occasional absence or interruption of certain speech is not especially problematic, are the tensions and fighting over these decisions indicative of a deeper problem?

In my experience they are. These battles are both a symptom and a cause of a far more ubiquitous and pernicious free expression problem plaguing our institutions. It is a problem I'll term "speech timidity," and it refers to our students' 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. Speech timidity is inflicting students from all walks of life and all political persuasions. It appears to have little correlation with any given student's power or privilege. It is steeped into the culture.

So, I see the problem to be less about the quantity, variety, or "suppression" of speech—and indeed think pruning distractions is a valuable effort in these times. But I agree that these instances manifest an underlying, more subtle yet more omnipresent sickness in our law schools that nearly all our students are, quite literally, suffering in silence.

This leads to my second point: how to respond to the problem. Which of the many excellent suggestions outlined in these papers are best tailored to address speech timidity and not just speech suppression?

Certainly, Professor Franks' insistence on training students in courageous speech resonates.³ Professor Volokh's support for law schools to actively supply exposure to controversial ideas is well tailored to countering speech timidity—filling in the gaps that students are uncomfortable filling in themselves.⁴ We might also consider structural changes to our classroom settings that would foster safer dialectic environments.

3. Franks, *supra* note 1, at 625.

4. Volokh, *supra* note 2, at 645-50.

But in particular I want to highlight that understanding the problem at the individual level, rather than at the institutional or communal level, reinforces the astute observation Professor Niehoff makes in his piece: that free speech is a mental health issue.⁵

This perspective shifting device is not novel. We've heard that gun violence is a mental health issue, that substance abuse, crime, even the employment rate are mental health issues. And surely, at least in part, they are. In the context of expression, we are somewhat accustomed to seeing a link between mental health and speech because speech is often how we communicate the state of our mental health.

But the observation that free expression is a mental health issue puts the horse back in front of the cart. It acknowledges that the state of our mental health influences not just what we say, but whether we say anything at all. Speech—especially courageous, intellectual, creative speech that we strive for, indeed depend on, in law school—requires strength, confidence, and drive. In many ways, it requires bravery. It is only with proper support, direction, and self-assurance that students can be brave. And only then will they speak more bravely as well.

5. 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, 609-10 (2023).