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Comment on Freedom of Expression in American Legal Education

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It has been a pleasure to participate in this excellent symposium on "Freedom of Expression at American Law Schools." The presentations have been wide-ranging and informative. They have highlighted many unfortunate incidents where academic conversation has been inappropriately suppressed, and they have also emphasized the many essential ways in which the vulnerabilities of our students must be recognized and addressed. It is apparent that a serious tension is now working its way through American legal education. On the one hand, we aspire to teach our students to engage with a wide range of differing opinions on controversial and threatening subjects; yet, on the other hand, we strive to create constructive and effective educational environments.

There is no magic bullet to cure this tension. At best, we can muddle through its complex and contested terrain. The commentaries in this symposium offer wise and capacious advice for this journey. To the excellent articles already on offer in the *Hofstra Law Review*, I hope in this small essay simply to propose an alternative perspective about how we might best conceptualize the challenges before us.

This symposium has framed the tension we confront in terms of "freedom of expression." Symposium participants have accordingly fashioned their papers in the context of treasured, traditional standards of free speech, which are closely aligned with the formal doctrinal principles of the First Amendment.[1] We have heard invoked the wise words of Brandeis's magnificent concurrence in *Whitney v. California*,[2] and we have seen applied to our pedagogical problems the various justifications

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1. *See, e.g.*, 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, 594-99 (2023); Eugene Volokh, *Free Speech Rules, Free Speech Culture, and Legal Education*, 51 HOFSTRA L. REV. 629, 640-42 (2023); Kevin T. Baine, *Free Speech on Campus: The Attack from Within*, 51 HOFSTRA L. REV. 397, 401-02 (2023); Thomas Healy, *The Kids Are Alright*, 51 HOFSTRA L. REV 439, 443-45 (2023).

2. 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring).

for First Amendment freedoms.[3] The volatile issues facing law schools have been conceptualized as a balance between the values of free speech and those of non-discrimination.[4]

I write this Comment to dissent from this entire way of conceptualizing the challenges that lie before us. I do not think that it is helpful or even accurate to frame the tension we face in terms of freedom of speech. I argue instead that the core issue afflicting American law schools is the pedagogical question of how best to achieve our educational mission.

This way of framing the question may seem implausible to those who recall the elegant assertion of *Tinker v. Des Moines School District* that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[5] It is necessary to remember, however, that *Tinker* also immediately qualified its assertion by observing that constitutional rights must be "applied in light of the special characteristics of the school environment."[6] Applied in this light, free speech rights in a school are utterly different from those that we ordinarily associate with First Amendment freedoms.

To appreciate this point, we must first identify the substance of free speech rights. There are, of course, a huge number of First Amendment doctrines. Indeed, as I have written elsewhere, First Amendment law is "a vast Sargasso Sea of drifting and entangled values, theories, rules, exceptions, [and] predilections."[7] But for purposes of understanding the nature of free speech in a university, let us consider three First Amendment principles that most everyone would regard as incontestably fundamental and axiomatic:

Principle One

> It is "axiomatic that the government may not regulate speech based on its substantive content or the message it conveys . . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the

3. *See* Niehoff, *supra* note 1, at 591-99.

4. *See* Baine, *supra* note 1, at 411-17.

5. 393 U.S. 503, 506 (1969).

6. *Id.*

7. Robert C. Post, *Community and the First Amendment*, 29 ARIZ. STATE L.J. 473, 474 (1997) (quoting Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 278 (1991)).

more blatant. Viewpoint discrimination is thus an egregious form of content discrimination."[8]

Principle Two

There is an "equality of status in the field of ideas."[9] "We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a 'false' idea."[10]

Principle Three

"It is . . . a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say . . . . At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.'"[11] "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas . . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."[12]

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8. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828-29 (1995). *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) ("'[The State] has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.") (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972)).

9. Police Dep't of Chi. v. Mosley, 408 U.S 92, 96 (1972) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

10. Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 51 (1988) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)); *see* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504 (1984); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 284 (1974).

11. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 213 (2013) (quoting Rumsfeld v. F. for Acad. and Institutional Rts., Inc., 547 U.S. 47, 61 (2006), and Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 641 (1994)).

12. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (quoting Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 255 (N.Y. 1968)). "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796-97 (1988). "Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views." United States v. United Foods, Inc., 533 U.S. 405, 410 (2001); *see* Wooley v. Maynard, 430 U.S. 705, 714 (1977); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

These three principles are so essential that we might with justification say that without them we lack any recognizable system of freedom of expression.

These three principles make perfect sense within the context of the First Amendment as it was interpreted when courts first began to enforce free speech rights at the turn of the twentieth century. At that time, the United States evolved from a representative form of a government led by political parties into a democracy that conceived self-determination in terms of "government by public opinion."[13] First Amendment rights of freedom of expression barely existed prior to World War I, certainly not in federal courts.[14] But the changing American conception of self-government prompted courts to develop a First Amendment jurisprudence designed to ensure that "authority" was "controlled by public opinion, not public opinion by authority."[15] Courts were quite clear about why they were inventing protections for First Amendment rights of free speech: "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[16]

Each of the three basic principles of free speech doctrine we have summarized is essential to serve the purpose of self-government. Each was initially fashioned to apply to speech deemed essential to the formation of public opinion, which, following the Court's usage, I shall deem "public discourse."[17]

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13. This crisp definition of democracy is found in CARL SCHMITT, CONSTITUTIONAL THEORY 275 (Jeffrey Seitzer ed. & trans., 2008). Progressives defined democracy as "the organized sway of public opinion." CHARLES HORTON COOLEY, SOCIAL ORGANIZATION: A STUDY OF THE LARGER MIND 118 (1909). The story of the evolution of the United States from a nation governed through the representation of political parties into a democracy governed by public opinion is recounted in ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 3-43 (2014).

14. *See* DAVID RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 177-78 (1997); Robert Post, *Writing the Dissent in* Abrams, 51 SETON HALL L. REV. 21, 21-24 (2020).

15. *Barnette*, 319 U.S. at 641.

16. Stromberg v. California, 283 U.S. 359, 369 (1931).

17. *See, e.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 215 (2015). I should stress that the First Amendment question is not whether speech is "political." The whole point of democracy is that public opinion determines what issues should be taken up by official organs of government as political. The essential distinction for First Amendment purposes, therefore, is not whether speech is political, but instead whether it should be deemed "public discourse." The boundaries of public discourse are complicated to ascertain. *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and* Hustler Mag. v. Falwell, 103 HARV. L. REV. 601, 667-84 (1990). For present purposes, however, it is sufficient to note that speech in law school classrooms is not for the purpose of forming public opinion. It is for the purpose of educating law students.

The first principle against content discrimination serves a simple and obvious purpose. It ensures that the public shall set the agenda for government action rather than reverse. The State cannot mutilate public discourse to rule out topics or viewpoints that the public wishes to discuss. In this country, self-determination means that government must be responsive to public opinion. It may not control public opinion.

The second principle asserts that all ideas are equal and unfalsifiable for First Amendment purposes. This principle is more difficult to understand. It appears on its face to assert an absurd proposition. It is plainly not the case that all ideas are epistemologically equal. Any sane person would regard some ideas as true and others as false. Yet this First Amendment principle makes good sense once we realize that it is not meant to be taken as an *epistemological* proposition, as it sometimes is by those who celebrate the marketplace of ideas.[18] The principle instead asserts the *political* axiom of equality in the context of self-government. It stands for the proposition that every democratic citizen possesses an equal right to influence the contents of public opinion. As John Rawls once put it, in public debate "[t]here are no experts: a philosopher has no more authority than other citizens."[19] Because in a democracy every citizen's opinion counts equally, the state may not pick and choose among persons' opinions on the ground that some opinions are true or more worthy of consideration.

The third principle prevents the State from compelling speech. This principle makes little sense outside of the context of public discourse.[20] The State requires us to file tax returns, to report automobile accidents, to speak our verdicts when serving as jurors, to display our street addresses, and so on. Yet the principle makes good sense within public discourse. It is designed to prohibit the State from artificially creating public opinion. We would not be the democratic authors of our own government if we were compelled to participate in the formation of public opinion in ways contrary to our own will.

The three postulates of free expression that we have identified thus create a system of freedom of expression designed to sustain our form of democratic self-government. But they make little sense outside that system. They have, for example, virtually no application to legal education.

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18. On the failure of the marketplace of ideas theory to explain the production of knowledge, see ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 6-10 (2012).

19. John Rawls, *Reply to Habermas*, 92 J. PHIL. 132, 140-41 (1995).

20. *See* Robert Post, NIFLA *and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1088-90 (2022).

Consider, for example, the first principle that we identified. Content discrimination permeates law schools. This is certainly true from the perspective of students. If I am teaching a class on the First Amendment, my students are not free to ramble on about the Super Bowl. Consider the second principle. In my class all ideas are not equal. The function of my class is precisely to teach students how to distinguish better from worse ideas, true from false ideas. Grades institutionalize this function. With regard to the third principle, students in my class are continuously compelled to speak. Final examinations exemplify this compulsion. In any ordinary classroom, therefore, the three basic principles of free speech are turned on their head. Students are compelled to violate each and every one of them.

Professors also do not enjoy the kind of freedom of speech defined by the three principles we have identified. Universities engage in content discrimination whenever they hire teachers to teach one subject rather than another; they discriminate among the quality of professorial ideas whenever they decide whether or not to tenure a professor based upon the quality of her ideas; and they compel speech whenever they establish policies like "publish or perish." If the three principles we have identified define the essence of freedom of speech, there is no freedom of speech for students or faculty in a university. This is as true in public universities as it is in private universities.

This should not surprise us, however, for the three principles we have identified define freedom of speech for the purpose of democratic self-governance. A university is not a democracy. It is not engaged in a political project. It is instead a place for education. It is natural and obvious that freedom of speech will mean something quite different in such a context than it will in the context of public opinion formation.

The point is a general one. Whenever public opinion prompts government to organize to achieve a concrete purpose, the State responds by creating institutions designed to accomplish given tasks. The State creates the military to protect the national defense; it establishes courts to dispense justice; it produces bureaucracies to distribute specific services. None of these organizations function as a democracy. None is about the political project of self-governance. Each is instead about the instrumental achievement of a specific mission.

Every government organization organizes the resources within its domain to succeed in its given mission. This is as true of speech within such organizations as it is true of material resources. Lawyers, witnesses, and jurors are thus allowed (and compelled) to speak in courtrooms only as necessary to serve the interests of justice; soldiers are permitted (and mandated) to speak only as required to contribute to the effectiveness of

the military. The same is true of government employees, whose speech is restricted and compelled in ways necessary to achieve the mission of their bureaucracy. In such contexts, the concept of freedom of speech makes sense only when government seeks to control expression in ways that exceed or contradict legitimate institutional functions.[21]

Schools are a classic example of this logic. Within schools, speech is regulated so as to accomplish legitimate educational purposes.[22] As courts debate the legitimate constitutional purposes of education, so they allow different forms of speech regulation.[23] Free speech, in the sense that we imagine it in public discourse, barely exists. The focus of analysis is instead on the mission of a university and on how speech should or should not be regulated to fulfill that mission.

It is for this reason that within the context of universities we typically speak about academic freedom rather than about freedom of speech. Freedom of speech concerns individual rights that are defined by the political project of democratic self-governance. Academic freedom, by contrast, concerns the communal rights of the academic community that are defined by the achievement of university objectives, which are characteristically conceptualized in terms of teaching and research.[24]

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21. The logic of the regulation of speech within managerial domains is described in detail in Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1776-83 (1987).

22. For a detailed discussion, see Robert C. Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, *in* THE FREE SPEECH CENTURY 106, 112-17 (Lee C. Bollinger and Geoffrey R. Stone eds., 2019).

23. *See Racist Speech, Democracy, and the First Amendment*, *supra* note 7, at 317-25.

24. For a discussion of the academic freedom, and of its distinction from freedom of speech, see Post, *supra* note 18, at 61-95; MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 38-39 (2009); Robert C. Post, *Academic Freedom and Legal Scholarship*, 64 J. LEGAL EDUC. 530, 533 (2015); Robert Post, *The Structure of Academic Freedom*, *in* ACADEMIC FREEDOM AFTER SEPTEMBER 11, 61-64 (Beshara Doumani ed., 2006). At the conference at Hofstra, Professor Healy spoke in terms of yet another function of higher education, which was to credential students for high-paying jobs. His remarks reminded me of a trip I had once taken to Middlebury College in Vermont. Charles Murray had spoken at the College and a riot had ensued. Professors were beaten and seriously injured. Middlebury asked me to meet with students and faculty to discuss the relationship between academic freedom and invited speakers. To the undergraduates, I spoke about the purpose of their education in terms of achieving a mature independence of mind that would allow them to encounter and evaluate diverse ideas. *See* UNIV. OF CAL., REVISED ACAD. PERS., POL'Y 010, ACAD. FREEDOM (Sept. 29, 2003), https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-010.pdf [https://perma.cc/623W-CMWB]. It soon became apparent to me, however, that many of the students at Middlebury imagined that the purpose of the Middlebury College was not to educate them in this way, but instead to credential them for remunerative work, in much the manner expressed by Professor Healy. With respect to *that* purpose, the appearance of a controversial speaker like Murray, who was both distressing and unsettling, was a distraction that did not advance any educational objective. My experience at Middlebury illuminated the deep tension between an essentially consumerist goal for higher education that would seek primarily to satisfy the demand of students for

All resources within an educational institution ought to be dedicated to the accomplishment of its institutional goals. It follows that all speech within the managerial domain of an educational institution ought to be judged by its relationship to these goals. For example, if a law school dispenses funds to student organizations to invite speakers, or if it supplies educational facilities to support student-invited speakers, it must do so because it believes that it serves the school's educational ends. If this were not true, the school would be wasting its resources and potentially incurring legal liability. The fundamental question is whether and how a law school can justify delegating control of its resources to student groups in terms of the school's educational goals.

This way of conceiving legal education, however, has rather large implications for the issues posed by this conference. It suggests that the fundamental questions discussed by this conference have little to do with freedom of speech, or indeed with any question of legal rights. The fundamental questions instead concern the educational goals that law schools aspire to achieve. The legal language of rights is a rather poor medium in which to have this indispensable conversation about the nature of our substantive educational mission.[25]

So, for example, there was widespread consensus at the conference that sometimes freedom of speech could go "too far" insofar as it substantially interfered with necessary and "constructive conversations." Consider the necessary implication of this consensus. It implies that "freedom of speech" ought not be allowed to undermine educational conversations that are deemed necessary. But this means that the educational project is fundamental in the sense that it sets the boundaries of permissible freedom of speech. The nature of our educational project determines the limits of freedom of speech. Education is primary; legal rights are secondary.

It follows that we must inquire into the objectives of legal education in American law schools. There was much excellent discussion of

careerist credentials, and the more paternalist goal of seeking to instill intellectual maturation. It seems to me plain that many questions that are conceptualized in this conference as issues of free speech will actually turn on the kind of educational goal that colleges and universities seek to achieve.

25. I do not mean by this to take away from the important point raised by Professor Franks and President Holley, which is that there is now underway a serious and deplorable effort by conservative governors to impose outright government censorship on universities. I myself consider these efforts to be outrageous and indefensible incursions on academic freedom that ought to be vigorously resisted in the language of legal rights. But my understanding is that the subject of this conference is not external censorship but rather how law schools ought to govern themselves with regard to the many incidents in which the speech of students and professors are encouraged or condemned.

this topic at the conference, and I particularly commend the detailed observations about this issue by Professor Volokh. My own intuitions are much less concrete and sharply practical than his. In fact, my thoughts likely reek of an old-fashioned idealism that some might dismiss as the romantic illusion of a bygone era. But I shall nevertheless and without embarrassment quickly sketch them, suppressing the impulse elaborately to defend them.

I begin with the thought that American law schools do not, and should not, imagine themselves as merely supplying students with information, as law schools in other nations might conceptualize their mission. Our job is not simply to tell students what the law is. Our task is instead to socialize students into the rule of law. I use the word "socialize" advisedly, because the rule of law is not a noun but a *practice*. It exists only because lawyers conduct themselves in ways that enact it, much as a dollar bill is currency only because persons act in ways that constitute it as money.

The rule of law thus requires not merely knowledge but also commitments, character, and ethics. This implies that students in law schools cannot be merely passive receptacles for faculty communication. They must be summoned to rehearse and inhabit the practices that comprise the rule of law.

This means that law schools must find ways actively to engage students. It is for this reason that American law schools long ago gave up the pedagogical form of large passive lectures, which dominate legal education in many areas of the world. We seek instead to make education a scene of dynamic exchange. Many have reported at this conference that this exchange has been withering on the vine. It is reported that, fearing peer disapproval, students have become so timid that they no longer speak frankly and engage in controversial topics.

If this is true, it strikes at the heart of American legal education. But it is not a problem that concerns freedom of speech. It is instead a problem that concerns the achievement of our educational mission. It is a problem that requires a pedagogical, not a legal, response.

If students are apprehensive about certain topics, faculty must fill the void. We must find ways to facilitate uncomfortable conversations. We must crack open preconceptions so that students can no longer anticipate which responses will trigger social disapproval. We must find creative ways to flush students out into the open of legal conversation and discourse. We must ourselves model the practices that constitute the rule of law. These are responsibilities that sound in pedagogical commitments, not in freedom of speech.

No doubt polarization has made our teaching far more difficult. America is a hopelessly divided nation. But this is not new. We have for a very long time been a country that is simultaneously individualist, anarchic, tribal, and autocratic. Our terrible contradictions were long ago transcribed by Alexis de Tocqueville, who also shrewdly noted that "[s]carcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate."[26]

De Tocqueville's observation remains as true now as when he wrote it almost two centuries ago. This is likely because our extreme divisions have induced us to trust our law more than our politics. Sometimes it seems as if our law is just about all we have in common. In the past year, for example, the only rhetorically effective argument against Trump's brazenly false claims of a stolen election has been that *courts* have uniformly decided against him.

The capacity of our law to sustain this kind of trust is, of course, always at risk. It can be maintained only if our law is able to retain its legitimacy throughout our vastly heterogenous population. But how can law preserve this impossible legitimacy?

I myself retain the antique (and perhaps now merely quaint) view that lawyers are not mere technicians out to make a buck. They are also representatives of the law. I believe that lawyers are professionals who are obligated to assist the law in fulfilling its necessary function of social integration. This requires lawyers to appreciate and sustain the law in all its many dimensions, including those of fairness, justice, effectiveness, and social control.

Underlying these many dimensions of law lies the fundamental assumption that law is accountable, by which I mean that it can be rendered explicable to a massively diverse population. It follows from this assumption that lawyers are obliged to listen to all, to learn from all, and to speak to all. Lawyers must aspire more assiduously than other democratic citizens to become artists of alterity. They must become the glue that holds together the impossibly centrifugal forces that perpetually threaten to rip America apart.

The implications for legal education are apparent. Law students cannot be sheltered. Their obligation is to assist a diverse democratic society in sharing a common life in the law. They cannot fulfill that obligation unless they are exposed to all the heterogeneity that comprises America.

The necessity of this educational imperative is reinforced by the fact that American lawyers help make the law. Through arguments and

26. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 284 (Henry Reeve trans., 1899).

advocacy, common law lawyers shape the law in ways that hopefully bend it responsively to the needs of disparate sectors of the population. Because the law distinguishes acceptable from unacceptable behavior, lawyers must be able to look squarely at the most deviant and outrageous behavior, so that they can help determine how and where legal control should be exercised.

To my mind, these obligations of legal education in the United States derive from our commitment to the rule of law itself. The difficulty is that they require law schools to teach forms of behavior that are highly unnatural and counterintuitive. Most human beings avoid hostile and aggressive interlocutors. Most human beings turn away from repulsive forms of behavior. To break through these natural barriers is hard for even the most confident, the most well-placed, the most secure. But it is far more difficult for populations who are vulnerable and exposed, who lack the elite systems of support that have sustained generations of law students. As law schools embrace goals of diversity and inclusion, the human challenges to our educational mission grow ever more severe. Participants at the conference repeatedly noted that it is asking a lot of students from historically marginalized groups to expose themselves to the harsh and unnerving blasts of democratic tribalism.

We can overcome this challenge only through creative educational interventions. The word "education" derives from the combination of "ē", meaning "from, or out of," and "dūcere," meaning "to lead." To educate someone is to lead them out from one perspective into another. It follows from this definition that one cannot educate others unless one meets them where they originally are; that is, until one stands with them on the ground that they presently occupy. This is especially true when education requires instilling character and not merely transferring information.

Effective education requires empathy; it requires a genuine meeting of minds; it requires vulnerability from both teacher and student. All this is hard work. Education is not merely a matter of rapping students on the knuckles and insisting that they swallow whatever bitter pills we have to offer. That kind of an approach will produce passivity or oedipal conflict, not education.

Education is therefore a very messy business. It demands accommodation, negotiation, and conversation. Education is rarely simple or linear or epiphanic. Education is for these reasons not well illuminated by the abstract and insular language of rights. Rights may, of course, be necessary to defend educational environments from the truculent

external control of the State.[27] But within the educational process itself, we are much better served by conceptualizing our tasks in terms of our substantive mission. We need to clarify what we want to achieve and how we mean to achieve it. Freedom of speech is either about these questions, or it is not. If the former, the concept of freedom of speech is merely subordinate to our educational objectives; if the latter, the concept of freedom of speech can only obstruct our educational aspirations.

A few weeks ago, Yale hosted a very controversial speaker whose presence in the past year had elicited bitter and highly publicized protests. This time, however, Yale worked hard to make the occasion serve educational purposes. The school discussed the event with affected groups; it listened to their fears and sought to find accommodations. The school created alternative outlets for educationally constructive protests. It established terms of engagement in which students felt safe rather than exposed to public threats and reprisals. It provided for careful moderation that respectfully but forcibly expressed the concerns of offended students. As a result, the event was peaceful, constructive, and protest-free.

It may be asking too much, but I hope the event provided an opportunity for all sides to more keenly appreciate the diverse and inconsistent demands made on American law. As that appreciation spreads, the law may eventually become marginally more legitimate for all. The conversation between those on the right and those on the left may also have created the opportunity for some to learn that, although they may disagree on some issues, they may nevertheless agree on others.[28] In the end, to my mind, the prerequisite foundation for all law is the twin capacity to both acknowledge and overcome alterity.[29]

In legal education we live in the hope of facilitating that impossible combination. How to fulfill that hope is a question of education, not a question of rights.

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27. *See, e.g.*, Complaint at 2-5, Pernell v. Fla. Bd. of Governors of the State Univ. Sys., No. 4:22-cv-304 (N.D. Fla., Aug. 18, 2022).

28. *See generally* Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—and Why It Matters in Law and Politics*, 93 IND. L.J. 207 (2018).

29. *See* Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1348-49 (2010).