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Comment

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How should a law school deal with the problems we've been reflecting on? My first thought is that the problems today at law schools are symptoms of a larger fight over speech norms that is taking place across the country.

There is intense contestation today about how we should think about the past, the present, and the future of this country that is linked to the increasing polarization of national politics and culture. This contestation is affecting our students, and our faculties. And it is motivating many of the fights about free speech at our law schools.

Much of the conversation about these fights presumes the disagreement about speech norms is a bad thing—a sign of the new generation's declining commitment to liberal values. I am not so sure. We can equally see it as a necessary and inevitable part of broader political transformations. The 1960s offers the closest parallel to the kinds of intense speech fights that we are seeing today, and just as was true in the 1960s, fights about how we speak cannot be easily separated from fights about social and racial hierarchies, equity, and material distribution.

I'll give an example. When I started teaching, the presumption was that you, especially in a 1L class, addressed students by "Mr." or "Ms." and then their last name. This was because you were aping norms and forms of judicial procedure: you wanted to be formal, and make students feel like they were arguing in court. I understand why some law professors still do it. It is an effort to mimic the performative experience of being a lawyer. This effort to mimic the performative experience is one of the really interesting things about legal pedagogy.

However, over the years that I've been doing this, the question of pronouns and how we think about the politics of pronouns has become a central feature of pedagogical debates. And it is not an easy question to resolve. Some of my colleagues and I have stopped using pronouns; others continue to use pronouns, but ask students to tell what the correct

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pronouns are. These fights about speech norms in the classroom obviously reflect larger political struggles outside the law school. And that these fights are happening in the context of the law school classroom is not necessarily a bad thing. Law schools are important sites of social reproduction. As law professors we are intentionally socializing the new generation of legal elites. It is inevitable, I think, that there will be disagreement about how to do this.

America has gone through several serious periods of contestations about speech norms that are tied to serious political struggles, and we just happen to be in one of them. We should understand the problems we are having at law schools as political problems or signs of political or pedagogical problems.

But there are certain ways in which these matters are peculiarly heated in law schools. This is not just because of the nature of legal education and what we are trying to accomplish; it's also because law schools are a central site for the production of the political class and the political elite.

I happened to come to law school after graduate training in anthropology. Anthropology, as a discipline, attracts a much less diverse array of people—in part because it's much less politically powerful and an anthropology degree opens far fewer doors. Law schools, particularly elite law schools, are a funnel for the reproduction—or the creation—of political power and economic status. They attract—for good and for ill—an incredibly diverse array of people.

This means we need to complicate the idea that we create or have control of what our students do after law school. Law schools try to take responsibility for their graduates for all kinds of institutional reasons, including because we become close to our students and we care about our students when they are under our tutelage. But law schools not only provide an education; they also endow students with status. We see a range of students who come for all kinds of purposes, often political purposes, and who come to the law school with pretty clearly established understandings about who they are and where they are going. This presents a difficulty and offers an opportunity for law schools and those of us who are thinking about how we want to structure expression and life on campus.

It presents a difficulty because it means that students' purposes may not coincide with our own. As Robert Post said, we are not conceived as institutions that are just replications of the public marketplace of ideas.[1]

1. Robert Post, *Comment on Freedom of Expression in American Legal Education*, 51 HOFSTRA L. REV. 667, 675 (2023).

We are doing particular work. We have a pedagogical task. The shared understanding of how it is that law schools or universities in general perform this pedagogical task is that we are communities of knowledge and conversation separated from the outside world. There is a separation between the hurly-burly public marketplace of ideas, where anything goes, and these cloistered "ivory towers." Frequently this is spoken about as though being in these "towers" is a negative—but I disagree. It is *core* to the traditional understanding of how it is that we create new forms of knowledge, and how learning goes on, and how it is that we cultivate new forms of learning.

How is it that we teach? We create insulated communities that are different from and operate with quite different norms than the rest of the outside world. The problem we face is that this idea of the university or the law school as a community separated from the outside world in which we engage with one another to try and change our understandings and develop new knowledge has been undermined profoundly because of the politicization that is affecting all parts of American society.

Let me share my encounter with the problem I am talking about. I take my students out to lunch regularly and ask them about their experiences being at the law school. I teach at the University of Chicago, which attracts a pretty diverse range of students, but we are also a small law school. Everyone is in one building, and we are in Chicago, which is freezing in the winter. Because all the offices are in the same building, no one ever wants to leave the law school in the winter. Because we're all there together, it can create a lovely feeling of community. We're all in it together, and because we are a small law school, and a law school in the Midwest, there has traditionally been a strong identification with the institution.

But since 2016 at least—but I'm sure all of these trends go further back—my students tell me that they do not necessarily feel like they are in community with one another anymore. The conservative students don't really talk to the lefty students. Federalist Society ("Fed Soc") kids don't necessarily talk to the American Constitution Society kids. If you go to the student cafeteria or the lounge, the segregation is amazing: political segregation, segregation by identity. Students who do not speak to one another.

They are also, increasingly, speaking to an outside audience. The emergence of social media has increased the porousness of the university, the ability of anyone in the law school to tweet about or to post videos to talk about what happens on campus and attract the interest of a large audience. This is particularly so in a conservative media ecosystem where the question of what happens in schools seems to be newsworthy

because of a perception that universities are a site, which I think they are, of intense political struggle. There is this perception that the norms, the values, and the ideas that the members of the next generation of the political class and elite are going to learn will be learned at law schools—and so these are really important sites to wrest control over. This makes focusing on what happens in law schools very attractive both for those on the outside and for students who want to gain support and sympathy for their point of view. The result is a break in what I think had always been understood as a norm of privacy, or seclusion, when it comes to the core pedagogical practices of law schools, and the larger universities of which they are a part.

We've been experiencing this at the University of Chicago. Just this year, an adjunct anthropology professor at the University was scheduled to teach a class entitled "The Problem of Whiteness." The class was designed to explore "whiteness studies," and the construction of race, in particular the construction of whiteness. But a student, outraged by the idea that whiteness might be a problem, posted critical tweets about the class on Twitter. The student tweeted the instructor's photograph and information about the class and urged the audience of the tweet to help shut the class down. Soon after these tweets were made, the instructor began receiving death threats and rape threats, and lots of harassing emails and phone calls. The class was moved to another quarter, and the University had to take steps to protect the safety of the instructor.

This is a pretty extreme example of how the outside can intrude upon the cloistered world of the university. But it demonstrates how difficult these questions can be. What can a university like the University of Chicago do, when there are credible threats to the safety of an instructor, but the threats are not emanating from within the community? The instructor in this case wanted the student who tweeted about her class to be disciplined or expelled. The University refused, because it viewed his tweets as an exercise of his freedom of speech and, therefore, protected by University policies. I agree with that view—but it shows how vexing these problems can be. They are also not problems that are going to go away—they are going to last as long as we live in the political world that we live in. And so, it is a mistake to think of the problem of academic freedom on campus, or the solution, as a question solely of internal regulation and pedagogy.

The line between what happens on campus and what happens outside of campus is increasingly blurred. I would love to have thoughts from others about what to do, for example, about the Twitter case. But I think it also provides a really interesting and important opportunity for law schools and for the universities in general to think more deeply

about what freedom of speech or freedom of expression means on campus, because I think it has always been a really complicated concept, for some of the reasons that Robert Post pointed to. I think the law school is an archetypal example of this complexity—law schools are both educational institutions and microcosms of the nation—and we embrace the idea that the way in which we teach students in an effective way is to expose them to lots of different diverse ideas. And we embrace the idea that the way in which we educate students morally, socially, and in terms of the content of the class is to expose them to something approximating the larger public marketplace of ideas.

I have been looking at a report on freedom of expression that presents the core of the University of Chicago's free speech regime. It begins with a declaration that the principle of complete freedom of speech on all subjects has been, from the beginning, regarded as fundamental to the University of Chicago—that in order to be an effective pedagogical institution, you also have to be a site for the operation of the marketplace of ideas. We see layered on that a second idea—that we're trying to achieve pedagogical aims that require strong speech discipline, particularly in the classroom. When I begin my free speech class and students are still talking and I want them to shut up I always say, "This is the portion of a free speech class where freedom of speech ends. It's done. I'm now in control and there is strong content and viewpoint discrimination for sure." But outside the classroom, we do have an assumption that what we want to have is something approximating a public marketplace of ideas where lots of speakers get invited.

And so, when we are regulating speech and expression norms on campus we have to be thinking about these two different dimensions of how speech operates: both how it operates as a means of achieving particular institutional goals—in this case pedagogical learning and teaching—and also how it functions to create the kind of open, diverse free speech community that has been the way we understand learning environments in the United States.

I have heard really interesting ideas from the other Symposium participants about more positive visions of what it means to guarantee and vindicate freedom of speech and freedom of expression on campus than I think we have been used to hearing and thinking about in the past.

We have a largely libertarian conception of what freedom of speech means, in which freedom of speech means that you may not trespass, you may not interfere with the freedom that I as an individual happen to possess. But there is another way we can think about how to cultivate free speech on campus; it is a more positive one that a number of us

have suggested. We can model, we can encourage, and we can create sites and spaces for positive engagement.

More than that, law schools should be thinking about how money operates. How does the distribution of expressive resources and opportunities function to create or undermine the goals that we want to achieve? Most law schools give student organizations a certain pot of money to invite speakers, and then, depending on how the law schools are funded and organized, they cede more or less control to the students to decide who to invite, with the vision here being that everyone gets a pot of money and they can invite who they want.

But Erwin Chemerinsky, for example, talked about Ann Coulter coming to Berkeley.[2] She was funded almost entirely by outside money. At the University of Chicago, Fed Soc has pretty deep pockets and has speakers pretty much every day of the week. We have a very strong and powerful and involved Fed Soc chapter. Other student groups have far less money and resources.

So how do we want to think about the flow of money to campus? How do we want to think about the distribution of resources? How do we want to think about the conditions under which we can cultivate the freedom of our students in a time of incredible politicization and polarization? How, when students report a lot of anxiety both about their speech being circulated outsides the gates of the community and also about social sanctions from their friends?

I taught a class to undergraduates last year about the preconditions of the freedom of speech. What do you need to be free to speak? Many of them spoke about their need for safety. Certain forms of learning and speaking work well in conditions of uncertainty and difference, and when you are confronting those who speak and think differently than you speak and think. This is the archetypal model of how free speech works. In this vein and in the First Amendment tradition, I always think about Brandeis' concurring opinion in *Whitney v. California*, where he invokes the notion of courageous and brave speech.[3] Mary Anne Franks picks this up in her work.[4] And I think that's great.

It's really important to cultivate instincts of bravery and courage, and there are things about which you have to be courageous. But then I think about in my own life and ways I act or do not act when I'm trying to develop an idea, or I am trying to feel expressively free. I do not do

2. *See* Erwin Chemerinsky, *Comment on Free Speech in Law Schools*, 51 HOFSTRA L. REV. 687, 693-95 (2023).

3. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

4. *See generally* Mary Anne Franks, *How Law Schools Can Fight for Fearless Speech*, 51 HOFSTRA L. REV. 613, 625-27 (2023) (discussing the concept of fearless speech).

that in an environment where everyone thinks differently than me, and there are lots of strangers. I do it in intimate and safe spaces which enable a different form of expression, a different kind of freedom and exploration—because I trust those who I'm speaking to, and also maybe because we agree on about ninety percent of what we are talking about, but there's that ten percent about which we disagree.

For the students, too, we should recognize particularly at this very difficult time in American history that exploration and learning does not only occur at times of danger when you have to be courageous. It also requires—perhaps in different contexts and in different ways—intimacy, safety, and trust.

It is in part because of the recognition of the need for intimacy, safety, and trust that we have theorized our communities as set apart from the rest of the world. Classes are supposed to be places of intimacy, and safety, and trust. And when I teach, that's what I cultivate. I want us to feel like we're all in this together, we are engaged in this pedagogical project collectively. The experience of speaking and learning in the public marketplace of ideas is not the same experience as that feeling of intimacy that we're all in it together which I try to cultivate.

I'm not sure that that my classroom efforts at creating community are working so well anymore. I think over the past few years I have felt like the intimacy of the class is much more fractured. Students are much less willing to buy into this idea that we are all in it together. I think law schools should experiment, and should think about the different kinds of ways to create spaces for experimentation, for learning, for teaching, for expression that do not all depend upon the same model of what it means to learn, what it means to teach, and what it means to encounter ideas that have been taken for granted.

We should recognize that this moment in American history is both an incredible challenge for the way in which we have traditionally provided legal education, and also an opportunity to think harder about what it is we're doing, going forward.