

Statehouses, Not Student Activists, Are the Real Threat to Free Speech


Fixating on drama at Stanford Law leads us astray.



By *Eduardo Peñalver*

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JOHN W. TOMAC FOR THE CHRONICLE

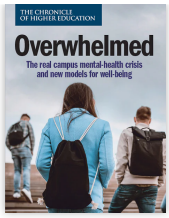


In recent weeks, academic leaders have defended expressive and academic freedom with noteworthy force. Martha E. Pollack, president of Cornell, vetoed an undergraduate student assembly’s resolution calling for “traumatic content” warnings in class. Penn State’s president, Neeli Bendapudi, released a video giving a rationale for having controversial speakers on campus. “The best way to combat speech is with more speech,” she argued, and the best way “to combat bad ideas is with better ideas.”

At Stanford, an incident in which a conservative federal judge was heckled by law students led the law school’s dean, Jenny S. Martinez, to issue [a letter](#) underscoring the importance of academic freedom. The letter also chastised the protestors for violating the university’s policy on disruption and announced a mandatory half-day educational session for students on freedom of speech. Clocking in at 10 pages and several thousand words, Martinez’s letter presented a persuasive and scholarly rebuttal of the law students’ argument that disrupting the judge’s speech represented a legitimate exercise of their own speech rights.

The national media has been quick to connect these dots. The *Washington Post* editorial board [called](#) the Martinez letter a “turning point” for campus speech after years of encroaching safe spaces and trigger warnings. A FIRE representative [suggested to](#) *The New York Times* that a “Stanford Effect” might be encouraging other colleges to robustly defend free speech. A *Chronicle* headline [announced](#): “Presidents Are Changing Their Tune on Free Speech.”

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The fact that Martinez’s letter, written in response to her students’ constrained conception of expressive freedom, is being hailed as a watershed moment — even as dozens of states [consider or implement bans](#) on critical race theory — reveals a great deal about the complex and often confused nature of our national conversation about freedom of speech on (and off) campus.

As a university president and former law school dean, I agree with almost everything in Martinez’s letter. I applaud her conviction that the range of opinions that universities must allow on campus is broad and necessarily includes viewpoints that are deeply offensive to segments of the campus community. And I believe, with her, that universities may restrict certain kinds of speech. Shouting down an unwelcome speaker is speech that should not be allowed on campus, even though, as a First Amendment matter, that kind of speech might be permissible in other contexts. But, even if restrictions on certain kinds of speech are necessary to preserve the teaching and learning environment, I share Martinez’s skepticism about the administrability of any but the most narrowly drawn exceptions to the baseline of free expression.

State censorship involves forces that often are beyond the power of university administrators to resist.

I also acknowledge that Martinez’s letter required significant courage. There are many loud voices on campus that expressly reject the values of free speech and robust intellectual debate. Last year, for example, a department chair at Williams College [dismissed](#) “this idea of intellectual debate and rigor as the pinnacle of

intellectualism,” which she said “comes from a world in which white men dominated.” Standing up to these voices can be unpleasant and sometimes professionally dangerous.

Importantly, however, the Martinez letter was penned in response to students. When students prevent speech from occurring (for example by heckling or by participating in social-media campaigns), their success requires the cooperation, tacit approval, sheer incompetence, or mere fecklessness of administrators. And yet we should be clear that student heckling falls within a category of threats to campus speech that we are well equipped to manage. As the *Washington Post* editorial board put it, when it comes to student disruptions, “academic institutions have the power to defend their fundamental values — and are willing to use it.”

Higher ed is less well armed when it comes to combating other threats to speech. State censorship involves forces that often are beyond the power of university administrators to resist. And so, while standing up to the heckler’s veto represents an important victory for campus discourse, overcoming student heckling is not the battle with which we ought to be the most concerned. The notion of the “Stanford Effect” has sparked breathless op-eds and anguished discussion in the national media and shone a spotlight on the endangered status of speech rights on campus. Yet many of these strident voices — so concerned about the dangers left-wing students and faculty pose to the freedom of speech — have remained curiously silent about the use of state power to suppress speech in the form of bans on so-called “critical race theory.”

Some have even praised the bans. *National Review* has been highlighting the campus-speech story for many years. And yet it has also [supported](#) the recent CRT bans. The National Association of Scholars, a conservative group that previously purported to stand for academic freedom, has [amplified the view](#) that “laws against critical race theory are only the first step.”

A few weeks after the Martinez letter, I was attending a meeting here in Seattle with a senior administrator from a public university in Idaho. She told me about having to carefully scrub her university's website and published materials — on the advice of university counsel — to avoid use of the word “inclusion,” lest the institution violate state law.

Similar exercises are no doubt happening at public universities across the state of Florida, where legislation like the so-called “Stop WOKE Act” seeks to prohibit the endorsement of concepts like affirmative action, even in the context of a university-classroom debate on the subject featuring guest speakers on each side. At New College, Gov. Ron DeSantis's appointees have taken over the Board of Trustees and [begun to insert themselves](#) in unprecedented ways into the tenure process. In Texas, legislators [are debating](#) the effective statewide elimination of tenure protection and the expansion of political oversight of faculty promotion at public universities. Unlike the situation at Stanford, there is often little that administrators in these states can do to push back against these restrictions on the freedom of speech on their campuses.

Can we really blame our students for wondering whether “free speech” is just a Trojan horse for conservative ideology?

Those of us at private institutions should have no illusions that the backers of these efforts plan to stop with public universities. If they gain the power, proponents of these bans will use every legal tool at their disposal — including civil-rights statutes and access to state and federal funding — to suppress positions they disagree with on issues like diversity and inclusion, abortion, and gender identity, wherever that speech is occurring. Can we really blame our students for wondering whether “free speech” is just a Trojan horse for conservative ideology? To remain credible in our

defense of freedom of speech, we must acknowledge where the rhetoric of free speech is being selectively deployed for political ends.

This is not, of course, to engage in “whataboutism.” We can fight against politicized state censorship without denying the existence of freedom-of-speech challenges on our campuses. Still, we need to be clear about what the protection of that freedom requires of us — and what it does not.

Martinez’s letter set forth what I take to be the prevailing paradigm among campus free-speech advocates, which I will call the “Chicago model.” The Chicago model posits that freedom of speech on campus depends on universities remaining strictly neutral on controversial questions, never allowing them to assert substantive positions except on the question of academic freedom itself. The quintessential expression of the Chicago position was articulated by the 1967 Kalven Committee, which Martinez cites with approval in her letter.

As the Kalven Committee [put it](#), “the university is a community only for” the “limited and distinctive purposes” of supporting teaching and research. Such a narrowly construed community “cannot take collective action on the issues of the day without endangering the conditions for its existence and effectiveness.” “There is no mechanism,” the report continues, by which the university “can reach a collective position without inhibiting that full freedom of dissent on which it thrives.” Thus, “if it takes collective action, therefore, it does so at the price of censoring any minority who do not agree with the view adopted.”

The Kalven Committee’s insistence on strict neutrality is echoed by many contemporary proponents of free speech on campus. It is also untenable. There is no way for the university to remain neutral around contentious issues when the operation of the university itself is the subject of political controversy.

If a university takes steps to ensure the diversity of students, faculty, staff, and administration, for example, it implicitly takes a position on the value of diversity. If it engages in race-conscious admissions, it takes a position on the morality of that practice. It is interesting that the University of Chicago's [website](#) says that it "is committed to affirmative action." Does that affirmation violate the Kalven Committee's injunction? Does it impinge on the academic freedom of faculty members and students who reject the practice? If the University of Chicago were to take the opposite position, refusing to consider race in its hiring and admissions, would it suppress the speech rights of those who enjoin those practices as necessary correctives for past and present racial injustice?

Fortunately, there is an alternative to the Chicago model that permits universities to espouse substantive values as long as they leave room for disagreement. I will call this the "Calabresi model," in honor of the legendary Yale Law School dean and now federal appellate judge, Guido Calabresi, for whom both Martinez and I served as law clerks. Like the Chicago model, the Calabresi model robustly defends the freedom of expression of university community members as essential to the academic enterprise. But it also makes ample room for the university and university administrators to affirm institutional values, even when those values become the subject of public controversy.

As Judge Calabresi recounts in a [recently published oral history](#), on more than one occasion during his time as dean at Yale Law School he refused to suppress controversial speakers he deeply disapproved of, and whom he thought were expressing ideas that ran contrary to Yale's values. Rather than canceling or deplatforming the speakers, he allowed the talks to go forward. But he used his "bully pulpit" as dean to criticize the speakers and to give voice to the harm he saw their speech as perpetrating against members of the Yale community. He even joined picketers and protesters of some of the very speakers he had allowed to go forward. In doing this, he hoped to affirm the value of free speech while mitigating the harmful

impact speakers can have on the inclusive intellectual climate necessary for the university to pursue its educational mission.

A little bit of self-censorship is healthy and necessary for sustaining a climate of education and engagement. Too much of it stifles necessary debate.

Administrators can articulate university positions while preserving space for disagreement. But to successfully preserve that space, we also need to be attentive to the social pressure many on campus feel to go along with the views that enjoy consensus support among students and faculty. Peer pressure exists regardless of whether the administration decides to express a position, and yet this pressure is something administrators must take seriously.

To be clear, some self-censorship is both inevitable and productive within any discursive community. This is why Martinez's willingness to suppress heckling is appropriate in a university setting, even though heckling might be protected speech in other contexts. Norms against using certain kinds of speech in educational settings (profanity or hate speech, for example) constitute vital guardrails that sustain the preconditions for a productive teaching and learning environment. The question is one of context and degree. A little bit of self-censorship is healthy and necessary for sustaining a climate of education and engagement. Too much of it stifles necessary debate.

In our current moment, social pressure and the resulting self-censorship have gone too far, and a sense of ideological conformity prevails on many campuses. Surveys conducted by FIRE over the past several years reveal that people holding even

mainstream conservative views report feeling afraid to give voice to their opinions on certain issues in classroom settings or campus events. This degree of self-censorship undermines the university's educational mission of preparing the leaders of tomorrow, leaders who will need to be able to understand and engage with people who hold views that are different than their own.

Academic leaders should address the problem of peer pressure directly. We can do this by taking steps to ensure that a broad range of perspectives are represented and expressed on campus. One obvious step is to talk about the importance of civil disagreement and about the discursive virtues of listening generously and speaking courageously. If we promote the idea that campuses are a place for practicing and teaching civil disagreement, and if we do so early and often, we can soften the soil for the steps we need to take when confronted with calls to deplatform or sanction people merely because of their point of view or the position they have expressed. Although I disagree with Martinez's embrace of the Chicago model, there is no question that her letter was an excellent contribution to this broader effort.

A second way to help our campuses become more friendly to civil disagreement is to be thoughtful about the speakers we invite. We tend to be attentive to diversity of identity in speaker selection or panel composition. How often are we attentive to viewpoint diversity? We can teach our communities about the value of civil disagreement by building it directly into the format of our programming.

As with student heckling, peer pressure is something administrators have the tools to address. But that power has limits. By all means, let's celebrate wise and courageous administrators like Martinez. But let's also pay attention to the more potent threats to campus discourse, those we do not have the same tools to resist. The greatest dangers to higher ed do not come from our students, but from the rising tide of state censorship. Against that threat, an enervating model of university neutrality will only muzzle us and hasten the erosion of our values.

We welcome your thoughts and questions about this article. Please [email the editors](#) or [submit a letter](#) for publication.

FREE SPEECH

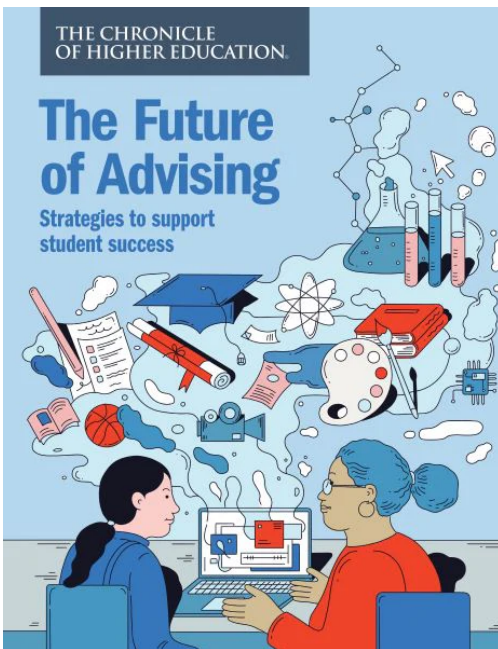
ACADEMIC FREEDOM

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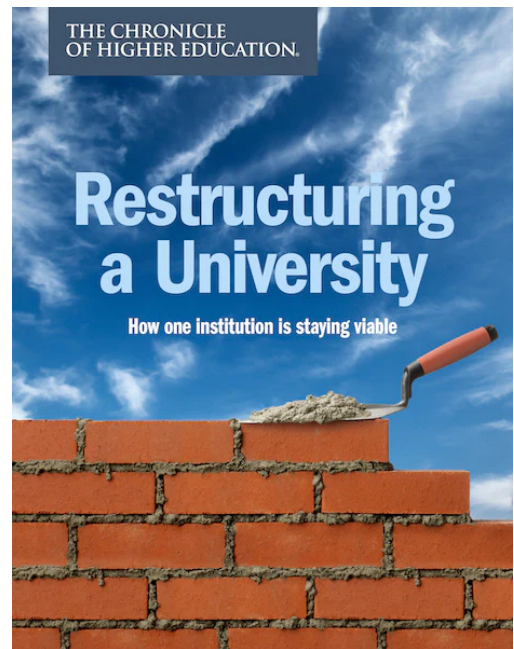
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