Academic Freedom and Governance: A Call for Increased Dialogue and Diversity

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I welcome the opportunity to participate in this Symposium, particularly at a time when I have taken a leave of absence from law school teaching to think about recent events at my law school and others that bear upon the meaning of academic freedom and governance. I would like to comment on several of these events, including the issues concerning diversity and community that they raise and how they affect my understanding of the academic freedom and governance concepts that we are struggling to define.

During the 1986-1987 school year, the president of Temple University summarily dismissed the law school dean, a black man. While members of the law school faculty were en route to an Association of American Law Schools (AALS) conference in Los Angeles or otherwise engaged in semester break activities, the university president locked the dean out of his office and appointed a new acting dean.[1] Although the president telephoned some members of the law school faculty on the night of the lockout, he consulted neither the faculty as a whole nor a faculty liaison committee that had been meeting throughout the fall with

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1. Accounts conflict on the events triggering the dean's termination and lockout. The university president announced early in the fall of 1986 that he would remove the law school dean at the end of the school year. The law school faculty liaison committee, elected by a faculty majority, met during the fall with the university administration to resolve the resulting dispute over the faculty's role in termination decisions. To buttress the faculty position, the committee requested relief on December 31, 1986, from the Association of American Law Schools (AALS) and the American Bar Association (ABA) Accreditation Committee of the Section of Legal Education and Admissions to the Bar. The liaison committee contended that the university president's unilateral action implicated ABA and AALS governing provisions, including ABA standards 204, 205, 211, and 405, AMERICAN BAR ASS'N, APPROVAL OF LAW SCHOOLS: STANDARDS AND RULES OF PROCEDURE 3, 5, 12 (amended 1983), and AALS article 6-6 on law school governance, ASSOCIATION OF AM. LAW SCHOOLS, ASSOCIATION HANDBOOK, Apr. 1986, at 24. The ABA committee sent a visiting panel to interview faculty, students, and university and law school administrators. Members of the faculty and the liaison committee submitted contradictory versions of the events to the visiting panel. Each of these versions are a part of the investigation record and are on file in the dean's office of the Temple University School of Law and the Office of the Consultant on Legal Education to the ABA.

My purpose is not to focus on the events leading to the lockout, but to consider the effects of the termination and lockout on the faculty's ability to play its appropriate role in the academic enterprise. Despite the faculty's good faith efforts to clarify its governance role through discussion, the physical act of locking out the dean and the unilateral appointment of an acting dean were suppressive, casting doubt on the value of dialogue and reducing the process to a meaningless charade.

the president and university officials to address the faculty's role in decision making.

The president gave no reasons for the dismissal. Analogizing his exercise of the power to terminate the dean to a corporate decision, the president argued simply that his power to terminate was consistent with his authority as the university's chief executive officer. Just as it applied to other corporate structures, the analogy held that the dean served as agent at the pleasure of the president, who answered only to the board of trustees.

Although many lawyers and members of the outside community accepted the president's corporate analogy (even though some criticized the lockout), a majority of the law school faculty disagreed. Those who disagreed believed that the corporate analogy conflicted with American Bar Association (ABA) and AALS regulations mandating faculty participation in law school decision making. Some of the faculty viewed the termination issue as implicating not only their role in law school and university governance but also intramural academic freedom.[2] The president's decision not to proffer the grounds for dismissal left faculty to speculate and thus deprived them of any opportunity to engage in meaningful dialogue. Because the faculty had been denied any opportunity to assess whether the termination was justified, we chose instead to talk about faculty autonomy. We argued to the ABA and AALS committees, whom we asked to intervene,[3] that principles of faculty autonomy are significant because they can protect freedom of inquiry in discussion and research, the core of academic freedom and the hallmark of the university. We need a strong, self-confident, independent faculty to protect the core concept of academic freedom. University faculty have recognized this need by supporting peer review in faculty hiring and tenure evaluation and in asserting general claims to shared governance in university

2. For general explications of intramural academic freedom, see Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEXAS L. REV. 1323 (1988); Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEXAS L. REV. 1265 (1988); Yudof, *Intramural Musings on Academic Freedom: A Reply to Professor Finkin*, 66 TEXAS L. REV. 1351 (1988). *See also* Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROBS. 431, 438-40 (1963) (arguing that without faculty participation in termination decisions, academic freedom could suffer); Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROBS. 447, 469-86 (1963) (describing academic freedom as an "emerging constitutional right" and urging due process protections in faculty termination cases); van den Haag, *Academic Freedom in the United States*, 28 LAW & CONTEMP. PROBS. 515 (1963) (describing academic freedom as an "extra-constitutional, intra-academic" right that protects professors from dismissal for expressing their views).

3. The faculty argued that principles of shared governance recoguized in the ABA and AALS regulations, *see supra* note 1, provided that the faculty should determine the best interest of the law school's academic development and that the unilateral action of the president compromised this role. *See infra* note 5.

affairs.[4] One cannot view academic freedom and governance in isolation.

The ABA and AALS committees concluded that the president had not violated their regulations.[5] The ABA urged the faculty and administration to come together and refrain from escalating the controversy for the sake of law school morale.[6] Many of us who had challenged the president's actions had mixed feelings about that advice because we felt the principles of governance were too important to ignore. For me, ending discussion on the governance issues because of fear of potentially divisive faculty disagreement would negate the essential and important values of intellectual pluralism and conversation within the academy. How could I continue to teach my students to strive for intellectual integrity and to pursue the truth if I could not explore honestly the boundaries of my own role in the academic community with my colleagues?

Some concern about the fallout from continued discussion may have been justified. A few untenured faculty expressed fear that participation in discussions concerning faculty governance could affect scholarship and tenure decisions. Some tenured and nontenured faculty worried that continued discussion about faculty participation in law school decision making was unproductive and contrary to our educational mission.

4. *See* American Ass'n of Univ. Professors, American Council on Educ. & Association of Governing Bds. of Univs. and Colleges, Statement on Government of Colleges and Universities (1966), *reprinted in* ACADEMIC FREEDOM AND TENURE 90-101 (L. Joughin ed. 1969). The statement provides that:

> Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal. The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy. Furthermore, scholars in a particular field or activity have the chief competence for judging the work of their colleagues; in such competence it is implicit that responsibility exists for both adverse and favorable judgments. Likewise there is the more general competence of experienced faculty personnel committees having a broader charge. Determinations in these matters should first be by faculty action through established procedures, reviewed by the chief academic officers with the concurrence of the board. The governing board and president should, on questions of faculty status, as in other matters where the faculty has primary responsibility, concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail.

Id. at 99. Commentators have amplified the need for governance principles that recognize the prominent faculty role in day-to-day decision making and have emphasized the interdependence of governance and freedom issues. *See, e.g.*, Murphy, *supra* note 2, at 484; van den Haag, *supra* note 2, at 516-17.

5. In a letter to the university president, the acting law school dean, and the faculty liaison committee, the ABA consultant on legal education wrote that the ABA Accreditation Committee of the Section of Legal Edueation and Admissions to the Bar had dismissed the complaint against Temple University based on the findings of the visiting panel. Letter from James P. White to Peter J. Liacouras (July 1, 1987) [hereinafter ABA Letter] (copy on file with the *Texas Law Review*).

6. Based on the visiting panel's fact findings, the ABA Accreditation Committee concluded that the dismissal actions did not violate standards 211, 205, or 405, or any other ABA standards. *Id.* at 4. However, the committee "directed" the president, the acting dean, and the law faculty to restore "the morale of the law faculty and community" and "[t]he importance to the University of the faculty's role in Law School governance pursuant to Standard 205." *Id.*

Upon reflection, however, I realized that it was not the confrontation of the governance issues itself that created the risk of further dissension; rather, it was the president's locking out the dean and appointing an acting dean without faculty consultation that created this risk by destroying the faculty's independence to discuss the issues openly.

The future will determine the long-term effects of these events on the law school's direction and the faculty's role in defining it. Sensitive law school and university leadership certainly can bring the faculty together and reforge a communal spirit. But one should not easily dismiss or forget the significance of the events surrounding the dean's termination. Temple's law faculty is perhaps the country's most diverse in composition.[7] The president's unilateral action sacrificed an opportunity to test assumptions about a diverse faculty's ability to draw upon their experiences and perspectives and to converse and make decisions important to the future of the law school and legal education. Moreover, the president's lack of reliance on the faculty's judgment in critical times indicates a breach of confidence that cannot be repaired easily. That the silencing occurred when a black was dean has further consequences. Suspicion of racial or other bias[8] can loom when the rationale or manner of decision making exhibits distrust and a sense of arbitrariness. Silence also sends the wrong message to law students about integrity, principled decision making, and the value of dialogue, which are inseparable aspects of the law school's educational mission. Thus, the president's silence not only breached the faculty's confidence and raised fears of racial bias but also deprived the faculty of the opportunity to fulfill its mission.

The academic enterprise, more than other endeavors, generates and

7. With six tenured black professors (including the terminated dean), two other tenured minority law professors, and four other minority faculty in tenure-track hiring positions, Temple has prided itself in the diversity of its faculty. There are four tenured and three tenure-track women professors, more than half of whom are also racial or ethnic minorities. According to a survey concerning faculty composition in 1986 and 1987, conducted by Professor Richard H. Chused at the request of the Society of American Law Teachers (SALT), of 149 responding schools (over 85% of AALS member institutions), about one-third have no black faculty and less than a tenth have more than three. Chused, The Hiring and Retention of Minority and Female Faculty in American Law Schools 4 (1988) (unpublished manuscript on file with the *Texas Law Review*). Between the 1980-1981 and 1986-1987 academic years, the number of black faculty increased from 2.8% to 3.7%; the hispanic population increased form 0.5% to 0.7%; and other minorities from 0.5% to 1%. *Id.* at 2. Thus, as Professor Chused observes: "Racial tokenism is alive and well at American law schools." *Id.* at 4. Temple University was one of nineteen schools with more than 6% of their faculty positions occupied by blacks during the 1986-1987 academic year. *Id. See generally* Lawrence, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429 (1986) (detailing minority faculty hiring in law schools); Kaplan, *Hard Times for Minority Profs*, Nat'l L.J., Dec. 10, 1984, § 1, at 1, col. 1 (ABA statistics showing that one-third of law schools had no minority faculty and one-third had only one minority member).

8. The ABA committee investigating the Temple University incident found no evidence of racial bias. ABA Letter, *supra* note 5, at 3.

evaluates ideas. Inhibition of conversation or the exchange of ideas negates the academic community's purpose—attaining and transmitting knowledge. Academic freedom and faculty governance provide the means for continuing the enterprise by protecting the uninhibited, free-flowing exchange of viewpoints. Academic freedom recognizes the need for an environment of unobstructed intellectual inquiry, and academic governance accords the role of regnlating the environment to those with a clear stake in continuing the enterprise. Each concept protects the participants' ability to engage in the enterprise. Open, robust dialogne and continuing debate have their potential dangers—paralysis from interminable conflict, factionalism, and disintegration of the existing community—but the invocation of silence to respond to those dangers exposes the enterprise to the far graver risks of stagnation and subversion of purpose. Viewed in this light, the experiences at Temple raise larger issues of academic freedom and governance than a narrow account of the events might reveal. One can also connect these experiences with events at other law schools that implicate the importance of dialogue, the nature of community, and diversity as a preferred value in law school education.

As others have observed in this Symposium and elsewhere, the academic freedom debate historically concerned how best to protect the academy from external forces that would inhibit intellectual inquiry by injecting politics into decision making.[9] More recently, the focus has shifted to faculty actions that exclude or stifle the expression of ideas because of politics or aversions to different perspectives.[10] Although the traditional conception of academic freedom may not apply meaningfully

9. *See, e.g.*, Curran, *Academic Freedom and Catholic Universities*, 66 TEXAS L. REV. 1441, 1447-54 (1988); Emerson & Haber, *Academic Freedom of the Faculty Member as Citizen*, 28 LAW & CONTEMP. PROBS. 525, 525 (1963); Metzger, *supra* note 2, at 1270-80; Morris, *Academic Freedom and Loyalty Oaths*, 28 LAW & CONTEMP. PROBS. 487, 488-89 (1963); Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEXAS L. REV. 1481, 1486-89 (1988); Schneider, *Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic Freedom*, 11 J.C. & U.L. 179, 180 & n.8 (1984); van den Haag, *supra* note 2, at 515-17; *see also* Frug, *McCarthyism and Critical Legal Studies* (Book Review), 22 HARV. C.R.-C.L. L. REV. 665, 667 (1987).

10. Commentators disagree about whether the predominant threat to the academy in the 1980s is the inhibition of academic freedom, persecution for espousing certain ideas, or intolerance toward alternative lifestyles and experiences that can engender different perspectives. *See, e.g.*, Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 1, 39-57 (1985) (recounting courts' reluctance to address predominantly white law school's failure to hire more than a token number of minority faculty); McIntyre, *Gender Bias Within a Canadian Law School*, CAUT BULL. ACPU, Jan. 1987, at 7, 10 (asserting that hostility towards women's perspectives led to efforts to silence and invalidate a feminist view). Disagreement arises in part because those who practice intolerance have used the rubric of academic freedom to their advantage. *See id.* at 10; Schneider, *supra* note 9, at 206; Gilligan, *Remapping Development: The Power of Divergent Data*, in VALUE PRESUPPOSITIONS IN THEORIES OF HUMAN DEVELOPMENT 37, 51 (L. Cirillo & S. Wapner eds. 1986).

to this new focus,[11] the institutional protections that previously aided intellectual inquiry and the germination of ideas must be refit to address today's problems. Academic governance and academic freedom are not ends in themselves, but rather instruments necessary to the exchange and attainment of knowledge. A questioning of diversity's role in fostering an environment for this fruitful exchange of ideas emerges from the recent focus on faculty actions that impinge on academic freedom. Despite a purported commitment to the essential values of academic freedom, recent conflicts in law schools have centered on the composition of the academic community, the importance of diversity as a means of achieving quality legal education, and the threat posed by diversity to the academic community's existence.

Paul Carrington, dean of Duke University School of Law, argued in his 1984 article *Of Law and the River*[12] that "nihilists" should leave law

11. This issue concerns the extent to which neutral principles or standards are available to minimize the opportunity for biased decision making within the academy. Current threats to diversity from within the community suggest that the invocation of academic freedom concepts is not always helpful and indeed has contributed to the movement stultifying expression. Feminists like Sheila McIntyre thus argue against casting the problem of exclusion as an academic freedom concern because that concept has been used to stifle viewpoints. McIntyre, *supra* note 10, at 10; *see also* American Ass'n of Univ. Professors, *A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*, 67 ACADEME 27 (1981) (decrying external intrusions into institutional self-governance without good cause); Gray, *Academic Freedom and Nondiscrimination: Enemies or Allies?*, 66 TEXAS L. REV. 1591, 1595-1600 (1988) (arguing that academic freedom is used as a defense to challenges of racism and sexism); Schneider, *supra* note 9, at 182 (noting that applying the term "academic freedom" lends legitimacy to one side's view in a controversy).

12. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984) [hereinafter *Law and the River*]. In his responses to the article's critics, Dean Carrington disavows having set out the position that heterogeneity in the legal academy should be limited. *See* Carrington, *Freedom and Community in the Academy*, 66 TEXAS L. REV. 1577, 1581 n.8, 1583 n.11 (1988) [hereinafter *Freedom and Community*]; *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1, 10, 24-26 (1985) [hereinafter *Nihilism and Academic Freedom*] (Dean Carrington's response to Professor Robert W. Gordon); *id.* at 24-26 (Dean Carrington's response to Professor Owen M. Fiss). Dean Carrington clarifies his position by stating that the "deterministic views that extreme advocates of critical literary theory seem to adopt . . . belie[] the intellectual premise of professional education in law and [are] therefore morally assaultive to students; people who adhere to that view ought to consult their consciences about their professional duties as teachers to students coming to them for help in learning to guide, exercise, or perhaps manipulate the exercise of the free will of the public." Letter from Dean Paul D. Carrington to Phoebe A. Haddon (Oct. 21, 1987) (copy on file with the *Texas Law Review*). Several readers have inferred from Dean Carrington's comments a disturbing suggestion that seeking a diversity of views may be somehow inconsistent with the law school's academic mission and that the law school should not include certain ideas in its dialogue. *See, e.g.*, Finman, *Critical Legal Studies, Professionalism, and Academic Freedom: Exploring the Tributaries of Carrington's River*, 35 J. LEGAL EDUC. 180, 182, 187-92 (1985) (stating that Carrington's thesis violates the university's commitment to the search for truth); Frug, *supra* note 9, at 681-85 (citing Carrington for the proposition that a university would not violate academic freedom by refusing to hire CLS adherents); *Nihilism and Academic Freedom*, *supra*, at 9, 13, 17 (Professor Robert W. Gordon's response to Dean Carrington) (stating that Carrington brands nihilism as "too dangerously corrupting" and as a view that "might be turned to frightful purposes"); *id.* at 17 (Dean Paul Brest's comments to Professor Phillip E. Johnson) (stating that Carrington suggests that a law school faculty or administrator should act against nihilist professors).

Notwithstanding his efforts to clarify his position, Dean Carrington's comments continue to

schools voluntarily because they do not help achieve the schools' educational mission and instead threaten to rob students of courage, leaving them to learn "skills of corruption."[13] The article evoked strong and angry responses from a number of respected thinkers and writers disturbed by the implications of his words.[14] The critics objected to Dean Carrington's suggestion that some group of faculty could objectively identify thinking that was acceptable, and thus suitable for teaching, and thinking that was unacceptable, and thus excisable from the curriculum. Dean Carrington seemed to argue that if the "legitimating" group identified a colleague as someone who writes and teaches unacceptable ideas, then that colleague deserved no place in the law school division of the academy because the law school's primary mission is to provide its students with professional training. The theory seems to be that the effective exercise of this mission requires some limitation on the range of ideas and the vigor of their exchange.[15]

Many interpreted Dean Carrington's comments as targeting "Crits," persons loosely identified with the Critical Legal Studies (CLS) movement. Some reacted heatedly with charges of red-baiting and academic freedom violations.[16] On the other hand, others seconded Dean

raise concern because they do not take sufficient account of the pursuit of truth that is the center of the academic enterprise. *See, e.g.*, Fuchs, *supra* note 2, at 435-36 (describing the university as a place "where scholars are to pursue truth"); *see also* Blumer, *Academic Freedom at Church-Related Institutions: Two Views*, ACADEME, Jan.-Feb. 1986, at 50, 51 (stating that one should never claim the right to be unencumbered by contrary opinion). It is objectionable to confer an "attitudinal reverence" upon contemporary legal orthodoxy and propose that this orthodoxy generates a moral imperative because this approach hinders an honest search for truth. Moreover, as the AAUP observed: "It is not merely that the long history of academic freedom teaches that charges of irreverence can readily serve as covers to objections to unorthodoxy; rather, it is that it is all but impossible to extenuate the one without abetting the other." *Report of Committee A*, ACADEME, Sept.-Oct. 1986, at 13a, 19a. This observation suggests that favoring certain views and forbidding others threatens the pursuit of truth. Such "attitudinal reverence" inhibits the interplay of ideas and participation in the enterprise of those with other viewpoints by casting doubt on the legitimacy of those who are unable or unwilling to assimilate their views with the orthodoxy. Thus, even a few utterances concerning the desirability of excluding nihilists may evoke potential repression of participation through the chilled spirit or reluctance to promote a viewpoint challenging the status quo.

13. *Law and the River*, *supra* note 12, at 227; *see Freedom and Community*, *supra* note 12, at 1581 n.8; *see also Nihilism and Academic Freedom*, *supra* note 12, at 25 (Dean Carrington's response to Professor Owen M. Fiss) (stating that students with nihilistic teachers may come to see their professional clients "as means not ends").

14. *See Nihilism and Academic Freedom*, *supra* note 12, at 1-26; *see also* Finman, *supra* note 12, at 183 (stating that Carrington's article "can easily be read as a declaration that law schools should expel nihilist teachers from their midst").

15. *Law and the River*, *supra* note 12, at 227; *see Freedom and Community*, *supra* note 12, at 1581 n.8; *see also Nihilism and Academic Freedom*, *supra* note 12, at 25 (Dean Carrington's response to Professor Owen M. Fiss) (stating that law schools, having as their primary function the training of lawyers, "are not pure in their academic obligations").

16. *See, e.g.*, *Nihilism and Academic Freedom*, *supra* note 12, at 9, 13-16, 17 (Professor Robert W. Gordon's response to Dean Carrington) (stating that Carrington's essay encourages "Red baiters"); *id.* at 17 (Dean Paul Brest's comments to Professor Phillip Johnson) (stating that Carrington engages in "Red-baiting," and that excluding nihilist teachers "would violate the most fundamental

Carrington's view of law school training based on his conception of the law school as a peculiar part of the academy with closer ties to actual practice than to other university concerns and academicians.[17] For me, Dean Carrington's arguments concerning the value of CLS scholarship are unsettling because they intimate the existence of objective standards in legal scholarship and notions of academic responsibility that rationally could justify total exclusion of a group from the academy.

One can appreciate the concrete impact of such a position in terms of the human toll among Crits; charges have surfaced that faculties at Harvard and other law schools are determined to exclude Crits from their ranks.[18] Some may view this movement to exclude Crits as affecting only a limited kind or number of law schools and thus not threatening legal education as a whole. Those who embrace CLS or who are challenged by some of its themes may reject the temptation to downplay the problem, suspecting that the stifling of ideas is even greater than has been publicized. Even those who are not convinced that the CLS movement has shed new light should hesitate to embrace an approach that justifies the exclusion of any group from the law school academic community. They also should look more closely to see if charges of scholarly or teaching incompetence mask an intent to exclude because of difference.

The broader dangers of an argument that justifies group exclusion are all the more disturbing considering that racial and other minorities, traditionally absent from law school teaching and admissions, are still

principles of academic freedom"). Dean Carrington's comments also have prompted conferences, including the December 1987 Conference on the Politics of Academic Freedom by the Society of American Law Teachers and New York University. *See also Report of Committee A, supra* note 12, at 19a (arguing that evaluation of CLS is ultimately the responsibility of law schools but that excluding professors because of "disrespect" for certain teaching is a tenuous proposition and contravenes the spirit of academic freedom).

17. *See, e.g., Nihilism and Academic Freedom, supra* note 12, at 19-20 (Professor Louis B. Schwartz's comments to Dean Paul Brest) (noting that Carrington's essay is "brilliant, civilized, and insightful"). Views about the purpose of legal education differ greatly, with depictions of law schools ranging from trade schools to academic halls of learning. The symposium in which Dean Carrington first offered his controversial views reflected a range of perspectives on the subject. *Compare Law and the River, supra* note 12, at 222-28 (arguing that the law school's duty to train professionals implies a duty "to constrain teaching that knowingly dispirits students") *with* Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163, 166-67 (1984) (stating that legal education should go beyond equipping students to perform professional roles and should enhance students' "capacity to realize their human potential") *and* Luban, *Against Autarky*, 34 J. LEGAL EDUC. 176, 188 (1984) (law schools should "inculcate a sense of justice" in their students so that they are better students and better lawyers). The suggestion that CLS advocates subvert the law school's professional mission collides with the university's commitment to the search for truth. Finman, *supra* note 12, at 188; *see supra* note 12 and *infra* text accompanying notes 34-36.

18. *See, e.g., Harvard Rally Protests Tenure Vote*, Boston Globe, May 14, 1987, at S6, col. 1; *see also Message of the President*, A. AM. L. SCHS. NEWSL., Sept. 1986, at 1, col. 1 (decrying threats to diversity in law schools that have developed over the past twenty years).

struggling to claim their places. Hiring and tenure decisions can thinly veil factional or ideological differences with ostensible assessments about teaching and scholarship weaknesses. Perspectives that challenge or contravene the status quo can become convenient targets and result in the squelching or stifling of the diversity of views that arise from alternative life experiences and thinking. The suggestion that a law school community should exclude certain expressions because of its institutional mission also raises more than an abstract concern about the continuing viability of the marketplace of ideas, which depends upon the presence of different voices. The Crits controversy raises questions about the limits and breadth of community and the amount of dissonance we will tolerate in the law school. Like the Temple experience, the CLS controversy challenges us to reconsider our educational mission and the confidence we are willing to place in dialogue as a means of resolving differences.

In both the Temple and CLS controversies, law school faculty and administrators used their power to exclude perspectives and limit opportunity for dialogue because they believed the community's health and educational mission required closure. This proffered justification minimizes the connection between free and full exchange and quality legal education. Productive conversation requires a certain degree of courtesy and trust among the participants, but to prefer silence over a vigorous exchange of different views in order to obtain communal civility jeopardizes the enterprise. Moreover, the argument that a pluralistic community or diverse views impair rather than strengthen our ability to educate in the law school rationalizes restrictions on the search for justice and truth. If we prefer silence over the expression of controversial ideas, relying on the refining strength of argument in theory, but not in practice, we invite our students' cynicism and distrust.

Minimizing the value of diversity in the academic enterprise invites grave danger: it allows us to erect a monolithic conception of competence that stifles the creative development of the discipline. Professor Derrick Bell has spoken most eloquently about the harm of a law school's smugly embracing a limited view of community. While he was a visiting professor at Stanford, Professor Bell described his feelings about a series of "enrichment lectures" imposed by the law school to "supplement" his constitutional law course.[19] According to Professor Bell, the law school "organized and specifically designed [the lecture program] to compensate for student-reported teaching inadequacies."[20] Student misgivings about the intellectual value of Professor Bell's teaching perspec-

19. Bell, *The Price and Pain of Racial Perspective*, Stanford L. Sch. J., Apr. 1986, at 1, col. 1.
20. *Id.*

tive did not trouble him (or come as a surprise to him or other minority faculty). What troubled Professor Bell was the apparent response of the faculty, with some administrative approval, in organizing and participating in the lecture series. The organizers invited Professor Bell to participate, but did not tell him the real purpose of the series.

> In a word, the interpretation and my presentation of it was as threatening to some students as my writing [is] unnerving for many of my law teacher colleagues. When the student complaints were reported to faculty members, I believe that the content of my course was translated into a competency problem to which response became important . . . .
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> I submit that had I come here with a political outlook comparable to the black neo-conservatives now receiving so much undeserved media attention, and had my teaching of Constitutional Law been in that mold, either the student complaints would have been less virulent or the faculty response would have been [to urge them] to be patient and talk over their problems with the teacher.[21]

Professor Bell stated that the "exclusion from the dialogues that must have taken place before so radical a remedy [was chosen] was a denial of my status as a faculty member and my worth as a person every bit as demeaning and stigmatizing to me as the Jim Crow signs I helped to remove from public facilities across the South two decades ago."[22] This observation exposes a sense of isolation readily understood by blacks and others persistently excluded from American institutions. Professor Bell's experience may appear all the more outrageous to people who hope that institutions would not subject those in the "highest reaches of our professions"[23] to such a challenge on the basis of competence. But do we not invite the recurrence of such outrageous events when we assume that our educational mission justifies a narrow conception of the law school community, purged of dissidents? In such a community, competence may be a convenient buzzword for conformity.

I do not mean to downplay the complexity of the racial issues raised by Professor Bell's perceptions of his experience at Stanford. Nor do I doubt that many people perceive real differences between the debate about scholarship and standards arising from the CLS controversy and the concern for increased minority presence in the law school community. Each case, however, presents the serious question of whether those who believe they are legitimately serving the interests of students and the

21. *Id.*
22. *Id.*
23. *Id.*

development of the law can truly do so without a more expansive view of community and of the value of dialogue between competing perspectives. Professor Bell entreated Stanford, for the sake of its students and educational enterprise, to recruit black teachers and change the composition of the community that teaches and judges the worth of ideas. But a law school may fulfill this call for increased diversity only if it provides the *opportunity* for its community to perceive and accept views as relevant and valid for the study of law. Professor Bell's argument accepts the premise that participation is a valuable means of attaining knowledge and that the sometimes clashing exchange of views promotes growth; it rejects stability and order as preferred values of community. Law faculty, perhaps more than other divisions of the academy, more quickly fall victim to the risk of a narrow vision of community because we believe our training places us beyond the dangers generally associated with threats to academic freedom. Although we may pose as a "citadel of due process and high principle,"[24] we deserve no special dispensation because we have not been fair or just in seeking and selecting others to become a part of the community.[25]

As I have suggested, diversity's essential value lies in the aspiration that knowledge derives from conversation and the competition of ideas. Perspectives that question dominant norms can generate real fear of upheaval and concern for the preservation of the status quo. Those in power may respond in a number of ways when confronted with a challenging position or idea. One possible response is to disagree vigorously with the proffered idea and move to resolution by allowing the fullest airing of views. Another is to declare the challenging view or the challenger illegitimate. Whether by physical lockout or more "civil" actions that label the challenger as incompetent or irrelevant, such as an alternative "enrichment" lecture program or a condescending, though polite, refusal to take part in dialogue, the use of power within the academy to silence a different view endangers the enterprise. The Temple experience, the Crits' tenure struggles, and the Stanford enrichment course suggest a disturbing preference among faculty and administrators for silencing rather than listening and discussing. This preference has

24. Kuttner, *Free Ideas at Harvard Law School Aren't So Free*, Boston Globe, May 18, 1987, at 19, col. 1 (discussing Claire Dalton's tenure denial and describing Harvard Law School as "supposedly a citadel of due process and high principle").

25. *See, e.g.*, Bell, *supra* note 10, at 39-59 (recounting the reluctance of predominantly white law schools to hire more than a token number of minority faculty); McIntyre, *supra* note 10, at 10-11 (recounting efforts to silence and invalidate a feminist view); Schneider, *supra* note 9 (detailing attacks upon clinical programs in law schools and the lack of support for such programs); *see also supra* note 7 (detailing minority hiring in American law schools).

profound consequences for the enterprise because those seeking to silence different views can take advantage of traditional protections of faculty governance and academic freedom.[26]

To combat the danger of such exclusion, faculty should assume primary responsibility for restoring faith in open debate, not as an end in itself, but as a means of attaining knowledge. It is difficult, however, to define the faculty's role and responsibility. In a review of *No Ivory Tower: McCarthyism and the Universities*,[27] Jerry Frug recognizes the danger of the wrongful use of power within the academy and its impact upon Crits and proposes that the academy view, as a form of academic practice, academic freedom as a principle or idea.[28] Professor Frug thus moves beyond Professor Bell's call for diversity and urges faculty to seek opportunity for open debate about changes they advocate. According to Frug, this opportunity can become available if faculty are empowered by an environment free of outside threats of control. Frug himself acknowledges criticism that his proposal is utopian or self-serving as a CLS agenda,[29] but his theory underscores the fundamental relationship between freedom and governance and highlights the fact that dialogue, enriched by difference, must be the focus of any solution.[30]

Professor Carrington's response, that law faculty serve as professional trainers and should constrain their community and dialogue to

26. *See* McIntyre, *supra* note 10; *supra* note 11; *see also* Frug, *supra* note 9, at 688-701 (arguing that administrations can use academic freedom as a weapon against dissent and that faculty governance can help remedy this problem); *Nihilism and Academic Freedom*, *supra* note 12, at 20 (Professor William W. Van Alstyne's remarks to the AAUP Committee on Academic Freedom and Tenure).

27. E. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES (1986).

28. Frug, *supra* note 9, at 688-91.

29. *Id.* at 700-01.

30. I do not subscribe to Professor Frug's almost mystical attribution of faculty empowerment to self-governance. That vision does not adequately consider the interdependent relationship of the law school faculty and other components of the university. A complete depiction of academic community cannot limit itself to the faculty, but must include students and administrators, each with competing interests and concerns regarding academic life. *See, e.g.*, Schneider, *supra* note 9, at 200, 205-06, 209-12 (noting that faculty, administrations, and students may have different interests in academic decisions). *See generally* Emerson & Haber, *supra* note 9 (discussing the degree to which institutions may regulate the political activities of faculty members). A concept of shared governance that recognizes the prominence of the faculty's role in day-to-day decision making on academic matters better reflects this interdependent relationship. *See supra* note 4.

Professor Frug is justifiably concerned with the effects of university governance by lay persons with scant academic experience who improperly adapt their own decision-making techniques to academic governance. *See* Frug, *supra* note 9, at 698-700. It is clear, however, that faculty—particularly law school faculty—more often apply decision-making techniques familiar to those outside the academy rather than cultivate practices particular to faculty communities. My own experience at Temple leads me to conclude that the "practice" of discourse can be productive only if a university observes the faculty's prominent role in decision making and the faculty develop self-confidence in their ability to make effective decisions. *See supra* text accompanying notes 1-2.

meet that purpose,[31] implies an overly narrow conception of the law school's role in training and serving students.[32] The conception of a law school as a professional training center, disengaged from the rest of the academy, may have served in the past as a means of asserting the law school's independence from the academic institution's centralized control.[33] This conception, however, contains an intolerably dangerous opportunity for abuse of power.

This Essay examines the importance of discourse as an alternative to techniques that attempt to safeguard the community by silencing different views. The value and preservation of academic freedom depend on an academic environment that nurtures, not silences, diverse views. The law school faculty has a special responsibility to maintain a nurturing environment for diverse views because of the importance of the marketplace of ideas in our teaching and the value we theoretically place on the role of persuasive discourse in the quest for knowledge. Faculty autonomy takes on significance because it can protect freedom of inquiry. An argument for faculty governance rests on the notion that the faculty is best equipped to make decisions about the allocation of resources within the academy and properly can judge, without irrelevant motivations, the competence of those who would promote the best interests of the enterprise. As faculty, we can seek power from the primacy we attach to participation in advancing discourse. Silence and silencing techniques violate the enterprise and we should not justify them for the sake of community collegiality.

I am not a nihilist. I came to the academy as a lawyer with an expansive impression of what a law school could accomplish through the persuasiveness of a viewpoint skillfully conceived and presented. The issues concerning academic governance, freedom, and community raised by the CLS debate and sharpened by my own experience at Temple, as well as the black experience I share with Derrick Bell, have led to my decision to leave law teaching and will affect my decision whether to

31. *Law and the River*, *supra* note 12, at 227; *Nihilism and Academic Freedom*, *supra* note 12, at 25 (Dean Carrington's response to Professor Owen M. Fiss); *see Freedom and Community*, *supra* note 12, at 1581 n.8.

32. *Nihilism and Academic Freedom*, *supra* note 12, at 26 (noting Professor Owen M. Fiss' response to Dean Carrington that "[l]aw professors are not paid to train lawyers, but to study the law and to teach students what they happen to discover"); *id.* at 23 (Dean Guido Calabresi's response to Dean Carrington) ("The role of the scholar is to look in dark places and to shed light on what he or she sees there."); *see also* Finman, *supra* note 12, at 182 (stating that according to Carrington, nihilist professors disable students from doing legal analysis based on legal principles).

33. *See* Schneider, *supra* note 9, at 179, 181 & nn.10-11; *see also* R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 226-71 (1983) (noting that despite attempts to introduce academic ideals, the American law school was founded and developed as a professional school).

return. These issues, of course, are intensely personal to me, but they are also of professional and scholarly concern. I cannot embrace a limiting image of legal education, nor do I wish to work in a law school community that is merely on the edge of the academy. I am left convinced that academic freedom begins with an expansive conception of community and that law faculty should examine the ways in which we use power politics, rather than discourse, in our decision-making capacities.

Less personally charged reasons exist for reflecting on the strengths of an open law school community with close ties to the rest of the academy. As admissions decline and administrators evaluate the efficient use of university resources, law school faculties must debate vigorously the strengths and weaknesses of their programs and not rest smugly on past priorities. An environment of isolationism and terrorism inhibits a school's ability to attract the productive young faculty who can develop a more creative vision of legal education.

To perform this task, young faculty need to feel confident about the structure of institutional governance and its openness toward innovation. A community that demands conformity and discourages healthy dialogue at pain of excommunication certainly will inhibit that performance. The hallmark of good teaching and legal thinking should be the courage to experiment and challenge existing norms, not responsiveness to the status quo. Law teachers should cultivate creative spirit for their own survival, because they soon may have to protect it from external limitations and institutional constraints arising from limited resources.

Finally, in assessing our educational mission we must ask how to best serve our students. The debate will continue as to whether traditional legal teaching, CLS, or any other perspective more quickly produces cynicism or lack of productivity in students. (Certainly cynicism was present before Crits began to trash the status quo.) But exposing students to the choices presented by differing positions is inherently valuable. Law schools should not limit nor collegially tolerate limitations on the opportunity to pursue ideas and provoke an intellectual exchange, but should *encourage* it for the sake of students and future lawyers. I cannot believe that we inculcate appropriate values like respect, integrity, and concern for truth by stifling argument or banishing a perspective on the law from classrooms or law reviews. Nor do I believe that the significance of our actions is lost on students. The events I have described reflect a pattern of rejecting dialogue as a means of testing the strength of an idea about the law. If we as faculty use positions of power to squelch expression rather than relying on our persuasive abilities, then we make a mockery of the first amendment tradition in our teaching and renege on

other obligations we assume as teachers.[34]

The law school, like other halls in the academy, should be "an intellectual experiment station, where new ideas may germinate."[35] That germination comes not only from embracing an idea but also from reacting to it. The grand and flowing language, such as that employed in the AAUP's 1915 Declaration of Principles,[36] to express the meaning of academic freedom remains unclear even today, especially when countercharges of incompetence and freedom of expression divide faculty. Institutional constraints of limited resources further exacerbate the problem. For academic inquiry in discussion and research to flourish, teachers must reside in a free and autonomous center in which they can pursue ideas through robust discourse inside the classroom and uninhibited exploration of views outside. The absence of a more scientific formula for academic freedom should lead faculty to insist on an open environment that minimizes institutional control over the ability to present and pursue ideas.

Recent events in law schools and commentaries in law school publications, however, offer a competing image of faculty in the law school community. These events and articles suggest that law schools may be condoning or encouraging the exclusion or elimination of some voices that challenge existing assumptions about the law. The implications of this exclusion or elimination are that we need not strive for a conversation that includes those with uncomfortably different views and that our educational mission requires closure rather than expression of dissident views. But the vitality of concepts like academic governance and freedom depends on robust, open dialogue, even if such dialogue becomes painful or causes discomfort or disruption. These new developments challenge us to accept responsibility for advancing intellectual inquiry and protecting the integrity of the enterprise by promoting diversity and seeking the fullest expression of views.

34. Society also benefits from claims for open exchange within the academy. *See* Morris, *supra* note 9, at 490. *See generally* P. CHEVIGNY, MORE SPEECH: DIALOGUE RIGHTS AND MODERN LIBERTY 1-21 (1987) (exploring the primary justifications for freedom of expression in modern political philosophy); B. SICHEL, MORAL EDUCATION 225-45 (1987) (arguing that educators are facilitators and leaders of moral discussions and serve as models for students).

35. American Ass'n of Univ. Professors, Declaration of Principles (1915), *reprinted in* ACADEMIC FREEDOM AND TENURE app. A at 157, 167-68 (L. Joughin ed. 1969).

36. *See id.* app. A at 157-76.