

VIEWPOINT DIVERSITY IN LAW SCHOOLS

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There are some people who hold the old-fashioned view that legal education does not belong in the university context; that it is, or should be, a form of essentially technical and vocational education that belongs elsewhere. They believe that universities should be devoted to the disinterested pursuit and transmission of knowledge, rather than teaching people skills such as advocacy or working with statutes and legal texts.

I am old-fashioned, but not even I am old-fashioned enough to believe that. I believe that law schools do have a very important place on university campuses, and that we should not conceive of law schools as merely vocational and technical institutions that are not concerned with the pursuit of knowledge and truth. And because I have that view of law schools, I do not sharply distinguish legal education, at least in its truth-seeking dimension, from legal scholarship. I do not sharply distinguish legal scholarship from scholarship in the arts and sciences, and I think that reflects law schools' ambitions these days. Law schools want to be places where real scholars do real scholarship. They are interested in the disinterested pursuit of truth, the creation of knowledge, the preservation of knowledge, and the transmission of knowledge.

So to a very considerable extent, law schools are not, and should not be in my view, mere vocational technical institutions, but truth-seeking institutions—a part of universities that have as their mission the seeking of knowledge and truth. And to that extent then, of course, truth-seeking is the end that gives the institution its meaning and defines it as the kind of thing it is. That is how Aristotle teaches us to figure out what things are: by

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what their aims are, what they do, what the end, the *telos* is. So truth-seeking has to be, and rightly is, part of the mission.

Learned Hand said that the spirit of liberty is the spirit of being not too sure one is right.¹ That is part of the spirit of liberty, but I think it is also the spirit of truth-seeking. Having a sense of one's own fallibility, a sense that one could be wrong even in one's basic premises and most fundamental beliefs, is essential to the project of truth-seeking. That is not to say that we should not be advocates for our points of view or that we should not be engaged as scholars politically. I would be a gross hypocrite if I said something like that. I am very engaged—notoriously engaged—politically, always on the wrong side from my colleagues' point of view. So, no, it does not mean that, but it does mean recognizing one's fallibility and the possibility that one could be wrong. It requires, therefore, a certain sort of intellectual humility and personal humility. It requires a willingness to entertain the other side's arguments in a serious way, and to listen to them just in case one is wrong and the other side is right.

I think the proper attitude to adopt is the attitude that Socrates teaches us to adopt in Plato's *Gorgias*: You should look for the friend who will benefit you enormously by showing you where you are in error—your truest friend is the person who corrects you when you are wrong. That openness to argument, and to having one's premises and most fundamental beliefs and values challenged, is terribly important to the truth-seeking mission that defines institutions like Harvard University and the Harvard Law School.

It seems to me that orthodoxies create the very great risk of groupthink. Groupthink is toxic to thought and inquiry and, thus, to the mission of any intellectual community or institution. The problem with groupthink is that when you are in it, you do not know you are in it. When is the last time you met somebody who said, "Yeah, you know what my problem is? My problem is groupthink. I just think like everybody else around me." When you are in groupthink, you will swear on the Bible or whatever your holy book is, even if it is *The Origin of Species*, that you are not in groupthink, and you would pass a lie detec-

1. E.g., David R. Dow, *The Relevance of Legal Scholarship: Reflections on Judge Kozinski's Musings*, 37 Hous. L. Rev. 329, 340 (2000) (quoting Learned Hand as saying "[t]he spirit of liberty is the spirit which is not too sure that it is right").

tor test. But that does not mean that you are not in groupthink. Wherever there is orthodoxy, you have to be concerned about the risks of groupthink.

It seems to me that viewpoint diversity, or intellectual diversity, has its value as a vaccine against groupthink and as an antidote to groupthink once it has set in. That is the real value of intellectual diversity. People who have the spirit of being not too sure that they are right, people who want to be challenged because they know that challenging others and being challenged is integral and indispensable to the process of truth-seeking, it seems to me, will want to have viewpoint or intellectual diversity in order to accomplish the mission of the institution.

This is not just an abstract appeal to fairness. Somebody could say that it is not fair that there are sixty-seven Democrats and two Republicans on the faculty, or that it is not fair that everybody is for same-sex marriage and nobody is defending the conjugal understanding of marriage. We could debate whether there is a serious issue there with fairness, but that is not what I am arguing for here. I am arguing for intellectual diversity not by abstract appeal to fairness and abstract ideal or principle, but rather to it as being integral to the truth-seeking process.

Now, of course, we all know that it is difficult to get intellectual diversity, and I think there are a number of reasons for that. In my own experience it is true—and some of my more liberal colleagues have told me that in their experience it is true—that there is sometimes conscious discrimination against people who dissent from campus orthodoxies in hiring and promotion. Jeffrey Stout, my colleague in the Religion Department at Princeton, has mentioned his own experience in being in hiring committees and departmental meetings. He says it has happened twice with two different candidates, where it was simply openly said by some participants in the meeting that, “Well, this candidate is not appropriate for us because this candidate is pro-life.” The people saying that just assumed that everybody else would go along. Jeffrey, to his very great credit, is not of that view and objected to any consideration of that.

So sometimes it is conscious, but I think that is not the fundamental problem. I think that is comparatively rare. I could cite some cases that I know about. I know cases like the one Jeff Stout has reported to me. Probably, other people in the acade-

my could mention their cases. But the more fundamental problem is non-conscious discrimination.

In this vale of tears, we human beings, fallen and frail creatures that we are, have a lot of trouble appreciating good work and even good arguments when they run contrary to our own opinions, especially when we are deeply emotionally invested in those opinions. This is not a liberal problem or a progressive or a left wing problem—it is a human nature problem. It does not matter whether you have left wing orthodoxy or right wing orthodoxy. It does not matter what kind of institution it is. Wherever you find an overwhelming dominant opinion on one side, it is going to be very difficult for a lot of people to draw the distinction between work they disagree with, despite its being very good and challenging and interesting and important, and work that goes contrary to what they just know to be true and what is really important and critical to them, and bound up with their sense of who they are as a—fill in the blank—progressive or, for that matter, conservative.

My friend and colleague Alan Kors at the University of Pennsylvania, with whom I am usually in complete agreement about everything, disagrees with me about this. He thinks it is a liberal and progressive problem, and not a human nature problem. He thinks it has something to do with the left. I do not think it has something to do with the left. I think it is a human nature problem, and you would have it wherever you have orthodoxies.

What should we do to improve intellectual diversity? I am not in a position of having much power in doing it, but I would say to my friends who are on the more liberal side of the street, and who perceive the problem as I do and think something needs to be done about it, that first, we must strike against any conscious discrimination based on viewpoint, and second, we must strongly encourage people, by precept and example, to be self-critical. Being self-critical is an essential virtue for scholarship anyway. We need to encourage people to be self-critical so that they will be able to say, as I might say about the work of my colleague at Princeton, Peter Singer, that I am scandalized by his advocacy of infanticide,² but he is making an argument that has to be met. The

2. See generally PETER SINGER, PRACTICAL ETHICS 154 (3d ed. 2011) (“We should put very strict conditions on permissible infanticide; but these restrictions should owe more to the effects of infanticide on others than to the intrinsic wrongness of killing an infant.”).

burden is on me to make the argument that our dignity as human beings comes by virtue of our humanity, or by our status as rational creatures, or creatures bearing a rational nature, possessing from the very beginning, in the earliest embryonic stage, the radical capacities for the types of characteristically human activities that we think of as the things that give human beings dignity. The burden is on me to meet his challenge. I want my colleagues on the other side to take the same position about work by more conservative scholars, especially in these hot button areas.

But I acknowledge that this is hard to do. And it is especially hard to do when the orthodoxy is in place, because you are not hearing arguments for the other side. When everybody you know, everybody in your circle of friends, tends to think the same thing about a body of issues, no matter how much diversity there is in other respects, it is difficult to work up the motivation to think more critically. It is best not to get into this fix in the first place by letting orthodoxies form, but when we are in them, we must do our best to get people to appreciate our work and be willing to say that they appreciate and acknowledge work that is good, even though they disagree with it.

I wanted to give a couple of examples of the value of viewpoint or intellectual diversity, again, from my own experience. One is the Madison Program at Princeton. The program was founded twelve years ago. Its impact on the intellectual culture of Princeton, precisely by bringing viewpoint diversity into Princeton in a serious way, has been salutary, and many of my liberal colleagues have not only acknowledged but also praised the Madison Program for that. There are more people around who think different things, even about fundamental issues that everybody cares about, and which to the outside world, everybody assumes that academics are on one side and not the other side. It is great because it means that across the university—not just at events sponsored by the Madison Program, but at events in the History Department or the University Center for Human Values where Professor Singer is—people cannot simply rely on everybody in the room sharing the same assumptions. They know they have to defend their premises. That makes for a different, much better, and more serious engagement, profoundly improving the quality of intellectual life.

The second example of the value of intellectual diversity is the experience I have had teaching with my very dear friend and col-

league, Cornel West. Now, Cornel and I disagree about a few things. But we have taught together. We have had three-hour seminars, straight through a semester, beginning with Sophocles's *Antigone*, ending with Martin Luther King's Letter From Birmingham Jail, with everything in between from Machiavelli to Hayek, Marx to Dewey, St. Augustine to C.S. Lewis to W.E.B. Du Bois. It has been a lot of fun, and I think it is a great benefit to the students, as well, and this is why: I have always prided myself as a teacher on being able to represent the other side's point of view really well. So if I am teaching *Roe v. Wade*,³ or affirmative action, or pornography and First Amendment, I would hope that if someone came in who happened not to know what my views were, they actually would not know which side I am on. This is not because I am trying to hide the ball or anything like that. I pride myself in being able to represent the best arguments not only for my own positions, but for positions I do not hold.

What I learned through teaching with Cornel, is that as well as I think I have done it, I have not done it well enough. The evidence for that is this: time after time, each time we teach the twelve-week course, I find that he has said something in response to a point I made that simply would not have occurred to me, and it is a serious point that needs to be engaged and dealt with. I would not have thought of it. I would have done my best to represent his side, but I would not have thought of it. And he tells me that he has had the same experience time and time again, noticing points or arguments that he had never heard of and had not considered and would not have been able to represent in his classes. That, I think, is a very good argument for intellectual diversity, as well as a very good argument for team teaching. Team teaching is wonderful, especially when you have people who disagree about things. And it does not have to be about political things. It could be disagreements about the proper interpretation of Shakespeare or any of a range of other areas, especially, of course, in the humanities and social sciences. But it is a very valuable thing to do, and more of it should be done, especially in an atmosphere of intellectual diversity. That, I think, is an ideal way of ensuring that students really do engage the best arguments on competing sides of an issue.

3. 410 U.S. 113 (1973).