The Atlantic

Georgetown's Cowardice on Free Speech

If we all spoke circumspectly and wisely all the time, who would even need free-speech policies?

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MAY 20, 2022

In 1985, the Yale anthropologist James C. Scott published a study of how subordinated populations can resist the powerful and dominant. He introduced the idea of "weapons of the weak": "foot-dragging, evasion, false compliance, pilfering, feigned ignorance, slander and sabotage." Pilfering aside, Scott anticipated many of the management techniques of the modern university administrator.

For more than three months now, Georgetown University has pondered whether to discipline a staff member whose words offended a number of students and faculty. The university's written policy on free speech pointed to one answer: No. Georgetown's protections for free-speech policy are very broad; on April 26, for example, its law school hosted a Palestinian activist who has appropriated Holocaust history to condemn Israel for "Kristallnachting" Palestinians. So that's in bounds at Georgetown Law.

At the same time, the offended students and faculty are still riled up, and people do not rise through the ranks of university management by brave defiance of local opinion. So perhaps it's natural that Georgetown has decided to … dither. But the longer the dither, the more painful and embarrassing the eventual outcome, whatever it should be.

The story opens at the end of January. Justice Stephen Breyer had just announced his retirement from the Supreme Court. Ilya Shapiro, a newly hired Georgetown Law staff member, sent tweets objecting to President Joe Biden's pledge to replace Breyer with a Black woman. Shapiro urged Biden to appoint Sri Srinivasan, the chief judge of the U.S. Court of Appeals for the D.C. Circuit, whom he considered "objectively" the best candidate to replace Breyer. Shapiro lamented that Srinivasan "alas doesn't fit into latest intersectionality hierarchy so we'll get lesser black woman"—whose nomination would always have an "asterisk attached." A third tweet invited Shapiro's Twitter followers to opine whether Biden's promise was racist, sexist, neither, or both.

Shapiro insists that he did not mean to imply that all Black women were inherently "lesser" than his preferred candidate. His choice of words, he said, had been "inartful." He deleted the tweets and posted an apology and explanation. (The apology and explanation have also since been deleted. Shapiro explained to me that he sets all his tweets to auto-delete after a couple of days.)

But Shapiro was punching buttons wired to a huge explosive charge. In March 2021, two Georgetown professors were recorded during what they had supposed to be a private Zoom conversation about a course they jointly taught. In a clip posted to Twitter, the adjunct professor

Sandra Sellers was heard saying: "I end up having this angst every semester that a lot of my lower ones are Blacks. Happens almost every semester. And it's like, 'Oh, come on.' You know, I get some really good ones, but there are also usually some that are just plain at the bottom. It drives me crazy."

Sellers was fired. The professor on the other end of the supposedly private conversation ultimately resigned himself. (My colleague Anne Applebaum wrote in more detail about this case for *The Atlantic* last October.) But the incident still rankled. The anti-Shapiro student coalition implicitly referenced the Sellers case in its letter demanding that he be fired too: "At Georgetown Law, Black students are haunted by the shadow of impostor syndrome."

The Georgetown administration at first tried to manage the Shapiro incident like that of almost a year earlier. The dean issued a statement of revulsion and condemnation.

But this time, unlike with the March 2021 controversy, the law school found itself in the crossfire. Pundits wrote editorials and articles defending Shapiro's free-speech rights. National and international news outlets covered the story. Shapiro has argued his case across many media platforms. He has written articles, made speeches, and given television interviews.

Outside critics quoted the university's own words in its free-speech policy:

It is not the proper role of a University to insulate individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Deliberation or debate may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or ill conceived.

It is for the individual members of the University community, not for the University as an institution, to judge the value of ideas, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting those arguments and ideas that they oppose.

Firing a staff member in violation of a written policy would not only embarrass the law school, but also expose it to considerable litigation risk.

Apparently baffled, the law school instead took a time-out. On January 31, it placed Shapiro on paid leave pending an internal investigation. On February 25, President Biden nominated Judge Ketanji Brown Jackson to the Breyer seat. The Shapiro investigation continued. Hearings on the nomination opened on March 22. The Shapiro investigation continued. On April 7, Jackson was confirmed. The Shapiro investigation continued, and continues still. Through all this time, Georgetown has had no comment. When I reached out again last month, the no-comment policy held, even as the supposed investigation reached, then passed, its 100th day.

Shapiro reports that he underwent one vigorous round of questioning at the very beginning of the investigation, but nothing since. What, really, was there to ask? If Georgetown was looking for proof of discriminatory practices by Shapiro, the question would naturally follow: Why had it not discovered them before announcing his hiring on January 21, scarcely a week before his tweets?

Without any even vaguely plausible evidence of discriminatory practices by Shapiro, Georgetown Law School faced two stark alternatives: It could defend his tweets as speech protected by school policy, reinstate him, and face the anger of Shapiro's detractors and

opponents. Or it could decide that the tweets so offended the law school as to justify an exception to the university's free-speech policy—fire him—and take the heat for *that*.

Instead, the school seems to be groping toward a third possibility: postpone action, wait for the campus to empty for summer break, *then* reinstate Shapiro—and hope like hell that the matter will have blown over by September. It's not a principled plan. It's maybe not even a very realistic plan. But it's a plan that at least averts painful choices in the near term—a classic weapon of the weak.

The trouble with the "wait them out" approach in this instance is that it's not working all that well. Sooner or later, summer vacation will end and the Georgetown Law administrators will have to defend their actions and accept the consequences.

There's a lesson here. Punishing people for their words does not make the words vanish from memory. The unsayable is not unthinkable. Indeed, the punishment of the word may actually magnify the impact of the thought. Never mind abstract free-speech principles: Purely on pragmatic grounds, when a member of a community says something that bitterly divides the community, the way to a resolution is not to suppress the thought, but to argue it out.

If we all spoke circumspectly and wisely all the time, who would even need institutional free-speech policies? The point of speech rules is to allow space for the unguarded and the ill-tempered, for the provocative and prickly person as well as the smooth and sinuous. The smooth and sinuous will seldom say anything worth hearing in the first place.

The people who disagreed with Shapiro's thoughts could have offered powerful counterarguments. Presidents do not think of the Supreme Court as some kind of Nobel Prize for outstanding legal merit. Those who appointed and confirmed Neil Gorsuch to the Court weren't looking for the finest legal mind in America, or even one of the top 10 finest legal minds. I doubt that even Gorsuch himself would imagine such a thing, and if he did, he would be deluding himself. President Donald Trump and his team were looking for someone who would reliably rule their way and who had respectable credentials for the job. For Trump, those credentials included "central casting" looks, "personal chemistry," and Trump's own rapport with the nominee's wife.

Supreme Court politics has always involved identity politics. The Grover Cleveland administration sought southern support by appointing the first justice to have aided the Confederacy. For the next three-quarters of a century, the "southern seat" on the Court symbolized reconciliation between the Union and the white South. Later administrations added a "Catholic seat" and a "Jewish seat." Since the 1960s, it's been understood that at least one justice must be African American. Since the 1980s, it's been understood that at least one must be a woman. Unusual legal talent is not required: Lists of brilliant justices usually peter out after about No. 15. The list of unusually bad justices would surely be at least as long.

About 10 days after Shapiro's offending tweets, I met with Deon McCray, the president of the Georgetown Black Law Students Association. McCray observed that Georgetown has been an especially appealing choice for Black law students because of its large and welcoming minority student body. The class admitted in 2020, for example, was 32 percent students of color, including 15 percent Black. I looked up other schools' numbers for the same academic year. Few peer law schools come anywhere close to matching Georgetown's commitment to admitting

Black future lawyers. Columbia Law's student body is less than 9 percent Black. Stanford's is just 8.5 percent. The University of Chicago Law School has a student body that is only 6.4 percent Black. Nationally, Black Americans' law-school enrollment has been declining over the past 15 years. McCray spoke of the lingering dismay created by Shapiro and Sellers before him. Why not talk that through too—openly and without the overhang of punishment for speaking wrongly? "For us," McCray said, "this is less about who Shapiro is, less about getting an explanation from him, than it was disappointment with our institution … Our quarry is Georgetown. We're mad at Georgetown."

Yet maybe an open discussion without threat of punishment would have helped everyone concerned to better understand each other. Shapiro, after all, may also have felt uncertain of his place at Georgetown Law. Like most elite law schools, Georgetown tilts pretty sharply to the liberal side of the political spectrum. Unlike most, Georgetown has consciously tried to balance that tilt with outreach to legal academics of more conservative perspective at its Center for the Constitution. Shapiro, who previously worked at the libertarian Cato Institute, in Washington, D.C., had been hired as that center's executive director precisely to expand and widen boundaries. Maybe that kind of expansion and widening is not a contradiction of the mission of a high court or a school of law, but part of it.

Or maybe not. But how is a society ever to settle its most important questions if it follows the rule "The more important a question, the more strictly its discussion is forbidden"?