

**Remarks of Gail Heriot, Professor of Law, University of San Diego (for Panel Two):** *Symposium on Intellectual Diversity; Panel Discussions: “Why Intellectual Diversity Matters” (Panel One) and “What Is To Be Done?” (Panel Two), Annual Meeting of the Association of American Law Schools in San Diego, January 6, 2018.*

Videos available on You Tube:

<https://www.youtube.com/watch?v=th02CNLZI5w> (Panel One)

<https://www.youtube.com/watch?v=LBuYnlsjQns> (Panel Two)

When I sat down about a week ago to figure out what I should say for this panel, my first thought was “Why did I ever agree to do this?” This panel is supposed to suggest solutions to the problem of the one-party state on campus.

But I’m not at all sure there is an easy fix for all this.

Granted, when it comes to higher education and legal education specifically, I have sometimes been accused of being a bit of a Cassandra by my more optimistic colleagues, both on the left and the right. But, as I like to tell them, never lose sight of the fact that Cassandra was right.

I won’t spend a lot of time today trying to convince you that there is a problem. That was more the job of the previous panel. But let me say a little bit. I believe the lack of ideological diversity among faculty and administrators is a huge factor in the decline of free inquiry on campus. In turn the decline of free inquiry has had a feedback effect that makes it harder to have intellectual diversity.

Students and faculty who lean left aren’t used to hearing from people who disagree with them, and some find it upsetting when they do. They have become exquisitely sensitive these days to what are called micro-

aggressions or hate speech, which all too often seem to be defined as “saying something they don’t agree with.”

Lack of intellectual diversity has thus helped produce the current campus culture of trigger warnings, safe spaces, and bias response teams where conservative outside speakers are shouted down, all of which is hardly consistent with free inquiry. A survey by Heterodox Academy recently found that conservative students are far more reluctant than liberal students to participate in classroom discussions (consistent with some of the data that Jim Lindgren gave us earlier).

To be fair, I think that the problem is worse at the college level than it is at the law school level. Less dramatically, the problem has cheated law students out of the opportunity to learn about and get a feel for the different arguments that animate legal and policy disputes today. Conservatives may be rare on campus, but they are not rare in governor’s offices, legislatures and on the bench. If young lawyers don’t have a sense of where conservatives are coming from, how will they be able to make arguments that are likely to persuade? How will they be able to identify the weaknesses in their own arguments?

I think a useful illustration of this is the 2006 Supreme Court case of *Rumsfeld v. Forum for Academic and Institutional Rights* (or FAIR), which Carissa [Byrne Hessick] mentioned on the last panel. Most of you will remember that FAIR was an organization of law schools and law professors challenging the constitutionality of the Solomon Amendment, which required federally-funded institutions to permit military recruiting on campus. The law schools objected to the military’s don’t ask/don’t tell policy. I recall being told by several **very** self-assured law professors that this was going to be a smack down for the Solomon Amendment. I remember listening intently and thinking, “Really? What am I missing here?” Instead it was a smack down for legal academia—a unanimous decision in favor of the constitutionality of the Solomon Amendment.

Now Carissa mentioned on the last panel that some liberals recognized that the briefs were awful. By the way, I'm not saying the briefs were awful. I didn't read them. But I wonder if they decided that retrospectively rather than starting out.

So let me get back to the panel's theme: To quote Lenin: (*Lenin? ...George [Dent], how did this happen?*) What is to be done? When I say this problem may be very difficult to fix I don't mean that things will just keep moving ever leftward. The decreases in enrollment at the University of Missouri, Oberlin College, and Evergreen State—three schools that lean so far to the left that they are in danger of toppling over—suggest that there are limits to what high school graduates are willing to put up with. Maybe that will be true or has been true for law students as well or potential law students.

Nor do I mean that utter collapse is near—either at law schools or universities more generally. I'm not that pessimistic. I am not saying that students will soon be deserting higher education in droves, although some might and some may already have. I saw a news story recently in which Chinese students were starting to question whether an American college degree was really worth it.

What I mean is that, unless things change a lot, American higher education's best days may be behind it—at least for a long while and at least outside of the hard sciences. There are a lot of reasons for this, not just its sometimes-comical political intolerance, although some of the reasons are arguably interrelated. There is over-bureaucratization. And increasing consumerism with its endless grade inflation and its luxurious student life financed through student loans that all-too-often can't be repaid.

Part of the reason for my pessimism is that universities evolved many years ago to insulate themselves from external influences and also to

disperse power internally among many decisionmakers. On balance at least, in the past, that has been a source of strength.

Externally, academic freedom has insulated state universities to some degree from becoming just another source of political patronage for state legislatures or governors.

Internally, tenure and shared governance evolved as a means to disperse power on campus. They make it difficult for a university official with delusions of grandeur to come and say “here’ show a university should be” or for educational groupthink to entirely take over campuses. Education is one of areas of human endeavor for which it is hard to measure success. And even with research it’s hard to know where the next big successes are going to be. As a result, education and research are prone to fads. Dispersing power has been a counterweight to that tendency.

But it also means that when colleges, universities and law schools go seriously awry, it is especially hard to right the ship. Again I don’t want to overstate the case. It’s not that every university and law school has gone off the deep end. With law schools, for example, there are some that do better than others at fielding teachers with a broad range of viewpoints. Dan Rodriguez has presided over two of those institutions that have been better average at this—the University of San Diego, my institution, and Northwestern.

So –again—what is to be done? Should trustees and state legislatures exert greater control over universities? Yes, I think that probably they should, particularly the purse strings. But it needs to be done with a light touch, and therefore the effects will likely be modest. If conservatives on campuses ask these institutions to come out with their guns blazing, the conservatives may end up being sorry they asked.

A better approach might come from reducing federal influence over higher education. For example, a university that is not in compliance with Title IX will get its funding cut off (and rightly so). But what is viewed as a violation of Title IX these days has gotten way out of hand. When Title IX is being interpreted in ways that tend to stifle free inquiry, when it is being interpreted in ways that deny any semblance of due process to those accused, you can bet it is being misinterpreted. That's just one example.

Right now many talented conservative lawyers would just laugh if I suggested they go into academia. Things would be different if the atmosphere on campus improved. But they won't be different until it does. Changing that culture, I believe, is Job One.

Should a law school go out of its way to hire conservatives? I would be happier if they just stopped going out of their way not to hire conservatives. I want an environment where faculty job applicants don't feel they have to delete references to the Federalist Society from their resumes.

But I doubt this will happen anytime soon, particularly at the schools that need it most. For one thing there's not that much hiring going on. But more importantly, we live in polarized times, not just on campuses, but across the country. It's something we have to change. If we don't we're doomed, doomed, doomed and you heard it here from Cassandra first. To give you a sense of it, back in 1960 a survey was taken that asked whether respondents if they would be "displeased" if their child married someone outside their political party. Only about 5% said they would be. Much more recently, a similar poll was taken, in which the question was whether they would be "upset" if their child married someone from the other party. An astonishing number—40%--said yes. And it's not a survey fluke. About a dozen polls over the last five decades show those numbers steadily rising.

But furthermore I don't want policies that demand faculty to hire for ideological diversity. I don't want a mentality where every law school thinks it needs a social conservative, a libertarian, a populist, a Marxist-Leninist, a Maoist and a Monarchist in order to be successful. Faculty candidate shouldn't market themselves as representatives of particular viewpoints. Among other reasons, it would stunt real free inquiry, since faculty members hired to be "the token such and such" will feel the need not to change their minds.

Marcus is telling me that my time is up. So I am going to conclude there.