

Where YLS Has Gone Off The Rails, And What Is Needed To Get Back On Track

Thoughts of Simon Lazarus '67, as of 11.9.2021

Like many other Yale Law School alumni, I have been profoundly saddened by the controversy surrounding the Trap House Affair. In particular, I've become increasingly disappointed by the YLS administration's persistent mishandling of the matter – which is largely responsible for escalating a small, apparently manageable misunderstanding between elements of the student body, into a focus for withering national and international criticism of YLS, by prominent journalists and academics. At this point, it seems worthwhile to step back, identify what the issues are, and what they are not, and suggest what it will take, short-term and long-term, for the administration to right its ship.

There is no need to reiterate in detail the many dangerously wrong things about the conduct of Deputy Dean Ellen Cosgrove and Diversity, Equity, and Inclusion Director Yaseen Eldik toward 2nd year student Trent Colbert, head of the Native American Law Students Association, in response to a party invitation that some black law students found highly offensive. This ground has been amply covered in, for example: the attached [piece](#) by Northwestern law professor Andrew Koppelman in the *Chronicle of Higher Education*; partially cross-posted on *Balkinization*, and [supplemented](#) by a column in *The Hill*; [Kathleen Parker's](#) and [Ruth Marcus's](#) *Washington Post* op eds; and *Atlantic* staff writer Conor Friedersdorf's [piece](#), emphasizing the “peek” the affair afforded of overreach by “diversity bureaucrats” at Yale and other universities. Less-noticed, but necessary to get the African-American complainants' perspective, are [accounts](#) by black student [leaders](#), which, among other things, dispute Colbert's claim that he sought private dialogue with them. What now is most baffling is the YLS administration's defiant, defensive crouch response to the widening public criticism – batting away the smoking-gun-studded factual record, as “partial facts” in a “charged media environment,” and attempting to deflect criticism by announcing an “assessment” by Deputy Dean Ian Ayres, “to help us move forward.” Refusing to address publicly available facts, and trivializing, as media hype, outrage from a Pulitzer Prize winning *Washington Post* columnist, a *Post* Deputy Editorial Page Editor, and distinguished academics – will not stem this tide. Nor will Dean Gerken's passing the buck to a subordinate.

To change course, Dean Gerken and her staff must (be persuaded to) acknowledge what's gone wrong, and credibly redirect YLS to restore its stature as a bastion of basic rule of law and Bill of Rights-compatible principles. Cosgrove's and Eldik's actions did not, as Dean Gerken seemed to suggest in her most recent public statement, reflect an attempt to resolve tension between competing of principles, i.e., free expression versus civility. On the contrary, their conduct constituted a flagrant abuse of power, pure and simple. In a nutshell, as *The Atlantic's* Friedersdorf cogently [put it](#), “Irrespective of whether the invitation was racially offensive, the behavior of Yale Law's diversity bureaucrats was unethical, discreditable, and clearly incompatible with key values that

the elite law school purports to uphold." That is what Dean Gerken needs to acknowledge, and rectify. Specifically, that means:

1st, Dean Gerken must disavow the mass email condemning the student Trent Colbert.

The dean must acknowledge that it was a grave error, substantively inaccurate and procedurally unfair, for Associate Dean Cosgrove and Diversity Director Eldik, to send their September 16 email to the entire YLS student body, "condemn[ing] in the strongest possible terms," Colbert's party invitation, for "containing pejorative and racist language," and asserting further that they were "addressing this." Cosgrove and Eldik sent this blast email, because, after meeting earlier that day with them, Colbert had not agreed to sign a *mea culpa* apology letter outlined, indeed, drafted for him by Eldik. In fact, the student's allegedly inculpatory party invitation was, as the administrators acknowledged in their meeting with him, neither intended to be pejorative or racially suggestive, nor did the sender have any reason to expect that its language would be so construed. It does not matter whether the complainants had reason for offense, from their vantage point, nor which side's account of their mutual interactions was more truthful. Sending out any such letter "condemning" one party to a dispute among students, with no notice to that student or fair opportunity to defend, belied the administration's claim to be a neutral or fair mediator.

2nd, for this manifest grave error, there must be consequences. If Cosgrove and Eldik circulated this inaccurate and defamatory message in contravention of relevant YLS policy and/or without authorization, they need to be appropriately disciplined, and the policies going forward need to be clearly spelled out. If, on the other hand, Dean Gerken was consulted about the matter or otherwise bore some responsibility for their actions, then she needs to accept that responsibility, publicly. In any event, there must be an acknowledgement of the error in sending out this message, and an apology to Colbert. Without such consequences, fear will persist, among students and faculty, that even innocent speech or actions could risk similar retribution from conspicuously zealous administration personnel.

3rd, the YLS administration must shelve the response strategy it has deployed so far – namely, mischaracterization of irrefutable, publicly available facts, blaming the media, and proffering, as a remedy, an in-house "assessment" by an official who reports to the Dean. Immediately after the story broke, in the *Washington Free Beacon*, on October 13, the administration issued a statement that Colbert's invitation was "protected speech," that no "disciplinary investigation" had been undertaken, that he would not be subject to sanction, and that no official complaint to bar authorities would be made. Dean Gerken's characterization of her staff's actions, reiterated subsequently by YLS's Manager of Public Affairs, were [called](#) by YLS Professor Roberta Romano, in "direct and total conflict" with what actually transpired, and, by another professor, who chose to be anonymous, "appallingly disingenuous and full of falsehoods," and the September 16 blast email to students, "a pronouncement of guilt without investigation."

In her most recent public [statement](#), on October 18, announcing that Deputy Dean Ian Ayres would “assess the situation” and “help us think” about what to do “going forward,” Dean Gerken said she “will not act on the basis of “partial facts” in “a charged media environment.” In fact, however, the indisputable facts of the administration’s misconduct are there for everyone to see and hear. No “assessment” by a deputy to the Dean that denies, finesses, or downplays the wrongs of the September 16 email, will carry public credibility. On the contrary, it is urgent that Dean Gerken act immediately, to show she has no hesitancy about owning up to the scale of those wrongs, and credibly assure the Yale community – students, faculty, and alumni, as well as the public – that nothing like that will ever happen again. Blaming the media comes off as the sort of desperation tactic embattled politicians grab onto when irrefutable unpleasant facts have come to light. That strategy will not calm this storm.

4th, Dean Gerken needs to disavow particularly egregious approaches pursued in the September Cosgrove-Eldik meetings with Colbert, most urgently, their ascribing inculpatory weight to association with the Federalist Society. The Dean and her team need to state, publicly and unequivocally, that the Federalist Society and persons or events associated with it are welcome members of the YLS community, and that it was deeply wrong, and a violation of YLS core policies and values, for YLS administration officials to label association with FedSoc a “very triggering” phenomenon, that could weigh in favor of communal disapproval or official retribution, including career-impairing official actions. The black leaders’ passionate objections to Federalist Society ideas and actions are no doubt heartfelt, and some carry weight well beyond African American activist circles. Indeed, in my advocacy and writing I have frequently made similarly critical characterizations of FedSoc supporters’ agenda priorities. But the Yale Law School cannot use its institutional stature and raw power to marginalize adherents of a mainstream conservative organization, numbering at least five Supreme Court justices, because their views offend other members of the YLS community. With each day that “very triggering” canard is left out there, and not disavowed, skepticism of the law school’s integrity, especially, but by no means exclusively, among conservatives, grows more intense and harder to dispel. Pieties about YLS’ commitment to free expression do not get this job done.

5th, YLS needs to credibly reaffirm its commitment to prioritizing freedom of speech and association. As noted above, the central problem with the administration’s treatment of Trent Colbert is not about ideological principles. It was simply a flagrant abuse of power. But the administration’s conduct, most explicitly, Dean Gerken’s most recent statements responding to criticism, indicate that her administration has sharply qualified governing Yale University principles that prioritize freedom of expression. This *de facto* policy reversal should itself be reversed, or, at a minimum, the change should be put on hold until approved by the sort of responsible inquiry and public vetting that led, in the 1975 Vann Woodward Report, to the current University policy protecting “freedom of speech . . . however offensive or disagreeable to some members of our community.”

On the class of '67 listserv, which has buzzed over the Trap House affair, one class member recommended that YLS adopt an excerpt from a statement of “principles”

adopted in 2015 by the University of Chicago and subsequently adopted by other leading universities:

[I]t is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

One class member shared this Chicago statement with Dean Gerken, relating that many members of the '67 listserv thought that YLS should embrace it. Dean Gerken was gracious enough to respond, in an email shared with the listserv. But her response, though forthright, is troubling in respects that were immediately recognized by listserv members. Here is her response:

The Law School and the University have not adopted the Chicago statement because they have long abided by a vigorous free speech policy that dates back much earlier in its history – the famed Vann Woodward report. It can be found here. <https://yalecollege.yale.edu/get-know-yale-college/office-dean/reports/report-committee-freedom-expression-yale> Warmly, Heather

As noted by several listserv members, that 1975 report is not directly apposite to the current Trap House Affair; it targets the treatment of (mainly visiting) speakers on controversial issues – circumstances that are related but materially different from the Trap House matter, which involves sensitivity to others' sensibilities in phrasing routine inter-student communications. However, and far more important, the Report adopts a general foundational principle that is starkly inconsistent with the actions of the two YLS administrators in the current matter, and also with Dean Gerken's statements about the framework that guides her administration's approach to free expression controversies. As one listserv member put it, "in every instance . . . the Report places Freedom of Speech in a superior position to the taking of offense by a minority – or even a majority!" In contrast, Dean Gerken's October 18 statement describes resolving viewpoint conflicts as an open-ended balancing exercise, with no priority given to free exchange of views. Her statement reads:

"Protecting free speech is a core value of any academic institution; so too is cultivating an environment of respect and inclusion. . . . There are times when it can be a challenge to balance these twin values."

Dean Gerken's framework appears to be at odds with the Vann Woodward Report, which stresses, repeatedly and unequivocally, that:

[T]he university must do everything possible to ensure within it the fullest degree of intellectual freedom. . . . unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable.”

The Report goes on to state that, while “fostering of friendship, solidarity, harmony, civility, or mutual respect . . . are important values, . . . a good university . . . will never let these values, important as they are, override its central purpose [of fostering] “unfettered” intellectual freedom.”

In effect, Dean Gerken’s statement, and the policies and practices apparent in the two YLS administrators’ treatment of Trent Colbert, break sharply with what Dean Gerken herself calls the university’s established governing policy. To be sure, it may well be, that the 1975 Vann Woodward formulation inadequately recognizes a need felt, a half-century later, to give weight to civility and core sensibilities of groups within the larger community. But revisiting, and perhaps adjusting or reframing the university’s or the law school’s most fundamental governing principles, should not occur without a transparent, thoughtful, and consensus-building process equivalent to the deliberations of the exceptionally distinguished 12-person panel that produced the Vann Woodward Report itself.

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“Inflection point” is an overused cliché, but in my opinion it applies to this situation. If YLS does not disavow the practices revealed by this incident, and either reaffirm or thoughtfully adjust the Vann Woodward Report’s robustly free-expression-centered regime, it will become a radically different institution from the one that gave me my finest educational experience, in moral as well as professional terms, and wholly deserved stature among America’s, and the world’s, law schools.