

WHAT ROMAN MARS CAN LEARN ABOUT CON LAW

WHOSE SPEECH, WHOSE CAMPUS

ROMAN MARS: Okay, so it's Thursday, September 5th, at 10:36 AM. What are we going to be talking about today?

ELIZABETH JOH: All right, Roman. Here is a statement from the President. "The United States has the greatest system of higher education ever developed by man. But in the past academic year, the integrity of this system--involving more than 2,500 colleges and universities and nearly 8 million students--has been threatened. While the overwhelming majority of those who live and work in the academic community are dedicated to nonviolence, there have nevertheless been over 100 campuses on which violent acts have recently occurred. This situation is a matter of vital concern to all Americans." The president was President Nixon, and he made that statement on June 13th, 1970. In April of 1970, Nixon had announced that the United States would invade Cambodia, and that invasion signaled a new expansion of the ongoing Vietnam War. And in response, college students around the country renewed their protests against the war.

One anti-war protest took place on the campus of Kent State, Ohio on May 1st, 1970. The protest was peaceful at first. But when violent confrontations broke out between protesters and the police, the governor of Ohio called in the State National Guard. About a thousand guardsmen occupied the Kent State campus. Tensions increased, and on May 4th, 1970, a large crowd gathered on the Kent State Commons. When the protesters ignored in order to disperse, some of the guardsmen fired their rifles and pistols. Some fired directly at the crowd. Four students died, and nine were wounded.

After the Kent State shootings, Nixon convened the President's Commission on Campus Unrest. The commission issued a 537-page report later that same year. Among its conclusions, the commission noted that "dissent and peaceful protests are a valued part of this nation's way of governing itself. We cannot emphasize too strongly that dissent and orderly protest on campus are permissible and desirable. American students are American citizens. And a campus--frequently even the campus of a private university--is essentially a public place." But the commission also noted that students "must face the fact that giving moral support to those who are planning violent action is morally despicable." In the spring of 2024, college students at many campuses are also protesting against war. Students are arguing that they have rights to speak, and colleges are again struggling with how to address those protests. What's different today though is the presence of other students who don't share the protesters' views and argue that their own rights are being violated.

The new school year has started. How should colleges respond to student protests? Whose rights matter? And what does the Constitution have to say about it? Time to find out.

ROMAN MARS: Let's do it. This is What Roman Mars Can Learn About Con Law--an ongoing series of indeterminate length and sporadic release, where we look at the recent protests on college campuses and whose free speech matters more and use them to examine our constitution like we never have before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars.

ELIZABETH JOH: So, Roman, as students return to classes this month, college campuses are preparing themselves for new rounds of protests over the Israel Hamas conflict. So, why don't we briefly summarize what's happened?

ROMAN MARS: Okay, let's do it.

ELIZABETH JOH: On October 7th, 2023, the militant Islamist group Hamas led a violent surprise attack from the Gaza Strip against Israel. More than 1,200 people were killed during the attack, including some American citizens. And Hamas also abducted more than 250 hostages. Now, in response, Israel formally declared war on Hamas and began a military campaign in Gaza. Israel hasn't just relied on military operations. It has drastically limited the supply of electricity, food, water, and fuel to Gaza. And we don't have precise numbers, but the Hamas-controlled health ministry claims that more than 40,000 Palestinians in Gaza have died in the conflict so far. Now, few people dispute that there is enormous suffering in the civilian population of Gaza, and there doesn't seem to be any foreseeable end to the war right now. Now, last spring, many colleges saw students respond to the war in Gaza with protests with the usual signs and chants. And some protesters set up encampments on college grounds. And a lot of people probably are familiar with the scenes they saw at Columbia University. Did you see them?

ROMAN MARS: Yeah, absolutely.

ELIZABETH JOH: Yeah. Pro-Palestinian students slept in tents on campus grounds for several nights, and the atmosphere became so tense that the university put the campus on lockdown. They had remote classes. No outsiders were allowed on campus. And then when the students occupied a campus building, the administration called in the New York Police Department. Hundreds of New York City police officers, clad in riot gear, arrested the students occupying the campus building on the night of April 30th. And then the encampment was cleared from the Columbia campus the very next day. That scene was repeated at several other colleges around the country, including places like UCLA, the University of Michigan, and the University of Arizona.

ROMAN MARS: So, in this situation, what kind of rights do students have when it comes to their free speech rights and protest rights?

ELIZABETH JOH: So, it depends on where they are. Public universities, because they are public, are regulated by the First Amendment. Public universities have to follow what

the Supreme Court has said regarding the First Amendment's guarantees of free speech. And the general idea is that you can't be punished even for very controversial or even outrageous things that are said. But the First Amendment does not apply to private universities. Private colleges and universities are not bound by the First Amendment. But they usually have policies that respect free speech for their students because they just think it's an important value for the community. But it's certainly not required. And even when the First Amendment does apply to a public university, that doesn't mean that every kind of speech is protected. Threats or inciting imminent violence are exceptions here. And the First Amendment doesn't protect students who engage in acts like vandalizing property or occupying campus buildings or creating an encampment. These can be considered criminal offenses. And colleges can call in the police to arrest students who are breaking these laws. And even when it comes to speech, colleges can impose what are called "time, place, and manner restrictions" just as long as they aren't regulating one viewpoint more heavily than another.

But, Roman, there's something different about these 2024 protests against the war in Gaza. And that's the nature of the protest itself, right? Some students are calling for an immediate ceasefire, and others are calling for more humanitarian aid for the people of Gaza; these things are not hard to understand. But remember that the current conflict began on October 7th with Hamas' attack from the Gaza Strip. And this is all part of a complicated set of tensions in the Middle East that we don't have time to get into here today. But some Hamas leaders have said that the goal--eventual goal--is to destroy Israel. And for many American Jews, the existence of a Jewish state is key to their own identity.

Now, if you're a Jewish student on a college campus, you might hear the words "ceasefire now" or "free Palestine," and you might agree or disagree about how and whether the war in Gaza should end--and that would be a political disagreement. But let's say you're a Jewish student and you hear someone say, "We support Hamas," or "Zionists don't deserve to live," or "No Zionists allowed," as some protesters have said. Now, that starts to feel very much like the protesters might be against you for being Jewish. And this speech sounds to some Jewish students and faculty as antisemitic. And some Jewish students and faculty have said that, in these protests, when they hear words like that, they feel personally threatened and intimidated by them--that these protests aren't just protests to end the war but they sound like antisemitic threats. Now, Roman, you and I have talked about speech rights before and how there isn't a hate speech exception to the First Amendment. We tolerate, under the First Amendment, a lot of very extreme statements.

ROMAN MARS: That's right.

ELIZABETH JOH: And a private university like Columbia is not restricted by the First Amendment. But what Columbia and nearly every educational institution in the United States is bound by--including K-12 education--is a federal statute called Title VI.

ROMAN MARS: Oh. I am not familiar with Title VI. What does Title VI say?

ELIZABETH JOH: "Title VI" is a shorthand for Title VI of the Civil Rights Act of 1964. That is the landmark Federal Civil Rights Act signed into law by President Johnson. It's the major civil rights legislation that applies across the country. Title VI is a federal anti-discrimination law that bans discrimination in public accommodations and in federally funded programs. Now, as far as title civil rights acts go, a lot of people might be familiar with a different one--Title IX.

ROMAN MARS: Right.

ELIZABETH JOH: Title IX is a 1972 update to the Civil Rights Act. Title IX is the reason why high schools are supposed to support girls with similar opportunities as boys when they play organized sports and why there was a huge increase in women's and girls sports participation after 1972. But that's Title IX. This is a different title. Back to Title VI. So, Roman, maybe you could read it?

ROMAN MARS: Oh, yeah, absolutely. I love this part. "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." So, how does that thing I just read apply to protests?

ELIZABETH JOH: Well, if you read the literal text, the answer appears to be nothing or not very much, right? There's nothing in the federal law that addresses antisemitism or religious discrimination in general. Instead, as you said, Title VI says that if you receive federal funds, you can't discriminate on the basis of race, color, or national origin. What's the type of institution that receives federal funds? Colleges and universities--and also K-12 schools. And this is a lot of money. Colleges receive hundreds of millions of dollars in federal funds. You can take one example of Yale University. Yale receives about \$600 million a year in federal funds.

ROMAN MARS: Whoa.

ELIZABETH JOH: It's a lot of money. Yeah.

ROMAN MARS: Oh my goodness. Okay.

ELIZABETH JOH: So, under the Supreme Court's interpretation of Congress' spending powers under the Constitution, Congress is allowed to attach conditions or strings to the federal dollars that it gives to colleges and universities. And here are the strings in Title VI: don't discriminate. But there is the problem that you've just observed. Why does Title VI matter in the context of the student protests against the war in Gaza? Well, that has to do with the Office for Civil Rights. And the Office for Civil Rights is a federal agency within the Department of Education. And the Office for Civil Rights is responsible for enforcing Title VI in schools that receive federal funds, including the vast majority of colleges and universities.

And enforcing Title VI also means that the Office of Civil Rights is allowed to interpret Title VI.

ROMAN MARS: Okay, so how do they interpret it?

ELIZABETH JOH: Well, until 2004, it wasn't really obvious that the kind of problem you see with the student protests of this past year have anything to do with Title VI. But in 2004, the Office of Civil Rights, under the Bush administration, issued a new interpretation of Title VI. And under the new interpretation, Title VI's protections also apply to students who are discriminated against based on what the office calls "shared ancestry." And that includes being part of a group that is identified for its racial and religious characteristics. The 2004 interpretations specified that Title VI could now apply to students who are Muslim, Sikh, or Jewish--and say, "Well, hey, I'm being discriminated against at my school." And so specifically for Jewish students, this means that the Office of Civil Rights now considers Judaism like a race or a nationality--not just a religion. And it's that 2004 interpretation which is applying Title VI's protections to students of religious faiths who are targeted for what the Civil Rights office calls "perceived shared ancestry." That new interpretation has been adopted by every presidential administration since, including the Biden administration.

ROMAN MARS: So, how does this expanded interpretation of Title VI to include shared ancestry and Jewish students affect the protest?

ELIZABETH JOH: Well, because of the enforcement powers possessed by the Office of Civil Rights. So, Congress has given the Office of Civil Rights broad powers to investigate complaints of potential Title VI violations. If there's a violation of Title VI, the office is supposed to first find some cooperative resolution with the school that's being investigated. So, that might mean persuading a college to change its policies or how it treats students or maybe doing something different or to stop doing something it had been doing before. And of course, we're talking about federal funds. And as a very last resort, the Department of Education could seek to cut off federal funding for the college or university. and that could mean the potential loss of hundreds of millions of dollars. And practically, that's probably unlikely, but the threat of it does give a college the incentive to change its behavior if it's been found in violation of Title VI. And since October 7th, the Department of Education's Office of Civil Rights has opened dozens of investigations into claims of antisemitism, at colleges and K-12 schools, under this relatively recent interpretation.

ROMAN MARS: So, how does the language of the protesters--when they're sort of taken in and perceived by Jewish students--violate Title VI?

ELIZABETH JOH: That is a much, much more difficult question. So, a Title VI violation can happen with a school either--one--when the school treats a student differently because of their race, color, or national origin or--two--because the school creates what courts have called a "hostile environment." So, a hostile environment means that the school might know that a student is being treated differently because of

their race, but the school does nothing about it. And so, it's that kind of indifference that can violate federal law. And the Office of Civil Rights has recently released some examples of how this might work. So, imagine a college student whose dorm room is defaced with swastikas or white supremacist slogans about Jewish people or a Muslim student who is targeted for wearing a hijab. And if the school is told about this and does nothing, the Office of Civil Rights has said that can be the basis of a hostile environment investigation for a violation of Title VI based on this idea of shared ancestry.

ROMAN MARS: Yeah.

ELIZABETH JOH: So, if any pro-Palestinian protester acts in ways that are similar, that would be a potential violation of federal law for the schools. But it's not so easy because what about some other statements? What if a campus protester puts up a sign that says, "Israel is a racist state that must be dismantled," or if a professor says that we must oppose Israel at all costs? Are those statements violations of federal anti-discrimination law? Because if you're a Jewish student hearing these words and you consider Israel as part of what it means to be Jewish, then it could feel threatening. And if you're asked to disavow Israel just to cross campus and get to your classes, it can feel like maybe you have to deny your own identity just to be a student on campus. But even if these kinds of statements might violate Title VI, aren't these also the kinds of statements that are protected by the First Amendment?

So, thus far, there haven't been any major court decisions that answer these questions, but there may be soon because, ever since October 7th, a number of lawsuits have been filed that asked this very question--whether highly critical statements against Israel can violate Title VI--because Title VI has been interpreted not just to give powers to the Office of Civil Rights, but it allows private individuals to bring lawsuits, too. So, for example, there is now a lawsuit by a group of Jewish students who have sued the University of California Berkeley Law School.

ROMAN MARS: What's the story with that lawsuit?

ELIZABETH JOH: Well, some student groups at the law school had established a policy. They said, "Look, we're not going to invite any speakers who hold views in support of Zionism." So, the UC Berkeley lawsuit argues that this student policy violates Title VI because it's antisemitic and the law school tolerates. It allows the student groups to do this. Now, the law school, on the other hand, has argued, "Well, we can't punish student groups for their policy because that would violate their own First Amendment rights." And in June of this year, a group of Jewish students at UCLA filed a federal lawsuit over pro-Palestinian protests held at UCLA's campus in April.

ROMAN MARS: So, what happened there?

ELIZABETH JOH: Well, there the protesters established an encampment on part of the campus called Royce Quad. And according to the lawsuit, protesters established checkpoints at the campus and required people who wanted to cross the quad to go to class or go to the library--they had to denounce the state of Israel. And the plaintiffs here--these Jewish students--argued they had a religious obligation to support Israel and the fact that the university did nothing to stop these checkpoints violated their rights. And on August 13th, a federal district court judge granted the plaintiff's request for a preliminary injunction or to order the university to stop doing what they were doing. And the judge ordered UCLA to ensure equal access to Jewish students when they wanted to be on campus and go to class. Now, this lawsuit claimed that UCLA violated the student's First amendment rights, including their free exercise of religion rights, as well as their rights under Title VI. On the preliminary injunction motion, the judge found that the students were likely to win on their First Amendment free exercise of religion claim. So, he didn't resolve the Title VI claim. And on August 23rd, UCLA decided not to appeal the judge's decision. So, that was a victory for the students at UCLA who had argued that they'd basically been denied their ability to freely access libraries and classes on campus.

ROMAN MARS: Because they had to go through these checkpoints.

ELIZABETH JOH: That's right. At the very least, this means that other lawsuits are also going to be coming to test out whether these kinds of actions that we're seeing and have seen violated federal anti-discrimination law, or whether they're protected First Amendment speech.

ROMAN MARS: I mean, it takes a lot of nerve to sue a law school, right?

ELIZABETH JOH: Yeah. But they're also law students, so they're litigators in training. But it is a difficult question, right? These are not easy things to resolve. I mean, clearly some statements that have been made during these protests--I think most people would agree--aren't clearly antisemitic. But there are a lot of statements that are kind of ambiguous. They're perceived by some as being antisemitic, but perhaps we shouldn't think of them as anything other than protected speech. And it's not even that there's a unified view among Jewish students and faculty on this very issue. There are definitely--

ROMAN MARS: Absolutely not.

ELIZABETH JOH: Right. There are Jewish students and faculty in support of these End the War in Gaza protests. And so, it's a very complicated picture. But it's very different than the kinds of situations we've seen before, where we see within the student body such a deep division over an issue.

ROMAN MARS: Yeah. Yeah.

So, you mentioned this. As the new fall term is starting, what's it looking like is going to happen now?

ELIZABETH JOH: Well, it appears that there are already some protests that have begun. But there is one subject that we should address because it's now beginning to emerge with the new school year. And that's what about the colleges and universities? They have speech rights too, right?

ROMAN MARS: Yeah.

ELIZABETH JOH: So, one thing we might start to see is a change in university behavior unrelated to the lawsuits we've just talked about, and that's the idea of institutional neutrality.

ROMAN MARS: So, describe institutional neutrality.

ELIZABETH JOH: Well, after October 7th, many colleges and universities offered official statements of support for the victims of the October 7th attack. And many colleges offered official statements in support of Ukraine over the Russian invasion. Many colleges also condemned the attack on the Capitol in 2021. And many of them also made official statements regarding George Floyd's death, when he was killed by a police officer in 2020. But it's been the October 7th statements that have put universities maybe in the most uncomfortable position because they received a response from students and some faculty that were not in support of the statements that they'd made. They wanted them to reverse those statements.

And so, after the campus protests of last spring, where you had hundreds of arrests of students and some faculty, several colleges--including Harvard, Johns Hopkins, and the University of Texas--have said that they will adopt what they call "institutional neutrality." And you asked about it. It really means that the university is officially saying, "We will stay out of political and social issues." And it's a policy position most commonly associated with the University of Chicago because it comes from a document called the Kalven Report from 1967. The University of Chicago had studied this through a committee saying, "What should we do in the wake of these violent protests of the '60s?" And Chicago ever since has said, "We stay out of these things. We don't say one way or the other in terms of our political support."

ROMAN MARS: So, if henceforth all these institutions were neutral, how would this affect the protest going forward?

ELIZABETH JOH: Well, it does affect it because of what the students protesting for Palestine have been asking for. First of all, they've been asking for campuses to condemn Israel. So, if a college is institutionally neutral, they'll say, "We're not going to say one way or the other." They've also been asking campuses to divest their financial holdings from companies that have anything to do with Israel. And that too can

be related to institutional neutrality. So, if a college says, "From now on, we are institutionally neutral," then they could respond to these demands by saying, "Look, politics do not dictate our financial decisions. We're not going to change based on what students are asking for."

ROMAN MARS: I mean, through all of this, how did the University of Chicago fare? If they adhere to the Kalven Report since the late 1960s, were protests substantially different there?

ELIZABETH JOH: Well, they didn't reach any level of violence. They certainly restricted the way in which students could protest. And I think, more than that, for a long time now, the University of Chicago has promoted a certain culture that you can have respectful protests. "You're allowed to protest in these places and in these ways. But that's it. If you go beyond that, we're going to crack down on you." And I think other colleges have promoted freer interpretations of how and whether and when to protest. And some of that, of course, has backfired because it's led to calling the police in and sometimes some violence and a lot of tension on campus. So, what you see with these student protests of 2024 is colleges having to take a new look at what free speech really does mean in practice for them and how much they're willing to tolerate. And keep in mind that some of the faculty themselves were part of another generation of protests. So there's some irony here, too.

ROMAN MARS: Yeah. Yeah. I mean, it just goes back to this whole idea of, like, when there's conflicting ideology, free speech is extremely complicated. So is neutrality. I mean, the idea of neutrality could mean, "Oh, yeah, I'm not on anyone's side." And then another interpretation of neutrality is the Swiss, like, laundering Nazi gold. You know what I mean?

ELIZABETH JOH: Right. Right.

ROMAN MARS: Just, like, both of those things are kind of their own mess.

ELIZABETH JOH: And, of course, neutrality is a statement.

ROMAN MARS: Yeah! Exactly.

ELIZABETH JOH: If you look at the University of Chicago's statement for January 6th, it only says, "We understand there was a terrible incident, and we have counselors and people to help for the students who are upset." That's very, very neutral--to say that there's been a thing that happened--whereas other campuses were much more willing to say, "We condemn this attack on democracy." Now, it all works when most of the campus is behind that statement. It doesn't work when there's incredible division.

ROMAN MARS: Right. Right. And so, is there any sense of how this will play out? I mean, is it just a matter of there really being no solution if the temperature is hot enough? You

know what I'm saying? Is the only solution just, like, things not being quite so volatile?

ELIZABETH JOH: Well, I mean, I think it's early yet in the school year to see whether these protests will be of the same size and intensity as last spring. I do think there will be continuing conflicts in the courts now that there have been investigations and there have been some successes in the courts on the part of Jewish students who say, "Look, this is a Title VI violation." And I think it will be really interesting to see how courts grapple with "Is this a protected speech issue, or is this a federal anti-discrimination issue?" because there does have to be some kind of decision. And it's not obvious which way to go for some of the most difficult questions.

ROMAN MARS: It doesn't seem obvious to me at all. It seems completely case-by-case with every utterance--every message--it seems completely different.

ELIZABETH JOH: That's right. And I think the problem then, of course, as someone pointed out, is that if you have the potential for the Office of Civil Rights to investigate you as a college and you just don't want to get involved in too many lawsuits, then you pull back and you actually curb student speech. You say, "You can't say stuff like this because we don't want to get sued in court."

ROMAN MARS: This is more and more complicated. I don't even know how a decision could be ever made. Like, if it goes up to the Supreme Court, what in the world could be the thing that's said that would help? I mean, especially this court--but any court--I don't even know how you would decide except for an extreme, fine detail, case-by-case basis with all this stuff.

ELIZABETH JOH: That's right. I mean, it would be case-by-case. It would have to go up to the Supreme Court. Or don't forget that, because this is about an interpretation of the Civil Rights Act, Congress could always step in and say, "Oh, no, we didn't mean that. We redefine what it means to violate Title VI in this different way." Or they could say, "We do mean this. We do want to include these kinds of students. And we'll provide instances in which there are violations of federal law." But that too takes time. Roman, one thing that this does make clear in this issue is that it's a clash of so many things that the Supreme Court tends to be really interested in these days. And that is protecting religious rights, protecting really, really robust interpretations of the First Amendment--and we do live in a pretty strong individual free speech culture--and then also this problem, I suppose, for the Supreme Court of how far can agencies go in doing what they want in interpreting federal law with the power that Congress gives them. So, this speech and protests over the war in Gaza is sort of a perfect storm of a problem.

ROMAN MARS: Yeah. It really is. And it's really going to come down to... Honestly, I could just, like... My cynical nature is like, "Yeah, sure, they seem to support a robust interpretation of free speech and unfettered and individualistic and stuff. But when it comes to this, it just depends on whose side you're on in terms of who

you think is adhering to free speech rules and who isn't." There's free speech involved on all sides--the university, the protesters, the people for religious freedom... So, in the end, I feel like their biases will just be revealed when they decide or if they decide on these types of things because there's nothing absolute about who is the standard bearer of free speech in this whole scenario.

ELIZABETH JOH: And that's why we need a Supreme Court whose neutrality we believe in.

ROMAN MARS: That's right. I agree with that. Thank you, Elizabeth.

ELIZABETH JOH: Thanks, Roman.

ROMAN MARS: This show is produced by Elizabeth Joh, Isabel Angell, and me, Roman Mars. It's mixed by Haziq bin Ahmad Farid. Our executive producer is Kathy Tu. You can find us online at learnconlaw.com. All the music in What Roman Mars Can Learn About Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree Records, get mech, and learn about who's on tour at doomtree.net. We are part of the Stitcher and SiriusXM podcast family.