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Keynote Remarks: Academic Activism and Freedom of Speech

*Gene Nichol**

I am much honored to be here, in such remarkable company. By my lights, the folks in this room represent the best of the legal academy; those who think, stunningly, that the real world, outside campus walls, actually matters; those who, every day, live out Václav Havel's definition of hope.¹ Havel thought of hope not as a prediction of success or a description of the world around us but as a conscious choice to live in the belief that we can make a difference in the quality of our shared, and sometimes threatened, lives. When you think about it, the nobler of contested hypotheses. It is an honor to walk among you.

As we come together, undoubtedly the world is in flux. A ceremony marking Justice Scalia's passing is being held, this morning, at the Supreme Court.² The Pope, yesterday, called out an American presidential candidate over his disparagement of the immigrant and the stranger.³ Here, hundreds of legal academics and students gather to explore what law schools largely ignore—the crushing impact of poverty. And, perhaps most surprising of all, we have journeyed across the country to Seattle and it is raining.

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1. VÁCLAV HAVEL, *The Politics of Hope*, in *DISTURBING THE PEACE: A CONVERSATION WITH KAREL HVIŽD'ALA* 163, 181 (1986) ("I should probably say first that the kind of hope I often think about . . . I understand above all as a state of mind, not a state of the world. Either we have hope within us or we don't; it is a dimension of the soul, and it's not essentially dependent on some particular observation of the world or estimate of the situation. Hope is not prognostication. It is an orientation of the spirit, an orientation of the heart.").

2. Peter Baker & Gardiner Harris, *Washington Pauses for Justice Antonin Scalia's Funeral*, N.Y. TIMES (Feb. 20, 2016), http://www.nytimes.com/2016/02/21/us/politics/justice-antonin-scalias-funeral-lets-washington-pause-in-praise.html?_r=0.

3. Jim Yardley, *Pope Francis Suggests Donald Trump Is 'Not Christian'*, N.Y. TIMES (Feb. 18, 2016), http://www.nytimes.com/2016/02/19/world/americas/pope-francis-donald-trump-christian.html?_r=0.

I have an important topic to consider: academics and activism. It is controversial perhaps. That is risky, of course; there is always the possibility of annoying folks. But, to be honest, I am glad to have an important topic. For most of the last thirty years, I have been either a law school dean or a university president. I was surprised during those long tenures how often deans, and especially presidents, were called upon not to talk about important matters but to give what I came to think of as “warm and mindless remarks.”

You know the drill. You are forced to see it constantly, on your respective home fronts: short, affectionate ditties designed to warm the hearts and, perhaps, loosen the pocketbooks of various friends and alumni of your respective institution; talks designed to convince an audience that, all appearances to the contrary, all proceeds swimmingly on the home front. Administrators are never to say anything strident, challenging, controversial, or worth listening to. I was surprised, frankly, how big a part of the job of being a university president the giving of warm and mindless remarks turned out to be. I was even more surprised when my faculty colleagues started saying, with near unanimity, how good I was at giving warm and mindless remarks. They suggest I am something of a natural for it. So this is fair warning, that, this noon, I am going to depart from my usual habits, and what are apparently my stronger talents, and talk about things that matter.

Now, I said I am honored to be here. Or at least I think I am. It occurs to me that I have only been invited to give these remarks to such a notable group because a few months back, the North Carolina legislature and its lickspittle on the University of North Carolina Board of Governors shut down our small, completely privately funded poverty center—because they do not like what I write in the newspapers.⁴ Not a very high honor, that.

4. See, e.g., Igor Bobic, *Tea Party Legislature Targets University of North Carolina in Major Assault on Higher Learning*, HUFFINGTON POST (Feb. 11, 2015, 5:24 PM), http://www.huffingtonpost.com/2015/02/11/poverty-north-carolina-gene-nichols_n_6641450.html; Zoë Carpenter, *How a Right-Wing Political Machine Is Dismantling Higher Education in North Carolina*, NATION (June 8, 2015), <http://www.thenation.com/article/how-right-wing-political-machine-dismantling-higher-education-north-carolina/>; Richard Fausset, *University of North Carolina Board Closes 3 Centers*, N.Y. TIMES (Feb. 27, 2015), http://www.nytimes.com/2015/02/28/us/university-of-north-carolina-board-closes-3-academic-centers.html?_r=0; Jedediah Purdy, *Ayn Rand Comes to U.N.C.*, NEW YORKER (Mar. 19, 2015), <http://www.newyorker.com/news/news-desk/new-politics-at-the-university-of-north-carolina>; Peter St. Onge, *The Biggest Cut Facing UNC*, CHARLOTTE OBSERVER (Feb. 19, 2015), <http://www.charlotteobserver.com/opinion/opn-columns-blogs/peter-st-onge/article10704065.html>; *UNC Board of Governors Committee Slaps Nichol - and Free Speech*, NEWS & OBSERVER (Feb. 19, 2015, 7:25 PM), <http://www.newsobserver.com/opinion/editorials/article10880669.html>; see also Michael A. Cooper, Jr., *The War on the War on Poverty*, NEW REPUBLIC (Feb. 15, 2015), <https://newrepublic.com/article/121062/north-carolina-republicans-battle>

I should be candid that if a governor and a legislature are willing to wage the nation's stoutest, most enthusiastic, and path-breaking war on poor people, then ditching free speech and academic freedom amounts to very, very small potatoes. These are politicians who will usher in the largest cut to an unemployment compensation program in American history; end the state's earned income tax credit, raising the tax bill of 930,000 workers making about \$35,000 a year; kick hundreds of thousands off food stamps; raise sales taxes to hit poor families; end the state appropriation to legal aid; slash the allocation to food banks; and force welfare recipients to undergo drug tests, all to give huge tax cuts to the richest 5%, a group that already takes a larger share of North Carolina's income than at any time this century.⁵ Next, they adopted the toughest voter suppression law in the country⁶ and kicked 500,000 low-income Tar Heels off the federally financed Medicaid program,⁷ without a whiff of proffered justification, except that they hate a young, black president. They ditched Medicaid knowing that it would mean a thousand or more of their sisters and brothers would die every year.⁸ These are, in other words, serious and brutal characters. Understandably, they had not the slightest qualm in closing an academic center because of what it publishes. Nor should they, given what they had already undertaken. The larger tide understandably sinks a bevy of small boats.

If you have blood on your hands, there is not much reason to fret over things such as constitutional nicety. The agenda is more robust and imposing. It is no amateur study. In the face of such brigands, it is hardly surprising that a chancellor and a provost would fold like the cheapest suit; shrinking away in terror rather than even making an effort to do their jobs. They would express a muted public support for the Poverty Center, of course, hoping to placate the faculty, while "back channeling" all their energies to close it. We save our "academic freedom" banter for speeches on University Day. They reminded me, crisply, that dissem-

uncs-gene-nichol-poverty-center; Valerie Strauss, *Law Faculty Accuses UNC Panel of Attempting to Chill Free Speech*, WASH. POST (Feb. 21, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/02/21/law-faculty-accuses-unc-panel-of-attempting-to-chill-free-speech/>.

5. See Gene Nichol, *From Silence to Savagery, Pain for the Poor Intensifies*, NEWS & OBSERVER (Dec. 28, 2013, 8:00 PM), <http://www.newsobserver.com/opinion/op-ed/seeing-the-invisible/article10288403.html>; Gene Nichol, *Gene Nichol: Taking the Measure of Who We Are in NC—A Greedy Bully*, NEWS & OBSERVER (Jan. 30, 2016, 1:00 PM), <http://www.newsobserver.com/opinion/op-ed/article57341643.html>.

6. See Sharon McCloskey, *Open Season on Individual Rights*, in ALTERED STATE: HOW FIVE YEARS OF CONSERVATIVE RULE HAVE REDEFINED NORTH CAROLINA 32, 33 (2015) [hereinafter ALTERED STATE], available at <http://www.ncpolicywatch.com/wp-content/uploads/2015/12/NC-Policy-Watch-Altered-State-How-5-years-of-conservative-rule-have-redefined-north-carolina-december-2015.pdf>.

7. Sarah Ovaska-Few, *Yanking Away the Ladder*, in ALTERED STATE, *supra* note 6, at 6, 8.

8. See *id.* at 6.

bling is often the highest skill, and most treasured practice, in lofty administrative quarters.

I suppose all this has made it unsurprising that a great, historic, public university law school like the University of North Carolina is now treated to a new dean who apparently spends his evenings trolling the law school website—eager to censor anything that might appear critical of the legislature’s barrage, like a middle-level bureaucrat terrified of offending his overseers. My state and my university, I will just say, are going through some changes. We did not think this could happen in North Carolina. We did not think it could happen at UNC. I trust you all fare better. If you have any extra time and energy, come east and join us. We could use you; we are in a fight for our very decency.

AN UNEXPECTED ODE TO TENURE

My first teaching position was at West Virginia University—a marvelous place that I fell in love with immediately. One of my old colleagues from WVU reminded me a couple of years ago that early on, now some thirty-five years ago, I had given a lecture taking what some regarded as a controversial position: that we no longer needed tenure in the academy, or at least in state universities, because First Amendment protections had become sufficiently robust and impressive that the important work previously done by tenure could be carried out effectively by the courts and the First Amendment. So, perhaps, we did not need the ancient, property-based protection after all.

My former colleague, as I said, reminded me of my earlier position and noted, somewhat ironically, that in the intervening decades, I seem to have needed the protections of tenure more than anyone he had ever known. It occurred to me that on this front, like many others in life, I was now grateful not to have had my wishes come true. I have rarely managed to actually know what was best for me.

But, to make the point, a couple of years after I had pontificated about the irrelevance of tenure, a couple of young professor friends and I represented a group of environmentalists sued by a massive coal company—for monitoring their downstream emissions. The case became a sort of famous one. And, to my great surprise, we won a pretty far-reaching victory.⁹

The infuriated coal industry—one of the largest donors to West Virginia University and the most powerful voice in the statehouse—indicated it wanted these young professors’ heads. A new, too-talkative university president announced to the press he was calling us on the car-

9. *Webb v. Fury*, 282 S.E.2d 28 (W.Va. 1981).

pet to straighten this out. An irritated faculty and the protections of tenure, for us at least, saved the day. I was beginning to change my mind about job security.

A few years later, when I was dean of the law school at the University of Colorado, the campus and the state roiled over a dispute concerning academic leadership. All of the university's deans, the faculty council, and a remarkably high percentage of the faculty had asked the president to resign. The trustees, much annoyed by the umbrage, reportedly decided that firing the opinionated law school dean would be a good first shot across the bow. In that instance, a friendly governor—who was rumored to have said to the trustees, “Don't let me read about firing any law school deans up in Boulder”—and, once again, the protections of tenure, intervened to save my hide. I decided, on the spot, that tenure had not yet outlived its usefulness.

A few years later, against all advice and my own best sense of judgment, I became a university president. I had, for many years, resisted such overtures because I had come to think being a law school dean was a better job. As it turns out, I was right. But while president at William & Mary, I changed the way a Christian cross was displayed in a constantly used university chapel—in open state endorsement of a particular religion sect¹⁰—and refused on two occasions to ban a controversial show from appearing on the campus¹¹. Both steps were clearly mandated, if we meant to comply with the constitution. But various trustees and legislators, as well as wealthy alumni, said that if I did not change my mind and reverse the decisions then I would have to go. My term, therefore, became a short one.

Reportedly, some trustees were so annoyed with me they thought it insufficient that I be dispatched as president and concluded that I needed to be fired as a faculty member as well. A sensible university counsel, and the protections of tenure, suggested otherwise. By this point, I had become a full-on devotee.

And all this was before I came to Chapel Hill—where legislators complained that, after closing the Center on Poverty, Work & Opportunity, I was still able to teach, write, and draw a paycheck, as a tenured member of the law faculty. Not, apparently, if they could have their way.

So, in opening, I draw two brief lessons. The first is, of course, be careful what you wish for. The second is more concrete and particular: it

10. See Frederick Kunkle, *Cross Returns to Chapel—But Not on the Altar*, WASH. POST (Mar. 7, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/06/AR2007030601456.html>.

11. *Nichol Will Not Halt Sex Workers' Art Show*, FLAT HAT (Jan. 28, 2008), <http://flathatnews.com/2008/01/28/nichol-will-not-halt-sex-workers-art-show/>.

may not be reasonable to have robust expectations for academic activism without a robust system of tenure. And for many crucial legal academics, especially those centered in clinical education, we do not always have one.

ON ACADEMIC ACTIVISM

Then, more centrally, there is the question of academic activism itself. It is, no doubt, a marvelous phrase. Some consider it a contradiction in terms—though that can hardly be true for law schools, which are, as the theory goes, professional training laboratories for legal advocates. So, I offer a word of caution about definition.

“Academic” is commonly defined as “of or relating to schools and education.”¹² Well and good. However, a second more colloquial use of “academic” connotes something quite different: “having no practical or useful significance,”¹³ as in “the debate has been largely academic.” In other words, for something to be academic, it ought to be careful not to matter.

Some of that—a little perhaps—is a question of tone. I have written law review articles and books for decades. I still do. They are, of course, essays of a certain timbre and tenor. I struggle to avoid tedium even there, though I concede that I am not always successful. But I have also written editorials for two decades for newspapers in Colorado and North Carolina. It is, to be sure, a different art form, if the word “art” can be appropriately attached. Short, concise, pointed, impatient, often colorful, testy, footnoteless. Editorials are not designed to wander.

Still, many believe that professors should sound like, well, professors. As one North Carolina editor put it, in criticizing something I had written, “Professors ought to be able to write . . . without fear of retribution from politicians or their appointees. But they should . . . lead us though [sic] debate at a high level that is focused on ideas and aspirations.”¹⁴

There is surely some truth in this, though it can appear rich coming from those who often refuse to publish professors’ work because they deem it boring. Nevertheless, the objection ignores an author’s inevitable, necessary link between tone and exigency. Theory and aspiration have their place. I use them a good deal myself. When power and privi-

12. *Academic*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/academic> (last visited Apr. 16, 2016).

13. *Id.*

14. John Drescher, *Gene Nichol Doesn’t Regret Column About Gov. Pat McCrory*, NEWS & OBSERVER (Mar. 20, 2015, 4:11 PM), <http://www.newsobserver.com/news/local/news-columns-blogs/john-drescher/article15495602.html>.

lege are deployed to burden and marginalize the most threatened among us, though, contest and engagement are called for, not detachment and repose. The admonishment to lead debate at a “high level” and to focus only on “aspiration” comes close to saying professors should abandon the field of accessible public discourse precisely when the most crucial matters and most dangerous motives are at play.

Next, and more interesting, there is the question of where one publishes. At some point during the skirmishes of the last couple years, the university “requested” that I include a disclaimer on my publications.¹⁵ I will admit, at first I thought this was comical (and just a bit of an honor). If the governor and General Assembly of North Carolina were so annoyed by the work of a single faculty member—out of the system’s tens of thousands—that suggested I must be doing something right.

But when it came to implementation, I asked the university folks how a disclaimer should work. At the time, I had recently published articles in the *Harvard Law & Policy Review* and the *Duke Journal of Constitutional Law & Policy*, and an additional one was in the pipeline at the *Wake Forest Law Review*. I asked, “Am I supposed to put a disclaimer on those?”

“No, of course not,” I was told—even though I was writing about the same themes and in the same manner. “You only need to put a disclaimer on pieces you write for the *Raleigh News & Observer* and the *Charlotte Observer*”—the state’s two largest papers. Essentially, I was told that no one gives a shit what you write for some Harvard journal because “no one in North Carolina reads that.” It is just the big papers the governor and the legislature are worried about. In other words, you can write whatever you want so long as the powers that be can be certain it does not matter.

So, we need to be sure that in adhering to the first definition of “academic”—“of or relating to schools and education”—we do not relegate ourselves to the second definition—“having no practical or useful significance.” Even though many of our would-be overseers, and perhaps our adversaries, want exactly that. Of course, this is a lesson long understood by those many of you in this room who do life-changing clinical and litigation work. That is why there are constant threats to close clinics and litigation projects across the country—they are going after the farm worker program in North Carolina right now even though it is federally

15. Jane Stancill, *Gene Nichol Speaks Loudly, Just Not for UNC*, THE NEWS & OBSERVER (Apr. 12, 2014), <http://blog.ecu.edu/sites/dailyclips/blog/2014/04/14/gene-nichol-speaks-loudly-just-not-for-unc-the-news-observer/>.

funded.¹⁶ Plenty of universities, governors, and legislators tolerate their law professors only when they are certain they do not matter.

And then there is a definition coming from the other direction—criticizing work of academics because it is said to be “political.” It is true, of course, that universities, especially public ones, are not to engage in partisan politics. We cannot be running amateur electoral campaigns out of our campuses.

But we have to take care with the definition of “partisan.” It will not surprise you to learn that government officials often take the position that criticizing them, or their chosen policies, is the most acutely partisan of all human endeavors. The governor of North Carolina and the leaders of the General Assembly have no doubt that publishing about the effect of their policies on poor people is political. Incumbents will always be tempted to believe that, I would guess. But, it is a trap we cannot, ourselves, embrace. By definition, there can be no academic freedom if a professor is not free to criticize the government. It is hard to imagine a more potent and defining violation of the First Amendment than that.

To illustrate the perhaps obvious, when I was president of William & Mary, I made a couple of decisions concerning the internal operation of the university which I am certain were clearly demanded by the constitution. The Speaker of the Virginia House of Delegates called me to Richmond for a meeting and accused me of running the university on a politically partisan basis. I asked him to describe what was political about the choices I had made, and he explained that a decision is “political” if a politician as important as the Speaker of the House disagrees with it. Enough said.

There is no freedom of expression and publication and inquiry and exploration if you are not free to call the government to task. To put it simply, something is not electoral or impermissibly political or partisan just because a political partisan says that it is. We cannot define what is political via the barometer of politicians. Huey Long might have been pleased to measure academic freedom in those terms, but universities cannot.

BALANCE

Of course, with academic advocacy—advocacy for social justice—there is the persistent question of balance, of academic distance, perspective, and remove. These are, no doubt, complicated questions for both

16. Gene Nichol, *Cuts to Legal Aid an Injustice to North Carolina's Poor*, NEWS & OBSERVER (Oct. 24, 2015, 1:24 PM), <http://www.newsobserver.com/opinion/op-ed/article41226495.html>.

public and private universities. But they present deeper questions of perspective as well.

While I was dean of the law school at the University of North Carolina, the faculty approved the creation of three privately-funded academic centers: a Poverty Center, a Civil Rights Center, and a Banking Law Center. All three concerned matters of intense interest to the state of North Carolina. All three helped us bring in experts, opportunities, resources, and personnel we could not have attracted otherwise. All three gave our students advocacy, research, publication, and sometimes even litigation experiences they could not have before enjoyed. All three opened interdisciplinary partnerships new to the campus. I was much committed to all three of them.

The Poverty Center and the Civil Rights Center were notably controversial from the outset: in the statehouse, in the broader community, among some alumni, and in some university quarters. Oddly, though, in the dozen years of its existence, I have never heard a whimper of complaint about the Banking Center—not a scintilla, not an iota, not a fume, not a whiff.

There is nothing more natural, more expected, more routine, more pervasive than the use of law and legal expertise; the halls of elite law schools; and the organizations of bench, bar, and the academy to foster, serve, sustain, and smooth the unfolding horizons of great bastions of economic power and privilege. This, truly, is the golden legacy of the past, the central and necessary grounding of the present, and the high aspiration of legal education's future. It is no more likely to be questioned than the choice to breathe in air.

Perhaps the presumption of legitimacy for the Banking Center is unsurprising in a nation that is the richest in the world, yet has the highest levels of poverty, child poverty, and income inequality and immobility in the advanced world. A nation that, despite all its pledges, commitments, dedications, and foundational promises to the contrary has become, undoubtedly, the richest, the poorest, and the most unequal major nation in the world.¹⁷

We operate, those of us here today, from institutions and platforms that are replete with, dependent on, based upon, rooted in, distorted by, and constantly in service of economic privilege. That reality is borne out in our admissions and funding structures, in our links to employment and

17. Gene Nichol, *Seeing the Invisible: Desperate for Dental Work, an All-Night Wait*, NEWS & OBSERVER (Aug. 24, 2013, 8:00 PM), <http://www.newsobserver.com/opinion/op-ed/seeing-the-invisible/article10278134.html>.

private giving markets, in the dominant focus of our research, in the costs that we assure and implement, and in the subject matters we emphasize.¹⁸

Despite the potent and inspiring work of many, often institutionally marginalized faculty—like the folks gathered in this room—issues of the wrenchingly inadequate access to our system of civil justice are, broadly speaking, missing or debased in our curricula. The legal system's greatest transgression against the American promise is largely absent from our educative deliberations. Little of our scholarly attention, comparatively speaking, focuses on what passes for justice among the have-nots. The written work of our faculties rarely involves arenas where people are the most greatly afflicted. Our curriculum takes the present deployment of legal resources as a given. Who uses the legal system, and how, is largely unexplored. Most legal education occurs as if there are no poor and near-poor people in America; their effective exclusion from the actual implementation of so much legal determination is swept unceremoniously aside.

Even "swept aside" is too generous a description. No crumbs actually appear to require the broom. In the classrooms of legal education, the poor are allowed simply to disappear, as they do before bench and organized bar. Economic hardship plays virtually no role in our exploration of constitutive justice. Economic privilege sits at center stage.¹⁹

We then compound the transgression with tuition bills that outstrip sensible cost standards and, for huge percentages of deserving students, the reasoned ability to pay. Our students' aspirations become swamped by their debts—limiting life choices and further fencing out the underserved. The idea that American law schools are in danger of overselling the commands of economic and social justice is obscene and occult.

SERVANTS OR CRITICS

I was thinking, last week, of a speech that I read, given at Harvard four or five years ago, by Rich Trumka, president of the AFL-CIO.²⁰ In ways that seem prescient, Trumka noted the growing anger of ordinary Americans; an anger that increasingly turns to polarization and bigotry, between self-described patriots and despised others, between those who purportedly belong and those who do not. I remember Trumka said that

18. Gene Nichol, *Foreword: Wages, Work, Privilege, and Legal Education*, 5 HARV. L. & POL'Y REV. 1 (2011).

19. *Id.*

20. *Id.*; see Richard L. Trumka, Remarks at the Harvard Kennedy School: Why Working People Are Angry and Why Politicians Should Listen (Apr. 7, 2010), available at <http://thepage.time.com/remarks-trumkas-harvard-speech>; see also ECON. POLICY INST., AMERICAN JOBS PLAN: A FIVE POINT PLAN TO STEM THE U.S. JOBS CRISIS (Tom Kiley ed., 2009), available at http://www.epi.org/files/page/-/american_jobs_plan/epi_american_jobs_plan.pdf.

in this time of challenge, pain, frustration, and anger, “political intellectuals face a great choice—a choice whether to be servants or critics of economic privilege.”²¹ A great and potent choice: servant or critic.

I know we do not think of things that way in legal education. That is probably to the good. Most of us are highly content to be neither servant nor critic. But as I get older, I am less sure that Trumka is wrong.

We work to sustain a legal system that fences out half of all Americans because they cannot pay the fare, and yet we leave the transgression unexplored and uncontested. The social science research tells us that the product of the United States Congress, our most important lawmaker, gives no credence to the preferences and interests of low-income people. None whatsoever. And we work in institutions that benefit from, and contribute to, the massive marginalization of those without ample economic resources.

It is less clear every year that we can successfully avoid the charge that we work in service to economic privilege merely by refusing to ever think or talk about it—as if the question had nothing to do with our respective institutions or our own roles in them. I was out in Harlan County, Kentucky, some months ago. I was thinking that those heroes might well ask, “which side are you on?” Folks, “which side are you on?” Sometimes we live as if we would be reluctant to answer.

Henry Brougham wrote two centuries ago:

It was the boast of Augustus that he found Rome brick and left it marble. A praise not unworthy of a great prince. But how much nobler would the sovereign’s boast be when he shall say, I found law dear and left it cheap, found it a sealed book, and left it a living letter, found it the patrimony of the rich, and left it the inheritance of the poor, found it the two-edged sword of craft and oppression, and left it the staff of honesty and the shield of innocence.²²

Thanks for letting me join you. Congratulations on your ennobling work.

21. See Trumka, *supra* note 21.

22. Gene Nichol, *The Charge of Equal Justice*, 47 *JUDGES’ J.* 38, 40–41 (2008).