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## Free Speech Rules, Free Speech Culture, and Legal Education

Eugene Volokh

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## FREE SPEECH RULES, FREE SPEECH CULTURE, AND LEGAL EDUCATION

*Eugene Volokh\**

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\* Gary T. Schwartz Professor of Law, UCLA School of Law (volokh@law.ucla.edu). Thanks to Jordan Brown, Orin Kerr, Genevieve Lakier, Tammy Oltz, Eduardo Peñalver, Robert Post, Francesca Procaccini, Gordon Renneisen, and Ilya Shapiro for their comments.

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## I. INTRODUCTION

The lawyer's job is to persuade people, including people who may disagree with the lawyer. To do this, lawyers must be able to connect with people whose views may be very different from their own.

And this is so even if the lawyer's views are shared by the majority. Sometimes, for instance, the lawyer must persuade all members of a jury. Even in a solid blue state, the lawyer may need to persuade some red jurors, and vice versa.<sup>1</sup> Even in a jurisdiction where most judges are liberals, the lawyer may draw a conservative judge, or a majority-conservative panel. A lawyer will also often need to persuade opposing counsel, whether in litigation or in a negotiation; to build trust with a reluctant witness; and of course to interact productively with the lawyer's own client. All of these people may sharply disagree with the lawyer on important matters.

One critical function of law schools is to help students learn the skills that they can use to persuade people with whom they disagree. As importantly, law schools must help students learn the habits and attitudes required for that—and to unlearn the habits and attitudes, which are so much a part of human nature, that tend to undermine such connections.

It is of course human nature to categorize the world into us and them, the good and the bad, the "enlightened" and the "deplorable." It is human nature to let these categorizations leak into our assumptions about people, into our decisions about whether to listen to people, and into our manners when we speak with people. It is human nature to resist

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1. This is true even for civil jury verdicts; as of 2006, the federal system and over a third of the states required civil jury unanimity for a verdict, and the rest required a supermajority (2/3 to 5/6). Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U.L. REV. 201, 203 (2006).

being exposed to arguments that challenge our deepest beliefs, or to facts that we may disapprove of or find offensive. That human nature, though, interferes with our effectiveness as lawyers.

In this Article, I will argue that creating a culture of free speech and openness to contrary ideas at law schools—including on the most controversial of topics—is vital not just for democratic self-government, the search for truth, self-expression, and the like, but also for effectively training future lawyers. Law schools should do all they can to communicate this point to students, in thought and action.<sup>2</sup> This can often be institutionally difficult for the law schools, given the various pressures they face from without and within. But it is necessary, if law schools are to properly teach their students.

## II. TEACHING FOR EFFECTIVE LAWYERING

To be an effective lawyer requires more than just knowing the legal rules, or even “thinking like a lawyer” in the sense of understanding the structure of legal categories. It requires a particular set of skills, habits, and attitudes that don’t come naturally—indeed, that may be contrary to certain facets of human nature.

### A. Understanding the Other Side’s Best Arguments

To begin with, lawyers have to understand the best versions of the other side’s best arguments, so they can better rebut them.<sup>3</sup> Even when the other side doesn’t make the best arguments, good lawyers must anticipate the arguments that decisionmakers might come up with on their own. It’s human nature to focus on the straw man arguments—the

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2. I also support free speech and open-mindedness in other educational institutions; but the arguments in this Article are specifically focused on law schools.

3. This point dates back to at least the ninth century. See CHARLES PELLAT, *THE LIFE AND WORKS OF JAHIZ* 71 (D.M. Hawke trans. 1969) (“[A] man who understands his opponent’s arguments better than he himself does is in a better position to select his own arguments, can go deeper into the various aspects of his case, and is better equipped to reach his goal . . .”). For more recent examples, see, e.g., Sarah Isgur, *I’m a Conservative Who Got Heckled at Yale Law School. But Not by Who You Think.*, POLITICO (Nov. 20, 2022), <https://www.politico.com/news/magazine/2022/11/20/yale-law-school-cancel-culture-boycott-00069568> [<https://perma.cc/79LE-F5E5>]; Andrew Koppelman, *Stanford Law Students’ Infantile Protests*, CHRON. OF HIGHER EDUC. (Apr. 3, 2023), <https://www.chronicle.com/article/stanford-law-students-infantile-protests> [<https://perma.cc/U24B-6962>]. I particularly recommend Professor Koppelman’s article. Koppelman, *supra* note 3 (“A good advocate must anticipate the strongest arguments on the other side—arguments that she may find painful to contemplate, especially when she has not yet figured out how to answer them.”); *id.* (“Shielding students from encountering [Judge Kyle] Duncan is like keeping a boxer from watching videos of an opponent’s fights. This kind of insulation will make law students less competent to do their jobs and will lead them to lose cases that they could have won.”).

weakest versions of the other side's arguments. Instead, lawyers need to engage in "steelmanning": coming up with the best possible arguments, in order to identify the best counterarguments to those arguments.

The need for this seems obvious to trained lawyers. But actually being able to do this is often difficult. It's normal to want to avoid arguments that challenge one's positions, and especially one's deeply held values. Considering such arguments—which, by hypothesis, one considers to be deeply wrong, morally or factually—can make one angry. Thinking about them, and taking them seriously, is an unpleasant experience (indeed, can make one feel dirty or disloyal). The temptation is to not consider those arguments, to gloss over them, and at least to subconsciously underestimate them.<sup>4</sup> And this attitude is reinforced by social norms in certain groups, whether liberal, conservative, religiously defined, or otherwise.

But a lawyer must resist that temptation, just as a doctor must resist the common human revulsion towards disease and towards those who are suffering from certain diseases, and as a psychiatrist must resist the natural human revulsion towards certain kinds of violent or otherwise abusive fantasies or experiences that a patient might disclose.<sup>5</sup> That doesn't mean that professionals must change their moral views—and it's not law schools' job, I think, to improve our students' morals.<sup>6</sup> But professionals must make sure that their moral judgments don't interfere with their effectively serving their clients. And law schools must train students to constantly consider and confront the best arguments on both

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4. Koppelman, *supra* note 3 ("A good advocate must anticipate the strongest arguments on the other side—arguments that she may find painful to contemplate, especially when she has not yet figured out how to answer them."); *id.* ("Shielding students from encountering [Judge Kyle] Duncan is like keeping a boxer from watching videos of an opponent's fights. This kind of insulation will make law students less competent to do their jobs and will lead them to lose cases that they could have won.").

5. *Cf.* Letter from Jenny S. Martinez, Dean, Stanford Law Sch., to Stanford Law Sch. Cmty. 6 (Mar. 22, 2023), <https://law.stanford.edu/wp-content/uploads/2023/03/Next-Steps-on-Protests-and-Free-Speech.pdf> [<https://perma.cc/DK84-2GZZ>] ("Just as doctors in training must learn to face suffering and death and respond in their professional role, lawyers in training must learn to confront injustice or views they don't agree with and respond as attorneys.").

6. Francesca Procaccini suggests that "excellent lawyers also need to be moral human beings." Francesca Procaccini, *Comment*, 51 HOFSTRA L. REV. 663, 664 (2023). But while that is good reason to encourage law students to consider and discuss the moral implications of legal rules and of the lawyer's role—which is what I understand Professor Procaccini to be suggesting—I do not think law schools are likely to be particularly good either at teaching any particular brand of morality or at selecting which moral precepts should be taught. Teaching lawyerly skills and knowledge is hard enough without adding teaching morals to the task. *Cf.* Letter from Jenny S. Martinez, *supra* note 5, at 6 ("Just as doctors in training must learn to face suffering and death and respond in their professional role, lawyers in training must learn to confront injustice or views they don't agree with and respond as attorneys.").

sides of the question, whatever the moral merits or demerits of the two sides.

*B. Understanding How People with Very Different Views See the World*

More broadly, lawyers need to be able to step into the shoes of decisionmakers (judges, jurors, legislators, administrative agency officials, voters, clients, or negotiation counterparties) and see the world from their perspective. Given the decisionmakers' views of the world—moral, empirical, religious—how can you bring them around to your conclusion on the particular question they're facing?

Human nature makes this hard. It's easy just to ask "is this argument persuasive?," because that often comes down to "is this argument persuasive to me?" But it's hard to ask, "is this argument persuasive to someone very different from me?"

And it's especially hard to see the world from the perspective of people who, by your lights, are wrong or downright stupid or evil: bigoted, fascist, unpatriotic, Marxist, supporters of slavery, supporters of genocide. Yet that's what one has to do. We might think that half our jury are racists or sexists or religious bigots who are prejudiced against our clients. Who knows, we may even be right to so think. Yet we still have to empathize with their perspective enough to figure out what facts or arguments might reach even them. Law schools must train students in the habits and attitudes needed to do this.<sup>7</sup>

*C. Being Willing to Make Arguments with Which We Don't Personally Agree*

Lawyers often also have to make arguments that, as independent thinkers, they might disagree with as a theoretical matter or otherwise find distasteful. A lawyer who rejects originalism or textualism may need to make originalist or textualist arguments; likewise, a committed originalist may need to make living constitutionalism arguments. A lawyer who deeply supports religious freedom may need to respond to the religious freedom claims raised against his client. A lawyer who

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7. See Koppelman, *supra* note 3 ("One of the biggest litigation victories I participated in was the Supreme Court's 2020 decision, in *Bostock v. Clayton County*, that discrimination against LGBTQ people is illegal sex discrimination . . . [When we] wrote our amicus brief in that case, we consciously targeted Justice Neil Gorsuch, aiming to show him that his textualist philosophy of interpretation demanded that result. I have big disagreements with Gorsuch. We thought it was nonetheless worth testing the hypothesis that he is not a mere political apparatchik, but an honest judge who sincerely tries to get the law right. Lawyers who can't imagine that possibility won't be able to do their jobs. We won, and Gorsuch wrote the court's opinion.").

thinks that practices that have a racially disparate impact are “structural racism” that needs to be fought may nonetheless sometimes need to make an argument that, for a particular client in a particular case, such disparate impact should not be seen as legally significant.

Even if we always practice on one side of a practice area—criminal defense, employee-side employment law, creator-side copyright law—we may sometimes have to make arguments that don’t fit our normal ideological commitments, because that’s what our clients need. And, practically speaking, many lawyers (and especially associates working at large firms) may be financially and professionally unable to maintain ideological purity. When they do take on a case that cuts against their ideological commitments, they have to be able to serve their clients well.

Again, it’s normal (and may well be human nature) to view such actions with distaste. As scholars, for instance, we’re generally expected to affirmatively make arguments only when we sincerely believe we are correct. If we make arguments in our academic work that we believe are mistaken, just to win a point, we may well be condemned as intellectually dishonest. Likewise, if our friends learn that we are trying to persuade them of something using arguments that we ourselves don’t believe, they may view us as insincere and untrustworthy.

But lawyers’ duty to their clients requires them to make the best arguments they can under the current legal rules, regardless of whether they personally view those arguments as theoretically sound. Even if they believe that originalism is logically incoherent, for instance, they need to be able to make originalist arguments on their clients’ behalf, when they think that the judge is most likely to be persuaded by those arguments. Law schools must thus teach students the kinds of arguments that are effective in various contexts (what Anup Malani has referred to as the educational institution’s transmission of culture<sup>8</sup>), entirely apart from whether professors or students agree with all those arguments.

#### *D. Tolerating People Who Hold Views We Condemn*

Even beyond the arguments, lawyers need to be able to build a personal connection with the decisionmaker (or with the other party in a negotiation), a connection of cordiality and apparent amity even if not of genuine fellow feeling.

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8. See Anup Malani, “Enforcing the First Amendment on Campus Won’t, By Itself, Address the Problem of Academic Freedom,” VOLOKH CONSPIRACY (REASON.COM) (Nov. 16, 2022, 12:13 PM), <https://reason.com/volokh/2022/11/16/enforcing-the-first-amendment-on-campus-wont-by-itself-address-the-problem-of-academic-freedom> [<https://perma.cc/NM3C-U3AR>].

Yes, we might think that people who take view *X* are horrible people. It is unfortunately human nature (or at least a facet of human nature) to assume the worst of our ideological adversaries—to assume that they are not just mistaken but are “deplorables,” fools, pigs, Nazis, Communists, corrupt, and so on. And of course this assumption may sometimes be accurate.

And yet there sits the witness, who is a loyal adherent of *X*—but whose testimony can help keep our client out of jail or financial ruin. Our natural human reaction to the witness might be to want to make clear that we think he should be drummed out of decent society, or even locked up for hate speech or sedition or anti-American conspiracy or what have you. It is human nature to let our feelings show, to greet views and people we disapprove of with condemnation or even visible contempt.

But of course what we need to do, as a matter of professional and moral duty to our client, is to build as much of a bridge as we can to the witness. To do that, we will often need to accentuate what we agree about (the importance of justice in this particular case, for example, and the value of telling the truth and remembering the facts as clearly as possible) rather than what we disagree about. And we will need to say all this with a smile and not a sneer.

The witness scenario is just one example. To effectively represent our client, we need to be able to interact effectively with opposing counsel, however reprehensible their views might be. To effectively argue to judges or jurors or arbitrators, we can’t come across as people who think they are retrograde yahoos, however much we might disapprove of their views.<sup>9</sup>

And sometimes the gulf between them and us might not be so great. Sometimes we might be able to bridge that gulf with just the right argument, which appeals to both sides’ shared beliefs that we can find if we aren’t too distracted by focusing on the divergent beliefs. Law schools must teach students to unlearn the habit of always assuming one’s enemies are bad people, and to learn instead to be able to take a charitable perspective towards the other side—not because that perspective is always correct, but because it can help yield effective lawyering.<sup>10</sup>

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9. See Koppelman, *supra* note 3 (“Some of the best law students in the country actually believed that they were advancing their cause by shouting insults at Duncan. Need one really say that yelling ‘We hope your daughters get raped!’ or ‘Why can’t you find the clit?’ is not effective advocacy?”).

10. *Id.* (“The protestors also don’t serve themselves well by distorting [Judge Kyle] Duncan’s views . . . Duncan isn’t a sociopath. He is an idealist, one who embraces ideals that are warped and



More broadly, being democratic citizens means living alongside people whom we might view as morally detestable. And if we want to be not just citizens but participants in political life—as public advocates for causes we support, even if not as elected officials—we need to talk empathetically and politely to such people.<sup>11</sup> Again, to be effective at this task, we need to learn the habits and attitudes of amicable interactions across political divides.

### *E. Learning from People We Disagree With*

It's also human nature to shun people because of their bad actions or bad beliefs. But if we refuse to listen to an accomplished and successful lawyer because we disapprove of that lawyer's views—however morally right our disapproval might be—we lose an opportunity to figure out how best to respond to those views.

We likewise lose an opportunity to figure out how that lawyer managed to become successful despite what we view as his moral benightedness. Might the lawyer have figured out how to frame his views in a way that appeals (again, however wrongly) to important decisionmakers? If so, how can we use that to our advantage, whether to respond to his framing or to borrow it for our own views?

And sometimes one's adversaries might have something of a point, even if only a partial point. I personally think, for instance, that Socialists' bottom line proposals are awful, and have caused untold death and misery; I support free markets, with only those regulations that are really necessary. And yet what regulations are necessary? Perhaps some of the Socialists' critiques of the existing system can help show that, even if their bottom line is wrong.

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destructive. I don't think I've ever met him, but I know people like him. By patiently learning about their claims, I've been able to rebut them in detail.”).

11. See Robert Post, *Comment on Freedom of Expression in American Legal Education*, 51 HOFSTRA L. REV. 667, 676 (2023) (“[L]awyers are obliged to listen to all, to learn from all, and to speak to all. Lawyers must aspire more assiduously than other democratic citizens to become artists of alterity. They must become the glue that holds together the impossibly centrifugal forces that perpetually threaten to rip America apart.”); Letter from Jenny S. Martinez, *supra* note 5, at 6 (“Law is a mediating device for difference. It therefore reflects all the heat of controversy, all the pain and suffering, and all the deeply felt moral urgency of our differences in position, power, and cherished principles.”); *id.* at 7 (“[L]earning to channel the passion of one’s principles into reasoned, persuasive argument is an essential part of learning to be an effective advocate”); *id.* (“[T]he cycle of degenerating discourse won’t stop if we insist that people we disagree with must first behave the way we want them to. Nor will it stop if we try to shame each other into submission (shaming, the research shows, has precisely the opposite effect in communities constituted by difference). The cycle stops when we recognize our responsibility to treat each other with the dignity with which we expect to be met.”).

Likewise if you're trying to figure out the proper way of regulating abortion, even if you're confident that such regulations should be very slight; or of crafting affirmative action programs; or of deciding when female-identifying athletes who nonetheless have bodies that are characteristic of males should be allowed to compete in women's sports. (Should just a statement of identification be enough? Should it require some time on testosterone suppressants? Something else?)

Our adversaries might also have a point that we may acknowledge, once we hear it and understand it, will likely sway a lot of people. We might then realize that, for our own proposal to be politically palatable, we'll need to make some modest compromises. Yet the more we keep the other side at a distance, the harder it will be for us to acquire those insights. Again, law schools need to teach students those sorts of skills, and the habits and attitudes—such as a willingness to listen, even to people whose views we loathe—that support them.

#### *F. Building Coalitions*

Lawyers also often need to build coalitions in order to win. The most effective amicus supporting our position, for instance, might be a group with which our client would sharply disagree on most things—but which may agree with our client's position on, say, the freedom of speech, or the right to jury trial, or whatever issue is important in this case. If we're arguing against a regulation, we might deliberately want to seek comments from people on all points of the political spectrum.

If we're lobbying for a statute or arguing to the voters in favor of a ballot measure, we may need to do the same. And this is especially important given how major a role we lawyers play in American political life.

Again, we can't be effective at creating coalitions if our first reaction is the natural human reaction of shunning one's adversaries for their ideological sins (or perhaps even heresies). Law schools need to teach students the habits and attitudes needed for effective coalition-building, and to unlearn the normal inclination towards viewing each one's ideological adversaries as permanent enemies.

#### *G. Unflappably Confronting Unpleasant Facts and Arguments*

Lawyers also need to be prepared to deal with difficult and unpleasant facts and arguments, whether in court, when reading precedents, when reviewing documents, or when interviewing witnesses

or the client. Indeed, we need to react to such matters as calmly and rationally as possible, even when they are understandably disturbing.<sup>12</sup>

Sometimes, these matters can come up in legal debate: The other side makes an argument that we find offensive, and we have to be able to respond to it substantively, rather than being distracted by its offensiveness. Occasionally, the other side's argument might not just be offensive but might violate legal ethics rules, for instance if it involves a personal attack on us; but those are just a small fraction of the arguments that may be understandably upsetting.

And sometimes such matters may arise simply because people feel they should tell lawyers everything, or just get on a roll and turn off their internal self-censors, or feel an emotional need to unburden themselves. We're interviewing a witness about what he heard, perhaps in an employment case or a criminal case or even a business partnership breakup case, and he reports on some racist or anti-gay slurs that someone said.<sup>13</sup> Or we're asking the witness why two people weren't working well together, and he reports on some sexist or anti-Semitic or anti-Muslim sentiments that one had expressed about the other.<sup>14</sup>

Or perhaps we're interviewing a witness who is bad for our side, and he starts launching on some offensive tirade of his own. Say, for instance, I'm interviewing a witness who doesn't know I'm Jewish, and he starts talking about how everything is the Jews' fault. That's potential litigation gold right there: The more I can draw him out, the more effectively I'll be able to undermine his position at trial, and the stronger my position will be in negotiating a settlement. (To be crass but realistic, imagine that, if given free rein, the witness will start talking about how much he admires Hitler.) But that will happen only if I can keep my cool, and resist the natural human temptation to argue with him or admonish him,<sup>15</sup> or the equally human tendency to get flustered and not know what follow-up questions I should ask.

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12. See Post, *supra* note 11, at 677 ("Because the law distinguishes acceptable from unacceptable behavior, lawyers must be able to look squarely at the most deviant and outrageous behavior, so that they can help determine how and where legal control should be exercised.").

13. Cf., e.g., Randall Kennedy & Eugene Volokh, *The New Taboo: Quoting Epithets in the Classroom and Beyond*, 49 CAP. U.L. REV. 1, 40-41 (2021) (citing business law cases in which the facts incidentally involved offensive material, such as racial slurs).

14. See, e.g., Complaint at 1-2, *Heritage Pharm. Inc., v. Glazer*, No. 3:16-cv-08483-PGSTJB (D.N.J. Nov. 10, 2016), ECF No. 1; First Amended Complaint ¶¶ 14, 67, *Terpin v. Pinsky*, No. 7:20-cv-3557-CS (S.D.N.Y. Oct. 25, 2020), ECF No. 37.

15. "Never interrupt your enemy when he is making a mistake." U.S. Army (@USArmy), TWITTER (Sept. 2, 2012, 9:13 AM), <https://twitter.com/usarmy/status/242294060650475521?lang=en> [<https://perma.cc/8SYH-M8HY>] (crediting Napoleon).

Or say we're talking to a client about why he did or failed to do something—even in some normally bland commercial situation—and an answer comes out of the blue: The client didn't come to a meeting because he had been targeted for a racist attack. Or the client didn't work well with someone because he had been sexually assaulted by that person a decade before. Or the client didn't work well with someone because that client had some prejudices, even highly offensive prejudices, against that person.

The client's revealing this might actually be a testament to the bond of trust we've created with the client: The client feels he can tell us everything, even things that both he and we find disturbing, or things that reflect badly on him. The last thing we should want to do is to damage that trust by lashing out at the client, or perhaps even just by visibly bristling.

Perhaps at some point we might feel that the client's disclosures of his own viewpoints—or even his willingness to discuss things that happened to him, which might be disturbing for us—might lead us to want to stop representing him. But there are times when we can't ethically do that, for instance if the trial is coming right up. And in any event, any such reaction on our part should be carefully thought through. In the moment, we need to react as calmly as possible.

Now, to be sure, each professor (and each event organizer) may decide differently how and when such calmness in the face of offensive materials should be taught. Thankfully, being a lawyer isn't quite like being a Navy SEAL, so one doesn't have to train accordingly, with frigid-water practice and “drown-proofing” exercises underwater with bound hands.<sup>16</sup> But law schools do need to make sure that they don't teach students counterproductive habits and attitudes, in which exposure to unpleasant material is seen as an occasion for complaint rather than for resilience.<sup>17</sup> And if students say that they are “traumatized” by exposure to such material, then we should ask how we can train them to avoid such trauma—and thus avoid a serious threat to their future

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16. See Dave Philipps, *Navy Orders High-Level Outside Investigation of SEAL Course*, N.Y. TIMES (Sept. 9, 2022), <https://www.nytimes.com/2022/09/09/us/navy-seal-training-investigation.html> [perma.cc/MB9Z-KYYJ]. The article noted that the investigation focused on “a damaging ethos of forced suffering that often dismissed serious injuries and illnesses as weakness and a growing subculture of students who saw illicit performance-enhancing drugs as the only way to get through the course”; but the investigation apparently doesn't cast doubt on the need for demanding training for a demanding profession. *Id.*

17. See Kennedy & Volokh, *supra* note 13, at 33, 42-45 (discussing this with regard to material that accurately quotes slurs, as over ten thousand court cases have done).

effectiveness as lawyers<sup>18</sup>—rather than to use the asserted trauma as justification not to expose them to certain matters.

### III. SPECIFIC PRACTICES

Law schools, then, need to act in ways that promote these important—but often counterintuitive—skills, habits, and attitudes. When they fail to do that, they fail their students (and, indirectly, their students' future clients).

And the students who suffer most from law schools' failure in such matters are generally the students who belong to the majority ideological group; today, that is mostly students on the Left. Students on the Right get to hear contrary views, and get to learn how to respond to the Left's arguments and to refine their own arguments (since people are likely to seek out ways to strengthen their own arguments, given their emotional investment in their own beliefs).<sup>19</sup> Students on the Left, however, are more likely to have heard only their side's arguments on many topics, and thus to be less prepared for the best arguments that the Right has to offer.<sup>20</sup>

#### *A. Protecting Student Speech (and Speech of Invited Speakers)*

One obvious step to educate students in the habits and attitudes discussed in Part 0I is to protect speech by students and by invited speakers, including speech that expresses views that sharply diverge from local majority views. This is a First Amendment obligation for public law schools, and it's an academic freedom obligation for private law schools that claim to be committed to academic freedom, rather than to promoting a particular belief system. Such speech should certainly not

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18. See *id.* at 49-50; Jesse Singal, *Stop Telling Students Free Speech Is Traumatizing Them*, N.Y. MAG. (July 18, 2017), <https://nymag.com/intelligencer/2017/07/students-free-speech-trauma.html> [<https://perma.cc/GH8D-34AY>]; Jesse Singal, *Conservative Law Students at Georgetown Were 'Traumatized' by an Anti-Scalia Email*, N.Y. MAG. (Feb. 22, 2016), <https://nymag.com/intelligencer/2016/02/law-students-traumatized-by-anti-scalia-email.html> [<https://perma.cc/67MC-GJZR>]; Conor Friedersdorf, *Are Today's Law Students Tough Enough?*, ATL. (Jan. 12, 2015), <https://www.theatlantic.com/education/archive/2015/01/are-todays-law-students-tough-enough/384376> [<https://perma.cc/5RV9-JEHW>].

19. To be sure, there is of course the temptation to closed-mindedness on both sides of the aisle. See, e.g., Isgur, *supra* note 3.

20. Michael McConnell has noted this before; and of course John Stuart Mill remarked on it as a more general matter:

But it is not the minds of heretics that are deteriorated most, by the ban placed on all inquiry which does not end in the orthodox conclusions. The greatest harm done is to those who are not heretics, and whose whole mental development is cramped, and their reason cowed, by the fear of heresy.

JOHN STUART MILL, ON LIBERTY 65 (1863).

lead to punishment of the students who speak, or who invite the speakers. And it should also be affirmatively protected from attempts to shout it down,<sup>21</sup> and of course from attempts to suppress it by threats of violence.<sup>22</sup>

Indeed, schools should point out that students who disrupt such events aren't just interfering with the rights of the speakers: They are also interfering with the rights of the students who are there to listen, and indeed with those students' education. And schools should discipline students who disrupt such events—of course, regardless of the event's ideology, whether the event is seen as, say, for or against transgender rights, for or against abortion rights, for or against critical race theory, and so on.

### *B. Responding to Unpopular Views in Ways That Promote Discussion*

Now of course law schools themselves also have the right to speak. Private law schools have a First Amendment right to speak; public law schools at least have the power to speak, absent any restrictions imposed by their state legislature. Faculty members also have such a right.

At the same time, law schools should recognize that their speech can understandably deter students, reinforcing already existing habits of “speech timidity.”<sup>23</sup> *NLRB v. Gissel Packing Co.*,<sup>24</sup> a labor case, offers a helpful analogy. In *Gissel*, the Court recognized that employer speech, though generally protected by the First Amendment, is particularly likely to be seen as implicitly threatening by employees, who are aware that they are within their employers' power: Labor laws “take into account the economic dependence of the employees on their employers, and the

21. See Erwin Chemerinsky & Howard Gillman, *Free Speech Doesn't Mean Hecklers Get to Shut Down Campus Debate*, WASH. POST (Mar. 24, 2022), <https://www.washingtonpost.com/opinions/2022/03/24/freespeech-doesnt-mean-hecklers-get-shut-down-campus-debate> [<https://perma.cc/U5D4-FXX5>]; Letter from Jenny S. Martinez, *supra* note 5, at 2.

22. See, e.g., David Lat, *Yale Law Is No Longer #1—For Free-Speech Debacles*, ORIGINAL JURISDICTION (Mar. 10, 2023), <https://davidlat.substack.com/p/yale-law-is-no-longer-1-for-free-speech> [<https://perma.cc/5RG5-CZKR>]; Robby Soave, ‘Grow Up’: Yale Law School Students Interrupt Event, Demand Right to Talk Over Speakers, REASON (Mar. 16, 2022, 5:30 PM), <https://reason.com/2022/03/16/yale-law-school-students-disrupt-event-adf-aha> [<https://perma.cc/ZN4V-2CM8>]; Samantha Harris, “Stop Debating”: CUNY Law Students Disrupt Speaker and His Critic, FIRE (Apr. 12, 2018), <https://www.thefire.org/news/stop-debating-cuny-law-students-disrupt-speaker-and-his-critic> [<https://perma.cc/LP58-9EAP>]; Robby Soave, *UC Hastings Law Students Silence Conservative Speaker, Demand Anti-Racism Training*, REASON (Mar. 2, 2022, 6:02 PM), <https://reason.com/2022/03/02/ilya-shapiro-uc-hastings-law-school-students-protest-racism-supreme-court> [<https://perma.cc/3P8S-C3LX>]; John Hasnas, *Free Speech on Campus: Countering the Climate of Fear*, 20 GEO. J.L. & PUB. POL'Y 975, 985 (2022).

23. Procaccini, *supra* note 6, at 665.

24. 395 U.S. 575 (1969).

necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.”<sup>25</sup>

Likewise, law schools should take into account that law students—concerned about their own economic and professional future—might interpret law schools’ condemnations of speakers, especially when couched in terms such as “hate speech,” as implying that students should treat those speakers’ views as beyond the pale. And law schools should also recognize that their speech can reinforce habits of closed-mindedness and unwillingness to listen.

Consider, for instance, Kansas University Law School’s condemning an Alliance Defending Freedom (“ADF”) speaker on the grounds that ADF—which has litigated and advocated against some gay rights and trans rights claims—engages in “hate speech” and that its values are “antithetical to the inclusion and belonging we strive to achieve on our campus.”<sup>26</sup> This sends a powerful message to students: If they invite such speakers, and perhaps even if they listen thoughtfully to those speakers, they themselves are hateful people who may merit being shunned, just as the university seems to be urging people to shun the ADF itself. But beyond that, the message urges students not to engage with ADF’s arguments, and not to take those arguments seriously.

Yet the ADF is an immensely successful litigation organization, which has won many cases both in the Supreme Court and elsewhere.<sup>27</sup> It also has significant influence in legislative and political debates. Perhaps ADF lawyers shouldn’t have won. Perhaps they deserved to lose, at least on the issues to which the law school was referring. But they are formidable adversaries, who obviously know much about effective lawyering for their causes.

Anyone interested in lawyering related to those causes can gain much from hearing from ADF lawyers, from asking them questions, and from thinking hard about their arguments and about how they frame those arguments. Students who hope to effectively oppose the ADF, for instance as to gay rights or transgender rights, should be encouraged to

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25. *Id.* at 617.

26. Patrick Richardson, *KU Law School Says ADF Discussion of the First Amendment Is “Hate Speech,”* LION (Oct. 26, 2022), <https://readlion.com/2022/10/26/ku-law-school-says-adf-discussion-of-the-first-amendment-is-hate-speech> [<https://perma.cc/J8JT-594G>]; E-mail from Leah Terranova, the KU Law Fac./Staff Diversity, Equity, Inclusion & Belonging Comm., to KU Law Students, Law Admin., and Law Fac. (Oct. 20, 2022, 10:50:33AM), <https://sentinelksmo.org/wp-content/uploads/2022/10/KU-Law-Email.png> [<https://perma.cc/2WGL-US9A>].

27. *See, e.g.,* Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021); Nat’l Inst. of Fam. and Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018); Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n, 138 S. Ct. 1719 (2018).

pay *more* attention to them rather than less. And even students who don't expect to practice in those fields have much to learn from how such successful lawyers craft their arguments.

To be sure, law students could learn about the ADF by reading its briefs, or watching videos of its oral arguments. But of course that's true on all topics, yet what law school says, "We don't need to organize talks, or fund talks by student groups, on (say) environmental law or technology law or bankruptcy law—students should just read a good book or brief on the subject, or listen to an oral argument"?

Law schools realize that watching a talk or a conversation, and having an opportunity to ask questions (or even just to listen to responses to classmates' questions), helps give an extra perspective that pre-prepared materials don't offer. And law schools realize that students are already overwhelmed with readings, and are just not that likely to do a lot of extra reading—but might be open to showing up to a talk. The same applies to talks by controversial advocates on controversial topics.

I would prefer that universities and their departments generally not take stands on various controversial public policy questions or legal questions. (The University of Chicago's Kalven Report speaks well to that point.<sup>28</sup>) But if a law school wants to express its views supporting

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28. Kalven Committee, *Report on the University's Role in Political and Social Action* (Nov. 11, 1967), [https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt\\_0.pdf](https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf) [https://perma.cc/8L2Y-RRCR]. In particular, I think the Kalven Report is right to conclude that:

To perform its mission in the society, a university must sustain an extraordinary environment of freedom of inquiry and maintain an independence from political fashions, passions, and pressures. A university, if it is to be true to its faith in intellectual inquiry, must embrace, be hospitable to, and encourage the widest diversity of views within its own community. It is a community but only for the limited, albeit great, purposes of teaching and research. It is not a club, it is not a trade association, it is not a lobby.

Since the university is a community only for these limited and distinctive purposes, it is a community which cannot take collective action on the issues of the day without endangering the conditions for its existence and effectiveness. There is no mechanism by which it can reach a collective position without inhibiting that full freedom of dissent on which it thrives. It cannot insist that all of its members favor a given view of social policy; if it takes collective action, therefore, it does so at the price of censoring any minority who do not agree with the view adopted.

*Id.*

Letter from Jenny S. Martinez, *supra* note 5, at 6, offers a more modest but still helpful approach:

[O]ur commitment to diversity, equity, and inclusion is not going to take the form of having the school administration announce institutional positions on a wide range of current social and political issues, make frequent institutional statements about current news events, or exclude or condemn speakers who hold views on social and political issues with whom some or even many in our community disagree. I believe that focus on these types of actions as the hallmark of an "inclusive" environment can lead to creating and enforcing an institutional orthodoxy that is not only at odds with our core commitment to academic freedom, but also that would create an echo chamber that ill



gay rights or transgender rights on occasion of such a talk, it should do that in a way that encourages rather than discourages engagement, for instance:

As Dean of this law school, I support gay rights and transgender rights, and the law school is committed to treating students fairly, without regard to sexual orientation or gender identity. But obviously this is a highly controversial topic; rightly or wrongly, many of our fellow citizens hold opposing views (and that's even more true of many of our fellow humans in other countries throughout the world).

The ADF, agree with it or not, is an extremely effective advocate for its views. I encourage you to come listen to Jordan Lorence's presentation, even if—perhaps especially if—you want to learn how to more effectively rebut his arguments, and how to become an equally effective and accomplished lawyer for the other side.

*C. Evenhandedly Encouraging Debates or Conversations Among People Who Disagree*

Law schools may also want to encourage student groups to organize debates—or conversations that aren't framed as formal debates, but that are still aimed at thoughtfully highlighting and discussing disagreements—instead of talks. For much the same reason that adversary presentations can help find the truth in the courtroom, they can also help people better understand the strengths and weaknesses of arguments in the university. They can also yield livelier events that students will ultimately find more engaging. Indeed, the Federalist Society has been successful at law schools in large part because it has urged student chapters to put on debates, or invite faculty commentators who provide an extra perspective beyond the lead speaker's.

A culture where law professors are willing to serve as debating opponents or commentators for student-group-invited speakers, for instance, may encourage such programs. That's especially so since the presence of a faculty member may encourage more students to attend (since many students may know and, one hopes, like the faculty member). Student groups will often do a lot to get more attendees; it shouldn't be hard to persuade them to frame a program as a debate or as a conversation with a faculty member, rather than just as an outsider's speech.

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prepares students to go out into and act as effective advocates in a society that disagrees about many important issues.

This having been said, this should not be framed as a rule. Solo presentations can often be useful, even if they would be better still with some commentary from the other side. It may be too difficult to line up a commentator, for a variety of reasons—for instance, the topic may be sufficiently specialized that few faculty members may feel competent to comment on it; the relevant faculty members may be on sabbatical or otherwise occupied; and some prospective respondents may sometimes deliberately decline to debate if they know that this will lead the entire event to be cancelled or to draw a smaller audience.

Requiring at least two speakers can also easily be circumvented, for instance by putting on speakers who have ostensibly different viewpoints but are nonetheless from the same side of the ideological spectrum on the issue. And any attempts to police such circumvention would require the law school to discriminate based on viewpoint, by deciding which viewpoints are different enough to qualify.

In any event, if there is any requirement of balanced debates or panels—or such a condition attached to school-provided funding—the school should apply it evenhandedly, rather than allowing one-sided presentations on some subjects but requiring balance on others.

#### *D. Organizing Law-School-Sponsored Events That Model Thoughtful Disagreement on Controversial Topics*

##### 1. The value of law-school-organized events

Of course, sometimes student groups won't organize events on the most controversial topics. They may be worried about disruption, social ostracism, or professional blacklisting. They may be daunted by the cost or logistics of organizing a debate or a panel, especially when local faculty members aren't willing to provide a counterpoint, and thus the group would have to invite two or more speakers and not just one. Or they may just not have much interest in that particular topic.

Law schools should fill such gaps, by organizing such debates themselves.<sup>29</sup> This has several advantages:

- a. The events can be organized to bring in the most thoughtful, expert, and reasonable speakers on both sides. This would avoid the occasional situation where student groups deliberately bring in speakers who are colorful and

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29. Some universities already do this; the Peter and Marilyn Coors Conversation Series at Cornell is one example. See Kenny Berkowitz, *Minding the Gap: Speaking Series Helps Bridge Left and Right*, 47 CORNELL L. F. (FAC. ED.) 4 (2022).

controversial but shed more heat than light—or the likely more frequent situation where student groups just don't know who the best speakers are, or can't persuade them to come. Student groups should of course be free to invite even the more-heat-than-light speakers, if they so choose. But those speakers generally don't provide as useful a learning experience, and law schools can do better.

- b. Because the events are organized by the law school, they may be somewhat less likely to be disrupted.
- c. The events can also model—especially with the law school's imprimatur—how students and lawyers can discuss such issues civilly and productively.
- d. The law school can be especially effective at encouraging the school's own faculty to participate in the program. Such faculty participation seems likely to bring in more students to listen. And faculty who may be reluctant to participate in a student-group-organized program, where they can be tarred by their side as sellouts or enemy sympathizers, may be more willing to participate in an event that is organized by the school itself.<sup>30</sup>
- e. Of course, a law school's organizing such an event, however balanced it may be, may particularly incense some people who believe that a particular perspective should not be heard on campus, especially in a school-organized event. But I think this too is an important teaching opportunity: It can help the law school remind people that they are training to become lawyers, and need to understand all sides of an argument (however opposed they might be to one side) in order to succeed.

## 2. The insufficiency of leaving such debates to the classroom

To be sure, on some such topics professors would presumably cover both sides in their classes. I hope that all constitutional law professors, for instance, do that when they teach the abortion or affirmative action cases.

But this will not always happen in all regular classes—and, even if it does, there's no substitute to hearing a perspective from an effective advocate who actually supports that perspective, rather than just discussing a Supreme Court opinion or making a devil's advocate argument.<sup>31</sup> And of course many of the most interesting questions that

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30. Naturally, no faculty member should be required to participate in such an event. But I do think the Dean should encourage such participation.

31. MILL, *supra* note 20, at 72.

bear on controversial topics are empirical and moral questions. Constitutional law classes will likely focus less on those questions, even when the questions are important to legislative advocacy on such issues, or are indirectly important to applications of the constitutional rules (e.g., in deciding whether a certain restriction is really necessary to serve a compelling government interest).

### 3. Focusing on real current debates

Of course, if a law school is to organize events, it needs to choose the topics. One can protect the rights of students and of student-invited speakers to speak from all viewpoints on all subjects. But one can't organize events on all subjects, nor can one invite all speakers on each subject.

Here, I think, law schools should focus on real current debates. If states are sharply split on some important policy question, such as abortion or capital punishment, there is obviously a real debate; students should be exposed to both sides of it. If the public is sharply split on some such question, such as transgender rights or race-based affirmative action or immigration (legal or illegal) or "defund the police," there is a real debate. If experts are sharply split on some question, such as the specifics of police reforms, there is a real debate, even if the public hasn't yet focused on it.<sup>32</sup>

Other debates may be less salient, and there may thus be less urgent need for discussing them. For instance, whether the law should ban race or sex discrimination in private employment is an interesting and conceptually important question, both for the sake of its own merits, and

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Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. This is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. He must know them in their most plausible and persuasive form.

*Id.*; see also Koppelman, *supra* note 3 ("There is no substitute for actually meeting and talking to the people on the other side, discovering that they do not instantly crumble under your questions, feeling frustrated that the encounter was not the moral triumph you had hoped for, and regretfully realizing, two days later, what you should have said.").

32. Procaccini, *supra* note 6, at 664-65, suggests that exclusion of some material might be good if it deals with an "over-saturated speech environment," in which it may help "prun[e] distractions." I doubt that this would be an adequate basis for prohibiting speech by students, or by speakers invited by student groups (and I'm not sure she would actually argue for such prohibitions). It does make sense as a criterion for deciding which events the law school itself should sponsor—which is another reason why focusing on real and important current debates is a good idea, especially when those debates are raging among the public but are not being discussed in a more sophisticated and thoughtful way at the law school.

because it bears on whether other forms of discrimination (e.g., discrimination based on political affiliation) should be barred as well.<sup>33</sup> But as a matter of current political reality, it is pretty well settled. Speech on the subject should not be suppressed, of course; but when a law school is choosing what debates to organize itself, it may be better to prioritize a more currently contentious question—such as whether affirmative action should be legal, or whether transgender athletes should be allowed to compete on women’s sports teams.

Likewise, while law students should certainly have been exposed to debates about same-sex marriage before the *Goodridge* decision, and while such debates today would of course be legitimate and interesting, that question is considerably less significant today, at least in the United States. A law school may well prefer to focus on other questions, ones that remain on the judicial or political docket.

The law school should also seek to present the most thoughtful speakers on both sides of the issue (or perhaps on several points on the spectrum), preferably ones who could speak to the most politically relevant viewpoints on both sides. The law school generally shouldn’t invite KKK speakers or Hamas speakers or Communist speakers or other extremists to participate in such programs—not because they are evil people (though many might be), but precisely because it’s usually more important to educate law students about mainstream or otherwise practically important viewpoints (right or wrong) than about extremist viewpoints.<sup>34</sup>

But the law school shouldn’t exclude speakers simply when the school or its faculty or students views their beliefs as *normatively* out of bounds, or for that matter when the beliefs are out of the mainstream of the (heavily left-leaning) legal academy.<sup>35</sup> It should ask whether the speakers effectively present views that are *actually* major parts of public debate or debate within the legal system. If so, students should be

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33. Cf. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992); Eugene Volokh, *Should the Law Limit Private-Employer-Imposed Speech Restrictions?*, 2 J. FREE SPEECH L. 269 (2022).

34. There may of course be plausible reasons to invite those speakers, for instance for events on extremism where you want students to better understand the mind of the extremist; I certainly don’t want to suggest a norm that such speakers should never be invited. My point is simply that it’s especially valuable to invite speakers who represent views that are within the public mainstream (or expert mainstream) but are nonetheless too little known by many law students.

35. See James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL’Y 89, 138-45 (2016), for more documentation on how left-leaning (estimating, for instance, that though the full-time working population has about a 41%:38% Democrat:Republican ratio, the ratio among law professors is about 82%:11%).

exposed to those views, precisely because the views are practically important.

Again, the goal here isn't full viewpoint neutrality—something that's impossible or undesirable in law-school-organized events. The goal is to better educate the students about the viewpoints that they are particularly likely to encounter.

*E. Inviting Leading Successful Advocates from All Points on the Ideological Spectrum*

Even apart from hearing all significant sides on particular topics, it's important for students to learn from successful lawyers of all ideological stripes. For every court decision that many students sharply condemn, there was a lawyer making the winning argument. For many such decisions, the lawyer's effective argument helped sway the court. And even if the judges would have ruled that way regardless of the lawyer's performance, the lawyer may have crafted the litigation strategy that brought the case before the court. Students who are on the other side of the aisle have much to learn from a lawyer like that.

*F. Encouraging Faculty to Express Dissenting Views*

For all these reasons, it is also important that law schools encourage their faculty to express dissenting views, even when some students may sharply disapprove of those views. Faculty speech, whether in class or at law school events, can expose students to a wide range of opinions even when classmates or outside speakers don't. (Indeed, faculty speech is supposed to be the primary source of opinions in an educational institution.) And the very presence of those views on the faculty is an important reminder to students that the world is full of people with many different views—held not just by some powerless rubes in some backward parts of the country, but by the very sorts of people they might encounter in their future law practice.

When students object that they have a hard time learning from faculty who have, for instance, condemned affirmative action or illegal immigration or transgender rights or what have you, law schools should clearly and unreservedly respond: In your professional careers, you will often need to interact with people who hold these views, and indeed to learn from them. They may be partners in your law firm. They may be judges for whom you clerk. They may be executives who hire you for in-house jobs. They may be professional leaders for whom you don't work, but who still have much to teach. Or they may even be clients who

can teach you about business, life, courage, or enduring adversity even if not about law.

Few lawyers will craft a career for themselves that is always spent removed from people who hold sharply different views. Few professional environments are as ideologically homogeneous as are many college departments and law schools. And the law school years are an easier time to learn how to learn across ideological divides—even divides on questions that one sees as central to one’s identity—than are the years working as a law clerk or a junior associate.

Law schools should also work to make sure that they aren’t excluding such dissenting candidates from being hired. Such an exclusion is of course also a facet of human nature: We naturally tend to view people who agree with us as smart, and people who disagree with us as foolish. Still, law school faculties should resist this human tendency.

I don’t generally support ideological affirmative action, in the form of deliberately hiring faculty to provide some level of ideological balance, for many of the same reasons that I don’t support race- or sex-based affirmative action.<sup>36</sup> But if a law school does indeed give some degree of preference to candidates based on race or sex, on the theory that this promotes diversity, I think it should do the same with regard to ideological belief as well.

#### IV. RESPONSES TO SOME POSSIBLE OBJECTIONS

To be sure, speech has costs as well as benefits. My point so far has been that exposing law students to important mainstream views, even ones that many students find to be offensive or downright evil, has benefits that are even more substantial than normal for speech to the public at large. But beyond that, the costs of doing so are in large measure less substantial than they would be outside law schools.

##### *A. Student Upset (Especially As to Views That Are Seen As Derogatory of Their Identities)*

Many students may doubtless be upset by certain kind of speech, especially if they view it as derogatory towards their identities. Gay and lesbian students, for instance, may understandably take personally speech that (say) proposes a rejection of same-sex marriage, a return to “Don’t Ask, Don’t Tell” in the military, or a return to *Bowers v.*

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36. Cf. Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2068-69, 2076 (1996).

*Hardwick*. Transgender students, or their family, friends, and other supporters may take personally speech that urges excluding transgender athletes from women's sports. Immigrant students may be upset by speech that criticizes immigration, especially immigration from their own countries of origin. Many students, and especially Black students, may be upset at speech that they see as unfairly criticizing Black Lives Matter, or that they see as unfairly exaggerating the magnitude of Black-on-Black crime.<sup>37</sup>

Many Muslim students may be upset at speech that they see as unfairly condemning Islam, or even at speech that they see as blasphemous towards Islam, such as reproduction of the Mohammed cartoons or even just of noted Muslim devotional works that depict Mohammed.<sup>38</sup> Many women may be upset at criticism of abortion rights, which they see as promoting the subordination or even enslavement of women.<sup>39</sup> Black and Hispanic students may be upset at criticism of race- and ethnicity-based affirmative action, which they may see as an implied suggestion that they (or many others like them) don't deserve to be at the law school.

Likewise, conservative Christian students may be upset at speech that calls their religious views bigoted or irrational. Students whose families come from Israel, or even many Jewish students more broadly, may be upset at speech that they view as unfairly targeting Israel for criticisms that aren't levied at other countries.<sup>40</sup> Children, siblings, or

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37. See, e.g., *Oakes Farms Food & Distribut. Servs., LLC v. Sch. Dist. of Lee Cnty., Fla.*, 541 F. Supp. 3d 1334, 1341 (M.D. Fla. 2021) (discussing termination of food service contract that was apparently based in part at opposition to the contractor's criticism of Black Lives Matter protests); Amara Omeokwe, *Economist Urged to Drop Post Atop Journal After Criticizing Black Lives Matter*, WALL ST. J. (June 11, 2020, 5:30 AM), <https://www.wsj.com/articles/economists-black-lives-matter-criticism-draws-calls-for-resignation-11591867805> [<https://perma.cc/3T9F-RMD3>].

38. See, e.g., Eugene Volokh, *Hamline University Lecturer "Is Fired Over a Medieval Painting of the Prophet Muhammad,"* REASON: THE VOLOKH CONSPIRACY (Dec. 26, 2022, 8:01 AM), <https://reason.com/volokh/2022/12/26/hamline-university-apparently-fires-art-history-lecturer-for-showing-depictions-of-muhammed> [<https://perma.cc/L8E8-MFCW>].

39. Cf. Dezanii Lewis & Bethany Ivan, *When Freedom of Speech Becomes Hate Speech*, NINER TIMES, [https://www.ninertimes.com/opinion/opinion-when-freedom-of-speech-becomes-hate-speech/article\\_9bc7879a-57de-11ed-8651-a383bf0c0b76.html](https://www.ninertimes.com/opinion/opinion-when-freedom-of-speech-becomes-hate-speech/article_9bc7879a-57de-11ed-8651-a383bf0c0b76.html) [<https://perma.cc/6V8Y-ZQZJ>] (last updated Oct. 30, 2022) (characterizing "a display on campus that depicted graphic images of fetal embryos" as "hate speech" in part because it "equate[d] a person's right to choose with genocide"); Jane Kirby, *Freedom of (Hate) Speech*, BRIARPATCH (Sept. 9, 2010), <https://briarpatchmagazine.com/articles/view/freedom-of-hate-speech> [<https://perma.cc/H5N4-6Z89>] ("[M]any pro-choice advocates have suggested that the activities of the [Canadian Centre for Bio-Ethical Reform] legally constitute hate speech by inciting hatred towards those women who have or support the right to have abortions . . .").

40. See *Anti-Israel Hate Week '22 Turbocharged by Recent Anti-Israel Events*, LOUIS D. BRANDEIS CTR., <https://brandeiscenter.com/anti-israel-hate-week-22-turbocharged-by-recent-anti-israel-events> [<https://perma.cc/C78X-ERZE>] (last visited Apr. 1, 2023).



spouses of police officers may be upset at speech that they see as unfairly suggesting that all police officers are racist or brutal (and especially at speech that defends the propriety of violence against police officers).<sup>41</sup>

People who see themselves as survivors of abortion<sup>42</sup>—perhaps because they know their mothers had almost decided on abortion, or because they know that their mothers had terminated pregnancies that would otherwise have produced their brothers or sisters—may be upset at hearing abortion rights praised. Cuban-Americans may be upset at people who praise (or, worse still, represent) the regime that their parents had to flee, or that had killed their family members.<sup>43</sup>

But a lawyer's job is to calmly and effectively confront even unpleasant, offensive arguments.<sup>44</sup> That may be especially true for lawyers who specialize in the fields we discuss above (such as constitutional law, civil rights law, and the like). Yet it is also true for lawyers in other fields.

Employment lawyers (on both sides of a lawsuit) may have to deal with cases in which an employee was fired for allegedly racist or anti-gay speech, or cases challenging affirmative action policies. Business lawyers may have to navigate their clients through disputes about boycotts of Israel or Cuba. Criminal lawyers may have to argue cases in which a defendant, witness, or victim has engaged in offensive speech. Indeed, lawyers attending a trial court motion hearing or an appellate argument will often end up seeing unrelated cases on other topics before their case is called (and may need to pay attention to those cases to get a sense of the judges' approaches).

Likewise, a lawyer's job is to calmly and effectively deal with people who have made unpleasant, offensive arguments in the past.

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41. Keri Blakinger, *National Police Organization Demands Hate Crimes Protection After Latest Cop Killing*, N.Y. DAILY NEWS (Sept. 3, 2015, 12:36 PM), <https://www.nydailynews.com/news/national/national-police-org-demands-hate-crimes-protection-article-1.2347376> [<https://perma.cc/FBM3-E7V8>] (stating that Chuck Canterbury, president of the National Fraternal Order of Police, “called out elected officials for being silent in the face of anti-police ‘hate speech’”).

42. See, e.g., Audrey, *I Was a Survivor of Abortion. I Can Remain Silent No More*, PRIESTS FOR LIFE, <https://www.priestsforlife.org/testimonies/1150-i-was-a-survivor-of-abortion-i-can-remain-silent-no-more> [<https://perma.cc/6JMV-9BXZ>] (last visited Apr. 1, 2023).

43. See, e.g., Miguel Perez, *Cubans Enraged at Che as T-Shirt Icon*, SEATTLE TIMES (Apr. 11, 2005, 12:00 AM), <https://www.seattletimes.com/life/lifestyle/cubans-enraged-at-che-as-t-shirt-icon> [<https://perma.cc/RE2G-EEXH>].

44. See Letter from Jenny S. Martinez, *supra* note 5, at 6 (“Some students might feel that some points should not be up for argument and therefore that they should not bear the responsibility of arguing them (or even hearing arguments about them), but however appealing that position might be in some other context, it is incompatible with the training that must be delivered in a law school.”).

Many boycotts and disruptions of speakers happen not because the speaker is saying things that some people view as offensive, but because the speaker *has* said such things before, for instance in past lawsuits.<sup>45</sup> Yet lawyers will have to routinely interact civilly with opposing counsel who have said such things in the past. Indeed, they may have to intensively work with opposing counsel to negotiate solutions that can help both sides. To do all that, they need to have the habits and attitudes that allow them to deal well even with people whose ethical and legal views they sharply condemn.

Beyond this, the objections I've most often heard have been to a law school's allowing or organizing optional, extracurricular events that the law student doesn't even have to attend. Law students should be able to take such mere presence in the building with some equanimity. If they are upset by it, the school should try to teach them to be less upset, perhaps by laying out the reasons why such events are important for a law school to host.<sup>46</sup>

And while I recognize that some law students will continue to be upset by the mere presence of such speech at the law school, law schools must try to work against this reaction, rather than validating it and thus reinforcing or even expanding it.<sup>47</sup> Giving in to students' objections by forbidding events involving certain ideas or certain speakers—or even by denouncing those events and speakers in ways that aim to shut down the events—would send the wrong message to students. That message would serve them ill in the practice of law, and would thus ill-serve their future clients as well.

### *B. Concern About Unfair Treatment*

In 2021, a Georgetown adjunct law professor was dismissed for saying to a colleague (in a Zoom conversation that she hadn't realized was being recorded), “a lot of my lower [graded students] are Blacks.”<sup>48</sup>

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45. See, e.g., incidents cited *supra* notes 13 and 14.

46. Cf. Kennedy & Volkh, *supra* note 13, at 52 (arguing that “feelings of hurt are not unchangeable givens, untouched and untouchable by the ways in which their expression is received. Such feelings are, at least in part, affected by the responses of observers”).

47. Cf. *id.* at 42-43 (noting the danger that giving in to students' objections that some material is offensive—there, material that quotes, without expurgation, slurs reported in court cases and court records—will counterproductively reinforce attitudes that tend to make students less effective lawyers).

48. See Eugene Volkh, *Adjunct Law Professor Fired for Saying to Colleague, “A Lot of My Lower [Graded Students] Are Blacks,”* REASON: THE VOLOKH CONSPIRACY (Mar. 11, 2021, 8:15 PM), <https://reason.com/volkh/2021/03/11/adjunct-law-professor-fired-for-saying-to-colleague-a-lot-of-my-lower-graded-students-are-blacks> [<https://perma.cc/22T8-3V7B>].

In covering the story, I asked another Georgetown professor for a reaction, and got this response:

For what it's worth, I think both that the sentiments expressed by the adjunct in that video were wrong, and that the dean was correct to dismiss her.

I followed up by asking,

As to the adjunct's sentiments being wrong, do you mean that the factual assertion—that the bottom of the class contains a disproportionate number of black students—is wrong? Or that it's correct but that it's wrong for faculty members to say so?

The faculty member responded in turn,

In my experience, it is factually incorrect. It is also in my view wrong for faculty to be thinking—not just speaking—along those lines, because it will tend to create the very facts that it purports to describe.

Now I appreciate the disagreement on the factual question. Nationwide aggregate evidence gathered on this in the 1990s, and discussed seriously in the mid-2000s by noted Yale law professors Ian Ayres and Richard Brooks, seemed to support the adjunct's position:

With the exception of traditionally black law schools (where blacks still make up 43.8% of the student body), the median black law school grade point average is at the 6.7th percentile of white law students. This means that only 6.7% of whites have lower grades than 50% of blacks. One finds a similar result at the other end of the distribution—as only 7.5% of blacks have grades that are higher than the white median.<sup>49</sup>

Perhaps, though, things have dramatically changed, or are different at Georgetown. (It would be great if Georgetown could shed light on that dispute by distributing aggregate data on its students' grades, broken down by race.)

But I'm more interested in my correspondent's normative judgment: that it is wrong for university faculty to think that such a thing might be the case, to the point that they should be fired for letting slip the fact that they think this. Indeed, if taken seriously, that normative judgment would preclude any discussion of the factual question, because even open-mindedly considering the factual question whether disproportionate numbers of Black students tend to get lower grades

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49. Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1807-08 (2005).

would risk “wrong . . . thinking.” (Are any people who reads the Ayres & Brooks passage quoted above disqualified from becoming a law professor, unless they can get themselves to stop “thinking” “along those lines”?) Some churches might excommunicate a member for wrong thoughts, or for speech that reveals the presence of wrong thoughts. But is this a proper position for a university?

Of course, thoughts lead to deeds, and thinking in a particular way could lead one, even subconsciously, to illegally discriminate:

- A professor who is thinking about these racial disparities might come to a Black student’s paper expecting it to be bad, and subtly undervalue it as a result.
- A professor who is thinking about “White privilege” might come to a White student’s paper with a sense that the White student has been unfairly getting more than the student deserved, and subtly undervalue the student’s work as a result.
- A professor who is thinking about how conservative evangelical Christians have what the professor thinks to be a foolish worldview and a harmful set of moral beliefs might undervalue that student’s paper.
- A professor who is thinking that Israel is evil might undervalue the paper of a student who he knows is of Israeli national origin.
- A professor who is thinking contemptuous thoughts of Republicans, Democrats, Libertarians, or Socialists might undervalue papers from students who are known to adhere to those parties.<sup>50</sup>
- A professor who sees social conflict as class struggle between the capitalists and the proletariat, and who is firmly on the side of the proletariat, might undervalue papers from students whom he knows to be the sons and daughters of privilege.<sup>51</sup>

And, of course, a student who hears professors talk about such matters may understandably fear that the professor will discriminate this way.<sup>52</sup>

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50. D.C. law, which governs Georgetown, bans discrimination by universities against students based on political party membership. *See* D.C. CODE §§ 2-1401.02(25), 1402.41(1). The First Amendment generally does the same for public universities, such as UCLA.

51. D.C. law also bans discrimination by universities against students based on “source of income,” including “payments received as gifts,” which would cover discrimination against those whose educations are being paid for by wealthy parents. D.C. CODE §§ 2-1401.02(29), 1402.41(1). But in any event it would certainly be unethical, at least by the standards of many educational institutions, to grade a paper worse because it was written by the child of a capitalist.

52. *Cf.* Danielle Holley, *Comment*, 51 HOFSTRA L. REV. 473, 474 (2023) (“If I have a professor in the classroom saying that they believe that people who are non-Western are harboring resentments against people who are of a Western background . . . [and] [i]f I have professors in the

It is hardly paranoid to worry that a professor who has sharply criticized Israel or Catholicism or capitalists, or who has remarked on low Black performance in law school or on White privilege, will be subtly prejudiced against Israelis, Israel supporters, Catholics, capitalists' children, Blacks, or Whites.

Yet the tradition of American universities is that punishing faculty for "thinking . . . along [potentially dangerous] lines"—or speaking along such lines—is not the right remedy for such problems. The point of a university is that both faculty and students can and should be able to think about all the positions on various questions, because it is only by considering all those positions that our knowledge can advance. How, for instance, can people seriously evaluate why, for instance, Black bar passage rates are lower than White or Asian bar passage rates,<sup>53</sup> if one can't speak and think about whether Black students do worse in law school classes (whatever the reason for that lower performance might be)? And if we depart from this tradition, then, as the list given above suggests, it will be impossible to fairly discuss a wide range of important topics, and to express a wide range of views (conservative, liberal, or otherwise) on those topics.

Naturally, we should indeed be concerned about the risk of subtle discrimination by professors, whether based on race, sex, religion, national origin, political ideology, social class, or whatever else. Blind grading, for instance, is a powerful tool for reducing such discrimination—and it fights discrimination even by people who carefully conceal their views of various groups. (For every academic who publicly expresses negative views about various races, religions, nationalities, political belief systems, and the like, there are surely many others who hold such views but don't disclose them.) To be sure, blind grading isn't available in certain contexts, such as when a professor closely supervises a student's written assignment. But it's an example of the sort of tool that can help fight unfair treatment of students without undermining professors' ability to discuss important subjects.

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classroom who are saying that they believe that their Black students end up at the bottom of the class every semester, then it really hurts the institutional credibility of what we're trying to do.”). One could equally say that, I think, of professors who say (in the classroom or, as in the Georgetown case, outside it) things that criticize Whites, conservative Christians, Israelis, and other groups.

53. See, e.g., Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 448 (2004) (“Out of the 1346 [B]lacks in the LSAC-BPS sample who took the bar, 516 (nearly 40%) failed at least once—nearly five times the [W]hite failure rate.”); Jane E. Cross, *The Bar Examination in Black and White: The Black-White Bar Passage Gap and the Implications for Minority Admissions to the Legal Profession*, 18 NAT'L BLACK L.J. 63, 63 (2005).

*C. Vulnerability of Powerless Minority Groups*

Some might argue that the presence of certain views or speakers in the law school (or in law school classes) is particularly harmful for powerless minority groups who feel hated or even threatened by the powerful. If the speech is allowed by the institution, then those groups will also feel unwanted and disrespected by the institution.

But of course speech suppression isn't generally targeted at the truly powerful, since if the targets were so powerful, they would easily defeat the suppression. Rather, the targets of the suppression I describe here are invariably speakers who have comparatively little power in law schools—speakers whose views are sharply at odds with the views endorsed by the administration.

Conversely, the suppression takes place precisely because the groups that the suppression is meant to protect have powerful allies—either vocal student advocacy organizations, or often the administration itself. Perhaps outside the law school, the suppressed groups may indeed have political power. But in the law school, the speech restrictions fit well with speech restrictions throughout history: The comparatively powerful are trying to suppress the speech of the comparatively powerless.

A law school is thus the place where it's pretty easy for the administration to make clear that it both values and respects the minority groups that are offended by the speech, and that it values open debate even on controversial topics. A school putting on a debate about immigration, for instance, can both stress to people:

1. that it values all its students, wherever they may come from (and even without regard to whether they are legally present, if that's the school's policy), and
2. that anyone interested in immigration has to hear the best arguments on both sides of the issue (if only to understand how one can better rebut them), especially since there is a hot national controversy on the issue.

There might still be some immigrant students—or friends or relatives of immigrants—who continue to be offended by there being such a debate at the law school, though I expect that many won't be, especially if it's framed this way. But the answer to them has to be that a law school can't deny educationally valuable programming to those who want to attend such events just because some people condemn the very existence of that programming at the law school.

*D. Risk of Persuasiveness*

Of course, if speakers can express such views at law schools, then they may persuade some law students. Indeed, since I'm talking here chiefly about mainstream perspectives, they have by definition persuaded millions of people. And even if one is confident that, in a balanced debate, the side one supports would trounce the other, there might still be some people who are persuaded by what one sees as the wrong side.

But I don't think that a law school can properly act on this theory. Law students, after all, are selected for their comparative intelligence, and their commitment to a discipline where rational argument is valued. They have been trained in college, where they presumably learned something about evaluating arguments. They are being trained further, specifically in thoughtful, critical, and self-critical analysis.

To be sure, they remain human. Being human, they may err or be deceived. But of course, the same can be said of the administrators (or objecting students) who are tempted to suppress certain views.

Those administrators—who may include faculty acting within a system of shared governance—have immense power over what is taught in the law school. They develop the curriculum. They hire the professors who teach the curriculum. They put on many events that reflect their own views.

If they refuse to allow certain views to even be aired at the law school, or otherwise take steps to discourage students from hearing the views—despite the pedagogical value, which I outlined above, of exposing students even to wrongheaded views—they are showing remarkable lack of confidence in their students, and in their own abilities to train their students in critical thinking. And they are showing overconfidence in their own ability to reliably discern which views are not just mistaken, but so mistaken that students shouldn't even be exposed to the most articulate exponents of those views.

Plus of course the students can't be insulated indefinitely from such views. Even if some students travel in ideologically homogeneous circles, and went to relatively ideologically homogeneous colleges, once they graduate they will likely have to confront positions that dissent from that orthodoxy. Many law firms remain somewhat ideologically mixed; but in any event, lawyers will often come across other lawyers, or clients, or others who hold such views and aren't afraid to express them.

If law school administrators are really concerned about that the views are wrong yet devilishly persuasive, law school offers a perfect

opportunity to inoculate the students against those views: Invite credible, articulate speakers who can rebut those views.

Of course, perhaps, despite that, more people are persuaded of what the administrators see as the wrong view than the right view. But might it then be possible that the administrators are themselves the ones who are mistaken, at least to a considerable degree and in a considerable fraction of such cases? Might the administrators' beliefs—however confident the administrators might be in them—be the sort of “fighting faith[.]” “that time [may] upset”?<sup>54</sup>

### *E. Risk of “Legitimizing” Certain Perspectives*

Some have argued that allowing certain speech at a law school student-organized event may wrongly “legitimize” that perspective. But, as I argued above, law schools are populated with intelligent people who understand that a student-organized event bears the imprimatur of the student group, not the law school.<sup>55</sup>

Nor will allowing such speech help legitimize the event for the broader public. That some speaker gave a talk at, say, UCLA School of Law (or even Harvard or Yale) hardly gives him credibility. Law school events just aren't that big a deal.

Now if the law school *invites* a speaker to an event that it itself organizes, that does involve saying something about the speaker. But the law school has a great deal of control about exactly what it says through such invitations.

As I suggested in Part 0, the point of such events should be to invite the most thoughtful, reasoned exponents of prominent and important perspectives. Law schools can easily organize the event to make clear that they aren't saying that either side is *correct*, but only saying that both sides are *important to listen to* so one can arrive at one's own conclusion about a notoriously contentious debate.

Indeed, even if a law school does want to say that one side is correct—again, something I'd recommend against, for reasons given in the University of Chicago's Kalven Report<sup>56</sup>—it can do so, while still stressing that it's important for people to hear both sides:

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54. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

55. “We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. Surely students have not lost that ability by the time they get to law school.” *Rumsfeld v. FAIR*, 547 U.S. 47, 65 (2006).

56. *See supra* note 28.



Come hear John Peters and Jane Williams debate immigration policy! Most of us in the faculty and the administration do not share Jane Williams' views, but both of the speakers are among the most thoughtful and engaging defenders of their positions, and it's important for law students who want to understand the debate to come and hear both sides.

It shouldn't be hard for law students to grasp that the school isn't endorsing Williams' position, but is endorsing the pedagogical value of the debate. And to the extent that this "legitimizes" Williams' position, in the sense of highlighting that (1) this is a view that much of the public shares (as, by hypothesis, it does) and that (2) Williams is a leading proponent of the view (as, by hypothesis, she is), that is precisely what an honest educational institution should do.<sup>57</sup>

*F. Losing the Opportunity to Chill Political and Ideological  
Participation and Organization by the Other Side*

To be sure, some instances of speech suppression do more than just stop one particular speaker from reaching one particular batch of listeners. Rather, they can deter many more people from expressing the same views.

Say a group shouts down a speaker who expresses some view that group dislikes: that transgender athletes shouldn't play women's sports, that America's war against some country is unjust, or what have you. And say that the law school does nothing to stop that, or to punish the disrupters.

Seeing that is likely to deter many students from expressing similar views. Even if they aren't afraid of being shouted down, they might be afraid of, for instance, being blackballed for jobs, or of other sorts of professional retaliation. If they see that a view is being treated as so bad that it can't even be expressed at a law school, they might naturally worry that it will be treated as disqualifying for various positions that they might seek. Even faculty members might worry that expressing such views will jeopardize their prospects of tenure, or of getting a job at a more prestigious law school.

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57. See Letter from Jenny S. Martinez, *supra* note 5, at 7 ("There is temptation to a system in which people holding views perceived by some as harmful or offensive are not allowed to speak, to avoid giving legitimacy to their views or upsetting members of the community, but history teaches us that this is a temptation to be avoided. I can think of no circumstance in which giving those in authority the right to decide what is and is not acceptable content for speech has ended well.").

Likewise, students might conclude that, for instance, it's too dangerous to contribute money to a ballot measure that expresses such a view, or to campaign for a candidate who expresses that view, both in law school and after they graduate; again, likewise with faculty. Less public speech in favor of a cause, and less contributed to the cause, means less chance that the cause would succeed. Creating an institutional culture where some policy proposals are out of bounds—as evidenced by the administration's shutting down events at which some proposals are advocated, or tolerating students' shutting them down—may thus tend to make those proposals less politically successful.

Some people might welcome that, and indeed be motivated precisely by such a desire. After all, they may think those proposals, if implemented, would be atrocious violations of the rights of the downtrodden, or would jeopardize the lives of our soldiers overseas, or would destroy the environment, or would prolong the ongoing genocide of the unborn. Even if advocacy of the proposals can't be outlawed by the government, why not try to suppress it through private action, and in particular by making people fearful of being boycotted or blacklisted if they support the proposals?

This is not, of course, a ridiculous position. Pragmatically speaking, it may work in some situations. And morally, one can certainly argue that, if some proposals are sufficiently gravely wrong, one should do all one can (perhaps short of violence) to prevent them from being enacted.<sup>58</sup>

But I don't think this ought to be the view of institutions of higher education, and especially of law schools. Just as it's often said that a university should teach students how to think, not what to think,<sup>59</sup> so a law school should teach students how to argue, not what to argue. And a law school should certainly not condone suppression of certain arguments as a tool for the political defeat of those arguments.

## V. CONCLUSION

The arguments in favor of protecting free speech, of suppressing attempts to disrupt speech, and of deliberately promoting debate—even on the most controversial of issues—are strong in many contexts. They

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58. “Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.” *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

59. See, e.g., RICHARD C. LEVIN, *THE WORK OF THE UNIVERSITY* 16, 28 (2003).

are particularly strong in universities generally, whatever subjects they teach, and of course in public debate more broadly.

But they are especially strong in law schools. Law schools need to teach students to hear out contrary views. Law schools need to teach students to learn from contrary views, whether to more effectively combat them or perhaps even to adopt any sound insights that even generally mistaken views might include. Law schools need to teach students to work effectively with people who have contrary views.

Suppressing speech, tolerating student disruption of speech, and even failing to expose students to both sides of important controversies thus doesn't just interfere with free speech and academic freedom: It undermines all law students' education, including the education of students who most disagree with the speech that some are trying to suppress.