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Terrible Freedom, Ambiguous Authenticity, and the Pragmatism of the Endangered: Why Free Speech in Law School Gets Complicated

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TERRIBLE FREEDOM, AMBIGUOUS AUTHENTICITY, AND THE PRAGMATISM OF THE ENDANGERED: WHY FREE SPEECH IN LAW SCHOOL GETS COMPLICATED

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I. INTRODUCTION

We idealize colleges and universities as places of unfettered inquiry, where freedom of expression flourishes. The Supreme Court has described the university classroom as "peculiarly the 'marketplace of ideas.'"[1] It declared: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection."[2] The exchange of competing ideas takes place not only in classrooms, but also in public spaces, dormitories, student organizations, and in countless other campus contexts.

This depiction of institutions of higher education as places of wide-open discussion seems particularly applicable to law schools. After all, law school faculty and students think about pretty much everything, and especially about the most important and divisive issues our society faces. On an average day, rigorous conversations are taking place in law schools across the country about such hot-button topics as racial equality, sex discrimination, civil liberties, capital punishment, abortion, gun

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1. Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967).

2. *Id.*; *see generally* LEN NIEHOFF & THOMAS E. SULLIVAN, FREE SPEECH: FROM CORE VALUES TO CURRENT DEBATES (Cambridge Univ. Press 2022).

control, human trafficking, health care regulation, criminal sentencing, immigration, climate change, taxation, and conflicts between sovereign nations.

Some law school conversations border on the metaphysical; some happily breach that border. A course in jurisprudence may explore the nature of law and ask why, when, and whether we should obey a statute or a judicial decision. A course in reproductive justice may delve into the question of when human life begins. In my seminar in Law & Theology, we examine such abstract concepts as authority, language, identity, punishment, revenge, morality, conscience, forgiveness, and liberation.

These high-flying intellectual exercises begin early. A first-year course in criminal law may ponder whether the state should have the power to punish people for their thoughts alone. A first-year course in tort law may consider whether economics should shape the way we think about allocating responsibility and costs when someone gets hurt. My first-year Civil Procedure course explores the nature of fairness and asks whether our elaborate architecture of process does a good enough job of achieving it.

Of course, many law school discussions have to do with narrower and more technical questions, but that doesn't drain them of their energy. A few years ago, I was walking through one of our law school's common areas and saw half a dozen students sitting around a table arguing heatedly. Curious about the heartfelt topic that prompted so animated a conversation, I steered myself past them. They were debating an arcane point of personal jurisdiction.

Precisely because an important part of legal education entails learning how to argue respectfully and persuasively, we do lots of it. We debate everything from assisted suicide to what counts as a "final order" for purposes of an appeal. We entangle ourselves in conflicting perspectives. We strive to disagree while remaining civil and focusing on the merits of the argument. In this country's law schools, the free exchange of ideas churns incessantly.

Or does it? Despite these characteristics of the law school environment, free expression runs into trouble there and has been doing so with increasing frequency in recent years—especially among students.[3] These problems have taken a variety of forms. Most of them have fallen into one of five categories.

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3. *See, e.g.*, David Lat, *Is Free Speech in American Law Schools a Lost Cause?*, ORIG. JURISD. (Mar. 17, 2022), https://davidlat.substack.com/p/is-free-speech-in-american-law-schools [https://perma.cc/6V7Z-8MYC].

The first category relates to guest speakers and student protests against them. Two incidents stand out, as of the writing of this article. First, on March 1, 2022, protesting students at the UC-Hastings College of Law shouted down conservative guest speaker Ilya Shapiro when he tried to participate in a debate with liberal faculty member Rory Little over the future of the Supreme Court.[4] Second, on March 10, 2022, more than 100 students at Yale Law School disrupted a panel on First Amendment issues that included both a conservative and a progressive speaker.[5] These back-to-back high-profile debacles prompted legal commentator David Lat to ask: "Is Free Speech in American Law Schools A Lost Cause?"[6]

Local chapters of the Federalist Society hosted both of those events, suggesting a second category of problematic expression: speech promoted by certain student groups, especially those with conservative agendas.[7] In recent years, students have increasingly protested or boycotted presentations sponsored by the Federalist Society.[8] And they have sometimes criticized progressive faculty members for agreeing to participate in the organization's activities.

The third category relates to speech by faculty members who hold and express views that are seen as racist or otherwise oppressive. Again, a few recent incidents stand out. First, the same Ilya Shapiro who was the target of protests at UC-Hastings was in line to join Georgetown Law as director of its Center for the Constitution, when controversy erupted over his tweet suggesting that President Biden's pledge to nominate a Black woman to the Supreme Court would result in a "lesser nominee."[9] Outraged students protested, the dean launched an investigation that lasted for four months, and the school ultimately cleared Shapiro to take the job.[10] Five days later he submitted a letter of resignation to the school, contending that the dean's approach to the issue had made a

4. *See id.*

5. *See id.*

6. *Id.*

7. *See id.*

8. *See id.* (discussing the prevalence of student protests and actions regarding events run by the Federalist Society at universities).

9. Neil Vigdor, *Georgetown Suspends Lecturer Who Criticized Vow to Put Black Woman on Court*, N.Y. TIMES (Jan. 31, 2022), https://www.nytimes.com/2022/01/31/us/ilya-shapiro-georgetown-biden-scotus.html [https://perma.cc/K5MA-PDYM].

10. Zachary Evans, *Ilya Shapiro to Resume Work at Georgetown Following SCOTUS Tweet Controversy*, NAT'L REV. (June 2, 2022, 4:32 PM), https://www.nationalreview.com/news/ilya-shapiro-to-resume-work-at-georgetown-following-scotus-tweet-controversy [https://perma.cc/5BGV-8LKU].

career for him at Georgetown untenable.[11] The next month, Supreme Court Justice Clarence Thomas attracted even more attention when he withdrew from teaching a constitutional law seminar at George Washington University because of student protests over his role in overturning *Roe v. Wade* and depriving women of their reproductive rights.[12]

The fourth category concerns professors who use language in class that offends students but that also relates to the subject matter under discussion. By way of example, a thoughtful course in First Amendment law needs to address the issue of racial epithets. This prompts the question of whether the professor should use the phrase "the n-word" instead of the heavily freighted word itself. Eugene Volokh of the UCLA Law School uses the word itself.[13] Others, like Geoffrey Stone of the University of Chicago Law School (and myself), have chosen not to do so.[14]

This controversy extends beyond racial epithets. In 2021, students staged a walkout at Emory Law School in protest of the use of the word "fags" in the classroom by Alexander Volokh, who happens to be Eugene Volokh's brother.[15] He said it while analyzing the Supreme Court decision in *Snyder v. Phelps*,[16] in which the epithet figures prominently.[17] I will have more to say about *Snyder* later.

The fifth, and final, category relates to speech on student listservs. In April of 2022, a bitter controversy arose when a pro-Palestinian student group at NYU Law School posted an email that some Jewish students viewed as anti-Semitic.[18] And in July of 2022, Yale Law School, which seems bent on ensuring that no institution has a free speech

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11. *See* Karen Sloan, *Embattled New Hire Quits Georgetown Law amid Free Speech Controversy*, REUTERS (June 6, 2022, 2:46 PM), https://www.reuters.com/legal/legalindustry/embattled-professor-quits-georgetown-law-amid-free-speech-controversy-2022-06-06 [https://perma.cc/B88H-HQQ6].

12. *See* Ayana Archie, *Clarence Thomas Drops Out of Teaching a Law Class After Students Protested*, NPR (July 28, 2022, 6:10 PM), https://www.npr.org/2022/07/28/1114285261/clarence-thomas-george-washington-university-law [https://perma.cc/9B3Z-FHX4].

13. *See* Kathryn Rubino, *Prominent Law School Professor Drops the N-Word After Specifically Being Asked Not To Do So*, ABOVE THE L. (Mar. 5, 2020, 1:20 PM), https://abovethelaw.com/2020/03/prominent-law-school-professor-drops-the-n-word-after-specifically-being-asked-not-to-do-so [https://perma.cc/GX5K-DL33].

14. *See* Colleen Flaherty, *A Free Speech Pundit Opts Not To Use the N Word*, INSIDE HIGHER EDUC. (Mar. 8, 2019), https://www.insidehighered.com/news/2019/03/08/first-amendment-scholar-geoffrey-stone-whos-previously-defended-use-n-word-classroom [https://perma.cc/Y8Z4-FUNC].

15. Matthew Chupack & Madi Olivier, *A Classroom Divided: How the Debate over Racial Slurs and Academic Freedom Splintered the Law School*, EMORY WHEEL (Dec. 1, 2021), https://emorywheel.com/a-classroom-divided-how-the-debate-of-slurs-and-academic-freedom-splintered-the-law-school [https://perma.cc/K2QF-ZNVR].

16. 562 U.S. 443 (2011).

17. Chupack & Olivier, *supra* note 15.

18. *See* Lat, *supra* note 3.

controversy that it does not, disabled its student listserv altogether because of concerns about its content.[19]

When these issues have arisen on law school campuses, it has become commonplace for critics to blame students for their "political correctness," their "cancel-culture" mentality, and their overwrought "wokeness" and to cast them as hypersensitive "snowflakes." These lazy and dismissive labels do nothing to advance our understanding of why speech encounters obstacles in law schools, the very places where we would expect it to flow freely. I think we can do better.

This Article describes three factors that substantially complicate the dynamics of free speech on law school campuses. Recognizing the significance of those factors can help us understand the turbulence that the expression of some ideas, and the use of some language, has recently caused, especially among students. These factors may not result in perfect comprehension, but at least they provide more insight than we get from invoking caricatures that have already grown tired and wearisome.

The observations offered in this Article rest on thirty-four years of teaching experience at three different law schools. That experience includes countless hours of talking with students and of navigating classroom subjects of extraordinary sensitivity. Indeed, my classes routinely touch upon such controversial topics as racism, sexism, obscenity, rape, child pornography, LGBTQ rights, and hate speech. Some days, walking through these minefields sends me home exhausted.

No empirical studies have tested the theories offered in this Article, perhaps because no reliable one could conceivably be constructed. Instead, this Article provides what Robert Pirsig called in his book *Zen and the Art of Motorcycle Maintenance* a "Chautauqua": a collection of ideas, with occasional digressions into personal narrative, respectfully offered for your consideration.[20] These thoughts come not only from my many years of teaching, but also from my decades of work as a practicing First Amendment lawyer who has advised a number of colleges and universities about their speech-related policies.

No one qualifies as a true First Amendment absolutist. All sensible people acknowledge that limitations on, and exceptions from, free expression, must exist in a civilized society.[21] But I am probably as close to an absolutist as one can be without drifting into anarchy. Nevertheless,

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19. Aaron Siberium, *Yale Law School Axes Student Listserv that Energized Protests and Scandals*, WASH. FREE BEACON (July 28, 2022), https://freebeacon.com/campus/yale-law-school-axes-student-listserv-that-energized-protests-and-scandals [https://perma.cc/NE4P-QWGY].

20. ROBERT PIRSIG, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE: AN INQUIRY INTO VALUES (1974).

21. *See generally* NIEHOFF & SULLIVAN, *supra* note 2.

as my discussion of these three factors will reveal, I am fairly sympathetic to law students' concerns about free speech. That may surprise you; it surprises me.

Before we get to my three factors, however, I want to provide a little background about free speech theory generally. These conceptual underpinnings help explain why law schools seem like particularly appropriate and important places for unbridled free expression. We need to grasp why this is obviously true in theory before we can see why it is much more complicated in reality.

II. WHY DO WE PROTECT FREE SPEECH, ANYWAY?

It is useful to begin by remembering why we afford robust protection to free speech in the first place. In our recent book, my co-author Tom Sullivan and I explore the most influential arguments that have been offered for doing so.[22] We divide those arguments into two categories: instrumental value arguments and intrinsic value arguments.

Instrumental value arguments focus on freedom of expression as a means by which we achieve some other end.[23] The instrumentalist argument that has had the greatest influence within First Amendment jurisprudence contends that we protect freedom of speech because of its indispensable role in discovering the truth.[24] Without open debate, we have little hope of finding our way to the right answers and the best solutions for the problems we confront.

The most famous articulation of the truth-finding argument is known as the "marketplace of ideas" theory, which entered United States constitutional law through the dissenting opinion of Justice Holmes in *Abrams v. United States*.[25] In sum, Justice Holmes's theory holds that "the ultimate good" we strive for as a society can only be achieved through "free trade [of] ideas" and that the "best test of truth is [in] the power of the thought" to get itself accepted in the "market."[26] The theory imagines a dialectical process in which someone puts forward an idea,

22. *See id.* at 5.

23. *See id.* at 6.

24. *See id.* at 12.

25. 250 U.S. 616 (1919).

26. *Id.* at 630 (Holmes, J., dissenting). The idea is not original with Holmes. We find essentially the same argument in John Milton's *Areopagitica* of 1644 and John Stuart Mill's *On Liberty* of 1859. JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND (1644); JOHN STUART MILL, ON LIBERTY (1859). For a discussion of the influence of the marketplace of ideas theory on First Amendment law, see Leonard M. Niehoff & Deevah Shah, *The Resilience of Noxious Doctrine: The 2016 Election, the Marketplace of Ideas, and the Obstinacy of Bias*, 22 MICH. J. RACE & L. 243, 248 (2017).

someone else challenges it, and the truth emerges from the ensuing debate.

The theory necessarily anticipates that almost any idea imaginable can enter the market. After all, excluding it would deprive the idea of the chance to compete and would thereby violate the theory's underlying rationale. The marketplace of ideas does not include a qualifying round, where only approved concepts and perspectives are allowed inside.[27]

Critics have raised numerous objections to the marketplace of ideas theory, especially in the age of the internet when information and disinformation travel at a fast pace and in vast quantities.[28] Among other things, they have pointed out that it sometimes takes the truth a long time to emerge—if it ever does.[29] Objections notwithstanding, this theory has had an extraordinary influence on our thinking about free speech. Indeed, when we describe how free speech works and explain why we foster it, we usually have in mind a dynamic that resembles the marketplace of ideas.

Another influential instrumentalist theory contends that we protect free speech because it is essential to self-government in a democratic regime.[30] This theory is generally associated with the philosopher Alexander Meikeljohn's book *Free Speech and Its Relation to Self-Government*.[31] In a democracy, the argument maintains, the people exercise ultimate authority over the government—not the other way around.[32] Citizens in a democratic system must be able to share and receive as much information as possible if they are to govern themselves wisely.

Critics have taken issue with this theory as well. Among other things, this rationale would appear to justify protection only for speech that relates to self-governance. But attempting to determine which speech fits that description feels like an impossible task.[33] And, again, this theory may not seem to align with our experience, especially recently. We have all come to realize that speech also has the capacity to create misinformed citizens, who are in no great hurry to clear up their own confusion.

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27. *See* NIEHOFF & SULLIVAN, *supra* note 2, at 20.

28. For a brief overview of objections to the marketplace of ideas theory, see *id.* at 15.

29. *See id.* at 19.

30. For a more comprehensive discussion of the self-governance theory, see *id.* at 17-18.

31. ALEXANDER MEIKELJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (HARPER & BROS. PUBLISHERS 1948).

32. *See* Niehoff & Shah, *supra* note 26, at 247-48, 268.

33. For example: Do the politically inspired paintings of Picasso help us with self-governance? How about rap songs that reflect a particular view of police authority? Are episodes of *Star Trek* useful to understanding the project of self-governance?

I want to raise one other very powerful, but less well known, instrumentalist theory because it has particular salience here. Defenders of free expression are often skeptical about the government's capacity to determine whether speech has value.[34] This skepticism rests not only on the inherent difficulty in drawing such lines but in the conviction that value is a necessarily subjective and relative concept.[35] The Supreme Court famously expressed this perspective in *Cohen v. California* when it declared that "one man's vulgarity is another's lyric."[36]

In his book *The Tolerant Society*, Lee Bollinger follows a different line of argument.[37] In essence, he assumes that some speech exists that makes no meaningful contribution to finding the truth, to conveying the information we need to be good citizens, or otherwise and that we can figure out which speech this is. In addition, the speech is hurtful to individuals and corrosive to our communities. The example that Bollinger considers at length in his book is that of neo-Nazis marching in a residential neighborhood of Holocaust survivors.[38]

Bollinger asks whether such speech has value, even though it adds nothing to the marketplace of ideas or to informed self-governance and comes at a significant social cost.[39] He argues that it does. He contends that such extreme speech compels us to learn how to manage our reactions to it, cultivating the virtue of tolerance.[40]

I think we can make a similar argument with respect to the virtue of courage. Freedom of speech does not just force us to confront "facts" we know to be false, "ideas" we believe to be intellectually bankrupt, and "principles" we view as morally obnoxious. It also brings into our orbit speech that we find threatening and frightening, and rationally so. Again, we must learn how to manage these reactions, and a fresh and more robust courage ensues.[41]

These instrumentalist theories are subject to challenges as well. Among other things, critics have argued that these arguments come from a position of privilege.[42] The burdens of hateful and frightening speech

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34. *See* Flaherty, *supra* note 14.

35. *See generally* NIEHOFF & SULLIVAN, *supra* note 2.

36. Cohen v. California, 403 U.S. 15, 25 (1971).

37. LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

38. *See generally id.*

39. *See id.* at 173.

40. *See id.* at 52-53.

41. *See* Whitney v. California, 274 U.S. 357 (1972) (Brandeis, J., concurring) (offering something like an inventory of all the reasons we allow freedom of expression and repeatedly alluding to the conquest of fear and the cultivation of courage); *see also* NIEHOFF & SULLIVAN, *supra* note 2, at 18-20.

42. *See* NIEHOFF & SULLIVAN, *supra* note 2, at 19.

do not fall equally on all individuals and groups; they overwhelmingly affect women and racial and other minorities.[43] Declaring that we need to be more tolerant and braver doesn't require much from those of us who are not targeted by this sort of speech. Furthermore, it is not clear that this theory fully accounts for the costs at which these virtues are acquired, which may be unjustifiably high and paid out over a protracted period of time.

Over the years, theorists have argued that free speech has not just instrumental value but intrinsic value—that is, they see freedom of expression not just as a means toward desirable ends but as a good in itself.[44] The most important of these theories maintains that free speech is an essential precondition to self-fulfillment.[45] This idea is closely associated with the work of scholar and civil liberties advocate Thomas Emerson.[46]

We can easily see the appeal of such a theory. Consider, for example, a person who writes poetry for the sheer pleasure of it and not for publication. This speech does not contribute to the public marketplace of ideas, promote a politically informed citizenry, or foster the virtues of tolerance or courage. Instead, it has value in itself as an act of self-fulfillment. In my view, a regime that permitted speech when it served some other end, but not when it had only value personal to the speaker, would be a uniquely and horribly oppressive one.

This self-fulfillment theory has also been the target of objections. An obvious one is that individual self-fulfillment does not always serve the greater good and, in fact, the world would be a better place if some people had not achieved it.[47] Indeed, it seems likely that someone spewing horrifically hateful drivel might also claim that they were pursuing self-fulfillment. Objections aside, the self-fulfillment theory has force because it embodies the notion that a denial of free expression is a violation not just of a legal right but of something deeply and personally important to us.

III. LAW SCHOOLS AS FREE SPEECH PARADIGMS

At first glance, every one of these theories seems to align closely with how law schools work and what we try to do inside them. Let us look at those theories in the order just discussed to see why this is so.

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43. *See id.*
44. *See id.* at 23-24, 26.
45. *See id.* at 25.
46. *See id.* at 25-26.
47. *See id.* at 28-29.

Law schools have a strong commitment to the discovery of the truth. In the law school environment, we put all arguments, claims, propositions, and conclusions under the high beam of critical analysis. If the freewheeling marketplace of ideas imagined by Holmes is indispensable to the discovery of truth, then it seems similarly indispensable to the business of legal education.

Of course, law schools are not the only places within universities that strive to discover the truth. Indeed, it seems extremely unlikely that any academic unit within an institution seeks to cast its lot with falsehood. But what we do in law schools and how we do it does, in my view, have a distinctive connection with the marketplace of ideas model. That distinctive connection lies in the *method* of instruction and inquiry that we follow and the extent to which that method informs our *identity*.[48]

In general, law school instruction follows a dialectical and dialogical approach that looks a lot like what Holmes imagined going on in his marketplace of ideas. A question is posed; an answer is suggested; more questions follow. Through the back-and-forth of this exploratory process, law schools arrive at places of greater understanding.

This dialectical and dialogical dynamic described have different iterations. It may manifest as the use of the Socratic method in a first-year constitutional law course. It may drive a conversation between a clinical law professor and a student as they strategize about a client's case. It may characterize the give-and-take of the adversary system we recreate in a moot court exercise.

We often describe what we are doing in all of these contexts as learning how to "think like a lawyer." In every one of these settings, what we observe looks very much like a Holmesian marketplace. All ideas are welcome; all ideas will be rigorously tested; and the force of an idea rests in our ability to defend it.

There is no need to claim a stronger law school exceptionalism than in fact exists. We might encounter the same dialectical process in a political science or philosophy department classroom, or during grand rounds at a university's training hospital. But law schools view this dynamic as uniquely self-definitional. The marketplace of ideas is not just something we do; for many members of our community, it is who we think we are.

The self-governance theory similarly aligns closely with what law schools do.[49] The idea of preparing individuals to function as informed

48. *See, e.g.*, Niehoff & Shah, *supra* note 26, at 246-48 (explaining that Holmes's marketplace of ideas theory is enhanced by the participation of informed citizens, by allowing for the free and open exchange of ideas, opinions, and facts and how that information fits one's cultural predispositions).

49. *See* NIEHOFF & SULLIVAN, *supra* note 2, at 17.

participants in a democracy lies at the heart of a law school's mission. We do not just send students out into the world to become voters. We launch them into careers as key players in all three branches of government—as prosecutors, defense attorneys, civil litigators, trial and appellate judges, senators, congressmen, attorneys general, cabinet officials, and Presidents. Like the marketplace of ideas theory, the self-governance theory goes directly to our core identity. We prepare students not just to participate in the political process, but to shape it and to lead it.

The cultivation of tolerance and courage also has an important role in a law school education, although it is subtler and less direct than the connection with the marketplace of ideas and self-governance. An intolerant lawyer will be an ineffective one—unable to deal with difficult clients, to remain civil in conflict with adversaries, and to master the empathic skills necessary for effective advocacy. Furthermore, courage and "grace under pressure" are essential to the successful practice of law in many of its dimensions. Over more than three decades of practice, I have had the privilege of litigating cases alongside some of the best trial attorneys in the country and they have all had one thing in common: an almost preternatural capacity to remain calm, poised, and focused during the heat of battle.

It may seem more difficult to argue that the intrinsic-value argument of self-fulfillment aligns closely with what law schools do.[50] But my experience tells me that self-fulfillment plays out in a distinctive way in law schools as well. The legal profession is a house with many rooms and a substantial number of our students arrive at their first year of study with only a vague idea of what they might want to do in their careers. For those students especially, law school transcends the simple acquisition of skills. It entails a deep dive of self-discovery, in which students try to match what they know (and continue to learn) about themselves with the wide array of opportunities that exist within the profession.

In sum, powerful and persuasive reasons exist for believing that freedom of expression in the law school environment is extraordinarily, perhaps even uniquely, important. A close alignment exists between the leading theories in support of free speech and the goals, philosophy, methodology, and identity of law schools. That alignment creates an expectation about how law schools and their community members will and should operate.

As a result, any departure from robust protection for free expression may look like a radical and unwelcome abandoning of a foundational

50. *See id.* at 25-27.

law school norm. It turns out, however, that a number of factors challenge that seemingly clear conclusion and the apparently simple model that lies beneath it. I will focus on the three factors that strike me as most significant.

A. Factor One: A Terrible Freedom

As a matter of basic constitutional law, the First Amendment limits only the activities of state actors.[51] It does not apply to private individuals or entities. Some exceptions exist—for example, if a private individual conspires with a state actor to deprive someone of their First Amendment rights, then they may be liable for the infraction. But, as a general principle, the First Amendment does not constrain the authority of a private institution to limit or punish speech.

By my calculation, there are 199 ABA-accredited law schools in the United States and more than half (112) of these are private institutions.[52] Of the sixteen schools that have in recent years routinely been ranked as the best in the country,[53] all but five are private institutions.[54] The number and high profile of private law schools make it disproportionately likely that the controversies that draw public attention will arise in settings where the First Amendment does not actually apply. The widely publicized law school disruptions that I discussed earlier mostly involved private institutions like Yale, NYU, Georgetown, George Washington, and Emory.

The significance of private schools within legal education significantly complicates the dialogue around free expression in law school. After all, when a free speech issue arises at a public school, the law of the First Amendment determines the options available to the institution. This is not to say that resolution of the issue will necessarily be clear and simple. The relevant First Amendment principles may have considerable play in the joints. Or a constituency within the institution may believe

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51. *See id.* at 40 n.2.

52. *See List of ABA-Approved Law Schools*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order [https://perma.cc/H37B-4E5C] (last visited Apr. 1, 2023); *see also Private Law Schools*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/private_law_schools [https://perma.cc/2YG9-ZA4D] (last visited Apr. 1, 2023).

53. *See Top 50 Law Schools*, VELOCITY TEST PREP, https://www.velocitylsat.com/resources/top-law-schools [https://perma.cc/2AFW-FBHC] (last visited Apr. 1, 2023) (showing Yale, Stanford, Chicago, Columbia, Harvard, Pennsylvania, NYU, Duke, Georgetown, Northwestern, and Cornell (private) and Virginia, UC-Berkeley, UCLA, the University of Texas, and the University of Michigan (public), as the top sixteen).

54. *See id.*

that the law has gotten things wrong and may push a public school to ignore it or to try to change it. But, for better or worse and with varying degrees of certainty, First Amendment law controls institutional decision making for public schools in a way it plainly does not for private schools.

This leaves private schools with a "terrible freedom," to borrow a phrase from Jean-Paul Sartre.[55] These institutions are typically constrained only by their own policies or perhaps those of the parent institution. They can choose to afford more or less protection to speech than the First Amendment provides. Or they can take the First Amendment as a model and follow its strictures even though the law does not require it. It is up to them in a way it is not for public schools.

These circumstances shift the campus dialogue from debates over what is *lawful* to debates over what is *right*; there, the trouble starts. After all, different constituencies within a law school community can hold different good-faith views about which values should prevail over others. Probably the most common conflict here pits the value of free expression against the values of diversity, equity, and inclusion.[56] But free expression can collide with other values as well, like those of maintaining a respectful community, or of preserving the kind of quiet and orderly environment conducive to study and hard thought.[57]

To flesh out the point, consider the following scenario: Assume that speech incidents at a law school have prompted serious concerns among students of color and their allies. As a result, pressure mounts for the institution to adopt a policy that forbids and punishes hate speech. To keep the hypothetical situation simple, assume that the law school has the institutional authority to adopt whatever policies it likes, provided that they comply with the law.

A public law school will find itself with few options. "Hate speech" has no precise legal definition and the Supreme Court has never held that it is excluded from First Amendment protection. To the contrary, the Court has repeatedly declared that speech cannot be suppressed or punished simply because an individual or group finds it offensive or even outrageous.[58] Indeed, the First Amendment protects lots of things that an individual of ordinary intelligence would think qualified as hate speech, like many uses of racial epithets or literature promoting white supremacist viewpoints.[59]

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55. *See* JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 381-82 (1943).
56. *See, e.g.*, NIEHOFF & SULLIVAN, *supra* note 2, at 190-92.
57. *See id.*
58. *See id.* at 149-55.
59. *See id.* at 17-18.

The Supreme Court decision in *Snyder v. Phelps*[60] provides an example. In that case, the Westboro Baptist Church, which condemns homosexuality in the most virulent terms, picketed the funeral of Matthew Snyder, a Marine who died in the service of his country.[61] Members of the Westboro Baptist church believe that the death of United States soldiers reflects God's judgment of our country for its tolerance of homosexuality. Their signs included loathsome slogans as "Thank God for IEDs" and "God Hates Fags" (the sign that occasioned Alexander Volokh's use of the epithet in class).[62] Matthew's father sued the church for infliction of emotional distress and a jury awarded him a multi-million-dollar verdict.[63]

The Supreme Court found the speech protected and reversed by a vote of 8-1.[64] The Court made no effort to defend the merits of the Westboro Baptist Church's ideas and acknowledged that the speech in question almost certainly did nothing but add to the family's already inexpressible grief. But the Court noted that the speech addressed issues of political concern, that it took place in public spaces where speech generally receives broad protection, and that the standard for liability under an emotional distress claim—"outrageousness"—was far too vague and broad a ground on which to restrict expression.[65]

Supreme Court precedent does not leave our hypothetical public law school completely powerless to act. Cases like *Snyder* notwithstanding, it is clear that freedom of expression is not absolute. There are some kinds of speech that we might think of as hate speech that the First Amendment does not protect.[66] For example, a specific and credible threat of serious physical harm directed toward an individual is outside the scope of the First Amendment.[67]

As a result, a public law school could adopt a policy prohibiting such threats and label it an anti-hate-speech measure. Doing so, however, will probably leave our hypothetical concerned students unsatisfied. Those students may understandably feel that the policy does nothing to change the legal landscape or to afford additional protection against

60. 562 U.S. 443 (2011).
61. *See id.* at 448.
62. *See id.*
63. *See id.* at 449-50.
64. *Id.* at 443, 446, 458-61 (2011).
65. *Id*. at 451, 454, 456-58.
66. Leonard M. Niehoff, *Policing Hate Speech and Extremism: A Taxonomy of Arguments in Opposition*, 52 U. MICH. J.L. REFORM 859, 883-84, 886 (2019) [hereinafter Niehoff, *Policing Hate Speech and Extremism*].
67. *Id.* at 886-87.

racist attacks. They may argue that in the name of doing something, the law school has actually done nothing at all.

In a technical sense, this is not true. Incorporating a permissible prohibition against speech into school policy allows the institution to take punitive measures outside the scope of the criminal justice system, including such severe steps as suspension or expulsion. A lower burden of proof may also apply.[68] Finally, symbols matter and it means something for an institution to affirm its commitment to a principle that condemns such threats. Still, our hypothetical students may see these as incremental enhancements at best and may take little comfort in them.

These hypothetical students are much less hypothetical than I am implying. In working with public universities on speech policies, I have encountered precisely the sort of student feedback I describe here. I know from experience that persuading any student that such a policy marks a meaningful step forward can be very difficult; persuading a *law* student can be even tougher.

Other First Amendment principles constrain a public institution's policy choices. A speech-related policy cannot be overbroad, reaching protected speech as well as unprotected.[69] Nor can a policy be so vague that it leaves a reasonable person with serious questions about what they can and cannot do.[70] In addition, the Due Process Clause of the Fourteenth Amendment requires public institutions to afford certain procedural protections to those accused of violating the policy.[71]

Again, because private law schools are not state actors, none of these constitutional principles applies to them or dictate their policy choices. Private law schools may, of course, feel pressure from a variety of sources to comply with these limitations. Those sources can range from the formal strictures of federal statutes that address educational environments at schools that receive government funding, to the informal influences of alumni and donor opinion. It would therefore be an overstatement to say that private law schools have the latitude to do whatever they want. But it is certainly true that private law schools have a substantially wider range of choices when it comes to these sorts of policies.

As noted above, this additional flexibility moves the discussion about free speech in private institutions from questions of law to questions of morality. In our hypothetical case, it is not enough for administrators within a private institution to cite the Supreme Court decision in *Snyder* and Holmes's marketplace of ideas theory to explain why they

68. *See* NIEHOFF & SULLIVAN, *supra* note 2, at 175-77.
69. *See* Niehoff, *Policing Hate Speech and Extremism*, *supra* note 66, at 875-76.
70. *See id.* at 870.
71. *Id.* at 869-70.

will not adopt a policy prohibiting hate speech on campus. Rather, they need to explain why the principle reflected in *Snyder* and the theory advanced by Holmes lead to intellectually and normatively defensible outcomes.

That is a heavy lift. Cases like *Snyder* are deeply counterintuitive. Why does it make any sense to protect speech that advances no useful or meritorious idea, that inflicts pain on someone who has already suffered horribly, and that is designed to shock and offend? Tolerance has its virtues. But the quality of a society can also be measured by the things it refuses to tolerate.

Then, there is the marketplace of ideas doctrine. Its description of how people disseminate and assess information and arrive at the truth, seems wildly optimistic and wholly disconnected from how things work in reality. With the rapid and relentless proliferation of disinformation on the Internet, the disconnection may seem particularly obvious today.

Furthermore, with respect to matters like hate speech, the theory's assumptions about human nature may strike us as naïve to the point of self-delusional. How did the marketplace of ideas work when torch-bearing neo-fascists marched through the campus of the University of Virginia?[72] Did individuals with competing viewpoints have a productive debate? Were the neo-fascists persuaded of the error of their ways? Did anyone else decide to become a neo-fascist? Were minds changed and was understanding deepened? If any "truth" emerged at the end, was it because of the speech—or in spite of it?

Finally, there is the issue of urgency. The free speech theories previously discussed take the long view. But how does that work when you have torch-bearing neo-fascists in your backyard—right now? Part III.C of this Article will discuss this theme in more detail.

In sum, free speech issues within law schools become complicated because so many of those schools, and so many of the most prominent among them, are private. This fact moves the conversation out of the neatly cabined world of legal concerns and into the wide-open universe of values and norms. Defending current First Amendment doctrine on moral grounds may be possible—indeed, I believe that it is—but doing so entails a depth and precision of analysis that can be hard to achieve in an emotionally charged discussion about an inflammatory incident or a controversial speaker. It is hard enough under those circumstances to

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72. *See* Dara Lind, *Nazi Slogans and Violence at Right-Wing March in Charlottesville on Friday Night*, VOX (Aug. 12, 2017, 11:36 AM), https://www.vox.com/2017/8/12/16138132/charlottesville-rally-brawl-nazi [https://perma.cc/8LTG-P5YF] (discussing a rally on August 11, 2017, in which a group of approximately 100 white nationalists carried tiki torches and chanted Nazi slogans).

discuss what the institution *can do* under the law; arriving at a satisfactory answer of what the institution *should do* when it has a broader range of choices poses exponentially greater challenges. It is an extraordinary freedom that private law schools have, but they may also experience it as a terrible one.

B. Factor Two: Ambiguities of Authenticity

In an arms-length conversation, when a person offers his or her view on an issue to another person, the recipient presumes the speaker's authenticity. In other words, we generally assume that people believe that what they are saying is true—or, at a minimum, that it is more likely true than not. As a consequence, we assign to those who speak some personal ownership of the statements they make—a concept that is reflected in the various laws that hold people responsible for what they say, like the laws of libel and fraud.

These dynamics of authenticity and ownership of speech can affect the operation of the marketplace of ideas. Precisely because we mean what we say, and because we feel some personal attachment to the ideas we express, we may hesitate to abandon our positions even in the face of compelling contrary evidence. An old spiritual hymn describes faith as being "like a tree planted by the water" that "shall not be moved,"[73] and, unfortunately, that description can apply with equal force to our opinions. The marketplace of ideas theory does not account for this phenomenon, except insofar as it makes no promises that in revealing the truth the market will operate quickly, efficiently, or with uniform success.[74]

In everyday conversations, we may expressly signal an absence of authenticity and ownership by saying things, like, "well, if I can play the devil's advocate for a moment" or "I am not sure what I think about this, but I have heard," or words to that effect. We do so precisely to rebut the presumption of authenticity and ownership that otherwise implicitly attaches to our statements. Such phrases convey important information to others about the limitations of our commitment to what we are saying. In their strongest version, they signal that we have come to the marketplace of ideas with an open mind and ready to do some shopping. This is how language works.

Except in law schools. Speech in law schools operates under a very different set of rules and community understandings. Sometimes the same norms just described will apply. For example, if the dean says that

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73. THE MILLION DOLLAR QUARTET, *I Shall Not Be Moved*, *on* THE COMPLETE MILLION DOLLAR QUARTET (Sony Music Ent. 2006).

74. *See* Niehoff & Shah, *supra* note 26, at 250-51.

she is deeply committed to racial diversity in the ranks of faculty and students, then the dynamics of authenticity and ownership come into play. Members of the community will, and should, hold her accountable for those statements.

In the law school environment, however, we suspend authenticity and ownership with astonishing frequency. Faculty, students, and visiting speakers spend a great deal of time saying things that they may or may not believe to be true and over which they claim no personal ownership. To make things even more confusing, we usually do not signal to each other that we have departed from the norms of authenticity and ownership. We just do it.

For example, in my Civil Procedure and Evidence courses, I will often ask a student to explain why a court's reasoning is right and then to reverse position and explain why that same reasoning is wrong. Moot court competitions may require a student to argue one side of a case in front of one panel of judges, and then walk down the hall and argue the other side of the case in front of a different panel. I have been in faculty meetings where a colleague has posited an idea and then, as it began to gain steam, has posited the exact opposite idea to test the merits of their own argument.

We do not do these things for the mere intellectual pleasure of the exercise, although there is plenty of that in it for most of us. Suspending authenticity and ownership lies at the heart of the practice of law.[75] Indeed, the ethics rules validate the practice, making clear that a lawyer's representation of a client does not reflect an endorsement of who that client is, what that client has done, what the client believes, or what that client wants.[76] A lawyer's eloquent closing argument on behalf of his or her client does not mean that the lawyer thinks his or her client deserves to win. A lawyer's searing cross-examination of an opposing witness does not mean that the lawyer thinks the witness is lying. A lawyer's puffery about the value of a client's case during settlement negotiations does not at all mean that the lawyer thinks the case actually has much value.[77]

And, things get still more complicated. At a theoretical level, everyone understands that the lawyer may not be acting authentically or

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75. *See generally* MODEL RULES OF PRO. CONDUCT r. 1.2(b) (AM. BAR ASS'N 2020) (explaining how lawyers can successfully advocate on behalf of clients with inapposite political, economic, social, and moral views).

76. *See id.*

77. *See id.* Of course, a lawyer cannot knowingly make a false statement of material fact or law to a tribunal or otherwise. MODEL RULES OF PRO. CONDUCT r. 3.3(a), 4.1(a) (AM. BAR ASS'N 2020).

expressing their own beliefs when advocating for a client. But good lawyers persuade people to forget that this is so. Skilled attorneys create the impression that they *do* believe their client deserves to win, that they *do* think the witness is lying, and that they *do* view their case as one of great value—even when none of those things is even remotely true. Good lawyers strive to suspend skepticism and disbelief.

We routinely deploy and hone these skills in law school. We study and exercise the art of persuasion, including the art of persuading others that we believe what we are saying, even when we do not. I have judged dozens of moot court competitions over the years and have witnessed countless oral arguments in courtrooms, but I have never heard a law student or an attorney say, "I am going to offer three arguments on behalf of my client, but please note that I do not personally subscribe to any of them." They may later say it confidentially, to a moot court coach or a colleague, but not when the play is on.

These considerations create an atmosphere of deep moral ambiguity around many of the statements we make in law school. Not always, of course; as noted earlier, the dean who says she supports diversity efforts will be taken at her word. But in law school we grow accustomed to and comfortable with playing roles in which our words lack the credentials of authenticity and ownership.

My conversations with law students over the years have persuaded me that they fully understand why we do this. At the same time, however, some students become uneasy with the moral agnosticism that this dynamic creates. Under certain circumstances, they think it is imperative to reject that ambiguity, decisively and explicitly, and take a moral stand that is clear, explicit, and uncompromising. In other words, on some occasions law students think it is important to be authentic, to take ownership of what they say, and to push back against opposing arguments—not because that is the assignment, but because that is what their conscience calls them to do.

Let me offer an example that may be helpful. In my Evidence course, I often ask students if they can make any argument that we should abandon the hearsay doctrine. Trying to do so requires boldness, creativity, and imagination. After all, the hearsay rule has a long and hallowed history within our legal tradition. It even finds constitutional expression in the Confrontation Clause of the Sixth Amendment.[78]

Jettisoning the hearsay rule would have dire consequences, especially for criminal defendants. For proof we need look no further than the Salem Witch Trials, where the court relied heavily on hearsay

78. *See* LEONARD M. NIEHOFF, EVIDENCE LAW 119-24 (2016).

evidence in finding the accused guilty and sending them to the gallows.[79] Getting rid of this critical principle of evidence law would be a seriously bad idea and would dramatically undermine the reliability of the evidence admitted at trials.

Despite all of these concerns, when I ask this question hands go up from multiple students willing to give it a shot. The arguments vary but they have this much in common: No student prefaces his or her argument on saying that he or she does not actually believe what he or she is about to say. This is not surprising. As is often the case in law school settings, the norms of authenticity and ownership do not apply.

Now, contrast that classroom experience with a different one: In my Evidence class, we also talk about Federal Rule of Evidence 412 ("Rule 412"), sometimes called the "rape shield law."[80] In essence, Rule 412 provides that in cases involving alleged sexual assault, evidence that the victim engaged in other sexual behavior or had a particular sexual predisposition is generally not admissible.[81]

State and federal courts adopted this rule in response to a tactic that was commonly used by defense counsel in these sorts of cases.[82] The defense lawyer would put the character of the victim (typically a woman) at issue, suggesting that she was more likely to have consented because she was sexually promiscuous. The evidence could take various forms, delving into her reputation, her sexual history, her other relationships, her marital infidelities, and so on. Cross-examinations of the accuser pursuant to this strategy were often invasive, humiliating, and brutal.[83]

Grave concerns arose about the practice—and for good reasons. It rested on the faulty assumption that past sexual behavior is a reliable indicator of whether consent was given in a later circumstance.[84] It forced the survivor of the attack to suffer through yet another assault on their dignity and privacy. It created a powerful disincentive against reporting such crimes and cooperating in their prosecution.[85] Rule 412 has its imperfections, and would benefit from some finetuning, but arguing in favor of its central principle is pretty easy.

In contrast, arguing against Rule 412 is pretty difficult—it is like arguing against the hearsay rule. In law schools, however, the pretty

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79. *See* Len Niehoff, *Proof at the Salem Witch Trials*, AM. BAR ASS'N (Oct. 8, 2020), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2020-21/fall/proof-salem-witch-trials [https://perma.cc/3M7Y-L9TY].

80. FED. R. EVID. 412.

81. *Id.*

82. *See* NIEHOFF, *supra* note 78, at 79.

83. *See id.*

84. *Id.* at 79-80.

85. For a fuller discussion of this rule, see *id.* at 78-81.

difficult is our bread and butter and, as discussed, students have no hesitation taking up the challenge when it comes to hearsay. So, years ago, when I was teaching Evidence, I would ask my students if they could make an argument that we should abandon Rule 412. Like the question about hearsay, it was an invitation for students to think critically about a legal principle, illuminating any fissures in its reasoning that might concern us.

In this case, however, things unfolded very differently. No hands went up. If I called on anyone, they would usually say that they could not think of anything. Most interestingly, if a student did articulate an objection, he or she would almost always preface his or her remarks with something like, "Well, I do not agree with this argument, but I suppose someone could say . . . . "

After a few years of replaying this exercise, I realized that with respect to this issue, students felt uncomfortable with the ambiguities of authenticity and ownership that otherwise characterize much of law school discourse. It mattered to them that no one thought they actually believed the arguments that they were about to advance. Suspension of authenticity and ownership has a critical place in law school education, but for some students it comes at too great a cost when certain issues are under discussion.

When I teach this subject now in my Evidence class, I take a different approach. I expressly identify the problem, acknowledge the extraordinary sensitivity of the subject, and recognize that students may hesitate to play the devil's advocate in this context. I do not call on students; instead, I depend on volunteers. I ask everyone to bear in mind that in discussing this issue we may—as we often do in law school—make arguments to which we do not personally subscribe. With these protocols in place, it becomes possible to have a full and rich discussion of the issue.

The difference in student willingness to suspend authenticity and ownership in these two situations seems to me significant and to reflect a broader truth. I believe that at some junctures, students find the prevailing moral ambiguity of the law school environment to be unsustainable. They feel strongly moved to distance themselves from some ideas and to align themselves with others. It is my sense that this impulse has become stronger in recent years, in part for reasons that will be discussed in the next Subpart.[86]

I think these students are on to something. In a universe in which the moral atmosphere runs gray and cloudy, it can sometimes feel especially important to speak out with clarity and gravity. We tend to

86. *See infra* Part III.C.

conduct ourselves in law schools as if every argument has multiple sides, some of which have more persuasive force than others, but all of which deserve airing and attention. But that trope can begin to feel like a game, and a dangerous one at that if it gives oxygen to ideas that have an ugly history of imperiling human freedom, dignity, and life.

If, in that environment, we feel moved to clarify our authentic stance on an issue, or at least to clarify that we are not necessarily expressing it, our doing so does not inhibit free expression. To the contrary, it adds the ideas of authenticity and ownership to a dialogue from which they may otherwise be missing. If the impulse stopped there, it would contribute another layer of speech and moral complexity to law school conversations.

But sometimes the impulse goes further. It becomes a desire to silence the ideas that we oppose by shouting them down and drowning them out, as happened in the protests of speakers at UC-Hastings and Yale.[87] In light of the description of law school environments offered thus far, it is unsurprising that these demonstrations came so loud and hard. A weaker gesture might fail to break the otherwise prevailing and numbing spell of inauthenticity and amorality.

The impulse sometimes goes further in another way, too. It can become an expectation that other members of the law school community will make the same decisions that we do, and we will thus expressly call out, condemn, and protest against the ideas and speech which we oppose. We begin to think that our authenticity sets a precedent for others, and anything less on their part becomes a moral failure.

The hope that other people will share our views and will express and act upon them in the same way we do is natural, logical, and in itself unproblematic. The difficulty arises when that hope becomes a hard demand, enforced through peer pressure. At that point, the push for authenticity can ironically lead to less of it, with members of the community afraid to say what they really think or even to acknowledge that they are unsure. At its most extreme, that pressure can foster exactly what the Supreme Court in *West Virginia State Board of Education v. Barnette*[88] condemned: a prescribed orthodoxy, administered with the insistence that everyone confess their faith in it.[89]

In recent years, I have had conversations with various members of our law school community who have told me that they periodically hesitate to express their convictions, or even their questions, for precisely

87. *See* Lat, *supra* note 3.
88. 319 U.S. 624 (1943).
89. *Id.* at 642.

this reason. They worry that doing so will lead to a blowback from students on social media or on a listserv. I do not have access to the student listserv at our school—it is my understanding that no faculty member or administrator does—but, based on reliable reports I have received, and my observations of some exchanges on social media, these concerns do not strike me as irrational.

As someone who has spent much of his academic, professional, and personal life advocating for freedom of conscience and expression, I find these circumstances concerning. But it also seems to me essential to recognize why this situation is complicated and is not simply a matter of less tolerant members of a law school community bullying more tolerant ones into silence. Several observations may help tease out some of that complexity.

First, arguing that certain ideas should not enter the marketplace also has the effect of injecting an idea into the marketplace. That idea does not have a lesser constitutional standing than the ideas it opposes. It would, for example, make little sense to say that a visiting speaker has a right to express his views, but dissenters have no right to argue against their expression, or that a professor can teach students using racial epithets, but offended students have no right to protest in response.

Second, the line between advocating for a position, on the one hand, and working to silence those with whom you disagree, on the other, can be a subtle one, particularly where a passionate commitment to an issue drives that advocacy. Under the legal ethics rules, lawyers have a duty to advocate zealously for their clients.[90] It would therefore be odd if, in a law school of all places, we believed that individuals should express themselves tepidly in order to avoid stepping on any toes.

Third, although critics like to charge student activists with an inadequate appreciation for the power and importance of speech, that argument has things exactly backwards. Student activists understand that speech has the capacity to make a difference in the world—moving hearts and minds and driving decisions and actions. Ironically, it is the champions of free speech who sometimes deny its power—downplaying its significance in one breath, while pressing for its rigorous protection in another.[91] That is a paradox that occasionally finds its way into Supreme Court opinions.[92]

Fourth, conventional arguments in favor of free speech do not provide a helpful counterpoint when these dynamics are in play because

90. *See* MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2020).
91. *See* Niehoff, *Policing Hate Speech and Extremism*, *supra* note 66, at 873-74.
92. *See id.*

they reintroduce the very moral passivity that gives rise to the problem. Arguments like "stand back and let the marketplace of ideas do its work—the truth will prevail, eventually," "stand back and let the people decide what they need for self-governance—they will figure it out, sooner or later," and "stand back and learn the values of tolerance and courage—despite the injury done by the speech in the meantime" do not get traction under these circumstances. For people who believe they must do something morally decisive, these prescriptions are passive strategies that serve only to enshrine the status quo and obstruct change.

Finally, people often find the abstractions of free speech doctrine least compelling when the current conditions feel urgent and potentially cataclysmic. In his book *Perilous Times*,[93] Geoffrey Stone recounts our long history of compromising (or jettisoning altogether) our commitment to free speech principles because they seem like a luxury we cannot afford in the face of apparently clear and present dangers. The stubbornness of this idea testifies to its appeal and perhaps even to an element of common sense embedded within it: Civil liberties are wonderful things, but they are not the only things that matter.

Justice Jackson famously got at this sentiment when he declared, in his dissent in *Terminiello v. City of Chicago*:[94] "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[95] That observation brings us to the last factor that complicates free speech in law schools, especially today. In short, it is the justifiable anxiety that many law students have that, to paraphrase William Butler Yeats, things are falling apart and the center will not hold.[96]

C. Factor Three: The Pragmatism of the Endangered

In May of 2020, in the throes of our statewide COVID quarantine, a group of graduating law students approached me with a request. The school had scrambled to organize an event to mark their commencement, but they had something different in mind. They wanted to sit back and relax in their various locations around the world, "Zoom in," have a few drinks, tell stories, and listen to a couple of faculty members give a few

93. GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 137-38 (2005).

94. 337 U.S. 1, 13 (1949).

95. *Id.* at 37 (Jackson, J., dissenting).

96. William Butler Yeats, *The Second Coming*, POETRY FOUND., https://www.poetryfoundation.org/poems/43290/the-second-coming [https://perma.cc/KZK3-FAJT] (last visited Apr. 1, 2023).

brief remarks. The students asked if I would serve as one of the speakers. I immediately agreed and got to work.

When the time came for me to deliver my remarks, I acknowledged that I was not going to tell them anything that they did not already know. They already knew that a legal education helps toughen students up for the rigors of practice; they already knew that on the toughening-up front, their third year of law school had seriously overachieved; and they already knew that their experience of living through the existential version of a *force majeure* clause was a whopper of a character-building exercise. By now, they had doubtless grown weary of having well-intended people offer them these experiential consolation prizes.

So, I announced that my goal was not to try to tell them anything that they did not already know. Instead, I wanted to remind them of something that they already knew but might have forgotten: who they were when they arrived at law school. I wanted them to think back over the past couple of decades and to take stock of how life had gone for them, even before the pandemic delivered their most recent trauma.

I highlighted just a few data points. My research suggested that they were, on average, twenty-seven years old, so most of them had been born around 1993. I took 1999 as the year when they probably would have started to become meaningfully conscious of the world around them. Then I reviewed how that world had unfolded.

It started with the shootings at Columbine in 1999. Then the worries over Y2K and the presidential election crisis of 2000, followed by the attacks of 9/11 in 2001. Then the beginning of the war with Iraq in 2003. The increasing awareness of global warming in the mid-2000s and Hurricane Katrina in 2005. The reemergence of the nuclear threat with Korea's tests in 2006. The financial collapse and the mass shooting at Virginia Tech in 2007. The Great Recession in 2008. The mass shooting at a theater in Aurora, Colorado in 2012. The elevated presence of racism and totalitarian ideas after the election of Donald Trump in 2016. The mass shootings at a concert in Las Vegas in 2017 and at Marjory Stoneman Douglas High School in 2018. The impeachment of the President of the United States—twice. And so on, and so on.

Of course, every generation can provide its own parade of horrible developments it had to endure. But, in my view, the gravity and imminence of these threats feels different. I grew up in the Cold War era when the specter of nuclear war loomed in the background of everyday life. But that all seemed very abstract. It never would have occurred to me that my classmates and I might be shot in cold blood at our school, at the mall, at a movie, or at church. I grew up during a time when our society became increasingly conscious of pollution and the degradation of

the environment. But it never would have occurred to me that the entire planet was in grave peril.

I reminded my students of this ugly chronology because I wanted them to understand that they had "commenced" a long time ago. The traditional idea of commencement entails a quaint and nostalgic idea of innocence. It says, so far, you have moved through life as sheltered and isolated scholars, but now the real and hard stuff commences. As if.

I quoted to my students an observation that the poet John Berryman shared with the novelist James Dickey, that "[t]he trouble with this country is that [someone] can live his [or her] entire life without knowing whether or not he [or she] is a coward."[97] My students had not had that luxury. The universe had been testing their courage since their earliest pangs of consciousness. I wanted them to see that, through all of this, they had acquired a singular credential before they even came to law school: they had grown brave.

They probably did not even know it. Courage was such an intrinsic and essential ingredient of life that they took it for granted, like waking up in the morning and breathing. The challenges they had faced, and the courage that they were forced to acquire (even if unconsciously), had endowed them with tremendous promise. And all of that had taken place before they struggled through their first law school cold call.

I delivered those remarks in 2020. It was a grim portrait. Things got worse afterward.

The students who sit in my law school classes now have watched the pandemic kill more than a million Americans. They have witnessed the chaotic election of 2020, the lie that it was stolen, and the January 6 assault on our Capitol and on our democracy. They have experienced Russia's invasion of Ukraine, and the renewal of hostile relations between the United States and Russia. They have seen the overruling of a precedent that, for half a century, protected a woman's right to reproductive autonomy.[98] In *Dobbs v. Jackson Women's Health Organization*,[99] the justices of the Supreme Court of the United States treat *Roe v. Wade*[100] as if it were a puzzling novelty; my students have never known a time when it was not the law of the land.

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97. John Leonard, *Private Lives*, N.Y. TIMES (Mar. 21, 1979), https://www.nytimes.com/1979/03/21/archives/private-lives.html [https://perma.cc/XHY7-S5HU].

98. Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2240-42 (2022).

99. *Id.*

100. 410 U.S. 113 (1973).

Research around student anxiety reflects the presence of these extraordinary stressors.[101] A recent article in the *Chronicle of Higher Education* reports that "[t]he data [is] staggering: Nearly a third of all college students have been diagnosed with an anxiety disorder, the number of reported cases of student anxiety has increased by 50 percent over the past eight years, and counseling centers are facing unprecedented demand."[102] Little wonder.

The *Chronicle* article suggests that a variety of factors may explain this dramatic escalation.[103] Today, there is less social stigma around acknowledging anxiety and other mental health challenges.[104] Students are more candid about their emotional struggles because the higher education environment is increasingly competitive. As with other academic units, law schools now admit more students who are likely to experience that environment as stressful, such as first-generation students.[105]

The *Chronicle* article also identifies large-scale political, social, and environmental factors as having an important role.[106] A 1968 study cited in the article argued that the increase in student stress perceptible at that time was attributable to the "overabundance of tensions, fears, worries, and anxiety that confront [hu]mankind today."[107] Our current students face at least as great a drumbeat of grave and destabilizing concerns.

Many law schools have taken helpful steps to address these issues. Mental health counseling is more readily available. The admission of greater numbers of first gens and minority students creates internal communities of support. At my law school, we have lots of conversations about wellness and how to try to achieve it and maintain it. But still.

For our purposes, the critical point is this: Living in a significantly, persistently, and imminently endangered state does not merely feed anxiety, it breeds pragmatism. When the house is on fire, we have no time or patience for speculating or theorizing. We can run from the blaze or

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101. Peter N. Stearns, *A 'Crisis' of Student Anxiety?*, CHRON. HIGHER EDUC. (Sept. 1, 2022), https://www.chronicle.com/article/a-crisis-of-student-anxiety? [https://perma.cc/VRY4-VPPF].

102. *Id.*

103. *See id.* (describing three important factors, including "the role of experts and services," "large-scale social and political change," and "the dramatic transformation of American higher education from the 1950s onward[]").

104. *See id.* (explaining the "[i]ncreased interest in anxiety on the part of campus professionals le[a]d[ing] to higher rates of identification . . . . ").

105. *See id.*

106. *See id.*

107. *Id.*

fight it, but we cannot stand around and talk. Urgency, like Occam's Razor, cuts away anything that feels luxurious or inessential.[108]

It is therefore unsurprising that the abstractions offered by First Amendment doctrine may hold little appeal to people who are contending with crises that feel, and in fact are, very real. This is especially true because so many of the rationales supporting free speech rest on assumptions about how things will play out in the long run:[109] in the long run, the truth will prevail; in the long run, we will become better citizens; in the long run, we will grow more tolerant and courageous; and so on, and so forth.

We might say to First Amendment apologists (myself included) the same thing that John Maynard Keynes said to economists: "*In the long run* we are all dead."[110] Keynes continued: "Economists set themselves too easy, too useless a task if, in tempestuous seasons, they can only tell us that when the storm is long past the ocean is flat again."[111]

We have set ourselves too easy and useless a task if, when storms rage, we do nothing but assure the anxious that, somewhere down the line, the rain will stop or shelter will mysteriously appear. We have to listen thoughtfully, engage respectfully, take objections seriously, and explain why freedom of expression makes sense even when the world seems turned upside down. If, indeed, we can do so.

IV. CONCLUSION

Kwame Anthony Appiah tells a story about an exchange that routinely occurs when he finds himself seated next to a stranger on an airplane.[112] The passenger asks: "What do you do?" Appiah responds that he is a philosopher. They typically reply: "And what's your philosophy?" He says: "Everything is much more complicated than you first thought."[113]

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108. *See generally Occam's Razor*, DICTIONARY.COM (June 18, 2018), https://www.dictionary.com/e/pop-culture/occams-razor [https://perma.cc/B2QW-SSYN] (defining the canon as a tool to simplify solutions).

109. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting) (suggesting that the marketplace of ideas, in time, determines which speech is most deserving of public attention).

110. JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 80 (1923) (emphasis in original).

111. *Id.*

112. *See* Kwame Anthony Appiah, *Swarthmore Commencement Address*, SWARTHMORE (May 2006), https://www.swarthmore.edu/past-commencements/swarthmore-commencement-address-kwame-anthony-appiah [https://perma.cc/2MR2-S64X].

113. *Id.*

This Article argues that, like everything else, the relationship between free speech and law schools is more complicated than it initially appears. This is so for many reasons, but in my estimation the number and stature of private law schools, the suspension of authenticity in which we routinely engage, and the prior life experiences of our current students all have powerful explanatory force. Recognizing the salience of those factors can lead us to a place of greater understanding.

The question of how to navigate free speech issues in law schools in light of those factors presents additional complications. No uniform guidance may exist given the significance of the specific facts in play, the individual personalities involved, the school's history and existing environment, and the prevailing social context at the moment.

Nevertheless, the factors discussed above provide extraordinarily clear guidance about what *not* to do. Do not imagine that invoking simplistic free speech platitudes will get the work done. It will not.

Too many institutions are private, shifting the debate from what is legal to what is right. Too much moral ambiguity exists within law schools, creating an imperative toward clarity and protest. Oh, and then there is this:

The house really is on fire.