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HOW LAW SCHOOLS CAN FIGHT FOR FEARLESS SPEECH

*Mary Anne Franks**

I. INTRODUCTION

In 2019, in the midst of a national moral panic over free speech in higher education, a prominent politician and Harvard Law School graduate opined, “The role of the university is not to shield students from speech that makes them uncomfortable The cure for speech that one disagrees with lies not in proscription but in open debate and free inquiry.”¹ That politician urged all the public colleges and universities in his state to adopt a version of the Chicago Statement, a widely-praised free speech resolution issued in 2015 by the University of Chicago Committee on Freedom of Expression that pledged the institution’s “commitment to a completely free and open discussion of ideas.”² The influential organization then known as the Foundation for Individual Rights in Education (“FIRE”)³ “applaud[ed]” the public official’s efforts to “lead the way in promoting open discussion and civil discourse.”⁴

That public official and product of an elite legal education was Florida Governor Ron DeSantis, who, soon after, began waging the most notorious, wide-ranging, and explicit censorship campaign against

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1. Jenni Fink, *Florida Governor: Some Universities Seek to Impose ‘Orthodoxy,’ Echoes Trump’s Call for College Commitment to Free Speech*, NEWSWEEK (Apr. 15, 2019, 5:10 PM), <https://www.newsweek.com/florida-governor-ron-desantis-backs-trump-campus-free-speech-says-some-1397270> [<https://perma.cc/3UP7-9Z5X>].

2. GEOFFREY R. STONE ET AL., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION 2 (2015), <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf> [<https://perma.cc/3HZ3-TDKG>].

3. The organization is now known as the Foundation for Individual Rights and Expression (“FIRE”).

4. Mary Griffin, *Florida Public Universities to Adopt ‘Chicago Statement’ Following Governor’s Announcement*, FIRE (Apr. 17, 2019), <https://www.thefire.org/news/florida-public-universities-adopt-chicago-statement-following-governors-announcement> [<https://perma.cc/YCK6-UDRP>].

educational institutions in recent history. Standing by the governor's side when DeSantis vowed to "protect student speech and the open exchange of ideas on our campuses"⁵ at a 2019 press conference was Florida Commissioner of Education Richard Corcoran, who boasted in 2021 that he had "censored or fired or terminated numerous teachers" for "liberal indoctrination."⁶ In 2022, just a few years after declaring that "[t]he role of the university is not to shield students from speech that makes them uncomfortable,"⁷ DeSantis signed the 2022 Individual Freedom Act—also known by the more juvenile title, the "Stop WOKE (Wrongs to Our Kids and Employees) Act"—which forbade teaching or instruction that might cause individuals to feel "discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race, color, sex, or national origin."⁸ The law has already been temporarily enjoined by a federal judge on First Amendment grounds. Another bill that DeSantis signed into law in 2022, the euphemistically titled "Parental Rights in Education" bill—dubbed the "Don't Say Gay" bill by its detractors—prohibits school districts from encouraging classroom discussion about "sexual orientation or gender identity . . . in a manner that is not age appropriate or developmentally appropriate for students."⁹ A new bill that would enact even more sweeping and blatantly unconstitutional regulations of higher education institutions, H.B. 999, was pre-filed in February 2023.¹⁰ The bill would outright eliminate entire fields of study focused on race or gender, defund diversity, equity, and inclusion efforts, and allow for politically motivated tenure reviews.¹¹

5. Emily L. Mahoney, *Ron DeSantis Seeks Free Speech Resolution Allowing Controversial Speakers at Florida Universities*, TAMPA BAY TIMES (Apr. 15, 2019), <https://www.tampabay.com/florida-politics/2019/04/15/ron-desantis-seeks-free-speech-policy-allowing-controversial-speakers-at-florida-universities> [<https://perma.cc/K4UL-7ZX3>].

6. Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused and Self-censoring*, WASH. POST (Feb. 14, 2022), <https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws> [<https://perma.cc/3GRX-7SEB>].

7. Fink, *supra* note 1.

8. Paul Blest, *Florida Just Passed Its 'Stop WOKE' Anti-CRT Bill*, VICE (Mar. 11, 2022), <https://www.vice.com/en/article/wxdbwb/stope-woke-act-florida-crt-bill> [<https://perma.cc/KX4U-7T5U>].

9. Amelia Nierenberg, *What Does 'Don't Say Gay' Actually Say?*, N.Y. TIMES (Mar. 23, 2022), <https://www.nytimes.com/2022/03/23/us/what-does-dont-say-gay-actually-say.html> [<https://perma.cc/5ZDQ-QLP5>].

10. H.B. 999, 125th Leg. Reg. Sess. (Fla. 2023).

11. Josh Moody, *DeSantis Higher Ed Bill Heads for the Legislature*, INSIDE HIGHER ED (Feb. 27, 2023), <https://www.insidehighered.com/news/2023/02/27/new-florida-bill-aims-enact-desantiss-higher-ed-reforms> [<https://perma.cc/8C4U-AEYV>].

What is happening in Florida is only one example of what PEN America calls “a legislative war on education in America.”¹² Bills aimed at restricting what subjects teachers can teach and students can learn, both in K-12 and higher education, began picking up steam in 2021 and intensified in 2022. Between January and August 2022, “lawmakers in 36 different states . . . introduced a total of 137 educational gag order bills, an increase of 250[%] over 2021.”¹³ This assault on education is heavily partisan; nearly all of the bills introduced to date have been sponsored by Republicans. The bills attempt to censor topics such as the role of racism and sexism in American institutions, discussions of sexual orientation or gender identity, and other “divisive concepts.”¹⁴ Many are so vaguely and broadly worded that it is impossible to know in advance what they prohibit and what they permit. Some of the bills create financial incentives for parents or other parties to sue for the removal of educational material they find offensive. The sponsors and supporters of these educational gag orders vilify teachers, administrators, librarians, and school board members as indoctrinators, “groomers,” and “pedophiles,” leading to firing, harassment, doxing, threats, and physical assaults.¹⁵

How did we get to this place, how do we get out of it, and what is the role of law schools in answering both questions?

II. HOW WE GOT HERE

One explanation of how we arrived at this dystopian moment of state-sponsored censorship and broad governmental assault on educational institutions is that this was the inevitable next phase of the rightwing extremist movement that was legitimized and normalized by the Trump presidency. That movement has been incredibly effective in appropriating the First Amendment and free speech rhetoric for totalitarian ends, from the 2017 Unite the Right Rally to the January 6, 2021 Insurrection. This is certainly not the first time in American history that democratic values have been weaponized against democracy; Justice Robert Jackson wrote in 1949 of the “many appeals these days to liberty,

12. Jeremy C. Young & Jonathan Friedman, *America's Censored Classrooms*, PEN AM. (Aug. 17, 2022, 7:48 PM), <https://pen.org/report/americas-censored-classrooms> [<https://perma.cc/2MQX-F6D2>].

13. *Id.*

14. *Id.*

15. Brennan Suen & Ari Drennen, *The Real Victims in the “Libs of TikTok” Discourse Are the Teachers and LGBTQ People Harassed Because of the Account*, MEDIA MATTERS FOR AM. (Apr. 19, 2022), <https://www.mediamatters.org/twitter/real-victims-libs-tiktok-discourse-are-teachers-and-lgbtq-people-harassed-because-account> [<https://perma.cc/M9XU-K7YT>].

often by those who are working for an opportunity to taunt democracy with its stupidity in furnishing them the weapons to destroy it.”¹⁶ The most notorious totalitarians of the twentieth century did not even make a secret of this strategy; Jackson quotes at length the Nazi propagandist Joseph Goebbels, who stated that the Nazi seizure of power was assured as soon the Nazis were granted the benefit of democratic consideration.¹⁷ In Goebbels’ words,

[W]e National Socialists never asserted that we represented a democratic point of view, but we have declared openly that we used democratic methods only in order to gain the power and that, after assuming the power, we would deny to our adversaries without any consideration the means which were granted to us in times of (our) opposition.¹⁸

To translate this for our own time: that cherished civil libertarian posture of “tolerance for opposing ideas” and protecting the “speech we hate” can and will be exploited by those with no intention of extending that protection for speech that does not serve their interests. Every successive phase of moral panic over insufficiently tolerant students and left-leaning faculty, however sincere or well-intentioned, ultimately serves the interests of the most regressive and anti-democratic groups in society. Good faith concerns about ideological diversity and intellectual fortitude are all too easily instrumentalized in reactionary propaganda aimed at vilifying institutions of higher education, their faculty, and their students as simultaneously perverted and puritanical, crude and censorious, hopelessly fragile and dangerously aggressive.¹⁹

And as long as the focus is on the sins of the illiberal student, the biased teacher, or the coddling administrator, the focus is not on the powerful government official or the vast machinery of the State. The continued insistence that the actions of private entities pose an equal or greater threat to free speech than those of governmental officials eventually leads to only one result: the imposition of government censorship as the answer to private censorship.

In a February 2023 op-ed, Suzanne Nossel, the CEO of PEN America, praised DeSantis for his 2019 endorsement of the Chicago Statement but criticized his recent efforts to use the power of his government

16. *Terminiello v. City of Chicago*, 337 U.S. 1, 35, 69 (1949).

17. *Id.*

18. *Id.* (second alteration in original).

19. See generally Mary Anne Franks, *The Miseducation of Free Speech*, 105 VA. L. REV. Online 218 (2019) (discussing the reactions to free speech crises on campuses).

position to suppress ideas.²⁰ Nossel describes DeSantis as now “embrace[ing] the very tactics he once decried, putting the weight of government power behind efforts to repress viewpoints that offend him and his supporters.”²¹ It is clear that in Nossel’s view, promoting tolerance of uncomfortable ideas on campus and ruthlessly purging entire concepts from schools are contradictory positions. But to the authoritarian, they are the *same position*: the classic authoritarian position of “free speech for me but not for thee,” with the added twist that the “me” is a government official who can bring the power of the state to bear against ideas that do not serve his interests. DeSantis himself made this clear in 2018 when he pledged to defend “First Amendment speech rights against those in academia, media and politics who seek to *silence conservatives*.”²²

Like many civil libertarians who are deeply concerned about the chilling effects of private intolerance, Nossel decries government censorship. But the hyper-focus on the supposedly intolerant acts of private individuals, especially students, is helping drive the demand for and justification of government censorship as a response of private action. Nossel writes that “the cure that DeSantis and his backers favor—intrusive legislation to muzzle the opposite set of views—is worse than the disease,”²³ but characterizing private intolerance as a “disease” in the first place is the kind of rhetoric that encourages, however inadvertently, this very cure. And even as she criticizes the cure, Nossel devotes much of the piece to agreeing with DeSantis and his supporters about the disease:

[They] are not wrong to call out the quest for a more inclusive and equitable society when it veers into the outright suppression of speech and ideas. Progressives too often forget that the movements they wage—whether for racial justice, gender justice, climate or anything else—depend upon free speech protections to guarantee the space for dissent; and that such protections must apply equally to speech with which they disagree. Some fail to acknowledge, too, that worthwhile perspectives and solutions can emerge from outside their own ideological spheres.²⁴

Even when they acknowledge Republicans’ blatant, multipronged, state-sponsored attacks on educational institutions, many liberals and

20. Suzanne Nossel, *Opinion: Ron DeSantis Abandons Former First Amendment Defense*, CNN (Feb. 23, 2023), <https://www.cnn.com/2023/02/23/opinions/ron-desantis-threat-to-first-amendment-nossel/index.html> [<https://perma.cc/6852-DQSZ>].

21. *Id.*

22. *Id.* (emphasis added).

23. *Id.*

24. *Id.*

civil libertarians continue to emphasize anecdotes of private intolerance as equal or even greater threats to freedom of expression. As free speech in schools and universities is literally under attack by partisan government forces in direct violation of the First Amendment—as Republicans throughout the country are using the force of law to remove books, ban words, strip curriculums, silence faculty, and compel speech in educational institutions—influential figures across the political spectrum continue to fulminate about the dangers of intolerant students, liberal bias among professors, and “cancel culture.” For example, a March 2022 *New York Times* Editorial Board op-ed, titled “America Has a Free Speech Problem,” noted the right’s coordinated censorship campaign against schools and educators while suggesting that isolated incidents of private recrimination were equally condemnable.²⁵ “Many on the right,” the Board wrote, “for all their braying about cancel culture, have embraced . . . laws that would ban books, stifle teachers and discourage open discussion in classrooms,” while “[m]any on the left refuse to acknowledge that cancel culture exists at all.”²⁶ In a rhetorical move that historian Thomas Zimmer refers to as “distortion-by-balance,”²⁷ the Board concludes that “the political left and the right are caught in a destructive loop of condemnation and recrimination around cancel culture.”²⁸

A. *The Role of Law Schools*

The *Times* op-ed contained another alarming distortion, this one of First Amendment law. The piece opens with the assertion that “Americans are losing hold of a fundamental right as citizens of a free country: the right to speak their minds and voice their opinions in public without fear of being shamed or shunned.”²⁹ But as any first-year law student knows, this alleged fundamental right does not exist. The First Amendment protects the right of private citizens against governmental restrictions of speech. It does not bestow a right to an audience, and certainly not to an adoring, uncritical one. In fact, the First Amendment

25. New York Times Editorial Board, *America Has a Free Speech Problem*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html> [https://perma.cc/YB4G-8ME5].

26. *Id.*

27. Thomas Zimmer (@tzimmer_history), TWITTER (Apr. 27, 2022, 1:28 PM), https://twitter.com/tzimmer_history/status/1519367792163762181?s=20 [https://perma.cc/3654-NTUS].

28. New York Times Editorial Board, *supra* note 25.

29. *Id.*

protects the right of private citizens to criticize, ridicule, or ignore other people's speech, including by shaming and shunning.

This misunderstanding of the First Amendment clearly drives much of the agitation over so-called "cancel culture." Multiple surveys have demonstrated that Americans' general constitutional literacy is quite poor, and while many people have strong feelings about the First Amendment, relatively few have a strong grasp of what it actually says and does. The situation is exacerbated by the complexity and inconsistency of free speech doctrine. And it is made even worse by First Amendment misinformation, often promulgated by individuals who are trained in the law but deliberately misrepresent the doctrine. That misinformation can take the form of outright false statements about settled doctrine or the intentional blurring of the lines between the law and societal norms.

Governor DeSantis presents an example of the first form. As noted above, he is a graduate of Harvard Law School, where he presumably received some instruction about the basics of First Amendment doctrine. In particular, he is surely aware that reactions of private citizens to certain ideas, however "intolerant" they may be, do not violate the First Amendment, whereas government attempts to prohibit or punish certain ideas often does. None of this has deterred him, however, from openly and frequently violating the First Amendment, and not only in educational institutions. His efforts to strip away First Amendment protections for any speech he finds personally objectionable have been described by one commentator as turning Florida into "a paradise of authoritarianism."³⁰ In April 2021, DeSantis signed a bill that would impose stiff criminal penalties on nonviolent protesters and those who damage Confederate monuments, while providing criminal and civil immunity to people who kill or injure protesters with their vehicles.³¹ The federal judge who blocked the law from being enforced described it as "effectively criminaliz[ing] the protected speech of hundreds, if not thousands, of law-abiding Floridians."³² DeSantis also signed a law that seeks to punish the Walt Disney Company for criticizing his "Don't Say Gay" bill and a law, already blocked by the Eleventh Circuit on First Amendment grounds, that attempts to force private social media companies to

30. Paul Waldman, *In Florida, Ron DeSantis Is Creating a Paradise of Authoritarianism*, WASH. POST (Jan. 19, 2022), <https://www.washingtonpost.com/opinions/2022/01/19/desantis-paradise-of-authoritarianism> [https://perma.cc/L4CQ-R2DW].

31. Daniel Conrad, *Florida Anti-riot Law Struck Down As Unconstitutional to Protesters*, COURTHOUSE NEWS (Sept. 9, 2021), <https://www.courthousenews.com/florida-anti-riot-law-chills-protestors-speech-finds-federal-judge> [https://perma.cc/G54C-LDVV].

32. *Id.*

carry speech against their will.³³ In addition, DeSantis fired an elected state prosecutor in 2022 on the basis of his political views, in a move that a federal judge determined to be a violation of the prosecutor's First Amendment rights.³⁴ DeSantis has also openly declared his desire to change defamation law in direct opposition to the Supreme Court's ruling in the landmark case *New York Times Co. v. Sullivan*,³⁵ leading one of his allies to propose a bill, H.B. 951,³⁶ that would allow the state to ignore Supreme Court precedent on defamation.³⁷

As renowned First Amendment lawyer, Floyd Abrams, noted:

If Governor DeSantis, a Harvard Law graduate, thinks the statute is constitutional[,] he's forgotten what he was taught . . . If he's looking for a way to offer the Supreme Court a case in which it might reconsider settled law, who knows. But what's clear is that it is today and tomorrow facially at odds with the First Amendment.³⁸

DeSantis is only one of many graduates of elite law schools currently promoting First Amendment misinformation. Governor Greg Abbott, a graduate of Vanderbilt Law, has attempted to force social media companies to host speech against their will and to make speech about abortion illegal; the Attorney General carrying out his commands, Ken Paxton, is a graduate of University of Virginia Law. Senator Josh Hawley—who graduated from Yale Law School and briefly taught constitutional law—famously pumped his fist in support of the violent insurrection that GOP leadership later referred to as “legitimate political discourse”³⁹ and described Simon & Schuster's decision to drop his book as a “direct assault on the First Amendment.”⁴⁰ Senators Tom

33. Anthony Izaguirre, *DeSantis Takes Over Disney District, Punishing Company*, ASSOCIATED PRESS (Feb. 27, 2023), <https://apnews.com/article/ron-desantis-politics-florida-state-government-36ec16b56ac6e72b9efcce26defdd0d8> [<https://perma.cc/CUQ3-K5VZ>].

34. Herb Scribner, *DeSantis Violated First Amendment by Removing Elected Official, Judge Rules*, AXIOS (Jan. 21, 2023), <https://www.axios.com/2023/01/21/ron-desantis-first-amendment-andrew-warren-ruling> [<https://perma.cc/42YJ-PEPL>].

35. 376 U.S. 254 (1964).

36. H.B. 951, 125th Leg. Reg. Sess. (Fla. 2023).

37. Colin Kalmbacher, *First Amendment Attorney Attacks Florida Effort to Roll Back Protections in Defamation Law, Calling It Unconstitutional*, LAW & CRIME (Feb. 20, 2023, 7:07 PM), <https://lawandcrime.com/first-amendment/first-amendment-attorney-attacks-florida-effort-to-roll-back-protections-in-defamation-law-calling-it-unconstitutional> [<https://perma.cc/J4EA-CJN2>].

38. *Id.*

39. Jonathan Weisman & Reid J. Epstein, *G.O.P. Declares Jan. 6 Attack 'Legitimate Political Discourse'*, N.Y. TIMES (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html> [<https://perma.cc/QA3Q-U85J>].

40. Aaron Keller, *'Constitutional Lawyer' Sen. Hawley Says He Has a First Amendment Right to Be Privately Published, Then Tells Biden to Retract Statements*, LAW & CRIME (Jan. 8, 2021, 7:57 PM), <https://lawandcrime.com/first-amendment/constitutional-lawyer-sen-hawley-says->

Cotton and Ted Cruz, both graduates of Harvard Law School, both voted against the creation of an independent commission to investigate the January 6th attack and characterized satellite television service DirecTV's dropping of conservative news channels as "censorship." And one should not forget that one of the key players in the Capitol attack, Stewart Rhodes, is a Yale Law graduate who has described the Oath Keepers, the far-right militant organization he founded, as "pushing the First Amendment to the absolute limit."⁴¹

But while Yale Law School has not been asked to denounce the actions of Stewart Rhodes or Josh Hawley or to question the quality of the First Amendment instruction they received there, it has been called to answer for a March 2022 student protest of an event featuring a lawyer from the anti-LGBTQ organization Alliance Defending Freedom.⁴² Some of the student protesters were disruptive during the first few minutes of the panel; they then filed out into the hallway, where they continued to make noise. After reading about the event, D.C. Circuit Judge Laurence Silberman emailed a list of nearly all U.S. federal judges encouraging them to blacklist the student protesters:

The latest events at Yale Law School in which students attempted to shout down speakers participating in a panel discussion should be noted All federal judges—and all federal judges are presumably committed to free speech—should carefully consider whether any student so identified should be disqualified for potential clerkships.⁴³

Some months later, Fifth Circuit Judge James Ho proclaimed that he would no longer hire clerks from Yale Law School to protest "rampant 'cancel culture' on its campus and incidents in which students had disrupted conservative speakers."⁴⁴ Judge Ho later doubled down on this position, writing in a National Review piece co-authored with Eleventh Circuit Judge Elizabeth Branch that "students who practice intolerance

he-has-a-first-amendment-right-to-be-privately-published-then-tells-biden-to-retract-statements [https://perma.cc/5M85-NSYA].

41. Hannah Allam, *Who Is Stewart Rhodes, the Oath Keepers Leader Arrested in Connection with the Jan. 6 Riot?*, WASH. POST (Jan. 13, 2022, 4:05 PM), https://www.washingtonpost.com/national-security/oathkeepers-stewart-rhodes-leader/2022/01/13/2e17e292-7492-11ec-bc13-18891499c514_story.html [https://perma.cc/9WQGQ-AF6D].

42. Mark Joseph Stern, *The Truth About the Yale Law Protest That Prompted a Federal Judge to Threaten a Clerkship Blacklist*, SLATE (Mar. 18, 2022, 1:38 PM), <https://slate.com/news-and-politics/2022/03/yale-law-school-laurence-silberman-free-speech-blacklist.html> [https://perma.cc/AA4X-7WQ6].

43. *Id.*

44. Nate Raymond, *U.S. Supreme Court's Alito Calls Law School Free Speech 'Abysmal'*, REUTERS (Oct. 27, 2022, 10:01 AM), <https://www.reuters.com/legal/government/us-supreme-courts-alito-calls-law-school-free-speech-abysmal-2022-10-26> [https://perma.cc/NW6C-G3G5].

don't belong in the legal profession."⁴⁵ The occasion for the judges' screed was a March 2023 event at Stanford Law School in which conservative Fifth Circuit Judge Kyle Duncan, a Trump appointee, was met with angry student protesters.⁴⁶ Notably, the judges did not express similar sentiments when, in 2021, members of the Stanford Federalist Society—the same organization that had invited Judge Duncan to speak—successfully pressured the law school to withhold a student's diploma because he had mocked the organization with a satirical flyer.⁴⁷

When Supreme Court Justice Samuel Alito was asked in October 2022 for his thoughts about the state of free speech at institutions of higher learning—law schools in particular—he responded that it is “pretty abysmal, and it’s disgraceful It’s dangerous for our future as a united democratic country.”⁴⁸ While he expressed no concern about how governmental censorship of topics such as race, gender, or sexual identity might have a particularly negative impact on law schools, he did emphasize his feeling that law schools were simply not doing enough to ensure that law students are “free to speak their minds without worrying about the consequences.”⁴⁹

But if a group of law students shouting down the occasional invited speaker is cause for concern about censorship, to such an extent that several judges have advocated blacklisting all of the graduates from that school, how much more concern should there be about former law students using state power to stifle the speech of millions of Americans or attempting to overthrow democracy? The powerful graduates of elite law schools who promote chaotic and unprincipled free speech positions—condemning “cancel culture” while promoting censorship; conflating speech *reactions* with speech *restrictions*; equating the right to speak with the right to an audience; alternately invoking and dismissing the state action doctrine as their self-interest dictates—should raise far more alarms about freedom of expression in law schools than any student protester.

45. James C. Ho & Elizabeth L. Branch, *Stop the Chaos: Law Schools Need to Crack Down on Student Disrupters Now*, NAT'L REV. (Mar. 15, 2023, 1:30 PM), [nationalreview.com/2023/03/stop-the-chaos-law-schools-need-to-crack-down-on-student-disrupters-now](https://www.nationalreview.com/2023/03/stop-the-chaos-law-schools-need-to-crack-down-on-student-disrupters-now) [<https://perma.cc/6AYW-W57J>].

46. Elie Mystal, *Protesting an Anti-Trans Trump Judge Isn't Disrespectful, It's American*, NATION (Mar. 15, 2023, 3:31 PM), <https://www.thenation.com/article/politics/protesting-anti-trans-judge-kyle-duncan-is-american> [<https://perma.cc/W6PE-Q23L>].

47. Neil Vigdor, *A Law Student Mocked the Federalist Society. It Jeopardized His Graduation*, N.Y. TIMES (June 3, 2021, 3:30 PM), <https://www.nytimes.com/2021/06/03/us/stanford-federalist-society-nicholas-wallace.html> [<https://perma.cc/9FHY-6PCR>].

48. *Id.*

49. *Id.*

Law schools need to be concerned about the current wave of government censorship not only because it is an urgent and important issue with particularly chilling implications for legal education, but also because law schools played a role in producing the political leaders who use their power to suppress free speech and deliberately misrepresent legal doctrine to the public.

III. HOW WE GET OUT

Though the terminology of choice shifts over time—political correctness, snowflake students, liberal intolerance, cancel culture—there is a persistent tendency in American society to fear and vilify younger generations, especially when they are attending institutions of higher learning. This tendency is not just destructive of the pedagogical project but is also easily harnessed by reactionary forces seeking to revert the country to a rigid racial patriarchy.⁵⁰ We are witnessing the consequences of this in real time, and we do not have long to figure out meaningful methods of resistance before anti-democratic forces become fully entrenched.

The first step in that resistance is recognizing the problem for what it is. The cancel-culture con⁵¹ has been allowed to go on for far too long; it is long past time to reject the clichés and grift of the politicized grievance industry. Attention is one of our most precious resources, and we should allocate the bulk of it to the existential, systematic threats to free speech and democracy, not to the distractions of subjective reports and cherry-picked anecdotes. While non-governmental actions certainly can have a detrimental impact on free expression, and aggressive displays of student intolerance do raise significant pedagogical and other expressive concerns, it is important to keep such issues in perspective. We should remain aware that their incidence and impact pale in comparison to the organized onslaught on free speech currently being waged by reactionary conservatives in positions of actual power, and recognize that the outsized attention they receive serve not only to distract from but also to justify state-sponsored censorship.

A. The Role of Law Schools

Law schools should be well positioned to help with the current tangle of competing and inconsistent free speech claims, as legal education

50. See Mary Anne Franks, *The Lost Cause of Free Speech*, 2 J. FREE SPEECH L. 337, 344 (2023).

51. *Id.* at 347.

emphasizes the importance of defining issues, identifying rules, and applying them to specific facts. What is more, given the extent to which freedom of expression is intertwined with legal doctrine, law students have unique opportunities to develop professional expertise in the complex law of the First Amendment and free speech. This expertise is an important counterweight to the rising influence of pseudolaw, which, like pseudoscience, can lead to serious confusion and injury to the public, especially when weaponized for political ends.

Accordingly, law schools should prioritize the teaching of First Amendment principles, not only in specialized classes but integrated more generally into the student experience. Arming students with accurate information about settled free speech doctrine, as well as highlighting areas of uncertainty and challenge, will help elevate the state of free speech discourse. This includes confronting the reality of how First Amendment doctrine has historically been applied, especially when it has tended to serve the interests of the powerful and the privileged. Law schools should encourage critical reflection about this fact and encourage students to explore alternatives to prevailing orthodoxy about free speech law and practice. As with other legal doctrines and questions, students should be urged to consider free speech issues not in the abstract, but in the context of specific facts, empirical and historical evidence, and evolving standards of justice, fairness, and equality.

One of the great gifts of legal education is the opportunity to wrestle seriously with the concept of harm, including the concept of reckless harm. Criminal and tort law define recklessness as the conscious disregard for a substantial and unjustified risk of harm to others. It is a mental state considered less culpable than actual intent to cause harm, but more culpable than a negligent failure to be aware of the risk of harm. Recklessness can be described as a product of selfishness more than malice; it is a risk calculation that values the potential of self-benefit more highly than the potential of harm to others. When the law imposes liability for recklessness, it serves as an important restraint on selfish risk-taking. By the same token, when risk-takers are allowed to offload the costs of their risky conduct onto others, it creates what economists call a “moral hazard,” or a perverse incentive to be reckless.

Accordingly, in many areas of the law, recklessness is viewed in a negative light: it is considered not only a legally culpable state of mind in many situations, but also a morally culpable one. In First Amendment law, however, recklessness is often treated as a virtue rather than a vice. The most commonly taught First Amendment cases involve speech that serves the speaker’s own self-interest while creating risks of harm to others: Ku Klux Klan members burning crosses, neo-Nazis brandishing

swastikas, corporations producing violent, misogynist pornography. In the prevailing First Amendment orthodoxy, reckless speech is privileged above all else.⁵²

Reckless speech is characterized by insincerity, sycophancy, and cowardice. Reckless speakers often distance themselves from the views they express; their speech flatters or legitimates those in power; and they are undeterred by the risk of harm to others created by their speech. Unsurprisingly, then, interpreting the right to free speech as the right to reckless speech perpetuates status quo hierarchies. As the costs of reckless speech will always disproportionately burden those with less power, unfettered reckless speech inevitably leads to antidemocratic outcomes.

But the privileging of reckless speech in First Amendment theory and practice is neither necessary nor inevitable. There is an alternative view of free speech, one that focuses on courageous, imaginative, and vulnerable speakers. This vision is based on *parrhesia*, the ancient Greek concept of speech essential to democracy, which, following Michel Foucault, is best translated as “fearless speech.”⁵³ Fearless speech has three fundamental characteristics: it is sincere, it is critical, and it is courageous. In contrast to the reckless speaker, the fearless speaker takes ownership of her positions and communicates them straightforwardly to her audience; her speech seeks to hold those in power accountable; and she is undeterred by the risk of harm to herself that her speech creates.

Where reckless speakers use speech to expand the influence of ruling elites, advance mob rule, and promote dangerous disinformation, fearless speakers use speech to challenge power and vindicate the rights of the oppressed. In contrast to a reckless speech culture that fetishizes speakers who endanger others for selfish ends, a fearless speech culture valorizes speakers who endanger themselves for the collective good.

Educational institutions, in particular law schools, can play a vital role in acknowledging the antidemocratic distortions that result from valorizing reckless speech and to encourage fearless speech as an alternative. First, they can provide students with accurate and comprehensive information about First Amendment doctrine, highlighting misinformation and disinformation about free speech law and its consequences while also acknowledging non-legal dimensions of freedom of expression. This should include not only rejecting false equivalences between

52. See generally Mary Anne Franks, *Fearless Speech*, 17 FIRST AMEND. L. REV. 294 (2019) (discussing the reckless speech standard and the need for a new model for free speech).

53. *Id.* at 294, 299.

government censorship and private regulation, but also emphasizing that the right *not* to speak and *not* to associate are themselves valuable exercises of the First Amendment, whether the entity in question is an individual or a private business.

Law schools can also deliberately seek to provide, through classroom instruction, extracurricular events, and invited speakers, examples of fearless speech, bearing in mind that the most consequential characteristic of fearless speech is the critique of power. While reckless speech that promotes hierarchies of race, gender, class, orientation, religion, or other arbitrary classifications might be *protected* under the First Amendment, it does not follow that such speech must be *promoted*. If a law school truly wishes to inspire courage and open-mindedness, it should give preference where possible to speech that challenges, or at least does not simply defer to or replicate, longstanding power asymmetries.

Law schools could also provide processes for student organizations and the student body as a whole to come together and share information in advance about the speaking invitations, providing students with meaningful opportunities to understand how institutional resources are allocated and to express concerns or questions about those allocations. Providing a forum for such conversations could help administrators identify and address potential conflicts before the fact, helping to avoid media spectacles that rarely serve the interests of anyone within the educational institution.

Law schools could also strive to provide more opportunities to explore how the much-touted value of “objectivity” in the face of prejudice or hatred might be a luxury more accessible to some students than others. It is all too easy for law professors to forget (or never consider) how their students’ lives might be precarious in ways that make it difficult for them to leave their personal experiences at the classroom door. Directly addressing those experiences can be a valuable exercise, particularly in the context of First Amendment law, to test whether and how cherished abstract legal principles actually work in practice.

Lost in the recurring moral panics over student intolerance is how often students have been among the most fearless speakers in society, and the most brutally suppressed. In 1968, state troopers opened fire on a student protest against racial segregation in Orangeburg, South Carolina, killing three and injuring twenty-eight.⁵⁴ Two years later, four students were shot and killed at Kent State during a protest against the Vietnam

54. Tim Arango, *Films Revisit Overlooked Shootings on a Black Campus*, N.Y. TIMES (Apr. 16, 2008), <https://www.nytimes.com/2008/04/16/arts/16oran.html> [<https://perma.cc/A3M8-2QUU>].

War; eleven days later two more students, including a law student, were killed at Jackson State College during an antiwar protest.⁵⁵

In February 1943, University of Munich student Sophie Scholl, a member of The White Rose resistance movement against the Nazis, was caught distributing pamphlets detailing Nazi atrocities against the Jews.⁵⁶ In one of their pamphlets, the group promised that they would “not be silent . . . The White Rose will not leave you in peace!”⁵⁷ Twenty-one year old Scholl and two other members of the group were sentenced to death. Before she was led to the guillotine, Scholl asked, “what difference does my death make if our actions arouse thousands of people? The students will definitely rise up.”⁵⁸

These fearless student speakers remind us that we do not have to settle for a version of free speech that is indifferent to harm and makes a virtue of recklessness. We can imagine different and better laws, different and better worlds, and work, fearlessly, to make them real.

55. Samuel B. Hoff & Carlos Holmes, *Kent State and Jackson State: Remembering the Age of Student Protests: 1968 to 1970*, USA TODAY (May 10, 2020), <https://www.delawareonline.com/story/opinion/contributors/2020/05/10/kent-state-and-jackson-state-remembering-age-student-protests-1968-1970/3094968001> [<https://perma.cc/PC9H-9LR5>].

56. ANNETTE DUMBACH & JUD NEWBORN, *SOPHIE SCHOLL AND THE WHITE ROSE* (3d ed. 2018).

57. *Id.* at 198.

58. *Id.* at 152.
