

FREE SPEECH ON CAMPUS: THE ATTACK FROM WITHIN

*Kevin T. Baine**

I. INTRODUCTION

For some time now, it has been apparent that free speech is under attack on university campuses—where controversial speakers are shouted down or uninvited, faculty members are threatened with discipline for expressing unpopular views, and students are afraid to speak their minds for fear of being ostracized or harassed by their peers. That is not how things are supposed to be. A university is supposed to be a bastion of free speech. Every university worth its salt proclaims itself as a place where ideas are freely expressed, vigorously debated, and openly challenged. That is the very idea of a university. It is also the liberal ideal and the foundation of democratic government.

The reality on university campuses, however, is nowhere close to the ideal. However much these institutions proclaim a commitment to freedom of thought and expression, the reality is that many students and faculty members don't *feel* free to express their opinions. Recent surveys show that as many as two-thirds of college students are reluctant to speak freely on controversial issues for fear that their peers might find their opinions offensive.¹ Faculty members, too, are afraid to express

* I am grateful to Robert Post for his helpful comments on earlier drafts of this Article.

1. JONATHAN RAUCH, THE CONSTITUTION OF KNOWLEDGE: A DEFENSE OF TRUTH 13, 221-22 (Bookings Inst. Press 2021); see College Pulse, *Free Expression on College Campuses*, KNIGHT FOUND. 12 (May 13, 2019), <https://knightfoundation.org/reports/free-expression-college-campuses> [<https://perma.cc/M98K-RVQH>]; Jeffrey M. Jones, *More U.S. College Students Say Campus Climate Deters Speech*, GALLUP (Mar. 12, 2018), <https://news.gallup.com/poll/229085/college-students-say-campus-climate-deters-speech.aspx> [<https://perma.cc/QU8S-GH7G>]; Melissa Stiksma, *Understanding the Campus Expression Climate*, HETERODOX ACAD. (2020), <https://heterodoxacademy.org/wp-content/uploads/2021/03/CES-Report-2020.pdf> [<https://perma.cc/4A4Z-CSDR>]; Foundation for Individual Rights in Education (“FIRE”), *College Free Speech Rankings: What’s the Climate for Free Speech on America’s College Campuses?*, FIRE 18-20 (2021), <https://www.thefire.org/sites/default/files/2021/09/24110044/2021-CFSR-Report-v2.pdf>

their views lest they be attacked by students. In his book *The Constitution of Knowledge*, Jonathan Rauch quotes a professor at a “conservative-leaning” university as saying, “[e]veryone is ‘careful’ on campus these days. Including me: I have not and will not discuss my research on affirmative action and diversity outside my own classroom.”² A world-renowned psychologist from NYU said the same thing,

I don’t take any chances at NYU. I don’t say anything controversial . . . [A]t NYU, there’s a sign in every bathroom telling students what number to call or what email to send to report me or anyone else who says something that they think is offensive. So I just don’t take chances at NYU.³

These fears may not be shared universally, but neither are they uncommon or unfounded, nor are they confined to undergraduate institutions. At Yale Law School, an associate dean and a diversity director threatened to withhold a bar recommendation from a student unless he apologized for an invitation he sent for the inauguration of the Native American Law Students Association’s “Trap House,” where Popeye’s chicken and “American-themed snacks (like apple pie, etc.)” would be served.⁴ (According to the Urban Dictionary, the term “Trap House” was “[o]riginally used to describe a crack house in a shady neighborhood” but “has since been abused by high school students who like to pretend they’re cool by drinking their mom’s beer together.”)⁵ The student was told that not only did the reference to Trap House and fried chicken have negative racial connotations, but the issuance of the invitation in

[https://perma.cc/79MK-AJYS]; Kelsey Ann Naughton et al., *Speaking Freely: What Students Think About Expression at American Colleges*, FIRE 3, 9 (Oct. 2017), <https://www.thefire.org/research-learn/student-attitudes-free-speech-survey>

[https://perma.cc/FVU4-TNP4]; FIRE, *Just Released: The 2022-2023 College Free Speech Rankings*, FIRE (Sept. 7, 2022), <https://www.thefire.org/news/just-released-2022-2023-college-free-speech-rankings> [https://perma.cc/SP4B-NPFF].

2. RAUCH, *supra* note 1, at 13.

3. *Id.* at 14.

4. Ruth Marcus, *At Yale Law School, a Party Invitation Ignites a Firestorm*, WASH. POST (Oct. 14, 2021, 7:04 PM), <https://www.washingtonpost.com/opinions/2021/10/14/yale-law-school-party-invitation-trap-house> [https://perma.cc/8M9H-S6VU]; Debra Cassens Weiss, *Yale Law School Sought 2L’s Apology for ‘Trap House’ Constitution Day Invitation, Citing ‘Triggering Associations’*, ABA J. (Oct. 18, 2021, 9:16 AM), <https://www.abajournal.com/news/article/yale-law-school-sought-2ls-apology-for-trap-house-constitution-day-invitation-citing-triggering-associations> [https://perma.cc/DAZ9-8QSN]; Eda Aker, *Email from Yale Law Student Sparks National Discussion on Racism and Free Speech*, YALE DAILY NEWS (Oct. 19, 2021, 1:51 AM), <https://yaledailynews.com/blog/2021/10/19/email-from-yale-law-student-sparks-national-discussion-on-racism-and-free-speech> [https://perma.cc/DQ9T-AR6L].

5. *Traphouse*, URB. DICTIONARY, <https://www.urbandictionary.com/define.php?term=traphouse> [https://perma.cc/2XPP-LE4U] (last visited Apr. 1, 2023).

collaboration with the Federalist Society, to which the student also belonged, was itself “very triggering for students who already feel like FedSoc belongs to political affiliations that are oppressive to certain communities.”⁶ No wonder conservatives are reluctant to speak their minds in colleges and law schools.

Several years ago, I asked members of the Federalist Society and American Constitution Society at a leading law school whether a student would feel free in a Constitutional Law class to argue that *Roe v. Wade* should be overruled, or that the Constitution should not be interpreted to guarantee the right to same-sex marriage. The Federalist Society representative said no—in fact, other students had told him they were reluctant to express those views in class. The fear was not that the professor would disapprove, but that fellow students would.

What this student was describing is what John Stuart Mill called “the tyranny of the prevailing opinion and feeling.”⁷ Mill thought that the greatest threat to freedom comes not from state repression, but from the pressure of social conformity.⁸ That pressure, it seems, is very real on university campuses.⁹

II. THE ON-CAMPUS CHALLENGE TO THE LIBERAL IDEAL

Free speech controversies on campus are not new, but there seems to be an increasing number in recent years. And the increase in number seems to reflect skepticism about the liberal ideal of freedom of speech itself. Ironically, that skepticism on campus appears to come primarily from the liberal end of the political spectrum. There were times, to be sure, when the pressure on scholars came primarily from the right—when liberal professors, for example, feared being branded as communists. And in more recent times, liberals, as well as conservatives, have been heckled and threatened by activists who disagree with them.¹⁰ In the political realm these days, the attacks on freedom of speech and the press come primarily from the right—from politicians who invoke

6. Marcus, *supra* note 4.

7. JOHN STUART MILL, ON LIBERTY 9 (Batoche Books, Ltd. 2001) (1859).

8. *Id.*; RAUCH, *supra* note 1, at 193.

9. Of course, an opinion or feeling that prevails on campus may not prevail in the country at large. But the pressure of social conformity works at the level of the particular community in which a person finds oneself.

10. See, e.g., Robby Soave, *Snowflakes on the Right: Conservative Hecklers Shut Down Speakers at Whittier College*, REASON (Oct. 16, 2017, 7:50 AM), <https://reason.com/2017/10/16/whittier-college-speakers-trump-shutdown> [<https://perma.cc/P23T-DG5J>]; Colleen Flaherty, ‘Concession to Violent Intimidation,’ INSIDE HIGHER ED (June 1, 2017), <https://www.insidehighered.com/news/2017/06/01/princeton-professor-who-criticized-trump-cancels-events-saying-shes-received-death> [<https://perma.cc/4P56-DW6A>].

the battle cry “fake news” and from state officials who seek to restrict what may be taught in state universities.¹¹ But for the most part, the explicit challenge to free speech *from within* the academic community does not come from the right. It comes primarily from the left.¹² It reveals a significant division on the left, however, between those who adhere to the liberal model of free speech and those who are skeptical of it.

There are, as I see it, two bases for this skepticism. The first is a generational one. Secondary school teachers in Washington, D.C. tell me that there has been a marked change in the attitude of young people toward freedom of speech over the last ten years. A decade ago, students invariably took the free-speech side of speech-related controversies, instinctively coming to the defense of those who express unpopular views. Today, not so much. While there is no single explanation for this shift, one stands out among all others—the influence of social media and its capacity to inflict injury. On social media, personal criticism and insults achieve instantaneous and wide circulation, often with devastating effects. Young people who have grown up in that environment seem to view speech as an instrument of harm as much as an engine for truth.

The second basis for the growing skepticism about the liberal model of free speech is a more ideological or political one. It is driven by a renewed, admirable commitment to eliminating racial inequality and promoting social justice. In liberal thought, equality and liberty go hand in hand. But in the real world of politics, they are often in tension. To oversimplify, those on the political left tend to prioritize equality, and those on the right tend to prioritize liberty. And those who are on the forefront of the contemporary demand for racial equality and social justice sometimes tend to prioritize those values over freedom of expression. Combine this demand for racial equality and social justice with the injuries inflicted by social media, and the argument becomes: “Free

11. See Young et al., *America's Censored Classrooms*, PEN AM. (Aug. 17, 2022), <https://pen.org/report/Americas-censored-classrooms> [<https://perma.cc/R SX2-C728>].

12. A study by FIRE found that roughly two-thirds of the challenges to faculty speech in 2021 came from individuals or groups to the political left of the targeted professor, and one-third came from the right. *Scholars Under Fire: 2021 Year in Review*, FIRE, <https://www.thefire.org/research/publications/miscellaneous-publications/scholars-under-fire/scholars-under-fire-2021-year-in-review-full-text> [<https://perma.cc/4UBU-YATB>] (last visited Apr. 1, 2023). An analysis of the FIRE database over the last seven years shows that over three-quarters of the challenges from the left of the targeted professor were initiated from within the academic community by students, administrators, or other scholars, while most of the challenges from the right of the targeted professor were due to pressures from politicians, public figures, and the general public. *Id.* Of the challenges that came from within the academic community, roughly three-quarters were from the left of the targeted professor. *Id.*

speech . . . may sound good on paper, . . . but in the real world it defames, oppresses, and injures minorities and the marginalized.”¹³

This outlook is a far cry from the liberal ideal of free speech. In fact, it echoes the themes of two related movements that have questioned elements of the liberal tradition—the critical legal studies movement and critical race theory. A central theme of the critical legal studies movement is that not every case has one correct outcome—that the choice of outcomes inevitably reflects political and social values, and as a result the judicial system “enforces . . . and legitimizes dominant social and power relations.”¹⁴ In other words, law works to protect the interests of the powerful and perpetuate oppression of the marginalized.

Critical race theory applies that perception to issues of race.¹⁵ One consequence is that, in the words of one of its founders, Richard Delgado, and his co-author Jean Stefancic, “critical race scholars are discontented with liberalism as a framework for addressing America’s racial problems.”¹⁶ Among other things, they are “suspicious of . . . rights”—including the right to freedom of speech—because “rights are almost always procedural” rather than result-oriented, and because they “are almost always cut back when they conflict with the interests of the powerful.”¹⁷ “For example,” Delgado and Stefancic write, “hate speech, which targets mainly minorities, gays, lesbians, and other outsiders, receives legal protection, while speech that offends the interests of empowered groups finds a ready exception in First Amendment law.”¹⁸

Because the skeptical outlook toward freedom of speech that has emerged in recent years so closely tracks these themes of the critical legal studies movement and critical race theory, I call it *critical speech theory*.¹⁹ Critical speech theory, as I see it, holds that speech is as much a

13. RAUCH, *supra* note 1, at 251.

14. POLITICS OF LAW: A PROGRESSIVE CRITIQUE 3-5, 14-15 (David Kairys ed., Basic Books 3d ed. 1998); *see also* ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE 14-15 (1990).

15. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY 5 (NYU Press 3d ed. 2017).

16. *Id.* at 26.

17. *Id.* at 28-29. Note that Delgado and Stefancic write that critical race scholars are “suspicious” of rights, not that they have given up altogether on the efficacy of legal rights, as many critical legal studies scholars have. *Id.* Critical race theorists recognize that the successful assertion of legal rights has done much to advance the opportunities and well-being of oppressed groups.

18. *Id.* at 29.

19. Using the term “critical speech theory” risks its being caricatured and politicized in the way that critical race theory has been. That is not my intention. Critical race theory is a serious scholarly approach to issues of race, racism, and power that, in Delgado and Stefancic’s words, “questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.” DELGADO & STEFANCIC,

force for evil as it is for good. It is not only a means to pursue knowledge and truth, but also a weapon wielded by the powerful to subjugate the oppressed. When *speech* is seen that way, *freedom of speech* becomes not so much the foundation of a democratic society as an obstacle to the creation of a more just and egalitarian one. Critical speech theory sees speech that conflicts with the goal of social justice and says it should be suppressed. Free speech theory says that the way to deal with unjust speech, however that is defined, is to tolerate it, attack it, and watch it die of its own weight. These two approaches to speech are at war on college campuses, as illustrated by the recent controversy at Princeton University over a professor's criticism of a Black student group.

III. THE JOSHUA KATZ CASE

At Princeton, a group of faculty members and staff published an open letter in 2020 containing forty-eight demands to enable the University “to become, for the first time in its history, an anti-racist institution.”²⁰ Joshua Katz, a long-standing member of the Classics Department, published a letter in response, saying that he agreed with some of the demands but disagreed with many—including giving faculty of color course relief, summer salary, and an extra semester of sabbatical; creating a faculty committee to investigate and discipline “racist behaviors, incidents, research, and publication”; and issuing a formal, public apology to the members of the Black Justice League, which had been active on campus from 2014 to 2016.²¹ Here is what Professor Katz said about that group:

The Black Justice League . . . was a small local terrorist organization that made life miserable for the many (including the many black students) who did not agree with its members' demands. Recently I watched an “Instagram Live” of one of its alumni leaders, who—emboldened by recent events and egged on by over 200 supporters who were baying for blood—presided over what was effectively a

supra note 15, at 3. This essay does not purport to address the broad range of issues addressed by critical race theory, only the issues presented by what I call critical speech theory.

20. See Brett Tomlinson, *On the Campus: Faculty Members Propose an Anti-Racism Agenda*, PRINCETON ALUMNI WKLY. (July 13, 2020), <https://paw.princeton.edu/article/faculty-members-propose-anti-racism-agenda> [<https://perma.cc/S5SG-Q3NG>]; Letter from Princeton University faculty and staff, to Christopher L. Eisgruber, President, Princeton University (July 4, 2020), https://docs.google.com/forms/d/e/1FAIpQLSfPmfeDKBi25_7rUTKkhZ3cyMICQicp05ReVaeBpEdYUCkyIA/viewform [<https://perma.cc/FC7W-FXV5>].

21. Joshua T. Katz, *A Declaration of Independence by a Princeton Professor*, QUILLETTE (July 8, 2020), <https://quillette.com/2020/07/08/a-declaration-of-independence-by-a-princeton-professor> [<https://perma.cc/VNU9-W88Y>].

Struggle Session against one of his former classmates. It was one of the most evil things I have ever witnessed, and I do not say this lightly.²²

In a court of law, calling the Black Justice League a “terrorist organization” would almost certainly be protected as “rhetorical hyperbole”—a provocative phrase used to highlight the psychological coercion of the “Struggle Session” Katz described, not a false accusation of murderous conduct.²³ But to Katz’s colleagues in the Classics Department and to the University’s President, it was irresponsible. His colleagues posted a statement condemning his words, and the President, Christopher Eisgruber, issued a strong statement objecting to his description of the student group as false:

While free speech permits students and faculty to make arguments that are bold, provocative, or even offensive, we all have an obligation to exercise that right responsibly Joshua Katz has failed to do so, and I object personally and strongly to his false description of a Princeton student group as a “local terrorist organization.”

By ignoring the critical distinction between lawful protest and unlawful violence, Dr. Katz has unfairly disparaged members of the Black Justice League, students who protested and spoke about controversial topics but neither threatened nor committed any violent acts.²⁴

A spokesman initially said that the University would be looking into the matter, which raised the possibility of a disciplinary proceeding.²⁵ But a week later, President Eisgruber clarified that Katz was not under investigation. Eisgruber, himself a constitutional scholar, explained in an op-ed in *The Daily Princetonian* that Katz “can be answered but not censored or sanctioned.”²⁶ “Our policies,” he wrote, “protect Katz’s

22. *Id.*

23. See, e.g., *Greenbelt Coop. Publ’g Ass’n, Inc. v. Bresler*, 398 U.S. 6, 13-14 (1970) (holding that the characterization of a real estate developer’s negotiating position as “blackmail” was protected as “rhetorical hyperbole” because “[n]o reader could have thought” the term was meant to accuse the target with the commission of a crime); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 284-86 (1974) (holding that the characterization of workers who refused to join a union as “traitors” was protected as “rhetorical hyperbole”—“a lusty and imaginative expression of . . . contempt”).

24. Marie-Rose Sheinerman, *Eisgruber Condemns Professor’s Op-ed That Called Black Justice League a ‘Terrorist Organization,’* DAILY PRINCETONIAN (July 12, 2020, 7:19 PM), <https://www.dailyprincetonian.com/article/2020/07/joshua-katz-black-justice-league-terrorist-organization-quillette-letter-princeton> [<https://perma.cc/34WD-DWXX>].

25. *Id.*

26. See Christopher L. Eisgruber, *Why Mutual Respect Makes Free Speech Better*, DAILY PRINCETONIAN (July 20, 2020, 8:11 PM),

freedom to say what he did, just as they protected the Black Justice League's."²⁷ This was a classic defense of the liberal ideal of free speech, drawn straight from the Chicago Principles that had been adopted by the Princeton faculty in 2015. They state in relevant part:

[T]he University . . . guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn

. . . [I]t is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive

. . .

In a word, the University's fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed.²⁸

President Eisgruber's statement ended the disciplinary threat, but it was not the end of the matter. Katz was subjected to strong criticism in a segment on race and free speech that was published on the University's website and included in the following year's orientation of first-year students.²⁹ Eddie S. Glaude, Jr., Chair of the African American Studies Department, was quoted as saying that "Professor Katz . . . seems not to regard people like me as essential features, or persons, of Princeton."³⁰ Another faculty member called Katz's letter "race-baiting, disguised as free speech."³¹ And in a video panel presented to the incoming students,

<https://www.dailyprincetonian.com/article/2020/07/christopher-eisgruber-joshua-katz-free-speech-inclusivity-letter> [<https://perma.cc/UY35-7HPN>].

27. *Id.*

28. *Rights, Rules, Responsibilities: 1.1 University Principles of General Conduct and Regulations*, PRINCETON UNIV., <https://rrr.princeton.edu/university> [<https://perma.cc/U553-JMUS>] (last visited Apr. 1, 2023); see *Report of the Committee on Freedom of Expression*, UNIV. OF CHI., <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf> [<https://perma.cc/VY3Y-JXSB>] (last visited Apr. 1, 2023).

29. See *To Be Known and Heard: Race and Free Speech*, PRINCETON UNIV., <http://knownandheard.princeton.edu/race-and-free-speech> [<https://perma.cc/EF3Z-EXLK>] (last visited Apr. 1, 2023). As Katz's defenders were quick to note, however, the initial version of that segment misquoted him—by omitting the parenthetical "including the many black students" from the critical sentence of Katz's letter: "The Black Justice League . . . was a small local terrorist organization that made life miserable for the many (including the many black students) who did not agree with its members' demands." Paige Cromley, *Responding to Academic Freedom Group's Letter, Eisgruber Resists Removing Segment on Prof. Joshua Katz from 'To Be Known and Heard,'* DAILY PRINCETONIAN (Apr. 1, 2022, 12:00 AM), <https://www.dailyprincetonian.com/article/2022/04/princeton-eisgruber-response-academic-freedom-alliance-joshua-katz-to-be-known-and-heard> [<https://perma.cc/VS82-KTAP>]. That omission was subsequently corrected. *Id.*

30. *To Be Known and Heard: Race and Free Speech*, *supra* note 29.

31. *Id.*

Dan-el Padilla Peralta, a colleague of Katz's in the Classics Department, took issue with those on the faculty who had defended Katz's right to express his views as he had. Theirs was a "masculinized bravado" sense of free speech, Professor Padilla Peralta said.³² His vision of free speech was different: it had but "one specific aim, and that aim is the promotion of social justice and an anti-racist social justice at that."³³ Here was an articulation of critical speech theory: speech that advances a more just and egalitarian world is worthy of protection, but speech that contradicts that vision is not. The problem with that theory, of course, is that it assumes what a system of free speech seeks to identify—what a just and egalitarian world looks like.³⁴

By now the battle lines were drawn at Princeton, and Professor Katz, it turns out, was vulnerable. Fifteen years earlier, he had been suspended for a year based on a forbidden sexual relationship with a student. The investigation and discipline had been confidential. But now, several women came forward to *The Daily Princetonian*, which conducted a lengthy investigation of Katz's personal conduct with female students. That investigation "uncovered allegations that Katz crossed professional boundaries with three of his female students."³⁵ The most serious allegation was the sexual relationship that had resulted in Katz's suspension, which the *Princetonian* now reported for the first time.³⁶

32. *To Be Known and Heard: Systemic Racism and Princeton University - Orientation Video*, KALTURA, https://www.kaltura.com/index.php/extwidget/preview/partner_id/1449362/uiconf_id/14292362/entry_id/1_oh5fvcjc/embed/dynamic [<https://perma.cc/6XQ5-7649>] (last visited Apr. 1, 2023).

33. *Id.*

34. In apparent response to complaints about the prior year's orientation program, the 2022 orientation contained a program on "Free Expression at Princeton," featuring remarks by President Eisgruber and the president of a student organization that had been established in opposition to the Black Justice League. Laura Robertson, *New University Orientation Event on Free Speech Garners Mixed Reaction Among First-Years*, DAILY PRINCETONIAN (Sept. 8, 2022, 11:59 PM), <https://www.dailyprincetonian.com/article/2022/09/free-speech-princeton-university-orientation-event-poccc> [<https://perma.cc/2SDG-6PRT>]. The program's description stated that "free expression is a foundational value at a university," and explained that the program would explore "how Princeton articulates this value, why [it] is important to our work as scholars, and how it aligns with our principles as an inclusive community." *Id.*

35. Marie-Rose Sheinerman & Evelyn Doskoch, *Alumni Allege History of Inappropriate Conduct with Female Students by Princeton Professor Joshua Katz*, DAILY PRINCETONIAN (Feb. 4, 2021, 7:38 PM), <https://www.dailyprincetonian.com/article/2021/02/alumni-allegations-princeton-joshua-katz> [<https://perma.cc/2JR2-QRNR>].

36. See Evelyn Doskoch & Paige Cromley, *Princeton Dismisses Professor Joshua Katz 'Effective Immediately' After U. Investigation Finds Policy Violations*, DAILY PRINCETONIAN (May 23, 2022, 6:30 PM), <https://www.dailyprincetonian.com/article/2022/05/princeton-professor-joshua-katz-fired-classics-investigation-board-of-trustees> [<https://perma.cc/4S8P-6YGT>]. The other allegations involved boundary violations—taking two female students out to dinner, commenting on personal appearance, and the like. Sheinerman & Doskoch, *supra* note 35.

The woman involved in that affair had not cooperated with the disciplinary investigation fifteen years earlier, nor had she spoken to the *Princetonian*. But after the *Princetonian* article was published, she told the University that Katz had discouraged her from cooperating with its prior investigation and had also discouraged her from seeking counseling at the student infirmary while the affair was ongoing, lest it be discovered. Professor Katz disputed those claims,³⁷ but the University reopened the case, credited the new charges, and terminated his employment.³⁸ Katz's supporters claimed retaliation,³⁹ but the University insisted that Katz's comments had nothing to do with his dismissal.⁴⁰ Katz's controversial comments may not have been the reason for his dismissal, but it is difficult to escape the conclusion that those comments—and the reaction to them—triggered the events that led to the reopening of his case and the decision to terminate his employment.

There are many lessons to be learned from the Katz case. For present purposes, however, the case is interesting because of the contrasting approaches to free speech that it exposed. The traditional notion of freedom of speech undoubtedly protected Professor Katz's criticism of the Black Justice League, however offensive it was to many on campus. What I have called critical speech theory, on the other hand, would leave his criticism open to punishment. But that raises a series of questions: Who is to say that Katz's criticism of the Black Student League was beyond the pale? Some central authority? How would that decision be made? By majority vote? And what impact would a decision to punish Katz have on others who might venture unpopular views? Katz used strong language, but he had a point. No doubt many on campus agreed with him and many disagreed. But even if the vast majority disagreed,

37. Joshua Katz, *Princeton Fed Me to the Cancel Culture Mob*, WALL ST. J. (May 24, 2022, 10:07 AM), <https://www.wsj.com/amp/articles/joshua-katz-princeton-campus-cancel-culture-woke-mob-11653350161> [<https://perma.cc/4WMR-MDAT>].

38. See Doskoch & Cromley, *supra* note 36; Evelyn Doskoch & Paige Cromley, *Eisgruber Recommends Joshua Katz's Dismissal After University Investigation Finds Violations of Faculty Rules: Reports*, DAILY PRINCETONIAN (May 20, 2022, 7:19 AM), <https://www.dailyprincetonian.com/article/2022/05/joshua-katz-fired-eisgruber-princeton-classics-title-ix-inappropriate-sexual-conduct> [<https://perma.cc/L7B2-6ZDJ>].

39. See, e.g., Robert P. George, *Free Speech and Due Process at Princeton: The Case of Joshua Katz*, QUILLETTE (June 10, 2022), <https://quillette.com/2022/06/10/free-speech-and-due-process-at-princeton-the-case-of-joshua-katz> [<https://perma.cc/4HNY-CNPK>].

40. Hope Perry, *Eisgruber Defends Free Speech Policy, Discusses Mental Health Crisis in Annual Alumni Address*, DAILY PRINCETONIAN (May 22, 2022, 12:53 PM), <https://www.dailyprincetonian.com/article/2022/05/princeton-university-christopher-eisgruber-alumni-address-reunions-joshua-katz-free-speech-divestment-financial-aid-covid-19> [<https://perma.cc/V2BV-GHCR>].

might they not have considered whether there was at least some partial truth to what he said?

The liberal ideal does not trust any authority to judge the validity of Katz's criticism. It trusts instead that the truth will emerge—or at the very least that understanding will be advanced—through an honest exchange of views about how the Black Justice League treated those who disagreed with its demands, and whether Katz had fairly characterized the group's conduct. In a land of free, independent-minded people, there really is no other way to address such questions—no substitute, in other words, for the liberal ideal.

IV. A CLOSER LOOK AT THE LIBERAL IDEAL IN THE UNIVERSITY AND LAW SCHOOL SETTING

The liberal ideal of free speech is simple: freedom of speech is an important element of individual liberty; it is the way we advance knowledge and truth; and it is essential to a democratic form of government. These principles are well ingrained in American law and culture. “[T]he best test of truth,” law students learn early on, “is the power of the thought to get itself accepted in the competition of the market.”⁴¹ And “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”⁴²

In his classic work *On Liberty*, John Stuart Mill offered three arguments for protecting free speech—arguments that have been summarized by Keith Whittington of Princeton University as the argument from humility (we are fallible and need to listen to those with whom we disagree); the argument from arrogance (we need to be willing to allow others to hear from those with whom we disagree, because the “prevailing opinion on any subject is rarely or never the whole truth” and “it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied”⁴³); and the argument from conviction (we can only be confident in our own opinions if they have weathered serious challenge).⁴⁴ These are not only *arguments* in favor of free speech; they are also *attitudes* that are essential if free speech is to accomplish its

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

42. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis & Holmes, JJ., concurring). These principles leave room for imposing liability for various forms of tortious speech, such as defamation and professional malpractice, because in those instances cognizable harm to a specific person has already occurred and it is too late “to avert the evil by more speech.” *Id.*

43. MILL, *supra* note 7, at 50.

44. KEITH E. WHITTINGTON, *SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH* 39-45 (Robert P. George ed., Princeton Univ. Press 2018).

truth-seeking purpose. So, the questions that need to be asked in the university setting are these: Are today's students humble enough to acknowledge that they may be wrong? Are they willing to listen to opposing views and give them fair consideration? Are they prepared to subject their opinions to serious challenge?

While many students on campus may be fearful of *expressing* unpopular views, Jonathan Rauch, author of *The Constitution of Knowledge*, suggests that the majority of students are interested in *hearing* a diversity of views.⁴⁵ Rauch believes that what is at work on university campuses is not so much the tyranny of the majority as the “[t]yranny of the few.”⁴⁶ In other words, the pressure to conform to the prevailing opinion may be strong, but a majority of students wish it were not. If that is the case, then the liberal ideal of free speech in the student body is not dead, only at rest.

The liberal ideal invites, embraces, and welcomes speech that challenges the prevailing opinion.⁴⁷ Indeed, protecting that kind of speech is the principal thrust of the liberal ideal, for freedom of speech “is valuable only when the speech is threatening and unpopular.”⁴⁸ There are limits on freedom of speech in the university and law school settings, but they are few.

A. Competence

For faculty members, there is the limit of competence. A professor of history who denies that the Holocaust occurred is an incompetent historian, in the same way that a professor of physics would be incompetent if he were to deny the law of gravity. He is incompetent because he rejects the data of his discipline. But a professor of mathematics who denies the Holocaust is not for that reason an incompetent mathematician.⁴⁹ Competence and expertise are critical to the educational enterprise.⁵⁰ They are preconditions for membership in the faculty. And those who have proven expertise in a field may judge the competence of others according to the standards of their field. They may also grade their

45. See RAUCH, *supra* note 1, at 245.

46. *Id.* at 228-29.

47. As Mill put it: “Precisely because the tyranny of opinion is such as to make eccentricity a reproach, it is desirable, in order to break through that tyranny, that people should be eccentric.” MILL, *supra* note 7, at 62-63.

48. *Stevens v. Tillman*, 855 F.2d 394, 399 (7th Cir. 1988).

49. Whether a math professor who denies the Holocaust has, by virtue of that comment or the totality of his conduct, violated the institution's non-discrimination norm is another matter. See *infra* Part IV.C.1.

50. See ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 66-68 (Yale Univ. Press 2012).

students. Students need not demonstrate their competence before they enter the classroom. But their incompetence at the end of the course may result in a failing grade.

B. Civility and Respect

What about civility and respect? Can student or faculty speech be censored because it is disrespectful or uncivil? The Chicago Principles say no:

Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.⁵¹

That does not mean that personal harassment and bullying must be tolerated. Concerns about civility and respect cannot justify “closing off discussion.”⁵² But direct harassment and bullying of specific individuals has little to do with the discussion of ideas, and undergraduate institutions in particular have a strong interest in protecting students against that kind of conduct, strictly defined.⁵³ Most universities have narrowly drawn policies that prohibit student conduct amounting to harassment or bullying—conduct or speech that is directed toward a person, that is intended to (and in fact does) cause physical harm or substantial emotional distress, and that does not serve a legitimate purpose.⁵⁴ That is a strict

51. *Report of the Committee on Freedom of Expression, supra* note 28; *Rights, Rules, Responsibilities: 1.1.3 Statement on Freedom of Expression, supra* note 28.

52. *Id.* The line between protected “discussion of ideas” and unprotected action may not always be clear—actions often communicate ideas. *See, e.g.,* *United States v. O’Brien*, 391 U.S. 367, 376 (1968). But some distinction between expression and action has always been part of free-speech theory, and “discussion of ideas” is a concept that is not difficult to apply in a law school or university setting.

53. *See, e.g.,* *Eisgruber, supra* note 26.

54. Typical definitions are those adopted by the University of Michigan:

Bullying: any written, verbal, or physical act, or any electronic communication, directed toward a person that is intended to cause or that a reasonable person would know is likely to cause, and that actually causes, physical harm or substantial emotional distress and thereby adversely affects the ability of another person to participate in or benefit from the University’s educational programs or activities. Bullying does not include constitutionally protected activity or conduct that serves a legitimate purpose.

Harassing: conduct directed toward a person that includes repeated or continuing unconsented contact that would cause a reasonable individual to suffer substantial emotional distress and that actually causes the person to suffer substantial emotional distress. Harassing does not include constitutionally protected activity or conduct that serves a legitimate purpose.

standard, consistent with the Supreme Court's definition of actionable harassment in *Davis v. Monroe County Board of Education*.⁵⁵ Fairly applied, it can easily be squared with the Chicago Principles and the liberal ideal. The discussion of ideas is protected even when, as in the political world, the ideas expressed are disrespectful and the tone is uncivil. But a line is crossed when speech or conduct is designed merely to intimidate individual students and is so extreme that it prevents a reasonably resilient student from reaping the benefits of the campus experience.

Broader concerns for respect and civility, beyond the narrow prohibitions of bullying and harassment, also have a place on campus. Respect and civility are important elements of any community—and of a community of scholars in particular. The academic community is “a conversational community” involved in “the collaborative pursuit of the truth,”⁵⁶ and conversations presume a level of respect and civility. By joining such a community, students assume an obligation not only to express their views with consideration for the feelings of others, but also to accord respect to those who disagree with them. It does not follow, however, that students should be subject to discipline on the ground that they have expressed themselves in a manner that is disrespectful or uncivil.

Universities are engaged in education, and they have an important educational function to perform here. Students should learn to understand that respect and civility are essential ingredients of effective speech, and that a climate of mutual respect is a necessary condition for free speech to accomplish its purpose. Insults rarely persuade anyone, and no one who lacks respect for those who disagree with him can hope to succeed in persuading those persons to change their minds. The humility that Mill describes as a *reason* for protecting speech is also an *essential element* of effective advocacy. Edward Bennett Williams, the great trial lawyer, once told me that the most important quality of a good trial lawyer is the ability to listen. Law students will never become effective advocates if they don't listen carefully and understand the point of view of their adversaries. And they will never persuade a judge or jury unless they argue with a healthy dose of civility and respect.

The point here is that the cultivation of civility and respect is itself part of the educational process. Student speech that is disrespectful of others, or uncivil in tone, offers an opportunity for education. But unless it amounts to individual harassment or bullying—or other conduct that

Definitions, Statement of Student Rights and Responsibilities, UNIV. OF MICH. (July 1, 2022), <https://oscr.umich.edu/article/definitions#ViolationG> [<https://perma.cc/4U2E-3BL5>].

55. 526 U.S. 629, 650 (1990).

56. ANTHONY T. KRONMAN, *THE ASSAULT ON AMERICAN EXCELLENCE* 16 (Free Press 2019); *see also id.* at 82-84.

interferes with the educational process, such as disrupting a class or shouting down a speaker—it is not an occasion for discipline in a law school or undergraduate institution.⁵⁷ When he was Dean of the Yale Law School, Judge Calabresi treated such occasions as teaching moments. In that way, he was often able to help students understand how their speech was harmful, without curtailing their ability to express the views they wished to express.⁵⁸ That is the liberal ideal in operation, and Dean Calabresi proved that it works. If offensive student speech is treated as a teaching moment, it will not only be tolerated but, at least to some degree, welcomed.

Faculty speech, on the other hand, is different. Faculty members are not in school to be educated; they are the educators. The strict definitions of harassment and bullying discussed above apply to students. Faculty members may be held to a stricter standard of civility—not only because their speech can inflict greater injury, but also because they are responsible for creating a climate of mutual respect and civility. A student who tells a fellow student that he is “a stupid idiot” may be counseled; a faculty member who says that may be disciplined.

C. Racially Offensive Speech

What about speech that is offensive on racial grounds? That is the speech that sparks the most controversy on university and law school campuses. Is there any reason to treat that kind of offensive speech differently from any other? As a general matter, the answer must be no, with one important qualification: a university or law school may insist on a commitment to non-discrimination and equal treatment of its students.

1. The Non-Negotiable Norm of Non-Discrimination

A professor who says “Blacks have no place in this institution” is repudiating a foundational principle of the institution and the legal system in which it operates. By openly and unambiguously advocating the

57. See generally Christopher L. Eisgruber, *Contested Civility: Free Speech and Inclusivity on Campus*, PRINCETON UNIV. (Nov. 12, 2019), <https://president.princeton.edu/blogs/contested-civility-free-speech-inclusivity-campus> [<https://perma.cc/RN6A-E2J5>] (discussing a university’s importance in articulating the meaning and value of free speech). Consideration of “the personal sensibilities of . . . other participants and audiences” is a more significant factor when dealing with adolescents in the high school setting. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (upholding discipline of high school student for offensively lewd and indecent speech at school assembly).

58. 2 NORMAN I. SILBER, *Conflict, Community, and Confidence: The Wall*, in *OUTSIDE IN: THE ORAL HISTORY OF GUIDO CALABRESI* 107-08, 113 (2022).

unlawful exclusion of a minority group, that professor disqualifies himself from the teaching role. So, too, does a professor who expresses unalloyed ill will, spite, or hatred toward a particular group. A professor who says, “I hate Jews” (or Catholics, or Blacks, or gays) cannot be expected to judge members of that group fairly or engage with them in a collaborative pursuit of truth.⁵⁹

At a bare minimum, a law school and a university may insist that those who hold positions on the faculty accept and embrace certain non-negotiable norms upon which the institution is founded. Freedom of speech is one of those norms. Non-discrimination is another. At times, those norms may be in tension. And the only way to resolve that tension, consistent with the liberal ideal, is to confine the non-discrimination norm to a very narrow category of speech that unambiguously contradicts what in this country and its educational institutions is accepted as established truth—that all men and women are created equal, possessed of the same human dignity, and entitled to equal treatment. On that principle, there can be no debate. On virtually everything else, there is room for the advancement of wisdom that freedom of speech can provide.

Unambiguous promotion of discrimination, or unvarnished expressions of racial or other group animus, may subject a speaker to punishment under this standard. But to justify punishment it is not enough simply to brand speech as racist or to label it hate speech. Whether an expression is racist is often a matter of opinion. Indeed, as Judge Frank Easterbrook has observed, that term “has been watered down by overuse, becoming common coin in political discourse.”⁶⁰ The hate-speech label is also without clear meaning and has too often been applied to suppress disfavored ideas.⁶¹ Speech bearing those labels may well violate the non-negotiable norm of non-discrimination, but often it does not. Two recent cases at one of the nation’s leading law schools illustrate the point.⁶²

59. Likewise, a *student* who expresses such views cannot be expected to collaborate with other students who belong to the groups whose basic rights and dignity he denies. Discipline, therefore, is justified in such a case. But even here, there may be room for the educational function to operate: the university experience may well change or soften such views.

60. *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988).

61. See generally WHITTINGTON, *supra* note 44, at 77-94 (“The term ‘hate speech’ itself does not refer to a legally recognized category of expression, and proponents of the view that hate speech is or should be unprotected have difficulty agreeing on what the concept is supposed to include.”); see also Olivia Glunz, *Seeking Justice, Seeking Truth: A Conversation with Nadine Strossen*, ACAD. FREEDOM ALL. (Aug. 26, 2022), <https://academicfreedom.org/seeking-justice-seeking-truth-a-conversation-with-nadine-strossen> [<https://perma.cc/JKY9-HRNJ>].

62. See Lauren Lumpkin, *Georgetown Law Professor Terminated After ‘Reprehensible’ Comments About Black Students*, WASH. POST (Mar. 11, 2021, 6:44 PM), <https://www.washingtonpost.com/local/education/georgetown-law-sandra-sellers-black->

2. The Georgetown Cases

In the first case, an adjunct professor at the Georgetown University Law Center was terminated after she was overheard commiserating with her fellow-teacher (another adjunct) about the poor performance of Black students in their class.⁶³ The comments were made in what the professors believed was a private conversation at the conclusion of a videotaped class, but the comments were captured on the video and circulated widely. Her precise words were:

And you know what, I hate to say this, I end up having this angst every semester that a lot of my lower ones are Blacks. Happens almost every semester And it's like, "Oh, come on." You get some really good ones, but there are also usually some that are just plain at the bottom. It drives me crazy.⁶⁴

When this video surfaced, the Black Law Students Association submitted a letter endorsed by over 1900 students, former students, and organizations at Georgetown and elsewhere demanding the adjunct professor's immediate termination.⁶⁵ Calling her comments "reprehensible" and "abhorrent," the Dean proceeded to announce that she was terminated.⁶⁶ The adjunct professor resigned instead, explaining that "I would never do anything to intentionally hurt my students or Georgetown Law and wish I could take back my words."⁶⁷ But were her words so reprehensible and abhorrent that termination was warranted?

In its letter demanding the professor's termination, the Black Law Students Association condemned her remarks as "racist," and the Dean appeared to agree—noting the need to address "the many structural

students/2021/03/11/c798eae0-827d-11eb-ac37-4383f7709abe_story.html?utm_source=rss&utm_medium=referral&utm_campaign=wp_local-education [https://perma.cc/UJ48-NZZ9]; 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/G5KH-FCZR].

63. See Lumpkin, *supra* note 62; Catherine Thorbecke & Benjamin Siu, *Georgetown Law Professor Terminated After Remarks About Black Students*, ABC NEWS (Mar. 12, 2021, 1:26 PM), <https://abcnews.go.com/US/georgetown-law-professor-terminated-remarks-black-students/story?id=76413267> [https://perma.cc/KB9E-NJVD].

64. Thorbecke & Siu, *supra* note 63; see Lumpkin, *supra* note 62.

65. Letter from Geo. Black L. Students Ass'n, 2020–2021 Exec. Bd., to Geo. L. Admin., https://docs.google.com/document/d/1k8WdnOboHIX9H2Lh5ofjDGygjCeUnAYgYICBGBK4G1k/preview?pru=AAABeEXzhgk*YVAYnDkpyeqnG2AF [https://perma.cc/D9YA-6LDU].

66. Lumpkin, *supra* note 62. The other adjunct professor was placed on administrative leave. *Id.*

67. *Id.*

issues of racism reflected in this painful incident.”⁶⁸ The charge of racism, however, is not self-evident. More importantly, it does not address the relevant question. Here was a professor lamenting the fact that Black students had not done better in her class—honestly confronting with her co-teacher a concern that has been much discussed in the academic world and apologizing for the harm her private words had caused when they became public. The relevant question was not whether the comments in question can fairly be called racist—a matter on which opinions may differ—but whether the law school really wants to discourage these kinds of candid conversations within its faculty. The liberal ideal would say no. This was a serious discussion of a legitimate concern. One might fairly ask whether the professor had unwittingly disclosed the performance of identifiable students. But in the absence of evidence that the professor in fact discriminated against Black students in her class, there was no occasion for punishment.⁶⁹

In the second case, Ilya Shapiro, former vice president of the Cato Institute, was suspended with pay from a position he was about to assume as executive director of the Georgetown Center for the Constitution—for tweeting the following about President Biden’s imminent selection of a candidate to replace Justice Breyer on the Supreme Court:

Objectively best pick for Biden is Sri Srinivasan, who is solid prog & v smart. Even has identity politics benefit of being first Asian (Indian) American. But alas doesn’t fit into the latest intersectionality hierarchy so we’ll get lesser black woman. Thank heaven for small favors?

Because Biden said he’s only consider[ing] black women for SCOTUS, his nominee will always have an asterisk attached. Fitting that the Court takes up affirmative action next term.⁷⁰

68. Liana Hardy & Rachel Won, *GU Black Students, Faculty Demand Systemic Change Following Racist Remarks by GU Law Professor*, HOYA (Mar. 18, 2021), <https://thehoya.com/black-students-faculty-demand-systemic-change-following-racist-remarks-by-gu-law-professor> [<https://perma.cc/C9XE-9T88>].

69. A Dean always has discretion not to renew an adjunct professor’s appointment to teach a class. Even tenured faculty members have no right to teach a particular class—or to teach a class at all. But in this case, the public condemnation and termination suggested that the Dean was setting a standard for what is acceptable speech at the law school.

70. Eugene Volokh, *What are Georgetown Professors Forbidden to Say?*, REASON: THE VOLOKH CONSPIRACY (June 7, 2022, 11:29 AM), <https://reason.com/volokh/2022/06/07/what-are-georgetown-professors-forbidden-from-saying> [<https://perma.cc/D2H7-49RH>]; Lauren Lumpkin, *Incoming Georgetown Law Official Placed on Administrative Leave for Tweets About Supreme Court Pick*, WASH. POST (Jan. 31, 2022, 2:19 PM), <https://www.washingtonpost.com/education/2022/01/31/georgetown-law-ilya-shapiro-administrative-leave> [<https://perma.cc/S4KZ-HUY2>].

Shapiro quickly apologized for his admittedly “inartful” tweet and deleted it.⁷¹ But the day before he was scheduled to assume his position, the Dean placed him on paid administrative leave pending an investigation, explaining that the tweet was “antithetical to the work that we do here every day to build inclusion, belonging, and respect for diversity.”⁷² The investigation resulted in a report by the Office of Institutional Diversity, Equity, and Affirmative Action (“IDEAA”), which noted the following:

More than 1,000 students and student organizations signed a letter “to condemn his racist tweet” and to give voice to the “hurt felt today by the Black community, and in particular Black women.” . . . [M]any faculty, staff, alumni, and prospective students expressed their outrage, concern, and hurt. The evidence establishes that the Respondent’s conduct adversely affected the Law Center’s environment.⁷³

Ultimately, the Dean announced that Shapiro would not be disciplined for his tweet, but only because he had posted it a week before his employment began.⁷⁴ Shapiro then quit, saying he did not want to work in an environment in which he would face discipline for similar remarks in the future.⁷⁵

The Dean’s statements and the IDEAA report echo a concern that is often expressed about remarks that offend on racial grounds—that they conflict with the institution’s commitment to diversity, equity, and inclusion. That, however, is a much broader set of values than the non-negotiable norm of non-discrimination. Reasonable people can disagree on a whole range of policies that may be embraced under the rubric of diversity, equity, and inclusion.⁷⁶ And where there is even the slightest room for disagreement, the liberal ideal welcomes the disagreement.

71. Antonio Planas, *Georgetown Law Administrator Resigns After Probe Into Tweet About ‘Lesser Black Woman’ on Supreme Court*, NBC NEWS (June 7, 2022, 5:28 PM), <https://www.nbcnews.com/news/us-news/georgetown-law-administrator-resigns-probe-controversial-scotus-tweet-rcna32361> [<https://perma.cc/8HL2-F5ZA>].

72. Letter from William M. Treanor, Dean & Exec. Vice President, Geo. L., to Members of the Geo. L. Cmty. (Jan. 31, 2022), <https://www.law.georgetown.edu/dean-william-treanor-statement-update-on-ilya-shapiro> [<https://perma.cc/V4WE-7W5J>].

73. Volokh, *supra* note 70.

74. Letter from William M. Treanor, Dean & Exec. Vice President, Geo. L., to Members of the Geo. L. Cmty. (June 2, 2022), <https://www.law.georgetown.edu/deans-statement-re-ilya-shapiro> [<https://perma.cc/3NFT-SQ3K>].

75. Ilya Shapiro, *Why I Quit Georgetown*, WALL ST. J.: OP. (June 6, 2022, 8:45 AM), <https://www.wsj.com/articles/why-i-quit-georgetown-11654479763> [<https://perma.cc/HN2T-MZWQ>].

76. See, e.g., KRONMAN, *supra* note 56, at 119.

Opinions expressed by an individual faculty member may conflict with the institution's diversity and inclusion policies—a professor might, for example, question the law school's affirmative action policy. But the opinions of individual faculty members are unlikely to undermine the institution's perceived commitment to diversity, equity, and inclusion.⁷⁷ And if that is a concern, the obvious solution is for the institution to distance itself from those opinions and explain that they are protected by the institution's overriding commitment to freedom of expression—as President Eisgruber did in response to Joshua Katz's calling a Black student group a “terrorist organization.” Suppressing speech in the name of an institutional commitment to diversity, equity, and inclusion would be, as another former Dean of the Yale Law School has written, “an awful concession of weakness”⁷⁸—an admission that the institution is too fragile to permit truth to be revealed in this area through the normal give and take of open debate. A university that makes that concession will have abandoned something even more central to its mission than its policies of diversity, equity, and inclusion, however important those policies are.

The real harm of offensive faculty or student speech, however, is not the effect it might have on the perception of institutional values. It is, rather, the emotional and psychological impact such speech can have on members of the group that is affected—and the consequent impact on overall faculty and student morale. Individual faculty comments that cannot by any stretch be seen as reflecting the official position of the school may nevertheless make students feel less welcome. Remarks by fellow students may have the same effect. That is the harm referred to in the Georgetown IDEAA report, and it warrants a response.

If offensive remarks amount to targeted harassment or bullying, narrowly defined,⁷⁹ punishment may be warranted. Punishment may also be imposed if speech departs from accepted standards of faculty civility, or if it violates the narrowly defined norm of non-harassment. But if speech is within the boundaries set by those standards, the response must take the form of words rather than punishment. Statements of reassurance by the Dean or President—and by other faculty members as well—ought to be effective in preserving a welcoming environment for all

77. Statements by Deans or other senior school officials are more likely to be understood as conveying the positions of the institution. Those officials, therefore, should exercise caution before making statements on controversial subjects. Because Ilya Shapiro had not yet assumed his position as Executive Director of the Law School's Center for the Constitution, his statements could hardly be confused as reflecting the views of the institution, as the Dean ultimately recognized in withholding punishment. Letter from William M. Treanor, Dean & Exec. Vice President, Geo. L., to Members of the Geo. L. Cmty., *supra* note 72.

78. KRONMAN, *supra* note 56, at 111.

79. See *supra* Part IV.B.

students. And there are a range of support systems available on any campus to assist students who feel particularly aggrieved by insensitive or harmful remarks. But as long as the harm experienced by members of an aggrieved group is a byproduct of the expression of ideas, there is no reason to substitute censorship or punishment for the normal process of reasoned discussion.

The line drawn here derives from the educational mission of the university and the liberal ideal itself. Speech that amounts to targeted harassment or bullying, or that violates accepted standards of faculty civility or the norm of non-discrimination, may be punished because such speech contributes little, if anything, to the exchange of ideas, and because it interferes with the educational experience. On the other hand, speech that expresses offensive ideas without violating any of those standards can contribute to the educational experience—not only because the ideas expressed may contain a kernel of truth, but also because an important part of the educational experience is learning to deal with opposing ideas that may be upsetting and even emotionally draining.

Those on whom injury is inflicted by virtue of their membership in a group need to say why, confident in the belief that their objection, persuasively articulated, will gain support outside their immediate group. And those whose comments inflict harm need to consider opposing views, acknowledge fair criticism and, if appropriate, reconsider either the substance of their remarks or the manner in which they were expressed—as both the adjunct professor and Ilya Shapiro did in the Georgetown cases. That is the educational process envisioned by the liberal ideal. And the ability to engage in that process is one of the objects of a liberal education. Colleges and law schools in particular should be preparing students, who are already adults, to defend themselves and their beliefs against attacks that may well be unpleasant and unfair. In the world beyond college and law school, it will not be enough to say that speech is insulting or hurtful to convince others that it is wrong. A good place to learn that lesson is in the relative comfort of a supportive institution. And an effective response to hurtful speech is the surest way to build morale in an institution that values free speech as the best engine for truth that has yet been devised.

V. CONCLUSION

The liberal ideal of freedom of speech is more than an abstract concept. It is a practical tool for the resolution of differences and the advancement of human knowledge and understanding—both important goals of a university. In this essay I have addressed one particular

challenge to the liberal ideal—an explicit challenge that would subordinate freedom of expression to an overriding goal of social justice. To reject that challenge is not to reject the goal or any particular version of it. It is merely to recognize that no argument for social justice can succeed unless it wins the hearts and minds of those to whom it is addressed. And that can only happen through persuasion—in a climate that is free of censorship, threat of punishment, and fear of social stigma.