



## CAMPUS SPEECH SHOULD NOT BE FREE

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### I. FREE SPEECH AND EDUCATION

A lot of people praise free speech, but no one really wants it. We don't want people to be able to follow us down the street at night yelling death threats. We don't want vital military secrets being revealed to our enemies. We don't want newspapers to write long articles about our private lives that are false, or even print pictures of us naked in the bathroom that are painfully accurate. We want certain kinds of speech, and not others. We want *some* free speech—but as soon as we say “some,” that means we want speech that isn't really free, but rather that conforms to certain standards that we as a society have set. The question, then, is not whether speech should be truly free, but in what ways we think it should be controlled.

In what follows I will be addressing the morality of restricting certain forms of speech in educational institutions. There are different values at play in the university than in the state, and different goods that come from allowing or disallowing speech. But just as governments can rightly set guidelines as to what is permissible,

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so too can educational institutions. My argument is simple. Colleges and universities have one goal: education. That is what they are for, and that is just what it is to *be* a college or university—what could be termed their essence, their defining feature. So as long as we are acting *qua* members of an educational institution, enhancing education is the only goal that should guide us in this case.

Given that education is the goal, what should be learned and how should those things be learned? There have been many different ideas as to the pragmatic goals of education—whether it should focus on religious doctrine, which used to be a popular goal, or teach whatever would promote democracy, a more contemporary goal, or whether it should simply promote knowledge for its own sake. However, I would suggest two things that we typically want to get out of education, whatever the specific pragmatic goals. For one thing, we want to learn facts. However, there are many facts out there and we obviously cannot learn all of them, so naturally we must select what we want to know about, whether in the area of biochemistry, the history of the Reformation, or constitutional law. While this allows a wide variety of choice in what to learn, our learning goals in these disparate fields all share one relatively modest criterion for what we want to learn, and that is that we want what we learn to be correct. No doubt there are occasions when we don't want to know the truth (How do you like my new haircut?) but generally people go to school to gain true beliefs, not false ones. Knowing the truth typically allows us to better reach our goals, and that is what we want.

Second, we want to learn the methods we may best use for ascertaining what beliefs are correct. We know that what is believed quite reasonably to be true at one point in time may come to be revealed as false later in time. Given this, we want to learn sound methodologies for discovering what is true, whether that's the correct way to go about historical research, how to do extraction in the chemistry lab, or calculate Bayesian probability. That is the way we can check our beliefs and see whether we are justified in our beliefs. We improve our methods through experience, when, for example, what a science predicts will happen doesn't happen and we re-evaluate our methodology. We use our best methods to expand our knowledge, so learning effective methodologies is probably even more important than learning specific facts, since these methodologies provide a way of checking those facts.

Contemporary commentators, who vary greatly on how free campus speech should be, agree on this overarching goal:

As institutions of higher learning, their overarching goal is to expand knowledge. . . . [I]t is a basic expectation that courses expand the knowledge of students. This involves teaching things that are true. Faculty who use their institutional authority to teach false ideas are violating their duties both to the institution and also to students.<sup>1</sup>

And “the spirit of the University should be that of intellectual freedom in pursuit of the truth.”<sup>2</sup> And again:

[At] their best universities are dedicated to the task of gathering, preserving, and advancing human knowledge not for the sake of achieving some other goal, but for its own sake.<sup>3</sup>

So how do we best acquire true beliefs? And how best do we develop the skills to recognize what is true in new situations when we are dealing with unknown territory and lots of conflicting claims? I will argue that this requires guidance, and good guidance requires determining what should and should not be said on campus, both in the classroom and outside the classroom. The argument goes along these lines:

1. The goal of the university is education.
2. Education requires selection of appropriate materials.
3. Selection requires exclusion of inappropriate materials.
4. Therefore, education requires exclusion of inappropriate materials.

#### *A. True Beliefs*

Consider. A college course doesn't meet for all that many hours. A typical schedule would be 3 hours of direct contact per week for 14 or so weeks. Teaching an entire body of knowledge in 42 hours is not easy, even when we include the reading that the students must do outside of class. In fact, it is pretty much impossible, which is why teachers spend so much time agonizing over the syllabus, making difficult decisions as to what to include and what to leave out.

If an instructor routinely taught outdated methodologies or “facts” widely known to be at variance with the truth, no student would pay for that: Complaints

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<sup>1</sup> Michael Joel Kessler, *The Difference between Being Offended and Taking Offense*, in *THE VALUE AND LIMITS OF ACADEMIC SPEECH: PHILOSOPHICAL, POLITICAL, AND LEGAL PERSPECTIVES* 136, 138–39 (Donald Alexander Downs & Chris W. Surprenant eds., 2018).

<sup>2</sup> ERWIN CHERMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 57 (2017).

<sup>3</sup> KEITH E. WHITTINGTON, *SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH* 14 (2019).

would go to the administration, and rightly so. We expect instructors to provide information that is as up to date as possible, that is widely accepted in their field, and that is justified according to the standards of that discipline. Even if an instructor tossed out false information only part of the time, you would object just as you would object if the instructor showed up drunk for one class out of three, because the job of the instructor is not just to provide the occasional tidbit of education but to provide as much as possible within the constraints of time. Obviously, there are bad teachers, but we try not to hire them, and if they do get hired, students try to avoid them. We don't waste our time and money if we can help it.

Now, on the face of it, few people would advocate that teachers teach what is false, and yet, if we successfully advocate complete free speech, we will have no way to prevent that. We need control over what is being said. This seems obvious, but apparently it is not: At least, many people speak enthusiastically of the university as a place where anything and everything may be taught. But if our goal is the discovery and dissemination of truth, what would make us think there should be no controls over what is said on campus? Why would we think that to teach students properly we should just let them be bombarded with opinions as if opinions were paintballs and the student the target? We shouldn't. That said, there are some arguments for complete free speech which, while incorrect, have some initial plausibility, and looking at them can help us understand the mistakes that lead people to oppose control of campus speech.

1. *The Fallibility of Judgment*: Some people would like to avoid having any differentiation between acceptable speech and unacceptable speech because having such a differentiation requires having to decide which is which. When this is not obvious, we are required to make what are commonly called judgment calls, where the probability of being mistaken is higher than in some decisions where the justification for a conclusion is less ambiguous. If we refrain from differentiating between two conclusions when there is no conclusive evidence for either, we are thought to eliminate the need for fallible judgment.

However, a requirement that we suspend judgment when it is not clear which of two options is correct would lead us to refrain from drawing conclusions in the majority of cases where decisions are made. Even when there are rules literally in black and white—like the rules written down by the NFL—we see that there are judgment calls, cases where interpretation of both empirical evidence and the meaning of the rule is needed. Some judgment calls are better and some are worse.

Some are quite bad. That said, playing football without any rules at all as to what is permissible and what is not would obviously be a failure: Not only would the game no longer be amusing, it would no longer be a specific game. The game is constituted by the rules, and all rules allow the possibility of judgment calls. The same is true of education: It is constituted by selection, not a failure to discriminate between claims.

2. *The Marketplace of Ideas*: A well-known argument for free speech rests on the analogy with the economic marketplace: we want a “marketplace of ideas.” The idea behind a free market is that people can best find what suits their desires and needs if they are left to buy and sell without interference. If, instead, a governing institution decides for them what they should have, individuals will end up with little satisfaction and likely an unwieldy bureaucracy to boot. Just as the open economic market allows us to discover better products, open competition between ideas will result in the strongest emerging. We should be able to shop around, sample the intellectual goods on display, and decide for ourselves which is best.

This idea was articulated by U.S. Supreme Court Justice Oliver Wendell Holmes, who said: “But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>4</sup> If we allow, for example, open discussion of political frameworks, we can decide that democracy rather than a benevolent dictatorship is the one that works best for us, just as the open economic market revealed that Samsung (in Europe) and Apple (in the United States) work better for those populations than the Energizer P18K, a phone you probably haven’t heard of because it was too ineffective to succeed commercially. If the government had prevented the sale of Apple and Samsung and forced us to buy the Energizer, we would be worse off than we now are.

The economic marketplace is not a bad analogy for what should happen when it comes to ideas. But to see this, we should look at how marketplaces actually work when they work well. Markets work well only when there are protections for both buyer and seller. We have laws against false advertising, for example: The phrase “snake-oil salesman” for someone who says his product will do things that it won’t

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<sup>4</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

isn't praise for someone using the free market to his advantage. We have regulations against including dangerous substances in what you sell. We have regulations against selling some products that are simply too dangerous to be on the market, such as unproven drugs or excessively dangerous cars. We have laws that protect sellers, as well, so that they may be sure they will get paid in a timely manner for the products they have sold, aren't liable for lawsuits whenever a product is misused, etc. All of these protections keep the market from being free in the sense of a free-for-all, because we have found over time that the free-for-all market doesn't benefit either buyers or sellers.

Not surprisingly, similar protections have made their way into the world of free speech, because we have realized we need them. We need them in part for a similar reason: Just as we don't have time to do personal research into the safety of every product on the market, we don't have time to investigate the truth of every statement. Furthermore, even if we could do that, we are not gods: We are not completely rational, completely dispassionate, completely informed, calculating machines. Freedom of speech is good to the extent that it gives us what we want and need, but in some circumstances it can be misused in a way that prevents us from communicating well, from taking in accurate information, or from deciding on a course of action that allows us to reach our goals. We are fallible, and we want to protect ourselves from those who would take advantage of that fallibility. For that reason, we have sought certain sorts of speech regulations. As Frederick Schauer writes:

Incitement has always been a crime because people are influenced to action in passionate moments by persuasive speakers. Defamation is a tort precisely because people believe what others tell them, even if full investigation might show the allegations to be false. Similarly, commercial misrepresentation is a tort because most people take at face value the labels they find on products. These and other examples compel the conclusion that much of the law is based . . . on an assumption that people are not always perfectly rational, that they are inclined to act on incomplete information, that the shortness of life often requires reliance on the statements of others, and that people are often swayed by passion as much as reason.<sup>5</sup>

The state's defining purposes are much more varied than is the purpose of the university and it needs to have much more freedom when it comes to speech than does the university. Even there, though, we have come to accept that controls are

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<sup>5</sup> Frederick Schauer, *Free Speech and the Assumption of Rationality*, 36 VAND. L. REV. 199, 205–06 (1983).

necessary, for our own protection. If we need these protections both in the economic market and in the marketplace of ideas as it exists outside the academic world, we need them even more in the university, where our primary job is to convey accurate ideas.

3. *The Happy Medium*: Some seem to think that the competition between extreme views will lead us to the truth, not because either of two extreme views is true, but because the truth probably lies somewhere in between. The idea is that we will naturally tend to weigh two extreme views against one another and modify them each in light of the other, ending up eventually with a moderate view that reflects some aspects of the two extremes. If we had suppressed one of the extreme views, we would lack this moderating effect and would be more likely to accept the remaining extreme view. For example:

Suppose, in the 1960s, that the truth of the matter is that a mild and moderate military interventionism is the most just policy. Suppose students and faculty are largely anti-intervention, but the Department of Defense is radically pro-intervention. Suppose the money [given by the DOD to the university] induces people not to share the DOD's point of view but instead to split the difference—they adopt the moderate position.<sup>6</sup>

The argument that articulating two extremes will lead one to accept a more moderate truth has two elements: one descriptive, where it says how we come to formulate opinions, and one normative, where it says that formulating ideas this way is a good thing. The question, of course, is whether either of these claims is correct.

When presented with two extremes, are we likely to meld the two in some way to a moderate, in-between position? It depends. Certainly what we believe can be affected by context—specifically, by the other options we are given. Those who engage in marketing, for example, know that how likely we are to believe that a product is worth its price depends on the price of the other options we are presented with, rather than simply on an objective evaluation of the product's value. That doesn't always mean we pick the in-between price, the one that is neither the most expensive nor the cheapest, however. In some contexts the in-between price actually drives us to buy the highest-priced option.<sup>7</sup> It all depends. When it comes to

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<sup>6</sup> Jason Brennan, *Outside Funding to Centers: A Challenge to Educational Mission?*, in *THE VALUE AND LIMITS OF ACADEMIC SPEECH*, *supra* note 1, at 96, 100.

<sup>7</sup> Gary Mortimer, *The Decoy Effect: How You Are Influenced to Choose Without Really Knowing*

politics, having had a left-leaning President Obama and a right-leaning President Trump has famously not driven U.S. voters together towards a shared moderate position. So before concluding that it's good to have two extremes taught in a university because that would drive us to accept a position that somehow combines or lies between the two, we would, for one thing, need evidence that that happens.

More important, however, than knowing if this is a true description of how we formulate opinions is whether it would be a *good* way to formulate opinions. Should we strive to accept “moderate” opinions? Why should we think that the “middle” opinion is more accurate? That is a normative claim that needs a lot more defense. It's true that Aristotle argued for the mean, as he called it, saying that when we develop our character traits we want to land somewhere in the middle, not too cowardly but on the other hand not too rash. He is surely right about that in some cases, but it's not much of a guideline. What if we are thinking of torturing a lot of innocent people and torturing no innocent people—is the right move to torture a moderate number? No. Whether the middle between two more extreme options is correct depends on the two extreme options, and Aristotle doesn't tell us how to identify the correct extremes between which we should choose the mean. He acknowledges this himself. In a rare moment of humor, he says that the goodness or badness of adultery does not depend on “committing adultery with the right woman, at the right time, and in the right way” because all instances of adultery are, in his opinion, wrong.<sup>8</sup> Fine—but if we are presented with two “extreme” political opinions, how do we know if the middle course is the correct one or if, as with adultery, a moderate position is still wrong? There is nothing about between two extremes that in itself is any evidence that an opinion is correct, so that is not a reason that both should be advocated for the sake of education.

4. *Truth Will Always Win!* John Milton argued that some false opinions may be dangerous, but he thought that was only a problem in the short term. In his *Areopagitica* (1644), Milton said of Truth, “Let her and Falsehood grapple; who ever

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It, CONVERSATION (Feb. 17, 2019), <https://perma.cc/HY88-KSHR>; Liraz Margalit, *Online Decision-Making: What Really Drives Customers to Choose One Option Over Another?*, FORBES (June 18, 2014), <https://perma.cc/BB8F-RLBR>.

<sup>8</sup> ARISTOTLE, THE NICOMACHEAN ETHICS bk. II, ch. IV (David Ross trans., Lesley Brown ed., 2009).

knew Truth put to the worst in a free and open encounter?”<sup>9</sup> He thought that allowing free speech can never result in our being misled for long, because we will eventually come to accept the true opinion rather than the false one. If a belief is false and allowed to circulate we will eventually see its falseness, but if an opinion is true and suppressed we may not learn its truth for a long time, if ever.

However, how exactly can we verify such a claim? The idea seems to be that if we look to the past where there was a conflict of opinion which has since been resolved, we can see that the correct belief won. We know that it prevailed because it's the one we believe now. The argument goes like this:

1. In the past, some people believed X and some people believed the contrary opinion, Y.
2. Now we all accept opinion Y.
3. Therefore, the true opinion was finally accepted.

Obviously, there is a flaw here. As it stands, the argument is invalid: The conclusion doesn't follow from the premises. To get from (2) to (3) we need an additional step, which we can call 2': If we accept Y, Y is true: If we believe something now, it must be correct, so the correct opinion is the one that won. But this presents a new problem. Is premise 2' correct? How do we know that what we believe now is correct? Of course, we *believe* it is correct—that is just what “believing” means. Does the fact that we now believe a given opinion actually mean that it is correct? Of course not. The most we can say when we look at a conflict between Truth and Falsehood, as Milton puts it, is that in some cases, after exposure to two conflicting opinions, we may well come to believe that one of them was correct. And that is accurate as a psychological description, but of course it doesn't mean that the one we believe to be correct *is* correct. Committed Nazis could have said “At last, the Truth has won out over Falsehood and we know that the Jews are inferior.” We aren't guaranteed to come up with the truth simply by allowing the free expression of conflicting ideas in an educational institution. We need something more to be sure we will come up with what is most likely the correct belief.

5. *The Slippery Slope*: If we allow any control of speech, before long we will have speech controlled for all sorts of illegitimate reasons. Once the precedent has been

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<sup>9</sup> JOHN MILTON, AREOPAGITICA 69 (The Floating Press 2009) (1644).

established, administrations will throw students out for criticizing last night's entrée at the dining hall; faculty will be fired for raising a question in a faculty meeting about the Dean's plans for first year seminars, etc.

This sort of argument is known as a Slippery Slope argument because the idea is that once you start down the slippery slope, you will keep slipping whether you want to or not. However benign the original measures, we will move, increment by increment, to measures that are morally unacceptable. The only way to prevent this is not to step onto the slope at all.

This is a very common form of argument. However, the Slippery Slope is actually known as a fallacy, a logically flawed argument. One step doesn't lead you inevitably to another. In its classic form the fallacious argument goes something like this: Say someone runs by you. You don't know if he's running 5 or 6 miles an hour, because you can't tell the difference. But then, the argument goes, if you can't see the difference between running 5 or 6 miles an hour, then you probably can't see the difference between running 6 or 7 miles an hour. In that case, you can't see the difference between running 7 or 8 miles an hour, or 8 or 9 miles an hour, etc. etc. So, the argument concludes, you can't really tell the difference between running 5 miles an hour and 25 miles an hour since you can't distinguish any of the incremental steps. You've slipped down the slope. However, the conclusion is false: You *can* tell the difference between 5 miles an hour and 25 miles an hour. It is a fallacious argument.

We can introduce an appropriate restriction on some speech without inevitably being led to inappropriate restrictions on lots of speech. We can introduce a law that says you can't drive until you are 16 without that gradually becoming a law that says you can't drive until you are 35. It just means we have to pay attention to each restriction as it comes along. If we never made a good rule on the grounds that it might lead to bad rules, we would have no law. So the Slippery Slope argument—if you introduce any restrictions, you'll soon have unacceptable restrictions—just doesn't work.

6. *What You Think Is Wrong Might Be Right* and 7. *You've Got to Know Why*: I've grouped these together because both come from John Stuart Mill, and because both are sophisticated arguments. Mill is justly famous for his defense of liberty. In the appropriately titled *On Liberty*, Mill wrote: "If all mankind were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified

in silencing mankind.”<sup>10</sup>

Mill was writing about censorship in general society rather than about the standards for education, and a person can consistently advocate for free speech in society in general while supporting much stricter control in universities. Still, since these are powerful defenses of free speech, some may think these arguments work in educational institutions. For that reason, we should look at the reasons Mill thinks that free speech is so important.

Mill was a utilitarian. This means that he believed that the morally right act is the act that provides the greatest benefit for the greatest number, whatever that act turns out to be. Thus, he wasn't particularly concerned with rights as they are typically construed. We typically think of rights as claims an individual may make on society that should be respected even if respecting them isn't good for the rest of society. For Mill, however, the cost to society is what determines the rightness of the practice. Given this, he endorses free speech because he simply thinks that, in the long run, allowing free speech will always be more beneficial than not allowing it. He has two primary arguments for this: First, the opinion that we currently think is wrong might really be right, and we would lose out by not being able to learn it. Second, even if the opinion we want to suppress is in fact false, it actually benefits us to have false opinions around—especially false opinions that contradict our most deeply held and correct beliefs. If no one ever questions our beliefs, we will forget what reason we have to think they are true, and in losing our sense of what justifies the belief we will lose our actual comprehension of what it means—which means, among other things, that we may stop believing it even though it really is true. When you silence an opinion, you harm not only the person who wants to express that opinion but you deprive others of the benefit of that idea: “If the opinion is right, they are deprived of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”<sup>11</sup>

Let us look closely at these two arguments, beginning with Argument 6, *What You Think Is Wrong Might Be Right*. Mill is certainly right that we should not simply assume that everything we believe is true. On the contrary, when we look at false

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<sup>10</sup> John Stuart Mill, *On Liberty*, in *UTILITARIANISM AND ON LIBERTY* 88, 100 (Mary Warnock ed., 2d ed. 2003) (1859).

<sup>11</sup> *Id.*

beliefs that have been held in the past by intelligent and educated people, we should apply induction and say that certainly some of our current beliefs are false. But what follows from that about free speech? Mill has an argument. He writes: “Wrong opinions and practices gradually yield to fact and argument; but the facts and arguments to produce any effect on the mind, must be brought before it.”<sup>12</sup>

Mill’s first argument for free speech, then, seems to be something along the lines of:

1. An opinion you believe is false might be true.
2. We won’t find out what is true unless we have free speech allowing completely open discussions.
3. It is desirable that we have true opinions
4. Therefore, it is desirable that we have free speech

This doesn’t really give us the whole picture though. He is right; one way to come to a true opinion is to hear criticisms of our false opinions. On the other hand, is this supposed to mean that open discussion will *always* lead to true opinions? Does it even mean we will usually end up with true opinions? This seems to be the suggestion: If we let everything be said, in the long run most of us will have correct opinions. But why believe that that is true?

There are two claims we need to disambiguate here. Mill says that a person “is capable of rectifying his mistakes by discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted.”<sup>13</sup> On the one hand, Mill might be saying that in order to lose our false beliefs, it is necessary that we hear opposing views. That is, we won’t lose our false beliefs unless we hear people discussing, and arguing for, alternatives. Even if that is true, however, it does not mean discussion of opposing views is *sufficient* for us to arrive at true beliefs. These are two very different conditions. It is necessary for you, as a human, to have oxygen in order to live, but it is not sufficient: You also need food, water, a livable temperature, etc. If all you have is oxygen, you will die pretty fast if it’s 200 degrees out. In the same way, discussion alone may not be enough to lead us to true beliefs.

Discussion by itself may actually lead us to false beliefs. Say that I have the true

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<sup>12</sup> *Id.* at 102–03.

<sup>13</sup> *Id.* at 102.

belief that Ottawa is the capital of Canada. I'm out for coffee with friends and they all tell me I'm wrong, that Toronto is the capital of Canada. Barring other evidence, I may well start to think that if they all agree I must be wrong. We know, after all, that online discussion in particular has sometimes led people to believe in wacky conspiracy theories: for example, that 5G created the coronavirus. So why think that opinions reached simply after exposure to opposing views will be correct? For the best learning experience, it is not enough that there should be discussion, but that the discussion should be guided by certain standards of evidence. That will involve excluding premises for which there is no justifying evidence. In a university setting we can control this, and we should.

However, this brings us to Argument 7: *You've Got to Know Why*. Mill argues that it benefits us to have false opinions around even if they are definitely false. It benefits us to have them freely articulated and discussed because it is when our true opinions are challenged that we review the reasons that support those opinions. Without that they become mere dogmas, and eventually we won't even really understand our own positions. For Mill, this is intellectually unsound and unworthy of us as intelligent beings. And, it is practically dangerous: If you don't know why your belief is true, you start to make mistakes. You believe that you aren't supposed to eat arsenic, and you are right about that, but since you don't know why you aren't supposed to eat it, you may think that smoking a bit over time is actually perfectly healthy.

Mill is surely right about this: Most of us could not defend the heliocentric view of the solar system because we all agree that it is correct and are not called upon to justify its claims. When it comes to something like gun control or abortion law, on the other hand, we are likely to be familiar with the arguments on both sides because proponents of each position encounter those who hold opposing views and must defend their reasoning. So it is indeed reasonable to say, as Mill does, that “[h]e who knows only his own side of the case, knows little of that.”<sup>14</sup>

However, Mill goes on to say that in order to understand both sides it isn't enough for someone to try to imagine the arguments on the other side, or even to hear the arguments for the other side from a teacher who is practiced in presenting both sides of a question. A person “must be able to hear them from persons who actually believe them; who defend them in earnest and do their very utmost for

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<sup>14</sup> *Id.* at 115.

them. He must know them in their most plausible and persuasive form.”<sup>15</sup> So for us to really grasp the full meaning of our true beliefs, we need people around who believe something false and who publicly argue for that:

1. We need to learn the reasons that justify our beliefs.
2. We won’t learn the reasons for our beliefs unless our beliefs are challenged.
3. Our beliefs can be effectively challenged only by someone who genuinely disagrees with them.
4. Therefore, we need people who genuinely disagree with our beliefs to challenge them.

However, consider the implications of Mill’s view. Based on his account we want there to be people who sincerely believe these aberrant views. Thus, on this account, the more we ourselves believe in equal justice for all races, the more we want people around who believe the opposite just to keep us on our toes. Really? Would we be better off if there were more racists in the world? No doubt there are times when a robust community of those who believe an opinion at variance with the truth does no harm and may do some good. If some people sincerely believe that the Great Pyramids were built by aliens, that might not only keep the rest of us amused but might also lead us to review the archaeological evidence as to their being built by Egyptians. When it comes to important policy-making, however, we don’t want to promote difference just for difference’s sake. We do not want to have people who sincerely believe that women are inferior, that black people are stupid, or that torturing the weak is a just exercise of superiority. We want to encourage the views that we think are correct.

Furthermore, understanding a variant view does not require discussion with people who sincerely believe that view: Premise (3) is incorrect. For one thing, people who hold an aberrant view aren’t necessarily good at explaining their reasons for holding it. And in any case, we can articulate arguments against a position without believing that those arguments are sound. Those who teach for a living are practiced at explaining the reasons that underlie theories or interpretations on both sides of an issue even when they believe only one of those opposing views to be correct. We do not need sincere advocates of falsity.

Thus, while we want to teach what we believe to be true, the underlying reasons

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<sup>15</sup> *Id.* at 115–16.

for that belief, and a reasonable knowledge of opposing views, we don't need adherents of false views for that to happen. We will choose what to teach and whom to invite to campus to speak on the basis of how they enhance the educational mission of learning truths, and this generally means exposing students to views we think are reasonable. Could we be wrong in our beliefs? Obviously. The fact that a majority of experts in a given area have agreed on something does not guarantee that they are correct. The mistake is in thinking that this means all opinions are equally justified. It doesn't and they aren't.

Does this constitute censorship? Of course not. As others have pointed out, not being given a platform for your opinion doesn't constitute censorship.<sup>16</sup> Most colleges and universities don't assign my books, but I'm not being censored. No one is seeking out copies in order to burn them (as far as I know) and certainly the government isn't doing that. It is true that ideas that are not taught do not get as much exposure as those that are. This is true of all intellectual and artistic endeavors, and is hardly grounds for complaint. Education is about selection. These ideas that aren't taught in educational institutions can still circulate in society. And maybe someday they will gain enough credibility and support to make it into the curriculum.

### ***B. Skills***

But will this selective presentation be effective when it comes to the broader goals of education? We might accurately learn facts, and we might learn the justification for believing them, but will our faculties atrophy if those things are just handed to us on a platter? Oftentimes learning the skill to discern what is true or false is more important than learning some particular truths. That depends, of course: In the short run, learning a fact (that's anti-freeze you're about to drink, not blue Gatorade) might be more important than learning how to discern the difference between the two or to gauge the likelihood of your partner having left a cup of blue Gatorade on the hood of the car. But by and large we want to learn skills so that when we don't know what is true or false, we can figure that out. If we lose this sort of cultivation of the understanding, we are more likely to accept false beliefs in the long run, because we haven't actually learned to discern the difference between a justified and an unjustified opinion.

And, even if we hold on to some correct facts, we probably won't ever improve

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<sup>16</sup> Theresa O'Keefe, *Making Feminist Sense of No-Platforming*, 113 *FEMINIST REV.* 85, 86 (2016).

on that, because we won't have the critical wherewithal to assess the strengths and weaknesses of what we believe now against the strengths and weaknesses of new theories and new methodologies. We need to develop our skills of critical thinking, and we can't do that if we don't actually think for ourselves. It would be like watching someone play the piano without ever putting our fingers on the keys—we would never learn how to play, even if we understand a great deal of music theory. We want to equip people for life with the ability to assess new situations, new theories, new data, and to discern for themselves what the best response is. And that is a skill that is learned by doing.

It is correct that we need to use our assessment skills to improve them. But that doesn't entail complete freedom of speech on campus any more than it means we should be given the key to the chemistry lab and told to just play around any way we want without instruction or control. There are several reasons for this.

First: If we want to engage in critical thinking by assessing conflicting opinions, there will always be plenty of opportunities for that. If there were total uniformity of opinion about everything in the world, then yes, perhaps we would lose our critical abilities. But there isn't complete uniformity and there never will be, even if we control some aspects of speech. After all, no one is advocating that there should be uniformity of opinion about all things. There are and will continue to be plenty of complex, interesting, and important debates about pretty much everything: about public policy, science, literature, and law. We don't need to include wacky opinions in our syllabus just to get people thinking.

Second: Our skills are likely to be better honed with guidance as to what's a good way to proceed and what is not. Here's an example. When I first wanted to learn to ski, my then-husband, who had been skiing all his life, rented me some skis, took to me to the top of the mountain (because the beginner slope was "boring"), and let me go. I had never been on skis before. I fell getting off the lift. I fell when I tried to stand up after falling getting off the lift. I fell when I did stand up. I didn't know how to stop, how to slow down, or how to turn. It would be nice to say that by the time I reached the bottom of that Nevada mountain I had mastered all these skills and was ready for doing moguls on the double diamond slope, but that was not the case. I was just black and blue and irritated.

Now, obviously, a more athletic person might well have had the balance, strength, and coordination to essentially teach herself to ski. Some people do. But we can't gear education to those who have an innate talent for picking up a reliable

process. It's true that people who want to learn piano need to play and not just be told about the piano, as said above—you need to practice. But there is a reason that people pay money to take piano lessons, rather than just buying some sheet music and a piano. Most of us need guidance, and guidance is by its nature exclusionary—we focus on some things and leave others out. The role of the teacher is not to give equal exposure to the methodologies of chemistry and alchemy.

Third: We hone our skills by using them against worthy adversaries. If we want to perfect our critical thinking, we do that better in assessing sophisticated arguments rather than silly arguments. Sophisticated arguments tend to be harder to refute, thus drawing on more skills. You can't get too far with an argument as to whether the local school soccer team is better than a champion professional soccer team because the person supporting the school team is probably relying on the rejection of reason, logic, or both. To hone skills of analysis and assessment, a student needs arguments for positions which, even if wrong, have at least some justified premises; thus, being taught an aberrant view whose only merit is that it is really different from what the mainstream believes isn't necessarily the way to hone your skills. Of course, an extremely unpopular view might be one that is really well argued, and then that is a good argument to take on regardless of the lack of support behind it. But we want a view to meet the test of quality before we engage it, not simply the test of unpopularity.

When we learn critical skills, we indeed need to learn them. They don't just spring up by themselves. And learning requires selection and selection requires exclusion, and that is part of the educator's job.

This is straightforward. Having no speech rules in an educational institution would greatly diminish the education such institutions could provide. For anything that has a goal, there will be strategies that advance that goal and strategies that don't, and, not surprisingly, it is rational to choose the strategies that do advance the goal. When it comes to educational institutions this means appropriate rules for speech. We want the rules that work best for what we are trying to achieve. In colleges and universities that means that we should educate by teaching what we have reason to believe is correct and important, and avoiding what we have reason to believe is insignificant or false.

## II. APPLICATIONS

### A. *Students*

What is the best way to look at student speech? We already control student

speech in many ways. An obvious case would be the rules we maintain against plagiarism. There is nothing illegal about taking someone else's work and presenting it as your own, as long as you don't publish it under your own name. But if you hand in someone else's work as your own in a class, the university will punish you for that, sometimes very severely. Controlling whose work you submit as your own safeguards education, because it is educational when you do your own work and not when you copy someone else's.

In the same way, we control what is said in class. The instructor can allow people to speak at will or she may say they have to raise their hands and be called on before they speak, she can limit how long people can speak, and interrupt them if instead of sticking to the topic of Reformation history in a Reformation history class they decide they want to give a speech in favor of having Meatless Mondays.

Everyone seems to concede that these sorts of controls should exist; issues arise more when speech is controlled because of a specific social or political message. Erwin Chemerinsky and Howard Gillman argue that universities should never restrict campus speech on the basis of its content. That is, the political, moral, aesthetic, or even factual position that a student (or instructor, see below) takes on an issue should never be relevant as to whether speech is allowed. It is permissible for a university to ban chalkings on sidewalks because they are messy or expensive to clean up, but they can't ban just some and not others on the basis of what the chalkings say. Chemerinsky and Gillman consider, for example, the Confederate flag. They say:

A campus may choose to keep students from putting bulletin boards on their doors or displays in their windows, but universities cannot target and exclude certain views and not others. For instance, a campus could have a rule preventing students from affixing anything to the windows of their dormitory rooms, but a campus could not prohibit just the display of Confederate flags on dormitory windows.<sup>17</sup>

Since the Civil War was fought in part because the southern states wanted to maintain the practice of slavery, many people see the display of the Confederate flag as an endorsement of slavery. However, some people see the Confederate flag as simply a symbol of regional loyalty, with no reference to antebellum practices, so let us change the example to make it unambiguous. Say that a student wants to post a sign in his window saying "Black People Should Be Slaves." Say it's a large sign,

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<sup>17</sup> CHEMERINSKY & GILLMAN, *supra* note 2, at 129.

that no passer-by could miss. And say that at this university the idea catches on amongst a certain population, all of whom put up signs saying “Black People Should Be Slaves.”

On Chemerinsky and Gillman’s account, the university shouldn’t do anything about the signs. Even for the administration to come out strongly against the message in the signs would be a problem, because “[f]requent and persistent pronouncements by college or university leaders on the various views expressed within the community risk creating a campus orthodoxy of opinion, and it is the primary responsibility of campus officials to ensure that no such orthodoxy is established.”<sup>18</sup>

They do allow that the university may ban any signs from being posted in windows, but on Chemerinsky and Gillman’s account, if the university previously was fine with large signs on the windows that said “Go Cougars! Beat State” and suddenly banned all signs after “Black People Should Be Slaves” appeared, the truth would be that university administrators were banning all signs only because they wanted to silence the content of one particular message. According to Chemerinsky and Gillman’s argument, banning all signs under this circumstance would also be wrong. A policy can’t be adopted in order to silence a particular message, unless that message violates a law.

Does this seem right? No. Signs advocating racist ideas or practices should be banned because of their content. Signs advocating or opposing Brexit, for example, might generate heated discussion, but they don’t disparage members of the student body. Pro- and anti-Brexiterers may have thought poorly of one another, but there is nothing in a sign that endorses leaving the European Union that says that remainers shouldn’t be at the university, or have a status vastly inferior to those who want to leave. It’s purely a political and economic position. Some positions aren’t purely political, however, but are expressions of animus on the basis of identity. “Black People Should be Slaves” is an insult, to put it mildly. It is furthermore an insult that addresses a disadvantaged portion of the population, and one that has only recently had widespread access to universities.

A useful distinction here is one made by Eamonn Callan. He discusses the difference between attacks on a person’s dignity and attacks on what he calls “intellectual identity.” Being “dignity safe,” as he calls it, “requires that one is free of any reasonable anxiety that others will treat one as having an inferior social rank to

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<sup>18</sup> *Id.* at 149.

theirs.”<sup>19</sup> This is something every student should have: Being humiliated by others undercuts education for all concerned. However, this is very different from protecting what Callan calls “intellectual identity.”<sup>20</sup> That is, your ideas (for example, that abortion is wrong/right, that there should/not be gun control) are open to criticism from others, even if holding those ideas is central to your identity. Having your settled beliefs critiqued can help you grow, but being told that you yourself are an inferior being doesn’t have that salutary effect. The point is that treating people with dignity does not mean that we limit debate in a way that would be inconsistent with the university’s goal of pursuing knowledge and furthering education. Challenging ideas is central to education, but humiliating other students is not.

### *B. Faculty*

When it comes to faculty we are perhaps on more familiar ground. There are always restrictions on faculty speech. If you are hired to teach biochemistry you should do that, instead of telling lots of stories about your adorable four-year-old. We want people who know their field well and who will convey what they know appropriately. We also typically want faculty to engage in research and to meet the standards of their discipline when it comes to doing research. A teacher of biochemistry who publishes nothing in biochemistry but instead writes a lovely collection of children’s poems has not met the appropriate standard of research, and that will count against her chances of getting a raise, a promotion, or being hired in the first place. This is familiar, and of course it is a kind of control of speech—you are rewarded for some and not for others.

Lately, however, a new area of controversy has arisen. It has been said that by and large faculty in the U.S. at least have similar political views, and that they tend to be liberal rather than conservative. To some, in particular some conservatives, it is a significant educational problem if faculty are by and large liberal Democrats, and these conservatives apparently feel that the university would be more robust if there were more conservative faculty members, just so that their somewhat different views might be heard.

This view that in hiring we should favor people based on their having a minority political view is flawed in a number of ways. First of all, we may note that it is hardly advocacy of free speech to say that certain job candidates should be favored

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<sup>19</sup> Eamonn Callan, *Education in Safe and Unsafe Spaces*, 24 PHIL. INQ. EDUC. 64, 65 (2016).

<sup>20</sup> *Id.* at 74–76.

precisely because they will express a certain political opinion. That is a way of *controlling* speech. Advocates of such selective favoritism may feel that they are doing it because otherwise the expression of certain views will be prevented, in the sense that they aren't being given a platform, but such an intervention is still intentional control of speech. Since jobs are scarce, favoring one candidate because of his political orientation automatically means rejecting another because of her political opinion. It is hypocritical to say that we should support freedom of speech in the academy by choosing candidates according to what opinion we want them to espouse.

Furthermore, while we want lively intellectual debates, there is no evidence that differing political opinions contribute to that:

It marks a fundamental misunderstanding of academic life to conflate scholarly disagreements and political disagreements. It is perfectly possible for university faculties to overwhelmingly hail from the political left and yet disagree vehemently with one another on matters of scholarship and teaching, and it is likewise possible for faculty members who would be very much at odds with one another in the realm of politics to be in complete agreement in the realm of scholarship.<sup>21</sup>

Faculty are teaching their own field, not their political opinions, if they are teaching properly. English professors discuss whether Shakespeare or the Earl of Oxford wrote Hamlet, not who should be the next governor. Diversity of political opinions is not a fruitful way to bring about debate between most intellectual ideas. When we do want to introduce discussion of diverse political or social views, as is sometimes appropriate, we don't need faculty who hold those distinctive views in order for those ideas to be understood, as discussed above.

Lastly, advocacy for hiring more politically conservative faculty co-opts a legitimate movement for faculty diversity. There has been, and should be, pressure to seek out job candidates who belong to underrepresented races or ethnicities, and to hire women in departments that are overwhelmingly male. It is a very different thing to say that we should seek out people who hold conservative views, however. We want to hire underrepresented groups, for many good reasons that overwhelmingly do not support seeking out social conservatives as job candidates. Black Americans, for example, have been historically oppressed, and taking steps to end such suppression that are compatible with good educational practice are to be applauded. No one advocates hiring someone just because she is black—there is nothing served by hiring a person who is not competent to do a job. But seeking out and

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<sup>21</sup> WHITTINGTON, *supra* note 3, at 165.

hiring excellent candidates from among those who have been oppressed can in a small way help to address an ongoing problem, the systematic oppression of a group who have historically been denied education and the chance to speak. Second, these hires are good for students. We know that many students from underrepresented groups can feel disoriented and alienated in the university setting, and that this undercuts their ability to learn. Having faculty of color allows students to realize that they belong in the institution, and encourages them to think that their contributions are welcome. Hiring minority faculty addresses a historical injustice and furthermore advances the university's goal of educating, and this makes it a good idea.

None of these reasons apply to hiring faculty with socially conservative views. The argument for hiring conservatives goes like this:

1. We want a diverse faculty.
2. Conservative voices are in the minority on campus.
3. Hiring conservative voices would bring more diversity.
4. Therefore, we should hire conservative faculty.

The problem with this lies in a misunderstanding of the first premise. When we say we want diverse faculty, we don't want just any kind of diversity. We don't want more convicted murderers, for example, just because very few faculty members have been convicted of murder. We want diversity that redresses an injustice and that helps students who contend with a legacy of discrimination to feel that they belong.

People with conservative views have not been historically oppressed. And while students with conservative views may well feel that they are in the minority in their opinions at this point in time, we do not need to cater to people just because their opinions are being challenged by people who do not share them. Anyone who tries to conflate that with discrimination based on race or ethnicity or gender or religion or sexual orientation has fundamentally misunderstood what is wrong with discrimination.

### *C. Outside Speakers*

In 2017 Richard Spencer was prevented from speaking at the University of Florida at Gainesville. The alt-right white nationalist was shouted down by protesters

who made his talk impossible to hear, and after criticizing the crowd for not believing in free speech, he left the stage.<sup>22</sup>

Roughly the same standards that we use in the classroom should apply to speakers who are invited to campus. Just as with classroom instruction, speakers cost money—they are paid, their travel is covered or reimbursed, reserving the venue costs money, setting up beforehand and cleaning up afterwards costs money, etc. And time for outside speakers is, of course, limited. The same holds true for students: They obviously have a lot to do and while ideally they can occasionally afford a few hours to go to a talk by an outside speaker, they can't do that too often. So, anytime we invite someone to campus we do so within the constraints of limited resources.

Thus, we want speakers with new and interesting conclusions that are also well supported, because that is what engages our skills in a way that is educational. Some speakers that some might want to invite simply because their views are different are no more educational than hearing a dog bark, because their extreme views are presented without justification. That is a waste of time and money.

What if students invite a speaker? Some people think that a different standard should apply if the speaker in question is being invited by a student group rather than a university department or administration. Student groups typically have some funds, and they can choose to spend those funds on inviting a speaker they think the group members and perhaps others will enjoy. Some people think that in this case, the students' choice of speaker shouldn't be interfered with: For one thing it's the students' money that funds the university, and second, the students are learning how to invite good speakers, which is a useful skill. Experience can improve their ability to make good choices rather than bad ones, and also to handle the ramifications of either.

This argument fails, however. If some students want to spend their own pocket money to invite someone to speak to them as individuals, they are free to invite someone to speak to them. However, when a student organization invites a speaker, that is a very different thing. A student organization is supported and recognized by its school. If, say, the Peoria College Young Socialists decide they want to invite

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<sup>22</sup> Agence France-Presse, *White Supremacist Richard Spencer's University of Florida Speech Drowned Out*, TELEGRAPH (Oct. 19, 2017).

a major capitalist just to show him up or to hear the other side of the political spectrum, that isn't just a couple of private individuals. In their role as members of a sanctioned student organization their duties are very different, and the responsibilities of the university are different.

College organizations are permitted to exist as college organizations because the school thinks that having them is educational. Colleges often fund such organizations for the same reason, and while ultimately the students may fund the college, we have never concluded that gives them the right to make administrative financial decisions. Even organizations that don't receive cash payments are supported by their school through the supply of venues, publicity, etc. And the mere fact of having been permitted by their school and listed as a school organization gives them a certain cachet, and makes it easier for them to recruit members. This means in turn that their choices will be taken to be representative of the school as a whole. Receiving these benefits means that the student organization, in turn, has duties towards the institution that has allowed it to exist, and that includes not representing the college badly. Thus the organization has a duty to allow the college or university some oversight over speakers, just as the college or university has oversight over other activities—*forbidding, for example, dangerous initiation rites.*

#### CONCLUSION

Colleges and universities have a *telos*, an end, which defines them as what they are. That end is education. Education requires selection as to what is said. Complete freedom of speech is incompatible with education, and thus with the point of colleges and universities.