



RESISTING CANCEL CULTURE

Promoting Dialogue, Debate, and
Free Speech in the College Classroom

BY NADINE STROSSEN

Perspectives on Higher Education

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Nadine Strossen is the John Marshall Harlan II Professor of Law Emerita at New York Law School and served as the first female president of the American Civil Liberties Union from 1991 to 2008. Professor Strossen is a stalwart defender of free speech and was named one of the *National Law Journal's* "100 Most Influential Lawyers in America." Supreme Court Justices Ruth Bader Ginsburg, Antonin Scalia, and David Souter participated in her retirement luncheon.

Professor Strossen is a leading expert on constitutional law and civil liberties; she has given thousands of public presentations and has published over 300 works for both scholarly and general-interest publications. She is most recently the author of *Hate: Why We Should Resist It with Free Speech, Not Censorship*, published in 2018 by Oxford University Press. She currently serves on the advisory councils of the American Civil Liberties Union, the Foundation for Individual Rights in Education, the Heterodox Academy, and the National Coalition Against Censorship.

Professor Strossen received her B.A. from Harvard College, where she graduated Phi Beta Kappa in 1972, and her J.D. from Harvard Law School, where she served as editor of the *Harvard Law Review* and graduated magna cum laude in 1975. She has practiced law in her hometown of Minneapolis as well as in New York City.

FOREWORD

by Jonathan Rauch

Nadine Strossen, a friend and mentor to me for almost 30 years, has built one of America's most distinguished careers among defenders of free speech and civil liberties. She served for almost 18 years as the American Civil Liberties Union's president (the first woman to serve in that post), taught law at New York Law School, writes elegantly and passionately (most recently, *Hate: Why We Should Resist It with Free Speech, Not Censorship*), and went to Harvard (well, no one is perfect). Now, in "Resisting Cancel Culture," she puts us in her debt yet again.

Cancel culture, as it has recently come to be known, may be a new dinner-table topic, but it is not a new phenomenon. Anything but. As Strossen points out, J.S. Mill warned against it emphatically in his classic 1859 defense of free speech, *On Liberty*. A generation earlier, Alexis de Tocqueville, the greatest observer of democracy in America, warned of exactly the same danger. Before the term "cancel culture" came along, I called it "coercive conformity," and others called it other things. By whatever name, it is controversial. Some people—among them many civil libertarians—dismiss or minimize it, making three arguments.

The first is that cancel culture amounts to a spate of overhyped anecdotes, not a national problem. But, as Strossen shows, recent survey evidence finds that Americans are more fearful to voice their real opinions now than at the height of the McCarthy era. Almost a third worry their livelihoods will suffer if they fail to self-censor. On campus and off, millions feel the chill.

A second claim is that cancel culture is just criticism, and if you can't stand the heat, get out of the kitchen. But, as Strossen establishes, the two are very distinguishable in principle (and usually in practice, too). Criticism uses rational, non-coercive persuasion to influence public opinion and uncover truth. It is inherently friendly to viewpoint diversity and intellectual pluralism. Cancel culture organizes or manipulates the social or media environment to

isolate, intimidate, deplatform, or demoralize political or social adversaries. It is inherently hostile to viewpoint diversity and intellectual pluralism. Criticism comes from the world of truth-seeking, cancel culture from the world of propaganda and information warfare. Far from being versions of the same thing, the two are irreducibly at odds.

A third claim is that cancel culture is a private matter, not a matter of law or government policy, and as such is not of concern to civil libertarians. But in recent decades, as free speech has won robust protections against government censorship, the action has shifted to the private sphere: campuses, social media, newsrooms, places of employment. Cancelers' power to coerce and intimidate has been turbocharged by social media, where devastating shaming campaigns can be organized literally in minutes, and by the discovery that employers and professional associates are quick to knuckle under to such campaigns. Strossen's salient contribution is to lead civil libertarians—by argument and by example—toward full engagement with the cultural side of the struggle.

Finally, Strossen the educator identifies an important locus for rolling back cancel culture: the classroom. Students who are encouraged to shrink from encountering unwelcome, repugnant, and sometimes, yes, “unsafe” ideas will learn to demand protection from speech they dislike. They will come to believe that free speech, far from being a civil right, is a *violation* of civil rights—the equivalent of allowing physical violence. They will accept and even favor government censorship, social repression, or both. As indeed they are doing. Students who are taught to be epistemically resilient—capable of encountering diverse and sometimes repugnant ideas without melting down or demanding protection—will be better informed, more tolerant, and stronger.

The culture of free speech, as Strossen notes, is especially vital for minorities. As Hosea Williams, one of the chief lieutenants of Rev. Martin Luther King, Jr., said, “One thing we must understand, a right is not a right in America until it is extended to every American.” Even the Ku Klux Klan should be allowed a voice, he said, because if it were suppressed, the NAACP could be next. “I was Dr. King’s field general,” he explained. “I organized every major march. The problem with the black struggle in America has been that black leaders like King didn’t have the ability to communicate with the masses.



Once they had that ability to communicate with the masses, things changed.” Indeed they did. As a gay American born 60 years ago, I can attest to that.

Finally, Strossen draws welcome attention to a promising pedagogical tool, debate-centered instruction, which teaches students how to defend multiple viewpoints, including ones they disagree with. Being a debater transformed my own argumentative and listening skills, as it did Strossen’s. Debate’s educational potential is great, and its benefits deserve to be widely shared.

So this essay is essential reading. And Nadine Strossen shows yet again why hers is an essential voice.

Jonathan Rauch is a senior fellow at the Brookings Institution and the author of the forthcoming book *The Constitution of Knowledge: A Defense of Truth*.

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What is a “culture of free expression”? How does it differ from “cancel culture”?

There is no consensus even as to what the terms “free expression culture” and “cancel culture” mean, let alone as to whether either culture is positive or negative. Therefore, before I suggest strategies for promoting free speech culture and countering cancel culture in online classes, I must briefly summarize my understanding of these two core concepts and why I support the former and oppose the latter. I will do so while fully recognizing that my perspectives are certainly subject to debate and dissent, along with all other ideas; I look forward to engaging in an ongoing discussion about these concepts.

That last sentence captures the essence of a free expression culture: one that encourages the most open, inclusive exchanges, equally open to all people and to all ideas, no matter how marginalized or even despised any individual or idea might be. Not only should all speakers and ideas be included in the discussion, but all ideas should also be subject to intense critical analysis, questioning, and refutation. Arguments should be based on any pertinent evidence, including observation and experience. In contrast, conclusory indictments of arguments (e.g., “that argument is racist”) and ad hominem attacks on speakers should be out of bounds.

In a nutshell, a free expression culture seeks to further debate and discussion. The opposite is true of cancel culture, which instead seeks to end discussion, or at least to truncate it, by summarily dismissing certain ideas—or even certain speakers—as ineligible for inclusion in the exchange. Accordingly, cancel culture accepts and even encourages conclusory

repudiations of arguments and ad hominem attacks on speakers, and does not insist on reasoned analysis or evidence-based arguments. Cancel culture also uses intimidating tactics, threatening to punish certain speakers through harsh measures, including even outright exile from the university community via expulsion (of students) or firing (of faculty or staff members).

John Stuart Mill's classic 1859 essay "On Liberty" eloquently defended free speech culture and deplored cancel culture in concept, albeit through different terminology. That powerful work focused not on speech-suppressive government measures, but rather on speech-suppressive cultural forces: social pressure exerted by our civil society peers. Mill explained that "social tyranny" is "more formidable than many kinds of political oppression, since . . . it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself."¹

Mill also distinguished criticisms of ideas—even harsh, hurtful criticisms—which epitomize free speech culture from the personally punitive tactics that characterize cancel culture. The former seek to prolong and broaden the discussion so that it incorporates even the most controversial challenges to current orthodoxy, whereas the latter seek to curtail and narrow the discussion so that it reinforces current orthodoxy. As Mill put it, one should "remonstrate," "reason," "persuade," or "entreat" those with different views, but one should not "compel" them or "[visit them] with any evil."² Mill also strongly condemned any mode of discourse that "stigmatize[s] those who hold the contrary opinion as bad and immoral [people]."³

Unfortunately, our current cancel culture deploys precisely this tactic, condemning people who express particular opinions not only as unworthy of participation in pertinent discussions, but also as unworthy of ongoing participation in the pertinent communities. In the campus context, for example, we recently have seen a rash of college and university retractions of decisions to admit students based on later-discovered social media posts in which the students conveyed views that campus officials deemed objectionable. These students have thus been completely barred from the colleges' and universities' educational communities and opportunities, even if the offending statements were isolated, took place long ago, prompted the students' sincere apologies and commitments to engage in restorative justice measures, and were inconsistent with the students' overall records.

The disproportionate, unconstructive nature of these admissions retractions is especially problematic when one considers the consensus of psychological and legal experts that teenagers are not as culpable for anti-social conduct as older adults, for multiple reasons. Among other factors, pertinent regions of the human brain, essential for our moral reasoning, are not fully developed until about the age of 25. For these reasons, the U.S. Supreme Court has categorically struck down harsh criminal law penalties for even the most heinous crimes committed by people under the age of 18, proclaiming them to

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constitute punishments that are “cruel and unusual.” Surely an educational institution—which is not in the business of punishment in the first place—should also recognize that its educational mission is undermined, not furthered, by punitive measures that deprive the young “offender” of any and all educational benefits that the institution

could bestow. If our criminal punishment system deems a teenager not fully culpable for murder, and susceptible to “rehabilitation,” shouldn’t our colleges and universities do the same for a teenager who has engaged in hateful expression? That educational institutions could succumb to cancel culture in these situations, thus betraying their signature educative missions, is a sorry indication of how powerful cancel culture has become even in academia, where free speech culture should be especially vibrant.

Even beyond retaliatory measures that punish particular speakers for what they have said, cancel culture creates a climate of fear, in which too many members of the campus community engage in self-censorship. Surveys consistently reveal that faculty members and students alike feel that they are

“walking on eggshells” and avoid even saying anything at all about important but sensitive subjects—let alone voicing a potentially controversial view about such subjects—for fear of inadvertently saying something that someone may perceive as insensitive or offensive. As a practical matter, therefore, cancel culture has the same speech-suppressive impact as the type of government censorship that is considered to be the most blatant First Amendment violation: a “prior restraint,” which preemptively stifles expression before a judicial determination that the strict prerequisites for constitutionally permissible speech restrictions have actually been satisfied.

Our legal system’s condemnation of prior restraints reflects the strong presumption that expression is protected and hence that any preemptive government restriction on it is unlawful. In this context, as well as others, the most controversial expression—and hence the most vulnerable—is consistently expression by marginalized individuals and groups and expression conveying unpopular ideas. Therefore, it is no coincidence that landmark Supreme Court decisions striking down prior restraints have given voice to civil rights demonstrators, whom Southern officials sought to block from marching, and to critics of the Vietnam War, whom the Nixon administration sought to stop from publishing the Pentagon Papers. In parallel fashion, in today’s cancel culture, the suppressed views tend to be those of relatively unpopular, marginalized individuals or groups in the campus community, and those who challenge prevailing campus orthodoxy on today’s pressing issues.

But isn’t self-censorship often commendable?

To be sure, a choice not to say something is itself an exercise of free speech rights, along with a choice to say something. Moreover, when this is truly a voluntary choice, it is consistent with free speech culture. For example, suppose Student A had a certain view that she was planning on conveying during the class discussion, but before she can do so, Student B cites evidence that convinces Student A that her prior view was unfounded, or at least not as well-founded as she had previously believed. In that circumstance, Student A’s decision not to convey her prior view is an appropriate exercise of self-

ensorship. It results from the processes of persuasion and reflection, based on an individual's open-minded consideration and analysis of evidence.

In contrast, self-censorship that is inconsistent with free speech culture results not from persuasion, but rather from coercion. It does not reflect an individual's voluntary change of mind based on evidence and analysis. Rather,

Overall, a full 62% of respondents concurred that “the political climate these days prevents me from saying things I believe because others might find them offensive.” Moreover, almost one-third of respondents—32%—say they worry they could miss out on job opportunities or get fired if their political views became known.

it results from the individual's fear that conveying her views might well lead to denunciations and social ostracism, or perhaps even worse consequences, such as losing an academic or employment opportunity. That kind of coerced self-censorship shortchanges not only the silenced speaker, but also all other participants in

the discussion, and ultimately our whole society, as “On Liberty” enduringly explained.

A recent Cato Institute National Survey (which was designed and conducted in collaboration with YouGov), released on July 22, 2020, confirmed that fears of retribution for expressing political views are alarmingly widespread, exerting chilling effects on people with views all across the ideological and partisan spectrums, and also from diverse demographic groups in terms of race/ethnicity, gender, income, age, and education. Overall, a full 62% of respondents concurred that “the political climate these days prevents [me] from saying things [I] believe because others might find them offensive.” Moreover, almost one-third of respondents—32%—say they worry they could miss out on job opportunities or get fired if their political views became known.⁴

This recent survey is consistent with others in showing a level of self-censorship among respondents of all partisan stripes that is not only high,

but also notably higher than in the past. For example, a June 1, 2020, article by Washington University Professor James L. Gibson and analytics executive Joseph L. Sutherland compared 12 surveys that asked Americans whether they were afraid to speak their minds, conducted from 1954 through 2019; the percentage of “yes” respondents tripled during that period.⁵ Most soberingly, in 1954, when Harvard Sociology Professor Samuel Stouffer undertook the first such survey—to assess the extent to which McCarthyism was inducing self-censorship—only 13% of respondents said they were afraid to speak their minds.⁶

As we seek to foster a free speech culture in the virtual classroom, a particularly troubling finding of both the Cato survey and the other surveys discussed in the Gibson and Sutherland article is that the generally increasing self-censorship has disproportionately silenced those who are the most educated; this pattern indicates that the campus community is fueling cancel culture, rather than free speech culture. According to the Cato survey, two pertinent groups are especially worried that their political views could harm their careers: young people and the most highly educated people. For example, this fear was reported by a majority of Republicans under age 30 (51%) and a large majority of Republicans with post-graduate educations (60%). As the survey report commented, “Younger people who have spent more time in America’s universities are most likely to hide their views for fear of financial penalty.”⁷ Likewise, Gibson and Sutherland concluded: “Those who are more highly educated are far more likely to censor their views . . . Far from becoming more comfortable with how to express their views as they become more educated, Americans who go to college appear to learn that they should shut up if they disagree with their peers.”⁸

Additional responses to the Cato survey underscored that fears of adverse consequences for voicing unpopular views are, sadly, rational. Ironically, many respondents who themselves fear reprisals for expressing their political views also support firing business executives who personally donate to either Donald Trump’s or Joe Biden’s presidential campaigns. For example, 50% of “strong liberals” support firing Trump donors, and 36% of “strong conservatives” support firing Biden donors.⁹ This is a vivid manifestation of cancel culture, deeply antithetical to a free speech culture. We shouldn’t be forced to “choose” between such a critically important form of expression—conveying our support for a presidential candidate—and job security.

But don't people have the free speech right to advocate "canceling" ideas or speakers?

And doesn't a free speech culture wrongly elevate freedom of speech above other fundamental campus values concerning equality and inclusivity?

Let me refute one red herring argument that is often raised against critiques of cancel culture: that cancel culture itself embodies exercises of free speech. Yes, all of us do have the free speech right to make any kind of argument—including conclusory and ad hominem ones. And yes, all of us do have the free speech right to advocate even the harshest retaliatory measures against speakers whose ideas we revile. But it is precisely the advocates of such retaliation who correctly stress the following crucial point: simply because one has a free speech right to say something doesn't make it right to do so. For example, those who call for disinviting campus speakers with views that the disinvitation advocates consider discriminatory on racial or other grounds typically recognize that the speakers have the right to voice their ideas. The disinvitation proponents nonetheless maintain that it is not right for such speakers to exercise their free speech rights on campus, because their ideas are inconsistent with important campus values: equal respect for and inclusion of all people, especially those who belong to traditionally marginalized groups.

In parallel fashion, those of us who oppose cancel culture maintain that it is not right for would-be cancelers to exercise their free speech rights in ways that are inconsistent with important campus values: those that are reflected in a free speech culture. This point usually provokes another red herring argument: that a free speech culture elevates freedom of speech above equality rights. To the contrary! As many towering human rights champions have eloquently explained, equality rights are especially dependent on robust freedom of speech and are especially endangered by speech restrictions. By way of example, let me quote civil rights hero John Lewis, who, sadly, died on

July 17, 2020: “Without freedom of speech and the right to dissent, the Civil Rights movement would have been a bird without wings.”¹⁰

Why are we talking about any kind of “culture,” anyway? Shouldn’t we be focused on rights?

As the preceding discussion indicates, even when the government honors our First Amendment free speech rights, we can still be deterred from actually exercising these rights by the actions of people and groups who are not part of the government, and hence not bound by the First Amendment. The power of cancel culture reflects the fact that pressure by private sector individuals and institutions can silence or punish our speech and induce us to engage in self-censorship, as effectively as government could do, if not more so. Conversely, a free expression culture—which embodies speech protections that go beyond what the First Amendment literally requires—encourages the actual exercise and enjoyment of our free speech rights. In short, if we are to enjoy meaningful freedom of speech, we need a free speech culture. Mill well captured this necessity when he wrote: “Protection . . . against the tyranny of the magistrate is not enough: there needs [to be] protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them.”¹¹

We Americans rightly pride ourselves on our First Amendment’s unparalleled protections of free speech against government censorship. Yet when one considers the weakened state of free speech culture in the U.S., we may not enjoy more actual speech freedom than citizens of countries whose governments wield more censorial power. As famed Danish journalist Flemming Rose has observed: “In Europe, we have more legal limitations on speech but less social pressure, while in the U.S. you have very few legal limits but far more social pressure.”¹²

Our hard-won legal protections for free speech did not automatically follow from the addition of the First Amendment to the Constitution in 1791. To the contrary, for most of that Amendment’s history, it was

completely unenforced, allowing government to silence all manner of dissidents, reformers, authors, and others with controversial views until the second half of the twentieth century. The Supreme Court did not strike down any federal law as violating the First Amendment until 1965, even though a long line of earlier federal laws had blatantly violated that Amendment's free speech guarantee, starting as far back as the notorious 1798 Alien and Sedition Acts, which outlawed criticism of federal officials and policies. Along with other constitutional provisions, the First Amendment is not self-executing, as the "Father of the Constitution," James Madison, recognized when he referred to the Constitution as a mere "parchment barrier" against government violations.¹³

It required the sustained efforts of many individuals and organizations to translate the First Amendment's paper promises into real rights for actual people. This was a major reason for the founding of the American Civil Liberties Union exactly 100 years ago, in the wake of World War I era speech suppression, resulting in the arrests and imprisonment of thousands of people solely for peacefully criticizing U.S. war policies. To this day, the ACLU and others continue to challenge government actions that unduly stifle peaceful protesters, across the ideological spectrum. Just as the First Amendment itself is not self-executing, the same is true of Supreme Court precedents enforcing it.

The same kinds of deliberate efforts are required to create and maintain a culture of free expression. The instinctive reaction of most people is not to defend freedom to convey controversial ideas; to the contrary. Writer Nat Hentoff well-captured this innate tendency in the title of his 1992 book, *Free Speech for Me—But Not for Thee*. It was also captured by no less stalwart a free speech champion than former U.S. Supreme Court Justice Oliver Wendell Holmes, when he wrote: "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart, you naturally" seek to "sweep away all opposition."¹⁴

Just as Holmes and countless others have had to continually strive to create and maintain legal protections for free speech, the culture of free speech likewise depends on similar efforts. That culture has been built by countless leaders and members of civil society, and every single one of us who prizes

that culture has a responsibility to continue those efforts. Those of us who are members of campus communities have not only special opportunities to do so, but also, accordingly, special responsibilities to do so.

* * *

Now that I have outlined why we should promote free speech culture and counter cancel culture, I will recommend some particular strategies for advancing these goals in the virtual classroom.

How can we teach in ways that foster free speech culture, while thwarting cancel culture?

Surveys and anecdotal evidence indicate that students have for years been engaging in too much self-censorship, due to peer pressure and other cultural factors, even before the pandemic-induced move to online education. Therefore, even pre-COVID, many faculty members had already devised approaches to counter this worrisome self-censorship trend. However, for the reasons that this guide explains, the online shift increases self-censorial pressures, hence making these counter strategies even more important.

My recommendations derive from my long experience as a law professor who for many years also has regularly spoken and taught classes at many, diverse colleges and universities, as well as at many high schools and middle schools. From this experience, I am convinced that key teaching approaches that are prevalent in law schools have universal benefits at all educational levels, including the specific benefit of fostering a free expression culture. The pedagogical approaches at issue are prevalent in law schools specifically because they are essential for learning legal advocacy skills, as well as for understanding both majority and dissenting judicial opinions, which are necessary for effective legal work.

Most importantly, law students are expected to understand, and to be able to articulate, not only differing conclusions about every issue, but also

the rationales that support those alternative conclusions. Law students are trained not only to answer every question, but also to question every answer. This is an essential aspect of the famed Socratic dialogue method that has long epitomized legal education. My repeated mantra for my students is that they must be able to understand, articulate, and advocate *all plausible perspectives* on every issue we study—i.e., every perspective that can be plausibly based on pertinent legal precedents and principles.

We law professors often summarize our pedagogical approach by saying that we teach students “to think like lawyers.” To my mind, though, we are teaching students *to think*—period! Or, to cite another apt phrase, we are teaching students to engage in *critical thinking*.

This kind of critical analysis has enormous educational benefits for students of all ages, and in all fields, well equipping them for future occupational endeavors, as well as active, constructive engagement in civic life. It is also the essence of what is often called “media literacy”—being able to analyze critically information and ideas that we encounter online as well as in other media so that we don’t passively accept misleading or false information. In the social media era, with torrents of information, as well as disinformation and misinformation, available—in addition to unparalleled resources for doing our own research and vetting all sources—these critical skills concerning information retrieval and analysis are more urgently important than ever.

Another benefit of the foregoing pedagogical approach is that it does not require students to endorse any particular argument or conclusion and indeed may even bar them from doing so. As law students are drilled, they shouldn’t begin any argument with “I believe,” since their personal beliefs are irrelevant; the operative question, rather, is what result comports with applicable legal rules and principles. Because lawyers have a professional responsibility—i.e., an ethical duty—to “zealously” represent any client, lawyers must vigorously advocate all plausible arguments that would advance a client’s position, whether they agree with any such argument or not. Moreover, all lawyers, as well as anyone else who engages in arguments—for example, student debaters—recognize that an essential strategy for honing one’s own argument is to become fully familiar with the most persuasive counter-arguments.

When students are required to lay out a range of evidence and conclusions, but not asked to identify themselves with any of these, they are shielded from the potentially punitive response that could well deter them

from personally advocating any unpopular positions. These controversial positions are articulated and added to the discussion—and hence, subject to examination, questioning, and refutations—but any student who lays out such a position is a “devil’s advocate,” not the devil himself. Nor is the educational

After all, the point of the educational process is hardly for students to fix on enduring answers to challenging, evolving, debatable questions. To the contrary, the goal is to help students develop habits of mind that will enable them to continue reexamining such questions in light of their ongoing quest for and analysis of additional information and insights.

experience notably shortchanged by eliminating or downplaying students’ own personal conclusions. After all, the point of the educational process is hardly for students to fix on enduring answers to challenging, evolving, debatable questions. To the contrary, the goal is to help students develop habits of mind that will enable them to

continue reexamining such questions in light of their ongoing quest for and analysis of additional information and insights. As stated by the celebrated former University of Chicago president Robert Maynard Hutchins: “The object of education is to prepare the young to educate themselves throughout their lives.” Likewise, in the words of Bishop Mandell Creighton, a prominent nineteenth century Cambridge University professor: “The one real object of education is to have a [person] in the condition of continually asking questions.”

Yale Law School Dean Heather Gerken has hailed the foregoing features of legal education for fostering a legal profession and legal system that accord equal opportunities for all individuals and all perspectives, bridging even differences that severely divide our broader society. As she wrote:

In law schools we don’t just teach our students to know the weaknesses in their own arguments. We demand that they

imaginatively and sympathetically reconstruct the best argument on the other side. . . . Lawyers learn to see the world as their opponents do . . . The litigation system is premised on the hope that truth will emerge if we ensure that everyone has a chance to have her say.

The rituals of respect [within the legal profession and system] come from this training. Those rituals are so powerful that they can trump even the deepest divides. . . . Thurgood Marshall was able to do things in court that a black man could never do in any other forum . . . Marshall was able to practice even in small, segregated towns in rural Maryland during the early days of the civil rights movement. . . . [D]espite their bigotry, members of the Maryland bar had decided to treat Marshall as a lawyer, first and foremost.¹⁵

Gerken concludes that these “core values” in our law schools and legal system—which epitomize free speech culture—should once again serve as models for our culture more generally.

One of the reasons I am convinced that law schools’ pedagogical approach works well for students at all educational stages is my own analogous personal experience long before I matriculated in law school: as a competitive debater throughout my middle and high school years (starting at age 13). Student debaters are routinely required to argue both sides of the issues and to defend their positions through evidence-based reasoning. Surveys confirm that I am typical of students who have had the benefit of debating experience in prizing it as the best preparation for all of my other studies and for my professional life. Moreover, social scientists have shown that people who have had debate experience tend throughout their later lives to be more open-minded than average, more actively seeking out information and ideas from diverse sources and engaging critically with them.

For these reasons, there has been a growing movement to institute “debate-centered” educational curricula for middle and high school students. Those curricula are endorsed in a book released in October 2020 by Brookings Institution Senior Fellow Robert E. Litan: *Resolved: Debate Can Revolutionize Education and Help Save Our Democracy*.¹⁶ As he explains, the skills essential to debating—which closely track the skills embedded in legal education—“are

... precisely the skills that *all students* ... should acquire to be good citizens and to be successful in the workforce.” These are “research; thinking logically and critically and doing it on your feet; listening carefully to others; backing up arguments with evidence (not fake news!); working collaboratively with partners; speaking persuasively in a civil fashion; and perhaps most important, being able to argue both (in some cases more) sides of nearly any issue or subject.”¹⁷ Moreover, debates have the added “virtue of separating ideas from the identities of those who offer them, while teaching participants to avoid putting labels—conservative or liberal, democratic or republican—on ideas, which should be considered on their merits rather than as markers of identity.”¹⁸

Significant resources are available online, for both teachers and students at all educational levels, for incorporating debate into our classes, including

Significant resources are available online, for both teachers and students at all education levels, for incorporating debate into our classes, including online ones.

online ones. Most excitingly, these resources include some that are designed and have been used even for young students, in elementary grades. Students and teachers alike praise such

programs for being enjoyable and engaging, as well as educationally enriching and personally empowering, instilling self-confidence in the participants. Last, but far from least, Robert Litan has concluded that “debate can and does work even better in a [Z]oom setting,” because “kids [are] more comfortable talking through their computer than in classrooms,” as “some evidence” demonstrates.¹⁹

For those who have not participated in competitive debating or a debate-centered education, but who have only watched debates, it may well seem counterintuitive to rely on debating skills to foster civil discourse and open-mindedness. That is because most people equate the debate experience with what is only a single episode in a long process of education, preparation, performance, and debriefing—namely, the important but relatively brief performance phase of the debate itself. During each “round” of a debate competition, each speaker must of course advocate a particular position and

seek to “defeat” the “opponent,” who advocates a different position. These are hallmarks of a cancel culture, not a free speech culture.

However, the majority of a debater’s time and endeavors are invested in research, analysis, preparation, and debriefing—i.e., further learning and preparation—processes that develop the skills noted above, which are hallmarks of free speech culture. These skills include researching and arguing multiple perspectives and collaborating with teammates, including those who argue different positions. Even in the debate competition itself, there are typically multiple “rounds,” during which each speaker must alternate between the “affirmative” and “negative” sides on the issue. Therefore, although the debater’s oral performance during one round solely advocates for one side and against the other, even during that phase the debater is carefully listening to and learning from arguments that the opposing side advances in that round, and might well incorporate the resulting insights into her own arguments in the next round.

Conclusion

All of us who are engaged in education must redouble our efforts to promote the embattled free speech culture and to counter the ascendant cancel culture in the especially challenging context of the virtual classroom. Without a vibrant free speech culture, even a strongly enforced First Amendment cannot secure the actual exercise of freedom of speech by individuals who are—understandably—cowed by social pressures, reasonably fearing that unpopular opinions might well result in adverse consequences imposed by individuals and institutions against which the First Amendment provides no protection, since that Amendment binds only government actors.

While the term “cancel culture” is new, it describes a problem that long has been noted by free speech proponents. As one case in point, I have already quoted John Stuart Mill’s landmark “On Liberty,” from the mid-nineteenth century. In the mid-twentieth century, the same theme was eloquently addressed in a celebrated speech by a prominent federal judge, Learned Hand, which also had a similar name, “The Spirit of Liberty.” Although Hand did not use the term “free speech culture,” it is exactly the concept that he memorably

extolled: “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it.”²⁰

All of us who cherish liberty, including freedom of speech and thought, are deeply indebted to all the members of the academic community who nurture it within individual hearts and minds, hence maintaining it as a vital force in our culture and society.



Endnotes

1. John Stuart Mill, “On Liberty,” ed. Elizabeth Rapaport (Indianapolis: Hackett Publishing Company, Inc., 1978), 4.
2. *Ibid.*, 9.
3. *Ibid.*, 51.
4. Emily Ekins, “Poll: 62% of Americans Say They Have Political Views They’re Afraid to Share” Cato Institute, July 22, 2020, <https://www.cato.org/publications/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share>.
5. James L. Gibson and Joseph L. Sutherland, “Keeping Your Mouth Shut: Spiraling Self-Censorship in the United States,” SSRN (June 1, 2020), <https://ssrn.com/abstract=3647099>.
6. *Ibid.*, 2.
7. Ekins, “Poll: 62% of Americans.”
8. James L. Gibson and Joseph L. Sutherland, “Americans Are Self-Censoring at Record Rates,” Persuasion, July 31, 2020, <https://www.persuasion.community/p/americans-are-self-censoring-at-record>.
9. Ekins, “Poll: 62% of Americans.”
10. John Lewis quoted by Nadine Strossen in *HATE: Why We Should Resist It with Free Speech, Not Censorship* (New York: Oxford University Press, 2018).
11. Mill, “On Liberty,” 4.
12. “Copenhagen, Speech, and Violence” (an interview with Flemming Rose), *The New Yorker*, February 14, 2015, <https://www.newyorker.com/news/news-desk/copenhagen-speech-violence>.
13. James Madison, *The Federalist No. 48*, February 1, 1788, The Avalon Project, https://avalon.law.yale.edu/18th_century/fed48.asp.
14. Justice Oliver Wendell Holmes dissenting in *Abrams et al. v. United States*, 250 U.S. 616 (1919), Legal Information Institute, Cornell Law School, <https://www.law.cornell.edu/supremecourt/text/250/616>.
15. Heather Gerken, “Dean of Yale Law School: Campus Free Speech Is Not Up for Debate,” *TIME*, July 13, 2017, <https://time.com/4856225/law-school-free-speech/>.

16. I am grateful to Jonathan Rauch for having alerted me to the concept of debate-centered education and to Robert Litan's then-forthcoming book, in July 2020, while I was writing this essay; I am also grateful to Robert Litan for having shared the manuscript with me at that time.
17. Robert Litan, *Resolved: Debate Can Revolutionize Education and Help Save Our Democracy* (Washington, DC: Brookings Institution Press, 2020), 4.
18. *Ibid.*, 13.
19. *Ibid.*, 10.
20. Judge Learned Hand, "The Spirit of Liberty," 1944, in *Our Nation's Archive: The History of the United States in Documents*, eds. Erik Bruun and Jay Crosby (New York: Black Dog & Leventhal Publishers, 1999).



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