Belmont Law Review

Volume 6 *Symposium 2018: The Modern Workplace: Contemporary Legal Issues in Employment & Labor Law*

Article 9

2019

Modern Legal History Series Free Speech Discussion

Ari Cohn

Jeffrey Usman

Modern Legal History Series Free Speech Discussion

Cover Page Footnote

Ari Cohn is the former director of FIRE's Individual Rights Defense Program, which engages in direct advocacy on behalf of students who have suffered violations of their rights, and he speaks regularly to diverse audiences about the importance of free speech, with a particular emphasis on bridging ideological divides and finding mutual understanding. He earned his J.D. cum laude from Cornell Law School and his B.A. from University of Illinois at Urbana-Champaign. Professor Jeffrey Usman, B.A., Georgetown University; J.D., Vanderbilt University Law School; LL.M., Harvard Law School. Professor Usman, who serves as the faculty advisor to the Belmont Law Review, is an Associate Professor of Law at Belmont University College of Law in Nashville, Tennessee.

MODERN LEGAL HISTORY SERIES

FREE SPEECH DISCUSSION

FEATURING: ARI COHN*

MODERATED BY: PROFESSOR JEFFREY USMAN**

MARCH 19, 2018

MODERATOR: Thank you all for being here, and to our guest, I know school is cancelled all over Nashville, so it's a crazy day for a lot of people around town. Let's start with this. Let's get a little background here. What exactly is FIRE?

ARI COHN: So, FIRE is a national non-profit, non-partisan organization founded in 1999 by a civil liberties lawyer and a professor at [University of Pennsylvania], who realized that there was a problem at our nation's colleges and universities. The problem being that faculty—or, sorry, administrators—were stifling speech on campus. Students were not free to speak their minds, they were not free to engage in the marketplace of ideas, and they were suffering—their education was suffering as a result. And because their education was suffering, the future of our society and our civic democracy was going to suffer. So, they set out to change that. They began an organization, just the two of them, while they had careers. And from then, it has grown over the past about eighteen years to an organization that employs about fifty people and more lawyers than you can shake a stick at.

And we have programs—my program, the Individual Rights Defense Program, gets about nine-hundred-plus case submissions every year from people who have faced violations of their rights, and we intervene in their

* Ari Cohn is the former director of FIRE's Individual Rights Defense Program, which engages in direct advocacy on behalf of students who have suffered violations of their rights, and he speaks regularly to diverse audiences about the importance of free speech, with a particular emphasis on bridging ideological divides and finding mutual understanding. He earned his J.D. *cum laude* from Cornell Law School and his B.A. from University of Illinois at Urbana-Champaign.

** Professor Jeffrey Usman, B.A., Georgetown University; J.D., Vanderbilt University Law School; LL.M., Harvard Law School. Professor Usman, who serves as the faculty advisor to the Belmont *Law Review*, is an Associate Professor of Law at Belmont University College of Law in Nashville, Tennessee.

disciplinary cases or in other ways advocating for the students or faculty members. But we also have an extensive campus network with students who are dedicated to fighting speech codes or other violations of civil liberties on campus. We work with administrators to reform policies or host events and speakers at events very much like this. We have a legislative team now that lobbies at federal and state legislatures that have passed bills—most recently in Florida, a free speech campus bill was passed ending free speech zones. We passed that in a number of states. We have a policy reform team that works proactively with administrators, very successfully, to change problematic policies before they're applied in many ways.

And we have, now, inhouse litigation for the first time in FIRE history, where we finally have a legal staff to take on schools that are—that will not change their policies and apply them against students in ways that violate the First Amendment. Instead of finding outside counsel to take care of that for us, we now do that ourselves. The magnitude of the problem has become clear, and I think, on a national stage, the issue has become one spoken about so regularly that few people who watch the news these days aren't aware that there is a controversy over free speech.

And so, with that global awareness of the problem, FIRE is growing to match it and keep up.

MODERATOR: Can you tell us a little bit about your role with FIRE?

ARI COHN: So, I oversee a department, and I honestly don't know how many people are in it—I'm going to count, now, because it changes on a regular basis. Including myself, four lawyers and two non-lawyers, and we take on new cases. We're the first ones there when the case submissions come in, who the students come to. We're the first to give help, and we look through every single one of those case submissions and then we ask for more information, documents, more facts, and then we determine those cases that FIRE can intervene in.

MODERATOR: What are you looking for? In selecting a case, what is it that you're looking for?

ARI COHN: Really just one thing: have your rights been violated? People always ask whether we take cases based on ideology or some kind of partisan litmus test. The answer is, and always has been, no. I always tell people that our body of work speaks for itself. It's all on our website. If you want to go and see what a truly principled defense of free speech looks like, our case archive—I can't picture a better exemplar. You can see anything from socialist speech to, you know, capitalist speech, pro-Affirmative Action, anti-Affirmative Action, pro-life, pro-choice—everything and anything. And if

you actually want to peg us as taking an ideological side, you'll find yourself with a very confused brain, because all of our cases contradict each other.

MODERATOR: There's so many different ways in which free speech issues arise. Why should people be particularly concerned about speech restrictions on college campuses?

ARI COHN: Well, there's a few reasons. First of all, I think most people understand that college campuses are often an incubator for the ideas—both socially, politically, and otherwise—that eventually grow to acceptance in general in society. It's been that way in several different ways, from both and all ideological perspectives, that has occurred. So, you know, we're endangering the advancement of our society from that.

But we're also endangering the students' ability to learn how to think critically. Students go to college to learn how to grapple with ideas. In high school, they are being talked to. In college, they can kind of engage with the material, and to really challenge it, to challenge yourself, to challenge your peers. You learn how to formulate arguments for your position and against your ideological opponent's position. That is an endeavor that can only be accomplished by actually confronting things that you find abhorrent. I know, on several occasions, I've only really understood why I believe what I knew I believed in—I didn't know why I believed it. The only reason I ever figured out why I believed that, was because I was forced by someone who challenged that idea to come up with a damn good reason why I was right, and they were wrong. Because, frankly, I'm not a person who enjoys being told that he's wrong. So, if somebody challenges me, I'm going to do whatever I can to prove them wrong.

But I think that, on top of that as well, the training that goes on on a college campus for participation in our civic way of life—civic engagement, something that frankly I think is not taught nearly enough at the high school, the secondary education level. We don't get it enough then; if we don't develop it in college, if we don't let students learn to find their passions, learn to become civically engaged, we are going to continue down this spiral of political apathy that we've certainly seen growing over the past decade or so. It's a real problem. And if we don't allow students to really, I guess, flap their wings and kind of get their feet wet, we're going to be in trouble. We're not going to have a citizen that cares much, and that's a sure way to see that society is dead.

And that's why I tell people, regardless—and this is in the college example—but regardless of what you think about what these students who walked out of class, you know, what you think of their position, everyone should be damn proud and heartened to see students actually realizing that they have a

voice; that voice can make a difference; and that if they want to change something, they'd better stand up and say something. Whether or not you agree with it, whether or not you agree that these students have really thought their position out, the fact that they are flexing that muscle, they are exercising it should really, really make everybody in this country proud. And if it doesn't, then the kids aren't the problem.

MODERATOR: Do you see a downstream effect, in terms of schools that are restricting with regard to speech rights, translating into weakening, corroding of speech rights outside of the school setting?

ARI COHN: Well, I think that the more our liberties fall into disuse, the more they are talked down on or they're attacked and seen as a vestige of a past that we shouldn't be proud of, the more susceptible they are to being eroded. And, I mean, you can see it over the course of, you know, even just our own history. The First Amendment, you look back at how free speech cases were applied in the Thirties—you know, some of these cases, especially the wartime cases, as soon as people started saying, "Well, that speech is going to help the Commies, or it's going to impact the war effort," slowly but surely, you saw convictions and people being sent to jail for doing something as simple as opposing the draft. Something you would take for granted these days, it actually took the dramatic swing and the changing of Oliver Wendell Holmes's mind to right that wrong. But the fact of the matter is, when society starts to feel that way about pretty much any right or liberty, the court will soon follow. I mean, you see that in reverse, too. You don't get from *Plessy v. Ferguson*[1] to *Brown v. Board*[2] without that intervening societal shift in public opinion. You know, the court doesn't really go out on a limb to turn over things. You know, they follow the public opinion for the most part, and only when society is ready. So, if it happens that way, it's going to happen in the reverse as well.

MODERATOR: In the K-12 setting, the U.S. Supreme Court in *Tinker*[3] tells us students don't leave their rights at the schoolhouse door, and we have this idea that there is a protection, but we've seen the Supreme Court significantly cut into what that actually means in terms of students' speech rights. I'm curious about how some of those restrictions at the K-12 level are translating over into the university setting. So, we have variables like *Hazelwood*[4], in which you have significant restrictions at the K-12 level related to curriculum. So, if it's a curriculum-based—if it's a limitation that's part of the class, part of the school paper in that case—how is that translating to the

1. Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by*, Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483 (1954).
2. *Brown*, 347 U.S. at 483.
3. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
4. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

university setting? Are you seeing courts—are they simply applying, are administrators simply applying the limitations that we see in that K-12 setting also to the university setting?

ARI COHN: Well, I mean, particularly—you just said *Hazelwood* and my blood pressure just shot straight through the roof, because *Hazelwood*'s probably the biggest thorn in every free speech advocate's side, who cares about student issues. Because *Hazelwood*, just to flesh out a little bit more, was basically the Court saying speech that bears the school's perimeters, school-sponsored speech, can be restricted for legitimate pedagogical reasons. And, at the high school level, to a certain extent, that makes sense given the difference in maturity level—the priorities of the educational process for high-school-aged students versus college-aged students, which are widely considered to generally be adults.

You have *Hosty v. Carter*[5], the Seventh Circuit, extended that to college papers, which was just a complete upheaval of everything that the Supreme Court had ever held about free speech at colleges and universities, and anything that pretty much anyone ever expected, to hold that college administrators should be able to censor student publications because they don't like what it says, and because somebody might, I guess, think that a college paper speaks for the school. Except no reasonable person would ever actually do that.

It was so bad that states actually passed what we started calling anti-*Hosty* laws. They had to pass laws to tell schools, it doesn't matter what the Seventh Circuit said, student publications are now public forums, and you are not allowed to step in and censor them because you don't like what they're saying about you. Because, as we all know, if there's one thing student newspapers love to do, it's relentlessly hit on administrators. Critique them, rightly or wrongly. And it's fun. Who doesn't like to do that? But, you know, the problem isn't that administrators are losing, because administrators, by and large, don't actually tend to think about the specific precedent and the mechanics of free speech on campus as it applies to students. And they should, but you know, they're not lawyers. Their first consideration isn't, "Well what does the law say?" It's, "How do I resolve X problem on campus." And that's understandable, to an extent.

But, when Courts have looked at these cases, they'll sometimes cite to *Tinker*, and schools will seize on that sometimes, not understanding that the court's not necessarily saying that *Tinker* provides the standard for college students. Because it very clearly doesn't. The Supreme Court expressly said as far back

5. Hosty v. Carter, 325 F.3d 945 (7th Cir. 2003), *reh'g en banc granted*, *opinion vacated* (June 25, 2003).

as 1972 that the precedents of the Court leave no room for the view that the First Amendment applies with any less force on college campuses as it does in the community at large. And several courts, including the Third Circuit, have expressly held that the difference in age, and the difference in maturity level, renders *Tinker* inapplicable for college students. Some courts have seemed to apply it, but—

MODERATOR: Why do you think we've seen district and circuit courts aiming to draw in the sort of K-12 limitations—*Tinker*, sort of balancing approach—why do you think we've seen that migrate into the college setting?

ARI COHN: Well, I think it's easy, first of all. You know, it's kind of a—because most people look at a case like a college campus and say, yeah, they're adults. But also, this is a school, so something's got to give. There has to be some balance, and *Tinker* kind of provides an easy out for it. It kind of satisfies that gut feeling—there has to be some kind of balance. I think that's part of it.

The courts also don't—when they cite to it—they're not even necessarily saying that it provides the standard for college students. FIRE's position is that *Tinker* is the absolute floor for student speech rights. It's not, this is all that schools have to provide. It is, you know—if it won't even satisfy *Tinker*, then you know you screwed up. Because, if a high school student can say it, of course a college student can say it. And so, I think there's confusion about what the courts sometimes mean when they bring in *Tinker*.

Of course, better judicial writing could alleviate some of these problems. You know, it's tough, because that gut instinct that something's gotta give at some point is, I mean, it's emotionally appealing. It's rationally appealing. It makes sense in our head. It's just kind of one of those arguments that, yeah, that must be right. But you also have to find a way, when you're writing an opinion, to actually state a principle and base it on that. Otherwise, you're going to end up with a mess. Not that we haven't ended up with a mess anyway, but—

MODERATOR: How should it work in a classroom, in terms of free speech rights? How should courts approach this when you're talking about students engaging in conversation, exchange with a faculty member or other students in the classroom? Some courts wanted to look out and essentially have a very aggressive approach with *Hazelwood*—this idea that, if it's in the classroom, it's completely subject to the professor's control, all limitations. How should it look, in terms of the students' free speech rights in a classroom?

ARI COHN: So, again, in a classroom is a little bit different. I'll start off with an example, actually, just from the other week. Indiana University of Pennsylvania, there was a student—I forget what the course was, but it was taught by a faculty member who, I think that, was described in the press as a transgender feminist or something of that nature—and the students were watching a video about transgender issues. And the faculty member—well, apparently one student kind of voiced some opposition during the video, and then the faculty member opened up the floor only to female students at first to comment, and then was going to open it up to everyone after the women in the class had had a chance to speak. And apparently, after twenty seconds and nobody had raised their hand, this guy thought to himself, "Well, this is—nobody else is talking, so I'm gonna say my piece." And he voiced opposition to the idea that, you know, transgender identities are valid, or there's only two genders and things like that. And he got kicked out of the class and brought up on disciplinary charges.

The problem was that, the disciplinary charges said, not only that he was disrespecting the rules of format of the conversation, but that he was disrespectful in denying the validity of trans identity and stuff like that. So, we have a case that actually could've been relatively clean-cut. Faculty members, as part of their academic freedom rights, have the ability to set the format for classroom discussions. They can set the ground rules in terms of how, logistically, this is going to work. What they can't do is say, "Well, you can only say things that agree with the work" or "You can't challenge these ideas. You can't, you know, voice dissenting opinions." Two different things: one based more purely on conduct, and the other based on viewpoint.

Had the faculty member just written in the disciplinary referral, "I opened the floor to certain people to comment first, and this student did not respect that, and it disrupted the class," in my opinion, it would've been an open and shut case. But by saying, "And he disrespected and denied the existence of the trans identity," it makes you wonder whether the conduct was what caused the disciplinary referral, or the views that the student had expressed. And, you know, which one it was, I'm not in a position to say. I don't know anything past what was published in the press about it. But it made me scratch my head—made me think, well, if you had a clear-cut disruption case, why did you bring in the viewpoint, because that just messed everything up for you. Because now, we're all sitting here wondering if you're just trying to engage in runaround viewpoint discrimination. It's problematic.

So, within the confines of the classroom, students need to respect the ground rules that the professor lays. The professor also cannot lay ground rules that discriminate based on the viewpoint that a student might want to express.

MODERATOR: In the K-12 setting, one of the struggles that courts are having is the off-campus speech issue. So, kid's at home, they're on a computer, they're commenting on something about the school—at what point does it get dragged into the *Tinker* setting? For a lot of college students, that's more complicated, in terms of, they live on campus, they live within that campus community. There is no home that's completely separated. How does that factor into student speech, when you're talking about somebody commenting from their computer, sitting in a dorm room. Does that come into play at all? How should we see that?

ARI COHN: So, it's a good question. There's actually a case, it was a couple years ago now, but it was the University of Kansas, where a student was tweeting about his ex-girlfriend. He didn't tag her, but he kind of implied that it was about her, and he had no contact with her, due to some disciplinary case between the two of them for regarding sexual misconduct. And the school expelled him. And the Kansas state courts said, your policy—your student handbook—does not give you jurisdiction over off-campus conduct. It says, specifically, that it applies to conduct on campus and at school-sponsored events, and therefore, you do not have jurisdiction to expel them for this. That's one of the few cases where I think it's shown up in the college context. It is very different than the high school cases, because the high school cases, you can—you have that line of demarcation. You have that off-campus had reached and created a disturbance on campus.

For college students, home is on campus, like you said. And frankly, given the fact that the First Amendment is held to apply in full on the college campus, where that speech happened shouldn't really make a huge difference. But, I will temper that a tiny bit by saying that, generally speaking, when—say something happens over spring break. If I tweeted something disrespectful on summer break at a politician, and the politician reported it to the school—I mean, even more so than if I'd done it on campus, where it would still be protected, a school has absolutely no business reaching out and saying, "Well, I'm going to use my longarm statute. You know, claim jurisdiction over your off-campus tweets over summer break, because, you know, some politician complained about it." You know, that's—I guess, as inappropriate as it would be if I were on campus, it's even more inappropriate when you are not—if I was off campus.

MODERATOR: In the K-12 setting, we see the exclusion, *Bethel*[6], in terms of lewd, vulgar speech being subject to discipline. Is there any place for a *Bethel* limitation on a college campus, in terms of speech that's punished at an extracurricular setting? Let's say it's lewd or vulgar speech that a student's engaging in.

6. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

ARI COHN: Honestly? Fuck no. [Laughter]. Sorry I had to. [Laughter]. Listen, the fact of the matter is, college students—well, it's hard to get them sometimes to care about things that aren't Keystone Light or the swimsuit edition of Sports Illustrated. The speech that is colorful, the speech that is attention-grabbing—that is what gets people to care about issues. That's what gets people to get up off their ass and actually do something. Nobody ever got excited about a political or a social issue by reading a dry, mundane, boring, you know, treatise on, you know, the philosophy of it. Especially not Millennials. If you want to get their attention, you've got to make some kind of snarky Snapchat or what have you, and definitely use words that don't exist. [Laughter]. But you've got to grab their attention.

And there's room for that—there has to be room for that—and we have to really enable people to decide what's going to have the mode of impact that they want to have. And that's important. That goes all the way back to *Cohen v. California,*[7] where—although many people don't know that Robert Cohen didn't actually know what the jacket said when he put it on—but he wore the jacket that said, "Fuck the draft," to the courthouse. And the judge held him in contempt. And, you know, the Supreme Court got it right when they said that one man's vulgarity is another man's lyric. What the Court got even more right is, by saying the reason we're not going to get into this and we're not going to let the government decide, is because the government is God-awful at deciding things like this and matters of taste.

And I think that, regardless of where you stand on the political spectrum, just—even the past eight years, you know, the past two presidential administrations, this one and the one before, can tell you that there is no way that the government can make principled distinctions on matters of taste. It's impossible, they suck at it, and you know what? Frankly, I wouldn't trust most of our politicians to watch my dog, let alone decide which words are vulgar. But I'm a cynic, so.

MODERATOR: Let's talk a little bit about hate speech on college campuses. Where are we at today, in terms of colleges, with hate speech codes? What are you seeing from colleges and universities with hate speech codes?

ARI COHN: Well, most of them don't call them hate speech codes anymore, because hate speech is very 1990s, P.C., you know—and also, in light of *R.A.V.*[8] and the other cases on hate speech, it's not fashionable to call them hate speech laws anymore. Now, they're called discriminatory harassment policies, and in and of itself, that's not a bad thing. Except, most of these

7. Cohen v. California, 403 U.S. 15 (1971).
8. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

policies are either incredibly broad, including, you know, saying things that subject other students to ridicule or scorn. Or, even if they're written in a way that's not ridiculously broad, they're applied in ways that are ridiculously broad. And it doesn't even—it isn't even limited to things like sex or sexual orientation or race, or things like that. There are legitimate discriminatory harassment policies that include things like political affiliation. You are not allowed to hate on someone for their politics. I mean, if there's anything that is just a time-honored American tradition, it is hating on your political opponents in the public square [Laughter]. If we can't do that, then what are we, really? [Laughter].

You know, you laugh, but it's true. These things exist. And, you know, there's ones that list things like bodies, body size, and you know, just complete laundry lists of anything you could possibly think of that somebody might insult somebody else on—you're not allowed to insult that person. To be sure, administrators have the legal and moral obligation to respond to and prevent discriminatory harassment—legitimate discriminatory harassment—against protected classes. Classes that are protected by federal law. But, the bar for discriminatory harassment is not where most colleges have it. The bar for discriminatory harassment, as the Supreme Court sees it, is conduct which goes beyond mere speech. You know, there's conduct—and I'll come back to that in a second—that is so severe, pervasive, and objectively offensive that it effectively denies its victims access to an educational opportunity or benefit. So, there's a lot in that.

But first of all, conduct. And the Office for Civil Rights in the Department of Education, which is responsible for enforcing Title IX and Title VII and all these non-discrimination statutes, has said that conduct must go beyond speech that merely offends someone. Take, for instance, if I stand outside of somebody's dorm room door, and I shout at them racial epithets every time they walk out of their dorm room and follow them around campus. If I just shouted something at them once that was mean, that's probably not discriminatory harassment. But, the act of following them around and lying in wait outside their dorm room door, combined with the just abhorrent nature of what I'm doing, the pervasiveness of it obviously, and the fact that if I were that victim, I would never leave my dorm room again—that raises it past the level of discriminatory harassment. I'm probably gonna get kicked out of school, and that's okay.

But writing, for instance, as one Texas State University student did recently in the student paper, an editorial saying, "I hate white people," basically, "your DNA is an abomination" and things like that—I hope he was advocating for the end of whiteness as he saw it, as a social construct used to oppress minorities. The discriminatory harassment tables were turned; people started accusing him of hate speech and making the campus an unsafe

place for white people. And so, you see kind of this tit-for-tat back-and-forth of people wielding discriminatory harassment policies in ways that simply seek to shut up the people they disagree with. Something's got to give.

I mean, the Federal Government is not even any better, because—and this is more of the sexual harassment sphere, but when the University of Montana was undergoing its O.C.R.[9] investigation, they came to an agreement with the O.C.R. and D.O.J.[10], which said basically that they were going to define "sexual harassment" as "any unwelcome conduct of a sexual nature." That is incredibly, incredibly broad. I mean, not to keep hitting on Millennials, but, you know, if somebody goes up to somebody of the opposite sex at a bar and basically propositions them for sex, that's something that most college students would consider fairly normal this day and age. That is unwelcome conduct of a sexual nature. Asking somebody out on a date, if you don't know that they want to go on a date with you, well that could very well be unwelcome conduct of a sexual nature. You don't know until you ask. So, you know, where does it end? And schools, seeing this resolution agreement, just kind of went down this path of declaring any and everything under the sun sexual harassment. There have been policies that, not even joking, have counted as examples of sexual harassment, quote, "Elevator eyes." Which is just a hilarious phrase. And, "Inappropriately directed laughter," which, for me, is a huge problem, because I inappropriately direct laughter every day, multiple times a day. It's crazy, and these policies—and particularly the examples that are accompanying the policies, like telling a sexual joke—well, I mean, you watch a Chris Rock special on Netflix, you're gonna hear a sexual joke. If you're playing that in the dorm room, in the lounge, and somebody's offended by it, are you going to get brought up on sexual harassment charges because you had it on? Could be. So, these policies haven't gone away. They've transformed, and they've taken on new justifications. The basis for them is now changing from, "We authored them to protect people's feelings" to "Oh, well, the big bad Federal Government is making us do it. And, you know, we want our federal funding, so we can't really just not do it." Unfortunately, they also drew up the actual definition of discriminatory harassment, so that's what we've got.

MODERATOR: FIRE does evaluations of school policies—looks at how schools are doing in terms of respecting and not respecting student free speech rights. What do you use to evaluate it? How are the evaluations done? How are they measured? What are you looking for?

ARI COHN: So, we have a team—our Policy Reform Team—and they survey over 400 schools, and I have such tremendous respect for their

9. Office of Civil Rights.
10. Department of Justice.

patience, because every year, they go through every one of those schools' websites. And, if you've ever looked at a college or university website, you know that they don't keep all their policies on one tight page; they're spread out in handbooks and guidance manuals and IT policy pages and, you know, administrative policies. All these different places, and they scour these schools' websites and pull every policy that can possibly implicate speech, and they go through them with a fine-toothed comb, and they say, well, is this code perfectly fine? Which would make it a green-light policy. A yellow-light policy would be a policy that's not expressly unconstitutional on its face, but it's subject to interpretation or application that could violate some of these rights. Or, it could be a red-light policy, which clearly and substantially violates the First Amendment, and is facially unconstitutional. And they analyze every single policy, they parse the language. They put up updated versions on our website every year. And then, if a school has only green-light policies, they're a green-light school; and we've had the number of green-light schools double in the past, probably, three years or so. Which is great.

MODERATOR: Are you finding that schools are responsive to your—to the studies that are done by FIRE, or is it changing school policies?

ARI COHN: More so than people think. The Policy Reform Team at FIRE is incredibly successful at proactively working with administrators, who are often very happy to have our help. Because we'll basically write their policies for them and not charge them. It's much less work that they have to do. We will write their policies in a way that is constitutionally permissible and give them the resources and the justifications they need to bring to their superiors to say, "This is why our policy should be this way." They'll bring a memo with legal analysis, which we wrote. And they can pretty much get positive P.R. from FIRE saying the school respects Free Speech. We've seen schools that we've given green-light designations to issue press releases saying, you know—Georgetown College did it—"Georgetown College Receives FIRE's Best Free Speech Rating." And schools actually care about that. They don't want to be seen as constitutional violators, and they particularly don't want to be sued for being constitutional violators. Because if there's one thing they hate more than a good P.R. scandal, it's having to pay for it. So, yeah, we've found that schools are actually, on the whole, very responsive.

MODERATOR: One challenge on the speech front these days is, essentially, this counter speech—you're shutting down speakers, depending on how one wants to look at it. A speaker goes to speak on campus, there's a protest, that's essentially designed to shut down the speaker. Some argue that that's just a form of counter speech, that sort of shutting the speaker down. Does FIRE take a position on those types of protests? That type of engagement on campus?

ARI COHN: We do. And there's a distinction that people have often failed to make that they need to. There's a difference between, say, what happened at Berkeley, with Milo Yiannopoulos and, you know, Molotov Cocktails and what have you; and the situation in which somebody goes in to the speech given by somebody they disagree with, stand up, and chant for sixty seconds, and then turn their backs or walk out or something like that. FIRE's position is that, that kind of minimally disruptive speech should be tolerated. There has to be room for that. The speaker hasn't ultimately been prohibited from finishing out their speech and from taking questions from the audience; they've suffered a *de minimis* interruption and allowing for that has given everyone a chance to have their say, and Free Speech is essentially maximized.

However, when you get to the point where you are actively shutting down an entire event, preventing somebody from being heard at all, that is not an exercise of Free Speech, and FIRE is very cognizant of Supreme Court precedent that holds that the right to receive information is the flipside of the right to Free Speech. They're two sides of the same coin: the right to hear, and the right to speak. So, if you don't like what somebody is saying, and you seek to shut it down, that's an act of civil disobedience, and you have to accept the consequences. And frankly, there should be consequences, because that kind of behavior, if not—I don't want to say "punished," because that's a harsh word—but, if not dealt with, then it will be repeated. I think we saw that with what happened at Berkeley. I think the students who, just a couple of months later, shut down George Murray at Middlebury College—or, sorry, Charles Murray—I think they seized on that kind of lack of response by Berkeley and said, you know, "Well, we can do this within the community. The school's not gonna want to do anything about it, because they would look bad, because they're gonna be going after people who are opposed to a racist." And what happened? They sent a professor to the hospital. I mean, it was just something like I'd never seen before, and that's even taking into account Berkeley, which was also something I had really never seen before. That kind of behavior is basically, if it's not dealt with, is being tacitly rewarded and encouraged. And that's a problem for Free Speech on campus, and we've seen instances of the other side doing it right back. And, you know, if—I guess the Free Speech version of eye for an eye is, you know, an ear for an ear makes the world mute or something like that. But it's true—nobody's going to be able to say much of anything, because we're going to be so busy actually just saying, "Well, you shut down what I'm going to say, so then I'm going to shut down what you were going to say," that nobody's going to be able to say anything new, nobody's going to hear anything, and then it's going to be a mess.

MODERATOR: For law students, for attorneys that are interested in these types of issues, in what way can they—what's your advice, in terms of,

somebody has a passion for student speech rights, student rights—what's your advice to law students? What's your advice to practicing attorneys?

ARI COHN: Well, first of all—and this goes for everybody, not just law students and attorneys—but if you care about these issues, talk about them with people, you know. Make sure it's an issue that you discuss and that you raise awareness on. That's kind of the number one—that does way more than any lawsuit ever does, is raising public awareness. And I think that the increase in that awareness in society generally, over the past couple of years, has done a lot of good. Of course, it's also led to a lot of partisan bickering about who likes censorship more, but, you know, what can you do?

For law students, we actually have a legal internship every summer, so you should send your resumes on over. For attorneys, we have a legal network. If we can't take a case ourselves, we will often farm it out to a group of attorneys who share our values and our mission. You can sign up on our website. And we also, when we do our own litigation, we also have local counsel. So, we need people on the ground with passion and experience to serve as local counsel in some of these cases sometimes. So, you know, let us know that you're there, join the legal network, and you could find yourself working with us. I would say, "Give us money," but that sounds like—donations are always appreciated. [Laughter].

MODERATOR: I have a number of additional questions, but I'd like to open it up to the audience. We're here talking about student speech, and there are a few students here—what questions do you have?

Audience Member 1: When you say you take cases where students' rights have been violated, do you mean with regard to existing precedent, or in cases of maybe first impression, or where you're trying to overturn precedent? What does that look like?

ARI COHN: So, frankly, historically, it's been in line with established precedent. Of course, the battles for free speech are generally on the margins. You know, the law is pretty well established, and it's the application—particularly the egregious cases—that test things out. But, for instance, you know, you can think recently about student athlete speech. There's a line of thinking that, you know, when you sign up for the team, it's a voluntary activity, and you expose yourself to more control over your speech as a member of the team. So, the team can discipline you. The university can't kick you out, but you might get kicked off the team, and you've forfeited some of your rights. But with the protests in athletics over the past couple of years, that's led to a lot of discussion about, "Well, is that really the case? Can a, you know, coach really discipline a player because he didn't like the views expressed in that player's, you know, speech, or protest, or tweet, or

what have you? Can that really be the case?" And that's leading to, kind of, the examinations of where these lines are in a lot of these, you know, kind of non-mainstream types of cases. You know, the student athlete speech question is now something on a lot of people's minds. So, I think you're seeing a little bit more of first-impression type stuff coming up recently. And so, you know, if you want my prediction, it's gonna be more and more of that in the coming years.

MODERATOR: More questions?

Audience Member 2: I got to attend some Nazi protests in our state earlier this year, in Shelbyville and Murfreesboro. And in the second place, Murfreesboro, they didn't show up, but the police had been deployed, at great expense, and then you mention these provocative speeches at universities where they've spent tens of thousands of dollars, sometimes, in security. Westboro Baptist Church used to have a habit of not showing up at funerals, after all this was incurred. Could a university argue or prohibit a provocative speaker on a financial basis, and argue that it's a content-neutral, secondary effect of the speech? They simply couldn't afford twenty-thousand dollars of police protection for Richard Spencer to come speak?

ARI COHN: So that's—that's definitely another question on a lot of people's minds right now. Because, instinctively, people think, "Well, colleges and universities shouldn't have to spend half a million for security for someone's speech." And again, the gut reaction is, "Well yeah, that makes sense." But is that really the case? And I think there's a couple of different ways to look at it. First being, Richard Spencer, to my knowledge—none of the colleges he's spoken at, he's ever been invited by a student or faculty member. It's always been a private rental. It would not surprise me if colleges and universities stopped renting out to the public their facilities because of this. Because when they do, I find it hard to believe that a court is going to exempt them from viewpoint neutrality because of the cost. The court might say, "Sorry, Charlie. You can stop renting it to the public."

Audience Member 2- That's the easy scenario. Let's say, now, it's the [Young Americas Foundation] says, "We want him to come," or a right-wing group says—the new Workers' Party says, "We want him to speak, and we have a small chapter."

ARI COHN: You know, I think that's an even stronger case for the university coming out on the losing side. Now, again, the university actually probably can prevent students, in general, from inviting outside speakers to campus. That is probably constitutionally permissible. Do I think that's a good idea? No. Do I think any college or university is actually going to try that? No. And I'm sympathetic to the argument that colleges and

universities—especially in this day and age, and especially where people are paying seventy-three thousand dollars a year for undergraduate tuition—that, you know, there's limited resources, and this is a drain. It's a sympathetic argument, and you know, I get it.

But, the purpose of a university is to facilitate expression, dialogue, the marketplace of ideas and critical thinking, and it has to be the guarantor of last resort in these types of cases. And yes, it might put a strain on colleges and universities for a bit. But you saw Richard Spencer just kind of petered out, said, "I'm not going to anymore campuses. This isn't fun anymore." It doesn't last forever, and I think administrators should kind of hold out hope that, you know, they can make a name for themselves as an administration that values and protects free speech on principle, even when they disagree with it, and know that this too shall pass.

And I think that's the smart way to go. I mean, you saw Berkeley do it when they spent four million dollars or something over the past year on free speech events, generally, between security and things like that. You know, it's not easy. It takes a very large budget, and you know, sometimes belts are going to have to be tightened. But at the end of the day, your students are going to be better off for it. That's not to say students are better off for hearing Richard Spencer, just so we're clear. [Laughter].

MODERATOR: Additional questions?

Audience Member 3: I know you said FIRE's been around for eighteen years or so. Has there been any, kind of, trend of increase of cases being brought, and do you think that that's indicative of anything in our society?

ARI COHN: You know, I think that—man, this is actually a really interesting question, because I just—we just had somebody do an in-depth analysis of our case submissions over the course of time for a while, but I haven't looked at the data yet. So, I really wish I'd had the time to do that, because I would've had a great answer for you. You know, I think, surprisingly enough, the censorship of speech that is a little bit more left-wing is becoming more prevalent than it used to be. I think, in a lot of ways, that's because free speech is becoming weaponized. I think that people have started to use it as a tool with a partisan agenda, and you know, that's—every political ideology is guilty of that. Let's just say that. But, you know, it's interesting—one of our most recent lawsuits, at Joliet Junior College in the Chicago area, not too far from where I live, a student was handing out pro-socialism fliers, because she saw [Turning Point USA] students advocating for capitalism on campus. And campus cops literally detained her, because she was distributing pro-socialism materials. Took her I.D., stuck her in an interview room. I mean, kind of your classic Crim Law, "Was this a

detention?" kind of case. It was just kind of astounding. And they told her, "Well, you can't really do that. You know, because of the political situation and tension in the country. You might start something." I mean, it's something you probably would've expected to have gone the other way, and we're sitting here watching this unfold live, thinking, "Holy cow, is this really happening right now?" You know, I think that the—and, to be clear, that's not really anything new. The tides of censorship shift from side to side every 'X' number of years. So, it's not unexpected, it's not really groundbreaking. But, you know, I look at some of the lawsuits we were filing over the past year, and realize wow, it's a lot more representation on the Liberal side of things than people expect. Because people always see free speech as more of a Conservative issue. You know, that's kind of struck me. But, you know, I always say that censorship is a remarkably bipartisan problem.

Audience Member 4: You mentioned that FIRE believes *de minimis* interruption should be tolerated. I agree with you—one person shouting thirty seconds during an hour-long speech, that's *de minimis*. The speaker is still able to speak. But when does *de minimis*, in the aggregate, become too much? What if it's ten people? What if it's twenty people? All, individually, it would be *de minimis.* But the aggregate effect of all of those people, you're effectively having equity to silence the speaker.

ARI COHN: Well, I think you identified where the line has to be drawn very well right there. It's that—that point where the speaker has effectively become unable to communicate with the audience, and the audience has become effectively unable to hear what they came to hear. So, if it's twenty students chanting for thirty seconds at the same time, and then they walk out, that's fine. But, if it's sustained, one after the other, and it lasts an hour, and as a result, the speaker's remarks have to be cut short by, you know, three-quarters of the time, I think that's not *de minimis* anymore. I think that, once you've effectively altered what the speaker is being able to get across, that's where the line has to be. I mean, there's really no other answer.

MODERATOR: If the university wants to foster a positive environment with regard to free speech issues, what are some of the most important things that university can do? You get called up by an administrator, they say, "You know what, we care about free speech issues on our campus." What should they do?

ARI COHN: I like orientation programs. I think that, one of the reasons we are seeing kind of pushback against free speech the way we have seen it, is because civics education in high school just sucks these days. I think we are not teaching people the philosophical underpinnings of free speech: why it's valuable, and why it's a good thing. We were talking about earlier, people

don't consider the fact that hate speech laws are applied by the people in power, not by the oppressed minorities that they are intended to protect. And when was the last time we saw oppressed minorities wielding significant political power, such that they could, you know, decide that these laws should only be enforced in good ways?

People don't know that, during the Civil Rights Movement, protesters in Louisiana—student protesters in Louisiana—were arrested for disorderly conduct. Not because of anything they did, but because people responded to their civil rights advocacy with violent thuggery. People don't know that LGBT artists and authors have their materials ripped off of store and gallery shelves and walls and declared obscenity. People don't know that the only reason why all of these contemporary social movements have been so wildly successful is because the First Amendment ultimately protected their right to speak and alter the nation's conscience. And the only reason that the Supreme Court, again, ever decided any of these cases, was because we were ready for it. It was because the public opinion had changed, and you can't have that without loud and contentious social advocacy, and you can't have that without free speech.

But people don't really know the history, people don't really understand the practical ramifications behind this, and people don't understand that, you know, if John is standing over there, saying something that I found horrifically bigoted, and I shut him up by enforcing a law against him, A, that doesn't teach anyone anything; and B, it doesn't prevent him from thinking that. It doesn't change his mind. He's just is only going to go associate with people he knows already agree with him, and that's going to make him even more bigoted than he was in the first place. So, what good does that do?

Whereas, if you think about it, if I'm allowed to stand up—because he's allowed to stand up—and we have a great public debate about it, A, I might convince him that he's wrong; and B, I might convince everybody watching me have this debate with him that he's wrong. This is what John Stewart Mill called the "livelier perception of truth, produced by its collision with error." And that's really valuable, but people don't really understand that practical reality behind why we have free speech.

So, I think, to the extent that administrators can teach students, and they can do it in a sensitive way—because, listen, "Sticks and stones can break my bones, but names will never hurt me" is bullshit. It's not true. Words can hurt, and it does no harm to free speech principles to admit it. We can be sensitive about it. We cannot call students snowflakes, we can understand that students have sometimes been through tough things, have encountered oppression, and we can be sensitive about that. But we can also teach them that the answer, the way that we remedy that, is not by silencing the people we

disagree with. We can prove to them, we can show them—because we believe it's true, and we know it's true—that free speech is a better way to go. And if we sit there and try not to teach them, but instead to belittle them, for expressing these things, then, you know, how strong are we really in our free speech convictions? If we really believe in it, then we should be able to teach them without, you know, any of this nonsense that we see in the media sometimes about how students are babies and what have you. I'm on my soapbox, now, but it's completely unhelpful.

MODERATOR: Please join me in thanking Mr. Cohn for being here. [Applause]