

ESSAY

POLITICAL CORRECTNESS AND THE AMERICAN LAW SCHOOL

STEVEN C. BAHLS*

During the last several years, the popular press has frequently condemned the "rising hegemony"¹ of the Politically Correct within the academy.² The press has harshly criticized an apparently increasing pressure to conform to Politically Correct thinking. Some critics have even called pressure to conform to Politically Correct thinking at American universities "the new McCarthyism,"³ "Stalinist Orthodoxy,"⁴ and "Liberal Fascism."⁵

Critics allege that teachers reduce the grades of students who express politically incorrect thinking,⁶ universities deny faculty members tenure for nonconformance to the New Orthodoxy,⁷ and faculty who disagree

* Associate Dean and Professor of Law, University of Montana School of Law; B.B.A. 1976, University of Iowa School of Law; J.D. 1979, Northwestern School of Law. The author is the Past Chair of the General Practice Studies in Law Schools Committee of the American Bar Association's Section of General Practice. The Law Student Survey described in this Essay was conducted by the author and generously funded by the Section of General Practice. The author appreciates the assistance provided by Audrey A. Brown and Steven Miller, University of Montana School of Law, Class of 1991. The views expressed are the author's and not necessarily those of the General Practice Section or those assisting with this article.

1. Richard Bernstein, *Academia's Fashionable Orthodoxy: The Rising Hegemony of the Politically Correct*, N.Y. TIMES, Oct. 28, 1990, § 4, at 1.

2. DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (1991); Jerry Adler, *Taking Offense*, NEWSWEEK, Dec. 24, 1990, at 48; Dinesh D'Souza, *Illiberal Education*, ATLANTIC, Mar. 1991, at 51; William A. Henry III, *Upside Down in the Groves of Academe*, TIME, Apr. 1, 1991, at 66; Clarence Page, *Where Narrow Minds Stifle Debate*, CHI. TRIB., Dec. 23, 1990, Perspective Section, at 3 (final ed.); Joan Buck, *The Tyranny of Political Correctness*, CHI. TRIB., Dec. 20, 1990, Perspective Section, at 27 (final ed.); Nat Hentoff, *Politically Correct at NYU Law*, WASH. POST, Nov. 3, 1990, at A23 (final ed.). See also Scott Heller, *Colleges Becoming Havens of "Political Correctness," Some Scholars Say*, CHRON. HIGHER EDUC., Nov. 21, 1990, at A1; *Academic Group Fighting the "Politically Correct Left" Gains Momentum*, CHRON. HIGHER EDUC., Dec. 12, 1990, at A1.

3. Page, *supra* note 2, at 27.

4. Bernstein, *supra* note 1, at 1.

5. *Id.* at 2.

6. See *infra* note 20.

7. Heller, *supra* note 2, at A14.

with students' political beliefs engage in rank name calling.⁸ The cause of the problem, critics agree, is intolerance by certain Politically Correct faculty members. The net result is dissenters' self censorship and a chilling effect on the campus debate of controversial issues. Balanced discourse concerning certain political topics (e.g., affirmative action, abortion, environmentalism, the issues involving gays and lesbians and the nomination of conservative jurists to the United States Supreme Court) either is nonexistent or has degenerated into name calling. Is what was once the citadel of democratic debate becoming the bastion of the Politically Correct?

When the popular press refers to the pressure academics assert to conform to Politically Correct dogma, it is usually speaking of pressure from those professors standing on the left of the political spectrum. Broader than pressure to conform from the Politically Correct left, the problem is one of intolerance. It exists when any professor, whatever his or her beliefs, is intolerant of political opinion different from his or her own. That intolerance discourages free expression and fair debate. I would not criticize professors who harbor strongly held political beliefs and who discuss these beliefs in the classroom. Only when professors present their beliefs so as to stifle the learning process does Political Correctness become a problem.

The press has leveled most of its attention and criticism at the academy generally and the undergraduate liberal arts curriculum in particular. Law school administrators and faculty generally have escaped criticism from the press.⁹ In this Essay I ask whether Political Correct-

8. See *infra* note 22.

9. One exception seems to be the New York University School of Law. See, e.g., Hentoff, *supra* note 2, at A23. According to media accounts, the law school withdrew a moot court problem concerning a custody dispute between a heterosexual father and lesbian mother. Apparently some students believed that to make students argue for the father might be hurtful. Newsweek magazine quotes NYU Professor Anthony Amsterdam as concluding "[t]he declaration that any legal issue is not an open question in law school is a declaration of war upon everything that a law school is." Adler, *supra* note 2, at 51.

Another publicized incident involved the State University of New York at Buffalo Law School. See Nat Hentoff, *The Rise in Racist and Sexist Remarks Threaten Free Speech on Campus*, THE PROGRESSIVE, May 1989, at 12. In an attempt to discourage hate speech, the faculty adopted a "Statement Regarding Intellectual Freedom, Tolerance and Political Harassment." Hentoff described his perception of the impact of the prohibitions: "The pressures to have the 'right' attitude as proved by having the 'right' language in and out of class can be stifling. A student who opposes affirmative action, for instance, can be branded a racist." *Id.*

Harvard law professor Alan M. Dershowitz observed that the colleges "are producing a generation of students who do believe in political correctness." He believes "[t]his is the most serious issue

ness is a problem in law schools. Specifically, I study whether law professors present their political beliefs in an intolerant fashion, thereby stifling debate and the learning process. I conclude that Political Correctness is indeed a problem at law schools. Finally, I offer suggestions on how to minimize the problem, while at the same time allowing and encouraging professors to express their political beliefs.

I. EMPIRICAL STUDY BY THE SECTION OF GENERAL PRACTICE OF THE AMERICAN BAR ASSOCIATION

A survey of law students recently conducted through the American Bar Association's Section of General Practice reveals that most students find some professors at their law school intolerant of political beliefs that differ from their own. Further, over half of those surveyed do not always feel free to express their disagreement with the political perspectives of their professors in class, on exams, or in papers. Law schools must start to address these disturbing perceptions.

In late February 1991, the Section of General Practice of the American Bar Association mailed a Law Student Survey to its 947 student members.¹⁰ Four hundred and forty-nine of the law students completed and returned the survey.¹¹ The results were tabulated at the University of Montana School of Law. The survey included questions separated into three categories: 1) students' views about the profession; 2) students' assessment of how well their law school imbued them with the attributes of a good lawyer; and 3) students' attitudes on various contemporary issues in legal education. The study gave students space to

facing universities today. We are tolerating and teaching intolerance and hypocrisy." Thomas Palmer, *At Harvard, Dissent on the State of Dissent*, BOSTON GLOBE, Apr. 11, 1991, Metro Region Section, at 29.

A recent American Bar Association Journal article includes the most complete set of anecdotes concerning political correctness in law schools. Arlynn Leiber Presser, *The Politically Correct Law School: Where It's Right to Be Left*, A.B.A. J., Sept. 1991, at 52. Presser observes: "Law School professors report an enormous unwillingness among students to even argue hypothetically for the 'wrong' side in matters that touch upon P.C. because of a fear of being labelled an *ist* of some sort; racist, sexist, heterosexist, classist, ableist." *Id.* at 53.

10. The student membership of the Section of General Practice is likely the most representative of all of the substantive sections of the American Bar Association. Student members of the Taxation or Litigation Sections may not have as representative interests as others.

A copy of the complete survey results may be obtained by writing to the author at: School of Law, University of Montana, Missoula, MT 59812 (please enclose a self-addressed stamped envelope).

11. Sixty-three percent of those responding were male. Thirty-seven percent were female.

elaborate or clarify any answer. The survey included, in the last category, the following questions:

- (a) (1) Are there professors at your law school who are intolerant of political beliefs that differ from their own?
- (2) If you answered yes, answer this question: How often do you see evidence of professors who are intolerant of political beliefs that differ from their own?
- (b) When I disagree with the political perspective of my professor, I always feel free to express my disagreement both in class and on exams or papers.

Sixty percent (59.8%) of the students answering question (a)(1) stated that some professors at their school do not tolerate political beliefs that differ from their own.¹² Of those students, forty-eight (47.7%) percent detected evidence that some professors are intolerant "frequently" or "very frequently."¹³

Fifty-one percent of the students answering question (b) stated that they do not always feel free to express, in class, on exams, or in papers, their disagreement with their professors' political perspectives.¹⁴ Only twenty-nine percent of students stated they always felt free to disagree.¹⁵ Twenty percent marked "neutral" with respect to the statement.¹⁶ These results are particularly surprising because law students are considered the most assertive in the academy.

The survey gave students space to elaborate and clarify any answer. A significant number of students elaborated on their view that professors at their law school exhibited hostility towards those expressing dissenting beliefs. Student comments ranged from the polite to the angry.¹⁷ For

12. Sixty-one percent of the men agreed with statement (a)(1), while fifty-eight percent of the women agreed.

13. Forty-nine percent of the men stated "frequently" or "very frequently." Forty-five percent of the women stated "frequently" or "very frequently."

14. The responses of men and women were identical.

15. Twenty-five percent of women and thirty-one percent of men always felt free to disagree. Women speaking less in class than men may account for the discrepancy between the responses of men and women. Some statistical evidence suggests that women indeed speak less in class than men. See Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education of "The Fem Crits Go to Law School,"* 38 J. LEGAL EDUC. 61, 77 (1988). One of the reasons may be a greater concern about disagreeing with the political perspective of a professor (most of whom are male).

16. Twenty-six percent of the women and seventeen percent of the men marked "neutral."

17. The names of law school and professor, when revealed, have been deleted because neither has been given the opportunity to respond. The survey was anonymous.

example:

There are definitely views of current importance which are considered "politically correct" by the students and faculty. Those expressing different views (i.e., conservative or truly libertarian views) face ridicule from students and faculty.¹⁸

... my law school has only one "right" legal position: pro-life at all costs.¹⁹

To express conservative political beliefs in my school would be to commit academic suicide. One professor in particular has taken it upon himself to lower the grades of people who disagree with him in or out of class. Fortunately I have *not* fallen victim to this practice—I received advance warning and kept my mouth shut. Although I have not observed any other examples of preferential grading by professors, I have noticed a general intolerance of beliefs which are not "politically correct."²⁰

I also have a great number of male professors who strongly favor male students in the classroom, i.e., won't call on female students and put down female students' comments and opinions.²¹

[My school] is a bastion of "political correctitude" enforced by a coterie of self-appointed professors cow-towing to this fascism of the left. If one is white and male, the odds are that he will be attacked as racist, sexist, homophobic.²²

The students are extremely reluctant to discuss controversial issues, such as abortion, in Constitutional Law. The students have complained to professors and asked that the class discussion not focus on subjects that make the students uncomfortable (abortion, racial issues, etc.).²³

18. Student Number 217 (Second-year male).

19. Student Number 413 (Third-year female).

20. Student Number 380 (Third-year male). Students are not alone in their belief that grades are reduced for those who do not tow the professor's party line. Professor Alan Grubben, an English professor at the University of Texas states: "You cannot tell me that students will not inevitably be graded on politically correct thinking in classes." Bernstein, *supra* note 1, at 41. Harvard president Derek Bok concurs: "Every effort by instructors to impose their own political orientation can pressure students to express ideas, not because they believe them, but because they fear that they otherwise get a poor grade or experience other unpleasant consequences." Derek Bok, *Universities: Their Temptations and Tensions*, 18 J.C. & U.L. 1, 8 (1991).

21. Student Number 372 (Third-year female).

22. Student Number 395 (Third-year male). The popular press frequently has noted the problem of name calling directed against those who refuse to conform to the Politically Correct orthodoxy. Charles J. Sykes, *The Death of Free Speech on Campus*, CHI. TRIB., Dec. 19, 1990, Perspective Section, at 25 (final ed.) ("... the atmosphere in the American university is increasingly shaped by the extraordinary promiscuity in which such emotionally charged terms as 'racist' and 'sexist' are wielded against heretics who dare to challenge the [Politically Correct] orthodoxy on campus.").

23. Student Number 133 (First-year female). It is not surprising students are reluctant to dis-

Rather than engaging in a dispassionate examination of the issues at hand, [some professors] often will engage in what amounts to gross personal attacks on the moral character and integrity of the person with whom they disagree.²⁴

The extreme liberal bias of my professors is, for the most part, overwhelming and pervasive. More importantly, such a bias is inappropriately expressed at every opportunity in a most offensive manner. I suggest that the student body is considerably more conservative and fearful of expressing their view publicly.²⁵

Several students stated that political intolerance was not limited to professors. Some perceived that their classmates were at least as intolerant as professors: "As far as political beliefs, there is probably more tolerance on the part of the professors than on the part of students."²⁶

II. ANALYSIS OF LAW STUDENT PERCEPTIONS OF INTOLERANCE

Professors who merely express their political beliefs in class are not troubling. Some students who believe that professors' beliefs differ from their own may assume (without knowing) that professors are intolerant of their views. Although some of these students wrongly expect professors to keep their political views out of the classroom, it is neither possible nor desirable to do so. Legislation is the result of a political process. Judge-made law often results from the application of political judgments concerning policy issues. Even the professor who eschews overt discussion of political values in favor of teaching nothing more than "black letter" law makes a political judgment to support the status quo.

A teacher who ignores the political aspects of the law does the students no service because political objectives often shape evolving trends in the law. Students therefore must understand how political objectives influence the law. Law schools should prepare students to make policy argu-

cuss controversial topics. Professors are also. Yale law professor Stephen L. Carter observes that an honest discussion of racism requires one to enter "the minefield of racial politics [that] is far too difficult to negotiate, at least if, like me, one wants to be thought of as politically correct." Steven L. Carter, *A Dilemma of Identity*, NAT'L L.J., Sept. 23, 1991, at 16. University of Minnesota law professor David Bryden contends that some law professors no longer discuss rape in criminal law courses. He states: "As liberals who are normally exceedingly concerned about defendants' rights, they are afraid they will offend militant feminists." David P. Bryden, *It Ain't What They Teach, It's the Way That They Teach It*, THE PUBLIC INTEREST, Spring 1991, at 51.

24. Student Number 135 (Second-year male).

25. Student Number 67 (First-year male).

26. Student Number 272 (First-year male).

ments to legislatures and courts to improve the law and the delivery of justice.

Similarly, professors who fail to discuss their own political views in class, simply discussing the strengths and weaknesses of competing political considerations, encourage ad hoc or situational values. Students do not learn to develop consistent political positions. These students may view political values as nothing more than an arrow in the quiver of the zealous attorney to be used only when expedient. While these students may develop the tools for using the status quo's system of justice, they will be ill-equipped to improve it.

Professors who express their political or moral views also encourage students to test their own views.²⁷ Likewise, professors can set an example for students in expressing political views clearly and persuasively and thus can help students to express their own views more effectively. Students with deeply held beliefs, if empowered to express them effectively, can become active participants in improving the delivery of justice.

Expressing political views, however, in an intolerant manner sets a poor example for students. Although exchanging values with students is surely more effective than imposing them, the Section of General Practice Law Student Survey reveals that most law students believe some law professors cross the line between exchanging views and imposing them.

Professors intolerant of other people's views chill students' academic freedom. They effectively encourage student self-censorship. While student academic freedom has not been given constitutional protection, courts nonetheless have recognized its importance.²⁸ In 1957, the United States Supreme Court acknowledged that "academic freedom thrives . . . on the independent and uninhibited exchange of ideas among teachers *and students*."²⁹ Similarly, the Court stated: "Teachers *and students* must always remain free to inquire, to study and to evaluate, to gain new

27. See Richard L. Abel, *Evaluating Evaluations: How Should Law Schools Judge Teaching?*, 40 J. LEGAL EDUC. 407, 438 (1990).

One law student made a similar observation in response to the Section of General Practices Law Student Survey. "I am uncomfortable with [the questions concerning] political perspectives. What is the relevance? The essence of advocacy is the ability to evaluate the strengths and weaknesses on both sides of an issue. A decent professor plays the Devil's Advocate. A mature student understands that analysis is the object, not a particular conclusion." (Student Number 360, Second-year female).

28. J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 262-63 (1989); Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1304-05 (1988).

29. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (emphasis added).

maturity and understanding; otherwise our civilization will stagnate and die."³⁰ Ten years later, the Court again observed that "the classroom is peculiarly the 'marketplace of ideas.'"³¹ Without debate, the academy loses its intellectual integrity.

That which is true for the academy generally is particularly true for the law schools. If intolerant and paternalistic professors are the sole arbitrators and thought police of what students believe, students may lose their dignity, crippling future generations of lawyers. Further, students unable to test novel or political arguments in class will never develop the courage or skills to make similarly cogent arguments to a client, a supervising attorney, the courts, or a legislature. To the extent laws are an expression of political judgment, students unable to express opposing political views may neither understand the law nor argue for its change. Students who believe their professors are intolerant are more likely to feel intimidated. Those students may become closed minded and too angry to consider the merit of the professor's views.

With more than fifty percent of students hesitant to express their views, legal educators have cause for concern. Law school administrators and faculty should take concrete steps to address these problems.

A. Reasons Students Hesitate to Express Themselves

Students hesitate to express themselves for a number of reasons. Those writing comments or responses to the Law Student Survey frequently identified the fear that professors would decrease their grade or chastise them in class. Whether such a practice exists is difficult to verify; these practices might be more imagined than real. Of course, whether these practices exist in reality is less important than what students *perceive*. An incorrect perception that a professor is intolerant is as chilling as a correct perception. It may be easier for a timid student simply to echo a professor's analysis than to risk unwanted criticism in class, on an exam, or in a paper. To challenge a professor's argument risks embarrassment. Developing a sound dissenting argument takes time, skill, and confidence. Some students may find asserting that professors will penalize dissent easier than overcoming the risk associated with challenging a professor.

I do suspect, however, that some professors fail to create a climate that

30. *Id.* (emphasis added).

31. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

encourages the risk-averse student to dissent. Law students and professors alike observe that first-year law students' crisp enthusiasm frequently turns to mush. Eager law students with strongly held views or emotional responses quickly learn that their views are not always welcome.³² Any hint of intolerance of dissenting or novel ideas easily discourages insecure law students from building up enough courage to participate in class.

Tolerant professors who are secure enough with their views encourage students to risk expressing dissenting positions. Students empowered by their professors to express dissent will overcome the fear and embarrassment of not dissenting well. Tolerant professors are patient with even apparently foolish dissent. The tolerant professor helps the dissenter to articulate an argument more clearly. The professor does so by endeavoring to understand the student's premises and political assumptions, evaluating those premises and assumptions, and assisting the student to build on them.³³

Students' beliefs that their professors chill free expression of ideas are troublesome, whatever the cause. If students cannot build the skills to dissent in class, they may subjugate their deeply held political views and learn to repeat what is Politically Correct.

It is difficult to evaluate whether the intolerance of law professors is more imagined than real. Are students blaming their professors for their reticence or are professors truly intolerant? Given the depth of law students' feelings and the passion with which students wrote their responses, I suspect that some degree of intolerance does exist. After all, law students are generally perceptive and savvy. Increasing numbers of students are older, less shy, more aggressive, and less easily intimidated than young undergraduate students. Most of these students know intolerance when they see it. Whether merely perceived or real, perceptions of intolerance

32. The following excerpt from an imaginary interview told by Cynthia L. Hill may be typical of the experience of many women:

My point is that emotional responses are part of the intellectual argument. It's ridiculous to pretend the two are mutually exclusive. Women tend to express more concern about the parties in the case. . . . When professors proceed to shoot down these early attempts at participation it results in silencing that voice.

Cynthia L. Hill, *Sexual Bias in the Law School Classroom: One Student's Perspective*, 38 J. LEGAL EDUC. 603, 605 (1988).

33. Professor Hayden makes the valid argument that teachers who too quickly identify a "right" and "wrong" answer chill discourse. Professors who do so become self appointed "policemen of legal ideas." Paul T. Hayden, *On "Wrong" Answers in the Law School Classroom*, 40 J. LEGAL EDUC. 251 (1990).

erance and unfairness will serve to undermine the confidence of students in law schools.

B. *The Problem of the Proselytizing Professor*

Written comment on the Law Student Survey and other evidence reveals that certain teachers apparently believe that they alone hold the keys to the truth. Some professors adopt as their mission the conversion of the unenlightened to the truth (in this case, to Political Correctness). These are the "Proselytizing Professors."³⁴ Name calling³⁵ and *ad hominem*³⁶ attacks, in the minds of these professors, are means that the end justifies. These professors look at their students as sheep waiting for the benefit of their morally superior wisdom. Legal scholarship is replete with references to students as "legal acolytes"³⁷ possessing "infantilized preprofessional sentimentality."³⁸ The Proselytizing Professors claim

34. Many of those referred to in the footnotes that follow subscribe to the Critical Legal Studies movement. One scholar has noted the proselytizing zeal of some in the Critical Legal Studies ("CLS") movement:

The CLS vision has an apocalyptic aspect. Evil liberals will some day be routed by the forces of communitarian good. In this the Crits have some surprising contemporary bedfellows. The radical religious right similarly envisions a society where secular liberal thought has been replaced by communitarian values of the right. The Crits and the religious bigots simply personify different strains of an historical phenomenon that combines apocalyptic vision with subjective moral judgment of society.

Calvin R. Massey, *Law's Inferno*, 39 HASTINGS L.J. 1269, 1289 (1988) (book review). Massey's is an unduly harsh assessment of those in the CLS movement. Tolerance and advocacy of the CLS movement are not mutually exclusive. Likewise, those in other movements (e.g., Feminist Legal Studies, Economics and the Law) and centrist law professors can be intolerant.

The Proselytizing Professor I describe is a caricature. I do not mean to suggest that those referred to in the following notes are, in fact, Proselytizing Professors.

35. For example, Professor Randall Kennedy, who advocates not elevating racial status to an intellectual credential, was recently called "reactionary" in scholarly commentary. Suzanne Homer & Lois Schwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 45, 117 (1989). Harvard law professor Derrick Bell's comment that Justice Clarence Thomas "looks black" but "thinks white" is further evidence of the low level of discourse surrounding controversial issues. Coleman McCarthy, . . . *and the Insults*, WASH. POST, July 6, 1991, at A19 (final ed.). Students also observe evidence of name calling. See *supra* text accompanying note 22.

36. See, e.g., Martin V. Tushnet, *Dia-tribe*, 78 MICH. L. REV. 694, 710 (1980) (book review) (a personal attack on Professor Laurence Tribe's motives). Students also observe evidence of *ad hominem* attacks, apparently provoked by their dissent. See *supra* text accompanying notes 17, 21, and 23.

37. Richard F. Devlin, *Legal Education as Political Consciousness Raising or Paving the Road to Hell*, 39 J. LEGAL EDUC. 213, 223 (1989).

38. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 1 (1987) (criticizing the approach of his fellow mainstream teachers).

they can “gaze out at [their] students and guess rather accurately where each one’s initial sympathies lie along the formal dimensions on the basis of dress and manner.”³⁹ Those who disagree are the “resistance.”⁴⁰ It is the mission of these proselytizers to “indoctrinate students”⁴¹ and to “reconstruct a legal academic exercise into a process of political sensitization.”⁴² These professors conduct their classes to force “students . . . to encounter, contemplate, and assess” their own political views and to make political views (usually Politically Correct views) “part of their psyche whether they want[] to or not.”⁴³ These unabashedly paternalistic professors claim their paternalism is justified by “love and altruism”⁴⁴ and by their ability to overcome “elitist presuppositions.”⁴⁵ The Proselytizing Professor’s veil of self-righteousness is transparent to all but the least discerning of students. Tolerance is not virtue for these self-appointed, Politically Correct, thought police. Tolerance, in their minds, interferes with indoctrination.

One technique the Proselytizing Professor uses is to endeavor to break down the moral and political fibre of law students so the students might recognize the “truth,” as the professor divines it. Many teachers argue that their morally superior and Politically Correct “truth” will be apparent to students, if they could only see it.⁴⁶ To them the truth becomes self-evident after they strip away preconceived notions. Students resent the condescending approach of the Proselytizing Professor. In many cases, these professors will alienate the very students who may have been

39. *Id.* at 61.

40. *Id.* at 137. Professor Kelman cautions his cohorts to be “sensitive to the resistance.” *Id.* Perhaps Professor Massey is right when he notes, “Kelman senses that there might be some resistance to the choices mandated for Montana cowboys by a mandarin class of elite academic radicals.” Massey, *supra* note 34, at 1280.

41. David Fraser, *If I Had a Rocket Launcher: Critical Legal Studies as Moral Terrorism*, 41 HASTINGS L.J. 777, 802 (1990).

42. Devlin, *supra* note 37, at 217. See also Jay M. Feinman, *The Failure of Legal Education and the Promise of Critical Legal Studies*, 6 CARDOZO L. REV. 739, 756 (1985) (the objective of Critical Legal Studies “is to change the world to realize a set of values”).

43. Devlin, *supra* note 37, at 258.

44. KELMAN, *supra* note 38, at 134.

45. *Id.* at 141.

46. For example, Professor Kelman states:

Some of us in CLS, perhaps wrongly, have been preoccupied with the fear that many of the students who pass through law school *feel* sympathetic to progressive goals, but can most comfortably argue right-wing economic politics. . . . We aim to overcome this separation between mind and spirit, to show that the rationalistic claims for resignations are, quite simply, overblown, manipulative, and frequently false.”

KELMAN, *supra* note 38, at 184-85.

predisposed to agree with their position.⁴⁷

Some professors advocate “trashing” as a method of analyzing legal texts.⁴⁸ This process involves probing legal arguments for contradictions and reducing those contradictions to the absurd. Trashing, according to its apologists, “[is] an active transformative, anarcho-syndicalist political project.”⁴⁹ Some even argue that trashing is “fun.”⁵⁰ While trashing legal texts and ideas in fact may be a useful pedagogical tool, it is not a technique that professors should apply to students’ political and moral beliefs. Professors who trash ideas can contribute effectively to an exchange of ideas. Those who trash students do not.

The Proselytizing Professor serves as a negative role model for students. These professors use their dominant position to control and weaken their subordinate students. Just as the Proselytizing Professor believes that the end justifies the means when teaching students, new proselyte-lawyers believe that the end justifies the means when practicing law. No wonder some attorneys feel justified using “scorched-earth” techniques in the courtroom, when Proselytizing Professors use scorched-earth techniques in the classroom.

Understanding the caricature of the Proselytizing Professor helps us understand the mindset of the intolerant. I suspect that relatively few professors have all of the attributes of the Proselytizing Professor. Students’ widely held perception that professors are intolerant indicates, however, that students found at least some of the attributes of the Proselytizing Professor at many law schools. These attributes of self righteousness, narrow mindedness, defensiveness, and humorlessness all contribute to an intolerant atmosphere that many perceive.

III. BUILDING A TOLERANT COMMUNITY

To build a tolerant community, law school administrators, law faculties, and law students must commit to exchanging ideas openly and tolerantly. Much of the responsibility for creating a community tolerant of political ideas lies with individual faculty members whose tolerance will help students build ideas.

47. See, e.g., Didi Herman, *Legal Education, Feminism, and the “Well Intentioned Man”*: A Response to Richard Devlin, 40 J. LEGAL EDUC. 257 (1990).

48. Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

49. *Id.* at 326.

50. Alan D. Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1230 (1981).

Professor Menkel-Meadow correctly observes the tendency in both traditional and critical legal education to break down ideas (presumably Politically Incorrect ideas).⁵¹ She proposes a model for teaching that involves emphasizing experiences and viewpoints, as well as moral perspectives.⁵² The model emphasizes mutual respect for each other's differing viewpoints and life experiences. Mutual respect fosters a more tolerant atmosphere, respectful of each student's political views and experiences.

Professor Menkel-Meadow emphasizes "[b]uilding trust, collaboration, engagement, and empowerment [as] pedagogical goals, rather than reinforcing . . . competition, individual achievement, alienation, passivity, and lack of confidence. . . ."⁵³ Intolerance, abuse of law students, and abuse of professorial power set a poor example. Students may decide that intolerant attitudes in the profession are normal, later acting out that intolerance with clients, thus leaving the legal system to suffer. If we abuse our power in the classroom, we can expect no better of students.

Finally, because a law school is an interdependent community in which all students are entitled to express their views, professors must take care not to dismiss other views because of gender, race, or any other minority or classificatory status. Increasingly, legal scholars argue that a party's status may increase (or decrease) capacity to argue a legal or political issue. Professor Randall Kennedy observes a disturbing trend in scholarship suggesting that non-minority scholars discussing race relations law are suspect and should "quietly leave the field."⁵⁴ If professors attempt to suppress the views of students because of race, color, or other status, students will engage in demeaning self censorship. Even if students refuse to engage in self censorship, their resentment and backlash may destroy civil discourse.

Law School administrators also can create an atmosphere that appreciates and rewards tolerance and discourages intolerance. Law school administrators should state clearly and unambiguously, that they will not permit intolerance of political ideas.⁵⁵ At the University of Montana

51. Menkel-Meadow, *supra* note 15, at 81.

52. *Id.*

53. *Id.* at 81.

54. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1791 (1989). Kennedy's analysis is directed primarily to the writing of Professor Delgado. Kennedy notes: "Two features of Delgado's analysis are thus deeply worrisome: first, the casualness with which he uses negative racial stereotypes to pigeonhole white scholars, and second, the tolerance, if not approbation, of that aspect of his critique." *Id.* at 1794.

55. Law-school accreditation organizations should also take steps to insure that member

School of Law, for example, the law school policy (clearly stated in its law school bulletin) elevates the prohibition on discrimination against individuals on the basis of "political ideas" to the same level as prohibitions against discrimination on more traditional factors such as race and gender.⁵⁶ The University of Montana's bulletin advises those who suffer discrimination on the basis of political ideas to contact, among others, the Montana Human Rights Division. Policies such as Montana's may protect students against politically motivated admissions decisions, politically motivated grading decisions, and other politically motivated decisions. Although the policies set the stage for a tolerant atmosphere, they alone cannot insure a classroom setting that tolerates political diversity.

Policies such as that of the University of Baltimore School of Law go further in creating a tolerant atmosphere. The School's Bulletin categorically states:

Consistent with the mission, the law school is committed to principles of free inquiry, free expression, and mutual respect. Members of the community have the right to hold, promote, and vigorously defend their opinions. Respect for this right requires that the members of the community tolerate the expression of opinions with which they disagree. In such atmosphere good ideas will flourish and bad ones will wither, according to their merit.⁵⁷

schools and law professors tolerate the views of dissenters. The Association of American Law Schools ("AALS") already has taken the first step in its "Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities." "Law professors have an obligation to treat students with avidity and respect and to foster a stimulating and productive learning environment in which the pros and cons of debatable issues are fairly acknowledged. Teachers should nurture and protect intellectual freedom for their students and colleagues." AALS, STATEMENT OF GOOD PRACTICE OF LAW PROFESSORS IN THE DISCHARGE OF THEIR ETHICAL AND PROFESSIONAL RESPONSIBILITIES 2 (November 1989).

The AALS also admonishes its members to "guard against discrimination on the basis of political viewpoint" in the tenure review process. AALS, REPORT OF THE SPECIAL COMMITTEE ON TENURE AND THE TENURE PROCESS 34 (August 1991).

Unfortunately, the AALS has failed to put teeth into its policies discouraging discrimination on the basis of political viewpoints. While an AALS bylaw prohibits members from discriminating against faculty and others on the basis of race, color, religion, national origin, sex, age, handicap or disabilities, or sexual orientation, the bylaw fails to prohibit discrimination on the basis of political viewpoint. AALS Bylaw § 6-4.

56. See UNIVERSITY OF MONTANA SCHOOL OF LAW, BULLETIN, inside cover page (1991-92). The Constitution of the State of Montana provides: "No person shall be refused admission to any public educational institution on account of sex, race, creed, religion, *political beliefs* or national origin." MONT. CONST. art. X, § 7 (emphasis added). The Board of Regents of the Montana University System, by policy, prohibits any "educational policy or practice . . . which is on its face or in its effect discriminatory on the basis of . . . political ideas." 2 MONTANA UNIVERSITY SYSTEM POLICY AND PROCEDURES MANUAL, Item 12, 004-R0676 (June 7, 1976).

57. UNIVERSITY OF BALTIMORE SCHOOL OF LAW, BULLETIN 12 (1990-93).

To foster free exchange of ideas, a school should combine prohibitions against discrimination on the basis of political ideas with a statement encouraging tolerance of the perspectives of various constituents in the community. These policies should increase student confidence in the institution and encourage students to risk dissent.

In addition to encouraging tolerance through policy statements, schools should hire faculty with diverse political views.⁵⁸ Law schools recently have improved their recruiting and hiring of faculty that is increasingly diverse culturally and racially. Students of diverse racial and cultural communities benefit from role models in the law school. Likewise, members of diverse intellectual and political communities benefit from role models. Intellectual and political diversity⁵⁹ among tolerant faculty also would create an open atmosphere facilitating free exchange of ideas.⁶⁰ A politically diverse faculty will help students perceive diverse political views as a societal good. Furthermore, students are less likely to sense a politically diverse faculty as having adopted a Politically Correct dogma. Diversity among faculty also forces the faculty members

58. The written comments to the Law Student Survey indicate that students do not perceive faculties as politically diverse. Many students commented that faculty tend to fall on the far left end of the political spectrum. Anecdotal evidence also suggests a lack of political diversity. One professor, who prefers not to be identified, tells of talking with the Associate Dean of a law school, who, after lauding the diversity of the school's faculty, conceded that none of the forty faculty members voted for the winning candidate in the 1988 presidential election. The same professor reports that during a visitorship at a law school in a Republican-leaning state, he was surprised to learn that in a faculty of nearly thirty, there was not a single Republican. Professor David Bryden observes leading law schools have "hardly any" orthodox conservatives and only a couple of professors who have "publicly dissented from any tenet of liberal orthodoxy." Bryden, *supra* note 23, at 52.

59. Some observe that the meaning of the word diversity has been ironically twisted: "'Diversity' no longer refers to a range of views on a disputed question but rather entails enlisting in a whole set of ideological causes that are identified as being 'for diversity.'" D'Souza, *supra* note 2, at 55. Professor Dershowitz observes: "How many politically correct students are demanding in the name of diversity an increase in the number of evangelical Christians, National Rifle Association members and Right to Life advocates. . . . Let's be honest: The demand for diversity is at least in part a cover for a political power grab by the left." Presser, *supra* note 9, at 56. In this Essay, a diverse faculty defines a group whose members hold a wide range of views drawn from varying political, intellectual, cultural, economic, and social backgrounds. D'Souza, *supra* note 2, at 51.

60. Professor Vernon argued:

The "diversity dogma" goes beyond the need for religious diversity. It is based on the premise that the absence of intellectual diversity within a faculty and student body tends to make the free exchange of ideas a sterile exercise. The basic question is whether the free exchange of ideas, which is at the heart of quality legal education, suffers in the absence of intellectual diversity. If I had a free hand, I would draft a standard calling on all schools to make efforts to achieve intellectual diversity among faculty and student body.

David H. Vernon, *The Importance of Intellectual Diversity to Educational Quality*, 32 J. LEGAL EDUC. 89, 192 (1982).

to focus and analyze their own political views when debating other faculty members. Increased discussion and debate between politically diverse faculty members serves to enhance the whole academic atmosphere of the law school.

Law schools and their accreditation organizations also should restrain themselves when making political judgments for their students on issues on which reasonable minds can differ. The Association of American Law Schools ("AALS"), for example, by its bylaws and regulations,⁶¹ effectively prohibits member schools from allowing the military to interview students using law school facilities. The AALS justifies its policy because of the military's discriminatory policy of not hiring gay and lesbian applicants. Whether to interview with the military in spite of this discriminatory policy is a political judgment, upon which reasonable minds might differ. Law schools banning the military without seeking input from students and other community stakeholders risk sending a message that a student's individual political judgment is not important. Instead, the AALS forces an institutional political judgment on students concerning an issue (access to interviewing with employers) very important to students. The accreditation agency then becomes the arbiter of the Politically Correct.

When the Law Student Survey asked whether law schools should permit the military to use law school facilities to interview students, 71.9% agreed that law schools should permit the military to interview, 16.7% were neutral, and 11.5% disagreed.⁶² A politically tolerant accreditation organization would allow students and law schools to make their own political judgments.⁶³ This is particularly true when the function of an accreditation association is to insure the quality of education. Policing who uses law school facilities for interviewing has a tenuous connection, at best, to that function. Finally, if a majority of students make a political judgment not to interview, the impact would be far greater than the law school's forcing the military to hold interviews across the street.

Ultimately, however, individual law professors have the responsibility of creating a tolerant atmosphere in the classroom. Whether a classroom

61. AALS, Memorandum 90-47 (Promulgation of Executive Committee Regulation 6.19 Clarifying Bylaw 6-4(b)) (Aug. 10, 1990).

62. 79.3% of the men and 58.3% of the women believed that the schools should give the military access to interview facilities.

63. According to the press, 60% of the law students at Washington and Lee School of Law signed petitions objecting to that school's ban. Washington and Lee lifted the ban. *Washington and Lee Lifts Ban on Military Recruiters*, WASH. POST, Mar. 28, 1991, at C3 (final ed.).

style is based on a critical legal studies model, feminist model, Socratic model, lecture-discussion format, or some other technique, professors can create a tone of tolerance relatively easily by respecting student opinion. Professors holding strong political opinions of their own should present them, while resisting the temptation to use the techniques of a Proselytizing Professor. Those holding and presenting strong political opinion have a special responsibility to state frequently that they respect and encourage student academic freedom.

IV. CONCLUSION

Pressure to conform to Politically Correct orthodoxy, in the view of many students surveyed, plagues American law schools. Law schools would do well to attack the problem of intolerance with the same vigor with which they attacked the lack of gender diversity and the lack of racial and cultural diversity. The issues of diversity and tolerance are interrelated. Law schools will not realize the full benefits of diversity until they build tolerant communities. Building a tolerant community is the final step in realizing the benefits of the struggle for diversity.

During the 1960s, law schools struggled with the "first generation" diversity issue. Schools adopted anti-discrimination policies that gave women, persons of color, and handicapped persons the opportunity to compete for admission to the law school community as both students and faculty. Starting in the mid 1970s and throughout the 1980s, many law schools recognized that equal opportunity was not adequate alone to achieve the objectives of cultural and racial diversity. Law schools identified "second generation" diversity concerns. These concerns challenged law schools to take affirmative steps to insure cultural and racial diversity. Legal opportunity alone was not enough; law schools identified subtle barriers and took steps to remove them. The schools studied ways to create a welcoming and nurturing environment for those previously not welcomed. Law schools make daily progress toward satisfying second generation diversity concerns, but have not yet resolved them all.

Unfortunately, however, the strides made to achieve cultural and racial diversity have not eliminated intolerance. The Law Student Survey suggests endemic intolerance. Perhaps some of the long-admitted faculty members, threatened by or uncertain about change, have become more strident. Some of the newly admitted faculty members, viewing the process of their admission as a struggle, also may have become unduly strident. Both of these valuable sets of stakeholders in the community, at

times, may separate into “warring camps.”⁶⁴ Warring camps breed Proselytizing Professors and view them as increasing the camps’ influence. Proselytizing Professors perpetuate intolerance. Ultimately law students are the casualties.

Diversity, without tolerance, has not fostered the open, nurturing community for which many had hoped. The “third generation” diversity issue, then, is how to build a tolerant community that respects all voices (both newly admitted and long-admitted). In a tolerant community no one single Politically Correct dogma rises to the top, and neither warring camps nor Proselytizing Professors attempt to force their version of Political Correctness on others. When third generation diversity is achieved, the community will tolerate diverse ideas and welcome different voices. Stakeholders in these new tolerant communities will exchange diverse ideas drawn from varying political, intellectual, cultural, economic, and social backgrounds. Diversity, when combined with tolerance, will create a true law school community. Law students entering the practice from a tolerant community surely will improve the delivery of justice.

64. Derek Bok explains that the political zealotry of warring faculty camps “undermines academic standards.” Bok, *supra* note 20, at 8. He states: “without either side being aware of what is happening, each stops listening and closes its mind to arguments by the other. In the process, the intellectual standards that normally apply in choosing faculty are an early casualty in the struggle for tactical advantage.” *Id.* at 8-9.