



ESSAY

Academic Freedom and Discipline: The Case of the Arguably Peaceful Protestors

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Abstract. Soon after Hamas's attacks on Israel on October 7, 2023, and Israel's military response in Gaza, a global spotlight focused on university members' and leaders' conduct and statements regarding those events. Intense debate ensued about what academic freedom means when university members' political protest and speech are alleged to constitute forms of discrimination, harassment, and bullying of other members of the university. The debate revealed widespread uncertainty about the relationship between universities' policies and attitudes on academic freedom on the one hand and universities' disciplinary rules on the other hand. The aftermath also raised questions about the proper role of universities in speaking on world events. Every day, universities receive complaints from their members about other members' violations of university policies. Those complaints are often investigated and adjudicated within a university's disciplinary system. This Essay consists of a fictitious disciplinary proceeding within a hypothetical university's complaint adjudication process. We present a written determination by adjudicators at a fictitious school, Newgarth University, who must decide whether to discipline students accused of policy violations during political protest. Our goal is to present examples of common intellectual positions in the terrain of academic freedom, discrimination, and university discipline. We hope that by making visible the most common intellectual approaches to navigating the intersection of political protest, academic freedom, discrimination, and university discipline, readers may better understand the legal terrain.

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Introduction

Seventy-five years ago, Lon Fuller's *The Case of the Speluncean Explorers* presented a fictitious legal dispute in a far-off jurisdiction at a different time.¹ The fictional case, inspired by actual legal controversies, involved cave explorers who were trapped underground for weeks, able to communicate with the surface world and aware of their likely eventual rescue but lacking adequate food.² To survive until their rescue, the spelunkers deliberately killed one of their own and ate him.³ The question for the fictitious court in the jurisdiction of Newgarth was whether the surviving individuals ought to be convicted of murder upon their rescue.⁴ The fictitious judges' opinions typified different jurisprudential approaches—for example, formalism, functionalism, legal process, legal realism, popular constitutionalism, consequentialism, and so on. Part of the Essay's genius was that the abstraction away from "our time" and "our place" allowed ideal types of legal reasoning to be more clearly presented.⁵

Soon after Hamas's attacks on Israel on October 7, 2023, and Israel's military response in Gaza, a global spotlight focused on university members' and leaders' conduct and statements regarding those events.⁶ Intense debate ensued about what academic freedom means when university members' political protest and speech are alleged to constitute forms of discrimination, harassment, and bullying of other affiliates.⁷ The debate revealed widespread

1. See generally Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

2. *Id.* at 616-17.

3. *Id.* at 618.

4. *Id.* at 616.

5. Fifty years after Fuller's essay, the same underlying facts were revisited by a slew of contemporary legal thinkers. See *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium*, 112 HARV. L. REV. 1833 (1999).

6. For examples of the extensive media coverage of university responses to the conflict, see Jack Stripling & Laura Meckler, *At Colleges, Violence in Israel and Gaza Ignites a War of Words*, WASH. POST (updated Oct. 11, 2023, 1:26 AM EDT), (describing the "tightrope some college leaders appear to be attempting: renouncing the violence and pleading for security and civility on their campuses, while often sidestepping the contentious politics of the Israeli-Palestinian conflict"); Emma Hurt & Eleanor Hawkins, *Universities Struggle with Responses as Israel-Hamas War Reverberates*, AXIOS (Oct. 18, 2023), <https://perma.cc/4KY3-5QQW> (observing that "American academic institutions are grappling with how to respond to the Israel-Hamas war for fear of angering students, faculty, donors and alumni").

7. In an attempt to mediate this debate, the ACLU issued an open letter urging protections to academic freedom, and the American Association of University Professors published a statement reaffirming its commitment to academic freedom. See *ACLU Open Letter to Colleges and Universities: Reject Efforts to Restrict Constitutionally Protected Speech on Campus*, ACLU (Nov. 1, 2023, 4:00 PM), <https://perma.cc/7S8P-7B7F>;
footnote continued on next page

uncertainty about the relationship between universities' policies and attitudes on academic freedom on the one hand and universities' disciplinary rules on discrimination, harassment, and bullying on the other hand.⁸ The aftermath of October 7th also raised questions about the role of universities in speaking about world events.⁹ All of these thorny issues implicate the core purpose and mission of a university.

Universities often receive complaints from their members about other members' violations of university policies.¹⁰ Those complaints are investigated and adjudicated within a university's disciplinary system,¹¹ the proceedings and decisions of which are generally confidential.¹² While a university's website may publicize its disciplinary policies and procedures, the confidentiality of cases means the public has no way to examine the workings, reasoning, or results of complaints, investigations, and adjudicative decisions, except in the unusual case in which a party aggrieved by the process or the result takes the step of filing a lawsuit alleging that the university acted unlawfully.¹³

Academic Freedom in Times of War, AM. ASSOC. UNIV. PROFESSORS (Oct. 24, 2023), <https://perma.cc/Z9Y7-2CGL>.

8. See, e.g., Vimal Patel & Anna Betts, *Campus Crackdowns Have Chilling Effect on Pro-Palestinian Speech*, N.Y. TIMES (Dec. 17, 2023), <https://perma.cc/KPB5-97RA> (reporting that the Brennan Center for Justice's founding legal director suggested that "[s]chool leaders are in a tough position" because they must balance "intellectual openness" with helping "traumatized and frightened young people").
9. See, e.g., Hurt & Hawkins, *supra* note 6; Josh Moody, *Presidents Can't Win*, INSIDE HIGHER ED (Oct. 18, 2023), <https://perma.cc/AM6A-5CQA> (listing university responses to the conflict and discussing the "pitfalls" of issuing statements); Karin Fischer, *The Third Rail of Higher Ed*, CHRON. HIGHER EDUC. (Oct. 18, 2023), <https://perma.cc/3GF7-K5Y7> (similar).
10. While the actual number of complaints vary by year and by institution, an illustrative example is the Brown University campus newspaper's report that there were almost six hundred cases of nonacademic violations at Brown in one academic year. See Scott Lowenstein, *Hundreds of Disciplinary Infractions Detailed in Report*, BROWN DAILY HERALD (Dec. 6, 2006, 7:00 PM EST), <https://perma.cc/T49G-4R2C>.
11. See, e.g., *Doe v. Stonehill Coll., Inc.*, 55 F.4th 302, 312-15 (1st Cir. 2022) (describing a college's disciplinary process in a Title IX investigation); *Roe v. St. John's Univ.*, 91 F.4th 643, 648-50 (2d Cir. 2024) (similar); see generally Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881 (2016) (discussing university disciplinary procedures for sexual misconduct).
12. See Margo Kaplan, *Restorative Justice and Campus Sexual Misconduct*, 89 TEMP. L. REV. 701, 733 (2017) ("[U]niversity disciplinary proceedings are confidential . . ."); Nancy Gertner, *Complicated Process*, 125 YALE L.J.F. 442, 443 (2016) (characterizing Title IX proceedings as "necessarily confidential").
13. For examples of cases in which a party sued after undergoing the university disciplinary process and thus made the university's internal procedures public, see note 11 above; see also *Doe v. Regents of the Univ. of Cal.*, 23 F.4th 930, 933-34 (9th Cir. 2022) (describing university process); *Plummer v. Univ. of Houston*, 860 F.3d 767, 770-72 (5th Cir. 2017) (similar). Disclosure: One of us, Jeannie Suk Gersen, has served as counsel for
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This Essay presents a fictitious case that takes place in the world of university discipline and explores a hypothetical university's adjudication process. We present a written adjudicative determination by members of a fictitious school, Newgarth University, who must decide whether to discipline students accused of policy violations arguably relating to political protest. Rather than abstract away from the current political moment as Fuller did in 1949, we draw from real events that occurred on university campuses after October 7, 2023, and use them to fashion a stylized fact pattern to which our fictitious panel of adjudicators must apply Newgarth University's policies.

Followers of events on campuses will recognize similarities to actual controversies. But this Essay does not aspire to produce an accurate record of what actually happened on campuses; the reported facts have been contested and various. Instead, we intentionally alter the reported facts to craft a composite set of facts that do not correspond precisely to actual incidents. For the policies of Newgarth University, we draw liberally from Harvard University's policies and procedures because they are ones with which we have greatest familiarity. Other campuses likely have similar policies and procedures. Our goal is to provide an illustrative analysis of university policies applied to a set of stylized facts. Like some actual adjudicative decisions within universities, the text that follows consists of a description of facts, an overview of the applicable rules, a determination that applies the rules to the facts, and a set of concurring and dissenting opinions.

Our goal is to present examples of common intellectual positions in the terrain of academic freedom, discrimination, and university discipline. We hope that by making visible the most common perspectives on the most relevant cluster of questions, readers may better understand their difficulties, tensions, and potential resolutions, as well as the quandaries that universities face.

I. Background

As the political conflict over Israel, Hamas, and the war in Gaza has reverberated across colleges and universities, acute tensions have arisen on campuses and in public discourse. Public letters, petitions, statements, calls for universities themselves to speak, awareness campaigns, and protests have roiled campuses.¹⁴ Some of these events constitute intellectual exchange,

complainants and for respondents in university disciplinary cases, as well as counsel for plaintiffs in lawsuits against universities.

14. See, e.g., Esmā Okutan, *Joint Faculty Statement Calls for End to "Ethnic of Collective Punishment" in Israel-Hamas War*, YALE DAILY NEWS (Oct. 17, 2023, 5:04 AM), <https://perma.cc/CP94-UNVY> (reporting on Yale faculty petition); Miriam Waldvogel, *About 120 Rally to Kick Off Sixth Push for Israel Divestment in Past 20 Years*, *footnote continued on next page*

political discourse, and protected protest.¹⁵ As tensions have run high, other incidents have given rise to unlawful conduct including physical violence and property destruction, to which law enforcement has responded.¹⁶ While many events on our campus unquestionably involved protected speech and exercises of academic freedom, others are alleged to have crossed the line to impermissible conduct in violation of University policies.¹⁷

The current matter comes before us as members of Newgarth University's Determination Panel of adjudicators. It requires us to decide whether the University will discipline students who are accused of the conduct outlined below in Part II, including chanting slogans that some understand as calls for genocide even as others dispute that understanding. As adjudicators charged with addressing alleged violations of the University's disciplinary policies, it is our responsibility to clarify the line between permissible and impermissible conduct; here, the line between free speech—including academic discourse and political protest—and discrimination, harassment, or bullying.

On October 7, 2023, Hamas killed about 1,200 and kidnapped around 240 Israelis and others in the area.¹⁸ That day, several dozen student groups at Newgarth University issued a joint public statement holding “the Israeli regime entirely responsible for all unfolding violence.” The backlash against the statement included public calls for individual students involved in the statement to face University discipline such as suspension or expulsion and for the student groups to be suspended or banned from campus. Alumni of the

DAILY PRINCETONIAN (Dec. 4, 2023, 12:39 AM EST), <https://perma.cc/Q34E-8JRR> (noting protests and a petition at Princeton).

15. See Jessica Blake & Johanna Alonso, *Coming Together Over the Israeli-Palestinian Conflict*, INSIDE HIGHER ED (Oct. 20, 2023), <https://perma.cc/U7KS-HNYE> (some institutions have “arranged] vigils and prayer services, academic panels and teach-ins to encourage students to listen, learn and express their views”).
16. See, e.g., *UC Berkeley Leaders Denounce Violent Protest that Forced Evacuation of Jewish Student Event*, CBS NEWS (Feb. 28, 2024, 3:49 PM PST), <https://perma.cc/9GSH-6QF2> (describing how protestors at UC Berkeley broke into a Jewish student event, leading to the evacuation of attendees and a criminal investigation); Sara Weissman, *Jewish, Muslim Students Fear Their Views Put Them in Danger*, INSIDE HIGHER ED (Mar. 8, 2024), <https://perma.cc/5H3Y-SS9G> (reporting “acts of violence happening on campuses and antisemitic and Islamophobic sentiments expressed by a significant number” of students).
17. See, e.g., *On-campus Demonstrations*, TUFTS UNIV., <https://perma.cc/V2RN-86BM> (archived May 1, 2024) (listing violations of university policy related to the conflict); *Event Policy and Campus Resources FAQ*, COLUM. UNIV., <https://perma.cc/87A7-CHQ5> (archived May 1, 2024) (listing disciplinary actions related to the conflict).
18. See Patrick Kingsley, Aaron Boxerman, Natan Odenheimer, Ronen Bergman & Marco Hernandez, *The Day Hamas Came*, N.Y. TIMES (Dec. 22, 2023), <https://perma.cc/636H-UVC4>; Cassandra Vinograd & Isabel Kershner, *Israel's Attackers Took About 240 Hostages. Here's What to Know About Them*, N.Y. TIMES (Nov. 20, 2023), <https://perma.cc/9YED-XDBD>.

University called for employers not to hire the students and for students' visa statuses to be revoked.

For better or worse, Newgarth University operates in the glare of the public spotlight. Teaching, learning, developing intellectually, and maturing emotionally under constant scrutiny from print, television, online, and social media sources is not ideal, but it is part of the burden of the University and its members, some of whom are teenagers. Public figures have accused our students of antisemitism and the University's administration of failing to protect Jewish students. Others have decried the University for its complicity in the oppression of Palestinians, for enabling the intimidation of Palestinian and Muslim students, and for not protecting their speech and equality. The University has been urged by both internal and external parties to punish alleged "calls for the genocide of Jews" and, by others, to punish alleged "calls for the genocide of Palestinians in Gaza."

II. Facts

The Investigator appointed by the University found the following facts.

A. The Yard

On Friday, November 3, a group of approximately thirty students (Protesters), who were diverse in race, religion, and ethnicity and led by Muslim and Jewish students, gathered on the main Yard of our campus to protest in support of a "Free Palestine." Some wore hijabs or keffiyehs. A handful covered their faces. The Protesters held up Palestinian flags, marched, and chanted, "From the River to the Sea, Palestine will be free," "Globalize the intifada," and "Stop the genocide in Gaza."

The protest in the Yard was held in accordance with the University's rules governing the reasonable time, place, and manner for protests and in a space where political protests had traditionally and permissibly occurred. A second group of students walked past the protest on a public walkway on their way to the Hillel building as it was approaching the time for candle-lighting before Shabbat services. The walkway is used for pedestrian traffic, as it connects the main student dormitories, the main library, classrooms, and other University buildings. Some students in this second group were wearing items that suggested they were Jewish, including kippot, tzitzit with fringes showing, and necklaces with the Star of David. Some of them stopped walking to film the Protesters, using their phones.

At this time, some of the Protesters noticed the students filming them and pointed in their direction. A subset of six Protesters encircled three of the Jewish students while continuing to chant. Some Protesters stood one to two feet away from the Jewish students as the group chanted, "Free Palestine," "From the River

to the Sea,” and “Intifada.” One Protester yelled, “Death to Israel.” As the three Jewish students moved to leave, their path was blocked several times before one of the Protesters created a physical space for them to leave.

One of the encircled students reported feeling terrified and shaking with anxiety. Another Jewish student reported feeling no fear because the Protesters were directing their chants at Israel, not Jews or Judaism. Still another student reported feeling hurt and alienated, but she requested there be no discipline for the Protesters because she believes in the right of political protest and has participated in protests, sometimes in support of and sometimes in opposition to Israel’s policies.

There was no physical contact between any of the students and no physical assault is alleged. There was, however, some factual dispute about whether the path to exit the encirclement in the Yard was completely or only partially blocked. The Investigator in this matter found that it was not entirely blocked, a factual finding that we are not authorized to overturn. There was also some dispute about whether the Protesters encircled the students because they were Jewish. The Investigator found that the Protesters perceived that the students on the walkway were Jewish but that not every Protester who encircled the students intended to do so because they were Jewish. Several Protesters testified that they perceived the Star of David worn by some students as a symbol of support for Israel, which they said is a political position against which they were protesting. They denied that their group, which was composed of Muslim and Jewish students, was targeting Jewish or Israeli students. The Investigator found that the students were encircled both because they were Jewish and because they were filming without consent. She also concluded that the items that the Jewish students wore were more reasonably perceived as signs of Jewish identity or religion than as symbols of political support for Israel.

There is much dispute about the meaning, intent, and impact of the phrases that the Protesters chanted, including whether those phrases are “genocidal” or merely calling for freedom and equality for Palestinians. Protesters testified that they were not calling for genocide of Jews but rather calling for “an end to genocide” of Palestinians in Gaza. The Investigator found that the Protesters intended the chants to be calls for justice for Palestinians, with some of them using the slogans as calls for an end to the State of Israel but not for the genocide of Jews. The Investigator also found that some of the encircled Jewish students understood the slogans as calling for the genocide of Jews, while some perceived them as disturbing or wrong but not genocidal. The Investigator found that one of the encircled Jewish students was significantly delayed in completing several papers during the semester because of distress stemming from the protest and other similar protests on this campus and in various other cities.

B. The Classroom Building

1. Noise in the hallway

The Protesters in the Yard eventually marched to a classroom building and went inside, where they loudly chanted and blew bullhorns. Classes and meetings that were underway were interrupted for five minutes by the noise in the hallway. Professors who were in the midst of teaching came out to the hallway and asked the Protesters to leave. The classes and meetings resumed when the Protesters left the hallway.

2. Class interruption

The Protesters then marched into a lecture hall in which two hundred students were attending a regularly scheduled class. The Protesters' loud chanting interrupted the class session for approximately ninety seconds during which the professor could not continue lecturing because of the noise. Approximately ten of the students who were enrolled in the class stood and joined in the chants with the Protesters, and a handful of other enrolled students left the classroom. The Protesters then departed, and the professor resumed teaching without further incident.

Students who were in the classroom during the Protesters' interruption reported a range of reactions, including annoyance, anger, indifference, support for the message, fear, intimidation, and feeling unsafe. Some students said they felt unable to focus on the lecture even after the disruption ended. Others said they saw the short interruption of a class as a routine part of college life, comparing it to other class disruptions, including one when a student interrupted class for several minutes to perform a prank as an initiation ritual for a student organization, another when a student interrupted a class to publicly propose that a fellow student attend a semiformal with him, and several others when students sang "Happy Birthday" to a fellow student or to the professor.

C. The University Administration Building

The Protesters marched to the University building that houses the office of the Dean of the College, sat on the floor of the office, and chanted slogans. The Dean's scheduled meetings and calls had to be rescheduled. The Protesters were asked to leave but refused to do so until several hours had passed.

D. The Library

The next morning, the Protesters went to a reading room in the University's main library and, on one end of the room, displayed a large sign

that said, “Stop the Genocide in Gaza.” They wore keffiyehs, sat at the tables while working on their laptops, and remained there for several hours. The Investigator found that they did not chant or make substantial noise but that other students who went to the reading room to study felt uncomfortable using it during the protest and left.

III. Policies

Because they have been so often misunderstood and inaccurately portrayed, we find it necessary to state the relevant rules pertaining to the academic freedom and antidiscrimination principles that are essential to the University’s mission. The first set of relevant policies protects academic freedom, free speech, and protest. The second set prohibits discrimination, harassment, and bullying. The relationship between them is in need of clarification.

A. Academic Freedom and Free Speech

1. Statement on Rights and Responsibilities

The University-wide Statement on Rights and Responsibilities (Statement), adopted in 1970, states:

The central functions of an academic community are learning, teaching, research and scholarship. By accepting membership in the University, an individual joins a community ideally characterized by free expression, free inquiry, intellectual honesty, respect for the dignity of others, and openness to constructive change.¹⁹

An individual member’s exercise of rights and responsibilities “must be compatible with these qualities.”²⁰

The rights to dissent and protest are among those rights, and “[a]ll members of the University have the right to press for action on matters of concern by any appropriate means,” including to “join political associations, convene and conduct public meetings, publicly demonstrate and picket in orderly fashion, advocate and publicize opinion by print, sign, and voice.”²¹ The University considers “essential to its nature as an academic community” the values of “freedom of speech and academic freedom, freedom from personal force and violence, and freedom of movement.”²² As such, “[i]nterference with any of these freedoms must be regarded as a serious violation of the personal

19. Off. of the Provost, *University-Wide Statement on Rights and Responsibilities*, HARV. UNIV., <https://perma.cc/U5HV-7D3R> (archived May 1, 2024).

20. *Id.*

21. *Id.*

22. *Id.*

rights upon which the community is based.”²³ Furthermore, “interference with members of the University in performance of their normal duties and activities must be regarded as unacceptable obstruction of the essential processes of the University.”²⁴

University members have a corresponding responsibility “to maintain an atmosphere in which violations of rights are unlikely to occur.”²⁵ “No violation of the rights of members of the University, nor any failure to meet responsibilities, should be interpreted as justifying any violation of the rights of members of the University.”²⁶

In the past, the University has made clear in interpretations of the Statement that the “unauthorized occupation of a University building . . . that interferes with the ability of members of the University to perform their normal activities constitutes unacceptable conduct in violation of the Statement and is subject to appropriate discipline.”²⁷ Conduct that interferes with the carrying out of normal duties and activities is subject to discipline, whether or not it involves occupying a building.²⁸ Finally, “intense personal harassment of such a character as to amount to grave disrespect for the dignity of others” is “regarded as an unacceptable violation of the personal rights on which the University is based.”²⁹

2. Free Speech Guidelines

The University’s Free Speech Guidelines (Guidelines), adopted in 1990, state:

Free interchange of ideas is vital for our primary function of discovering and disseminating ideas through research, teaching, and learning. Curtailment of free speech undercuts the intellectual freedom that defines our purpose.³⁰

The Guidelines acknowledge that “we take certain risks by assigning such a high priority to free speech[,]” but “assume that the long term benefits to our community will outweigh the short term unpleasant effects of sometimes noxious views” and “do not permit censorship of noxious ideas.”³¹ The University’s commitment to diversity means that its members “do not share

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. HARVARD FAC. OF ARTS & SCIENCES, FREE SPEECH GUIDELINES 3 (1990), <https://perma.cc/P2US-JQTV>.

31. *Id.*

similar political or philosophical views, nor would such agreement be desirable,” and that we must allow “diverse opinions to flourish and to be heard.”³²

The Guidelines state that we are “equally committed to the individual’s pursuit of inquiry and education,” and that “[r]acial, sexual, and intense personal harassment . . . prevent rational discourse.”³³ Thus, “[b]ehavior evidently intended to dishonor such characteristics as race, gender, ethnic group, religious belief, or sexual orientation” can be punished “because it violates a balance of rights on which the University is based”—a balance that “will be struck after a careful review of all relevant facts.”³⁴ The Guidelines also indicate that any punishment decision must “be consistent with established First Amendment standards.”³⁵ We may thus punish expression that would not be protected under the First Amendment if the University were a state actor bound by the Constitution. For example, the University’s protections for speech exclude utterances that are “true threats,” which intend to make listeners fear for their bodily safety,³⁶ “fighting words,” which are inherently likely to provoke a violent reaction or immediate breach of the peace,³⁷ and incitements, which intend to produce imminent unlawful action.³⁸

All gatherings or events, including protests, are subject to “appropriate time, place, and manner” limitations that “should have a presumption favoring free speech” and “should ordinarily not be interpreted to prevent signs or expressions of political views that are not disruptive.”³⁹ The Guidelines define “disruption” as “any repeated or continuous action which effectively prevents members of the audience from adequately hearing or seeing the event.”⁴⁰ They

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. See *Virginia v. Black*, 538 U.S. 343, 359 (2003) (“‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”); see also *Counterman v. Colorado*, 143 S. Ct. 2106, 2113 (2023).

37. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (defining “fighting words” as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”); see also *Cohen v. California*, 403 U.S. 15, 20 (1971) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)) (defining “fighting words” as “personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction”); *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992).

38. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1968) (per curiam) (defining incitement as words “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”) (footnote omitted).

39. HARVARD FAC. OF ARTS & SCIS., *supra* note 30, at 3.

40. *Id.* at 4.

provide that the University should “maximize the room for dissent without curtailing the speaker’s ability to communicate.”⁴¹

During an event on campus involving a speaker, for example, University officers are supposed to first warn disrupters that “their actions are unacceptable and must stop.”⁴² The warned disrupters are not punished if they leave without further disruption, but if they leave disruptively, they may be disciplined with admonishment or a semester of probation.⁴³ If the warning is not heeded and the disrupters refuse to leave, University officers or police may remove them, and they may receive up to a year of probation.⁴⁴ And if the disrupters’ refusal to leave effectively prevents free speech, the suggested penalty ranges from a year of probation to a year-long withdrawal, depending on the disruption’s severity.⁴⁵ Anyone who commits an act of physical violence “should be ejected from the event immediately,” without need of a warning, and the suggested penalty is at least a year-long withdrawal and has “no upper limit.”⁴⁶

Protest that is not disruptive, including signs, clothing, standing, or gesturing, is permissible.⁴⁷ Chanting or making noise is also acceptable if it is not disruptive.⁴⁸ Any otherwise permissible activities become prohibited conduct if they interfere with an audience’s ability to see or hear a speaker, regardless of whether the disruption occurs inside or outside of the meeting.⁴⁹ But an audience is also required to “respect the right to dissent,” and anyone “who substantially interferes with acceptable dissent is violating” the Guidelines “in the same way as a dissenter who violates the rights of the speaker or audience.”⁵⁰

The Guidelines designate the classroom, however, as “a special forum” wherein the Guidelines do not apply, instead providing that “the teacher should be the one who determines the agenda of discourse in the classroom.”⁵¹ But the University’s law school, in particular, has chosen not to leave teachers to make the rules governing protest in their own classrooms. The Law School’s Handbook of Academic Policies specifies that, “with respect to classrooms, any form of protest that disrupts the conduct of [a Law School]

41. *Id.*

42. *Id.*

43. *Id.* at 7, 9.

44. *Id.*

45. *Id.*

46. *Id.* at 5, 9.

47. *See id.* at 3-5, 9.

48. *See id.*

49. *See id.* at 4.

50. *Id.* at 5.

51. *Id.* at 4.

class would violate the University-Wide Statement of Rights and Responsibilities' prohibition against interference with 'the performance of the [] normal duties and activities' of the University."⁵² Thus, in the absence of University rules governing the disruption of classes, the Law School rules provide for punishment of those who disrupt law school classes through "any form of protest."⁵³

The Guidelines finally emphasize that punishments should not be decided on the basis of "the political content of the transgression" and should "not be used to discourage the specific content of legitimate political dissent."⁵⁴

B. Discrimination, Harassment, and Bullying

1. Non-Discrimination Policy

The University's Non-Discrimination Policy, which became effective in 2023, prohibits discrimination on the basis of, among other things, race, color, national origin, ancestry, religion, creed, and political beliefs.⁵⁵ It defines discrimination as "adverse treatment of an individual based on . . . [a] protected characteristic[]." ⁵⁶ Discrimination falls into two categories. The first is "discriminatory disparate treatment," which is "singling out or targeting an individual for less favorable treatment because of their protected characteristic," for example, by "imposing more severe discipline" or by "suspending, dismissing, or expelling an individual."⁵⁷ Such conduct violates the policy if it unreasonably interferes with or limits a person's "ability to participate in or benefit from the institution's programs and activities."⁵⁸

The second type of discrimination is "discriminatory harassment," which is "unwelcome and offensive conduct that is based on an individual or group's protected status."⁵⁹ Such conduct violates the policy when:

[I]t is so severe or pervasive, and objectively offensive, that it creates a work, educational, or living environment that a reasonable person would consider

52. HARVARD L. SCH., HANDBOOK OF ACADEMIC POLICIES 2023-2024, at 99 n.1 (n.d.), <https://perma.cc/25K8-7LKD> (second alteration in original) (quoting Off. of the Provost, *supra* note 19).

53. *Id.*

54. HARVARD FAC. OF ARTS & SCIS., *supra* note 30, at 5.

55. HARVARD UNIV., HARVARD UNIVERSITY NON-DISCRIMINATION POLICY & ANTI-BULLYING POLICY 1 (2023), <https://perma.cc/DZK6-NQDK>.

56. *Id.* at 2.

57. *Id.*

58. *Id.*

59. *Id.*

intimidating, hostile, or abusive and denies the individual an equal opportunity to participate in the benefits of . . . the institution's programs and activities.⁶⁰

In determining whether the conduct violates the Policy, the decisionmaker considers, for example, its frequency, its severity, its pervasiveness, whether it is physically threatening, and the degree of interference with "a student's academic performance or ability to participate in or benefit from academic/campus programs and activities."⁶¹

2. Anti-Bullying Policy

The University's Anti-Bullying Policy, which became effective in 2023, states: "Bullying, hostile and abusive behavior, and power-based harassment directly threaten the ability of community members to engage in the free exchange of ideas and pursue their educational and professional goals."⁶² The policy "aims to foster a University community built on mutual respect and trust while protecting academic freedom, reasoned dissent, and legitimate pedagogical and employment-related feedback."⁶³

The policy defines bullying as "harmful interpersonal aggression by words or actions that humiliate, degrade, demean, intimidate, or threaten an individual or individuals."⁶⁴ But in order to constitute a violation of the policy:

[S]uch aggression must be sufficiently severe or pervasive, and objectively offensive, that it creates a work, educational, or living environment that a reasonable person would consider intimidating, hostile, or abusive and denies the individual an equal opportunity to participate in . . . the institution's programs and activities.⁶⁵

The Policy specifies that "unless sufficiently severe or pervasive, a single act typically would not constitute bullying."⁶⁶

The Policy explains that bullying includes:

Abusive expression directed at an individual or individuals, such as derogatory remarks, epithets, or ad hominem attacks that are outside the range of commonly accepted expressions of disagreement, disapproval, or critique in an academic community and professional setting that respects free expression.⁶⁷

60. *Id.*

61. *Id.*

62. HARVARD UNIV., *supra* note 55, at 11.

63. *Id.*

64. *Id.* at 12 (footnote omitted).

65. *Id.*

66. *Id.*

67. *Id.*

It also includes “[s]abotage or threatened sabotage of the studies, work, or career advancement of an individual or individuals,” such as “[i]nterfering or threatening to interfere with a person’s visa status” and “[s]preading false or misleading information or malicious rumors.”⁶⁸

The Policy further indicates that “[d]ifferences of opinion, interpersonal conflicts, and occasional disagreements . . . are often part of academic and working life and do not necessarily constitute bullying.”⁶⁹ It excludes from the definition of bullying “reasoned opinion on controversial issues.”⁷⁰ And for good measure, the policy emphasizes:

[It] should also construed within the context of the University’s enduring commitment to academic freedom and free inquiry, and the conception of the University as a place that must encourage reasoned dissent and the free exchange of ideas, beliefs, and opinions, however unpopular.⁷¹

The Policy “is not intended to constrain the freedom . . . to engage in academic disagreements or to discuss controversial matters, criticize the administration or University policies, or take part in political protest.”⁷²

Both the Non-Discrimination and Anti-Bullying Policies provide that discipline for violations can include but is not limited to “counseling, warning, reprimand, suspension, probation, monitoring, community service, reduction in access to resources, . . . dismissal, expulsion, or termination.”⁷³ Neither Policy limits the University’s or its Schools’ “ability to address behavior that it determines is inconsistent with their expectations, policies, standards, or values.”⁷⁴ Thus, behavior that does not violate the Non-Discrimination and Anti-Bullying Policies may still be disciplined if it is deemed inconsistent with, for example, the Statement,⁷⁵ the Guidelines,⁷⁶ the Title IX Sexual Harassment Policy,⁷⁷ the Other Sexual Misconduct Policy,⁷⁸ or the Sexual and Gender-Based Harassment Policy.⁷⁹

68. *Id.* at 13.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 13-14.

73. *Id.* at 10, 21.

74. *Id.* at 1, 11.

75. See Off. of the Provost, *supra* note 19.

76. See HARVARD FAC. OF ARTS & SCIS., *supra* note 30.

77. HARVARD UNIV., INTERIM TITLE IX SEXUAL HARASSMENT POLICY (2022), <https://perma.cc/659F-Q2PN>.

78. HARVARD UNIV., INTERIM OTHER SEXUAL MISCONDUCT POLICY (2022), <https://perma.cc/7RJW-2QJS>.

79. HARVARD UNIV., SEXUAL AND GENDER-BASED HARASSMENT POLICY (2022), <https://perma.cc/PT8R-CJNC>.

C. Non-Retaliation

The University's Non-Retaliation Policy states:

The University expressly forbids anyone to take any form of retaliatory action against any member of the [University] community who in good faith voices concerns, seeks advice, files a complaint or grievance, seeks the aid of Human Resources, testifies or participates in investigations, compliance reviews, proceedings or hearings, or opposes actual or perceived violations of [the] University's policy or unlawful acts.⁸⁰

The Policy is intended to ensure that “ethical, moral, and legal matters may be raised without fear of repercussion,” and to encourage members of the University “to bring forward information of which they may have become aware related to potential or actual violations of University policies or any laws or regulations to which the University is subject.”⁸¹ In sum, the Policy “forbids retaliatory action for good faith reports of potential or actual misconduct and supports the reporting of the same.”⁸²

IV. Determination

A. Complaints

The Complainants are several students who allege that the Protesters or a subset of them violated the policies prohibiting discriminatory harassment and bullying; interfered with their “freedom of movement” and engaged in “intense personal harassment” in violation of the Statement; and violated the rules for acceptable protest laid out in the Guidelines.⁸³

The Complainants also accuse the University of discrimination against Jewish students in failing to protect them from a hostile environment created by allegedly antisemitic protests on campus. They allege that the University's failure to discipline, or failure to publicly denounce, the three dozen student groups for their statement on October 7th triggered a hostile environment for Jewish students.

For their part, the Respondents—the Protesters—deny that their conduct violated any University policy and claim the free-speech protections of the Statement and the Guidelines. In addition, the Respondents allege that the Complainants are weaponizing the University's policies to discourage political protest that Complainants find unacceptable, which the Respondents allege is itself a form of harassment and bullying in violation of the Non-

80. *Non-Retaliation*, HARVIE, <https://perma.cc/YPV2-DQ9L> (last updated May 21, 2008).

81. *Id.*

82. *Id.*

83. See HARVARD FAC. OF ARTS & SCIS., *supra* note 30, at 3, 5, 10.

Discrimination and Anti-Bullying policies, the Statement, and the Guidelines. The Respondents further allege that the Complainants violated the Anti-Retaliation Policy by filing these complaints in retaliation for raising “ethical, moral, and legal matters,” which the Protesters were entitled to do “without fear of repercussion.”⁸⁴

Moreover, the Respondents allege that the University failed to act to protect pro-Palestinian students who were publicly targeted by alumni and entities outside of the University and thereby compromised the students’ safety. The Respondents allege that the University’s inaction created a hostile environment on campus for Palestinian, Muslim, and anti-Zionist students. Finally, the Respondents allege that if the University were to punish them, that would be discriminatory harassment in violation of the Non-Discrimination Policy. That is, the University would allegedly be “imposing more severe discipline” on them than on past protesters “because of their protected characteristic”—namely their political beliefs, race, religion, national origin, or ethnicity.

B. Applying the Policies to the Facts

Having described the facts and relevant policies, we now must apply the policies to the underlying facts.

1. The Yard

a. Chants

The initial protest in the Yard complied with time, manner, and place regulations for protests. There is no allegation that the volume of chanting in the Yard was unreasonable or disruptive.⁸⁵ If discipline is to be imposed for the Protesters’ chants alone, therefore, it must be because of their content or the way in which they were used to target Complainants.⁸⁶

b. Content of slogans

The Complainants argue that the chanting of the slogans in itself violates University policies on discriminatory harassment and bullying. The Complainants interpret these statements as calling for genocide. The Respondents argue that the statements express opposition to Israel’s treatment of Palestinians and support for a Palestinian State.

84. *Non-Retaliation*, *supra* note 80.

85. *See id.* at 3–4.

86. *See, e.g.*, Off. of the Provost, *supra* note 19.

“Discriminatory harassment” entails “unwelcome and offensive conduct that is based on an individual or group’s protected status.”⁸⁷ However, conduct violates the policy when:

[I]t is so severe or pervasive, and objectively offensive, that it creates a work, educational, or living environment that a reasonable person would consider intimidating, hostile, or abusive and denies the individual an equal opportunity to participate in the benefits of . . . the institution’s programs and activities.⁸⁸

The policy requires us to consider the conduct’s frequency, severity, pervasiveness, whether it is physically threatening, and the degree of interference with “a student’s academic performance or ability to participate in or benefit from academic/campus programs and activities.”⁸⁹

The phrases that the Protesters chanted are fairly and commonly understood to advocate at a minimum for the end of the State of Israel and the displacement of Jewish people living there.⁹⁰ The content of the slogans was “unwelcome and offensive” to the Complainants as it would be to many people who support the Jewish state and its right to exist. This University, however, does not have a speech code. It would be inimical to the University’s Statement and the Guidelines to prohibit the expression of the viewpoint, “I do not think the state of Israel, the Jewish state, should exist” or for that matter, the viewpoint, “I do not think a Palestinian state should exist.” The expression of such views, however unwelcome to listeners, cannot be a violation of our Non-Discrimination Policy. This is true notwithstanding that the content of these statements might make a person feel offended, anxious, or distressed. Advocating for the end of the state of Israel and the displacement of its people cannot be treated as any more discriminatory or harassing to an individual than a statement calling for the destruction of any other country with which members of the University may affiliate or that they may support.

87. HARVARD UNIV., *supra* note 55, at 2.

88. *Id.*

89. *Id.*

90. Among other phrases, the Protestors chanted “From the River to the Sea, Palestine will be free,” “globalize the intifada,” and “death to Israel.” See *supra* Part II.A. The phrase “From the River to the Sea” is generally understood to refer to “the territory between the Jordan River and the Mediterranean Sea,” which “includes the state of Israel.” Bryan Pietsch, “From the River to the Sea”: Why a Palestinian Rallying Cry Ignites Dispute, WASH. POST (Nov. 14, 2023, 8:30 AM EST), <https://perma.cc/3PGY-KPVE>. It represents the “hope for an independent Palestinian state,” but its adoption by Hamas has given it a “darker meaning that has long shaped the way in which it is received.” Karoun Demirjian & Liam Stack, *In Congress and on Campuses, “From the River to the Sea” Inflames Debate*, N.Y. TIMES (updated Nov. 12, 2023), <https://perma.cc/LV64-ZCWJ>. The phrase “globalize the intifada” is “often understood by those saying and hearing it as encouraging violence against Israelis, Jews, and institutions supporting Israel.” *What Does “Globalize the Intifada” Mean and How Can It Lead to Targeting Jews with Violence?*, AM. JEWISH COMM. (Dec. 4, 2023), <https://perma.cc/WG2J-49XL>.

The Complainants' assertion that the slogans violate the Non-Discrimination Policy depends on the assumption that the slogans advocate for the killing and elimination of a group based on religion, ethnicity, or nationality, which is not protected speech. We do not question the Complainants' perception of the slogans' meaning. The Investigator determined that the subjective intent of the Protesters was not to call for the killing of Jews or Israelis. The subjective experience of neither the speaker nor the listener determines the objective meanings of the phrases. But the fact that the phrases' meanings are currently highly contested—not only between the parties but between many people in society and in our political discourse—makes us reluctant to declare the slogans out of bounds, which would curtail the right of university members to “demonstrate . . . , advocate and publicize opinion” about the Israel-Palestine conflict.⁹¹ The same would be true if statements supporting Israel's actions in Gaza were alleged to be calls for the genocide of Palestinians.

The answer to whether the slogans on their face constitute bullying in violation of the Anti-Bullying Policy must be similar. We have no reason to doubt that the slogans were experienced by the Complainants as “harmful interpersonal aggression by words or actions that humiliate, degrade, demean, intimidate, or threaten an individual or individuals.”⁹² The definition of bullying eliminates the requirement that the conduct be on the basis of a protected status, and includes some conduct that may not constitute discriminatory harassment.⁹³ The Anti-Bullying Policy additionally prohibits “abusive expression directed at an individual or individuals, such as derogatory remarks, epithets, or ad hominem attacks that are outside the range of commonly accepted expressions of disagreement, disapproval, or critique in an academic community and professional setting that respects free expression.”⁹⁴

To constitute a Policy violation, the bullying must be “sufficiently severe or pervasive, and objectively offensive, that it creates a work, educational, or living environment that a reasonable person would consider intimidating, hostile, or abusive and denies the individual an equal opportunity to participate in . . . the institution's programs and activities.”⁹⁵ The Policy takes pains to instruct that it must “be construed within the context of the University's enduring commitment to academic freedom and free inquiry, and the conception of the University as a place that must encourage reasoned dissent and the free exchange of ideas, beliefs, and opinions, however

91. See Off. of the Provost, *supra* note 19.

92. HARVARD UNIV., *supra* note 55, at 12 (footnote omitted).

93. See *id.* at 12-13.

94. *Id.* at 12.

95. *Id.*

unpopular.”⁹⁶ In particular, the Policy emphasizes that it “is not intended to constrain the freedom . . . to take part in political protest.”⁹⁷ Given these warnings embedded in the Policy, we are unable to conclude that the slogans themselves are punishable as bullying. Because there is widespread disagreement about the meaning of the phrase, “Free Palestine,” “From the River to the Sea,” and “Intifada,” we cannot conclude that the slogans by themselves rise to a level of objective offensiveness that would deprive someone of educational opportunity.

c. Factual context of chants

Even though the slogans on their own do not constitute discriminatory harassment or bullying, the particular factual context and manner in which the Protesters chanted them at the Complainants may still have violated University policies.

The University considers “essential to its nature as an academic community” the value of “freedom of movement.”⁹⁸ Interference with such an essential right “must be regarded as a serious violation of the personal rights upon which the community is based.”⁹⁹ Six Protesters surrounded three Jewish students who repeatedly tried to leave, and their right of way was repeatedly blocked by the Protesters who surrounded them, even though the Investigator found that escape was not entirely blocked. This conduct was “interference” with the three students’ freedom of movement.

Furthermore, when the six Protesters encircled the three students, they did so believing that they were Jewish, and chanting, “Free Palestine,” “From the River to the Sea,” and “Intifada,” with one yelling, “Death to Israel.” Though the slogans on their own do not violate University policies, and indeed are protected speech, the Protesters crossed the line from free speech to targeting specific students for “unwelcome and offensive conduct” based on their Jewishness, and for “harmful interpersonal aggression by words or actions that humiliate, degrade, demean, intimidate, or threaten an individual or individuals.”¹⁰⁰ The chanting of the anti-Israel slogans while intentionally encircling Jewish students affects the context and meaning of the slogans. What might be taken as political statements rebuking Israel was changed by the simultaneous encirclement of students perceived to be Jewish into conduct that targeted Jewish students simply because of the association of Jews with

96. *Id.* at 13.

97. *Id.* at 13-14.

98. Off. of the Provost, *supra* note 19.

99. *Id.*

100. HARVARD UNIV., *supra* note 55, at 2, 12.

Israel. In that context, the slogans also became “[a]busive expression directed at” the students, akin to derogatory remarks or epithets, that were “outside the range of commonly accepted expressions of disagreement, disapproval, or critique.”¹⁰¹ Reasonable people who are surrounded and prevented from leaving by twice as many people yelling in close proximity about death to a state they are associated with because of their religion or ethnicity would find the situation humiliating or intimidating, if not a threat to their physical safety. This situation is analogous to three black students being surrounded by six white students chanting, “The South shall rise again.” The statement in itself would be protected speech, but the physical encirclement while chanting the statement would make the incident highly intimidating to the targeted individuals. We find the Protesters’ conduct to be sufficiently severe and objectively offensive that a reasonable person would experience it as a hostile or intimidating environment.

Not all of the encircled Complainants have claimed to have suffered negative effects on their education because of the Protesters’ conduct. But the Investigator found that one of the Complainants was significantly delayed in being able to complete her papers because of the incident. Based on the harm to that Complainant caused by the Protesters’ objectively hostile conduct, we find that the Non-Discrimination and Anti-Bullying Policies’ requirement that the conduct “denies the individual an equal opportunity to participate in the benefits of . . . the institution’s programs and activities” is satisfied.¹⁰² Thus, the Protesters who encircled the Complainant violated those policies with respect to her.

In sum, the six Protesters who surrounded the three Jewish students are responsible for violating the Statement’s prohibition on interference with freedom of movement, the Non-Discrimination Policy’s prohibition on discriminatory harassment, and the Anti-Bullying Policy.

2. The classroom building

As noted, the Protesters marched to a nearby classroom building and loudly chanted and blew bull horns in the hallway and then inside a classroom. Classes and meetings that were underway were interrupted for several minutes. The classes and meetings resumed when the Protesters left.

a. Noise outside meetings

The Guidelines make clear that when facing a disruption, University officers should first warn disrupters that “their actions are unacceptable and

101. *Id.* at 12.

102. *Id.* at 2, 12.

must stop.”¹⁰³ The warned disrupters will receive an admonishment at most if they leave without further disruption, but if they leave disruptively, they may face more severe discipline.¹⁰⁴ Here, the Protesters did disrupt meetings, but when warned that their conduct was unacceptable, the protesters left the hallway without further disruption. Therefore, no discipline may be imposed according to University policy.

b. Noise outside classes

The University does not provide the same protocol for when protesters disrupt classes. The Guidelines designate the classroom as “a special forum,” saying that “the teacher should be the one who determines the agenda of discourse in the classroom.”¹⁰⁵ However, at the Law School, “any form of protest that disrupts the conduct of [a law school] class would violate [the Statement’s] prohibition against interference with ‘the performance of the [] normal duties and activities’ of the University.”¹⁰⁶ If the classes that were disrupted were law school classes, we would determine that the making of noise in the hallway violated the Statement. But because they were not law school classes, and the teachers of those classes have not complained about the disruption, we decline to impose discipline.

c. Interruption inside the classroom

The Protesters marched into a lecture hall in which two hundred students were attending a class. The loud chanting interrupted the class for approximately ninety seconds during which the professor could not continue lecturing because of the noise. The Protesters then departed the classroom, and the professor resumed teaching without further incident.

As noted, our university Guidelines provide that “the teacher should be the one who determines the agenda of discourse in the classroom.”¹⁰⁷ The class disruption here did not involve a law school class, though some of the students who participated in the protest were law students. The professor, who paused teaching for ninety seconds during the disruption and then continued teaching, has not sought discipline for the disruption. The Respondents claim that the professor therefore deemed the protest a permissible disruption. We question the wisdom of a policy that renders the same classroom disruption subject to automatic discipline when it occurs in a law school class but not when it occurs

103. See HARVARD FAC. OF ARTS & SCIS., *supra* note 30, at 4.

104. *Id.* at 5-6, 9.

105. *Id.* at 4.

106. HARVARD L. SCH., *supra* note 52, at 99 n.1 (quoting Off. of the Provost, *supra* note 19).

107. HARVARD FAC. OF ARTS & SCIS., *supra* note 30, at 4.

in another University class if the individual professor happens to be lenient. Nevertheless, we must apply the Guidelines as they exist. Given the professor's apparent preference not to deem the disruption a violation, we are without authority to impose discipline.

3. The University administration building

The Protesters marched to the University administration building, sat on the floor, chanted, and refused to leave for several hours. The "unauthorized occupation of a University building . . . that interferes with the ability of members of the University to perform their normal activities constitutes unacceptable conduct in violation of the Statement and is subject to appropriate discipline."¹⁰⁸ The physical occupation of a University office and the refusal to leave interfered with the ability of University employees to perform their normal activities. The Protesters are thus subject to discipline.

The Respondents allege that other past protests involving occupation of University administrative offices in past years have gone unpunished. They assert that pursuing discipline against them after not having pursued discipline against some past protesters for similar conduct would be discrimination on the basis of political beliefs and retaliation for engaging in protected activity.

While the Respondents are correct that pursuing discipline against them because of their political beliefs, religion, or ethnicity would be prohibited under several University policies, they offer no evidence that the University is undertaking this disciplinary proceeding because of any prohibited bias. The power and duty to enforce rules always entails discretion that is exercised in light of particular facts, circumstances, and contexts. The logical consequence of the Respondents' view is that if the University did not discipline protesters in the past, it would forever be estopped from disciplining other protesters engaging in apparently similar behavior. The reality is that there are many reasons to discipline or not discipline in particular cases. The mere fact that the University is enforcing its rules against students who violated its rules is not sufficient evidence of bias against them. The Respondents must offer more to establish that bias has motivated the imposition of discipline. As is the case virtually everywhere in the law, a successful challenge to the exercise of discretion would require evidence of actual bias against a protected class.

4. The library

The Protesters went to a reading room in the University's main library and on one end of the room displayed a large sign that said, "Stop the Genocide in Gaza." Many of them wore keffiyehs. They sat in the seats at the tables

108. Off. of the Provost, *supra* note 19.

working on their laptops and remained there for several hours. The Investigator found that they did not chant or make noise but that other students left the reading room because they felt uncomfortable using it during the protest.

The Guidelines make clear that protest that is not disruptive—including signs, clothing, standing, or gesturing—is acceptable.¹⁰⁹ Unlike the sit-in at the University administration building, the protest at the library did not actually block others from using the library. While the Protesters were protesting in the library, they were simultaneously using it for quiet studying. The students' coordinated wearing of keffiyehs did not transform the Protesters' quiet studying into disruption, even if it made other students uncomfortable or choose a different reading room for study.

The display of the large sign on one end of the room is alleged to have been intimidating and hostile. The Guidelines state that signs are acceptable if they do not prevent the use of the space by others.¹¹⁰ The sign here did not block use of the chairs and tables in the reading room, but it did cover bookshelves and thus may have imposed something of an obstacle to the full and equal use of the library by other students, though not an insurmountable obstacle.

Still, a sign indicating that members of a particular religious or ethnic group are unwelcome in a space might well constitute a substantial obstacle to the use of that space by the targeted group. The content of the sign here undoubtedly made some students who saw it uncomfortable, but we decline to simply equate a protest against “genocide in Gaza” with a targeting of a religious or ethnic group. The sign did not say “Death to Jews” or “Jews are Not Welcome Here.” Rather, the sign said “Stop the Genocide in Gaza.” To be sure, the sign was offensive to those who strongly object to the assertion that Israel is committing a genocide in Gaza. But the content of the sign does not itself constitute a violation of University policies against discrimination or bullying any more than the slogans discussed above. The fact of its large size and that it blocked some library shelves, as well as the overall effect of even a silent protest in a library space that may prevent the full and equal use of the library, does make the protest not entirely non-disruptive. Nonetheless, we find that the existing University policies including the Guidelines do not clearly indicate that discipline is warranted for the silent protest in a common library space that may render it non-ideal for other students' studying without actually prevent its use. There has also been no allegation that a person wanted to access the library shelves but could not do so because of the sign. While it might be conceivable for a university to institute a per se rule banning protest

109. HARVARD FAC. OF ARTS & SCIS., *supra* note 30, at 3-5, 9.

110. *See id.* at 3-4 (“[C]oncerns about time, place, and manner should ordinarily not be interpreted to prevent signs or expressions of political views that are not disruptive.”).

in a library because of the importance of being able to study undisturbed in a library, no such rule currently exists.

C. Conclusions

To summarize, we conclude that no discipline is warranted for the general chanting in the Yard, the disruptions in the classroom building, or the silent protest in the library. Discipline is warranted for the six Protesters who surrounded the Jewish students in the Yard and for the Protesters' occupation of the University administration building.

V. Concurring & Dissenting Opinions

A. Free Speech Absolutist

Without true academic freedom, the pursuit of knowledge will crumble. If someone in our community kicks or punches someone, then that physical conduct ought to be punished. However, so long as there is no physical contact and no actual violence, I think the values of our University should not allow for discipline.

Politics is often the domain of winners and losers. To advocate for one group is to advocate against another. The consequence of such advocacy is real. Words that valorize or condemn violence—particularly when directed at members of a particular group—produce genuine emotional and psychological harm. It is painful to encounter ideas that are offensive or abhorrent, ideas that suggest one is of lesser status or deserving of violence at the hands of others. When those ideas are expressed by members of one's community, that causes harm to individuals and to our community. Indeed, it would not be candid to pretend that speech within a university community does not produce genuine human suffering.

Nevertheless, I prioritize the free expression of all ideas—both laudable and despicable—over the potential harms. No matter how repugnant they are, words simply are not the same as sticks and stones. The production of knowledge and expression of artistic creativity demand that we not punish words, ideas, or their expression, no matter how awful, hurtful, or unpleasant. I recognize, as someone of my age must, that the younger generation does not always value free speech and academic freedom as highly as I do. But a research and teaching institution like ours cannot exist if people are punished for expressing ideas or views that are outside the mainstream and therefore offensive. When ideas are not expressed for fear of discipline and punishment, that will be the end of the University as we know it.

B. Speech Versus Incitement to Violence

I am in near-complete agreement with my colleague, the Free Speech Absolutist, that there is no more important value to a university than the free exchange of ideas. I too think that a university cannot punish a member of its community for articulating or advocating ideas that are uncomfortable or offensive to other members of the community—at least not without creating such a chill on the free exchange of ideas that we could no longer educate properly. If academic freedom is to mean anything, it must mean the freedom to express ideas that are unpopular and even despised by others.

Where I part ways with my colleague is that the freedom to pursue, develop, and express unpopular ideas does not include the freedom to *incite violence*. The moment at which words transition to *action*—indeed to *violent action*—is where academic freedom ends and conduct warranting discipline begins. Like other tools of political violence, words themselves may enable, facilitate, and encourage violence. I have no qualms about punishing this limited exception. Indeed, I think protecting the values of our community, and protecting the people within our community, demand it.

The line between harmful but permissible speech on the one hand and a punishable call to violence on the other will sometimes be unclear. Indeed, as adjudicators, we have sometimes struggled to consistently distinguish calls to violence from political protest. Nevertheless, just because it is difficult to distinguish day from night at the times we call dawn and dusk ought not confuse us into thinking we cannot generally distinguish day from night. It is, in any event, our job as adjudicators to make those distinction.

All communities have norms of acceptable conduct. There is no community of which I am aware that tolerates any and all speech under any and all circumstances. Some communities do not tolerate obscenity; others do not tolerate misgendered pronouns; others do not tolerate a lack of decorum; others prohibit the use of words that denigrate members of a race, class, sex, religion, or ethnicity; others prohibit any speech at all during certain times or in certain places.

To have sensible regulation of speech does not mean there is no freedom of speech. It does not mean we cannot educate or that we will cease to produce knowledge. Rather, those basic rules are what enable our community to produce knowledge. Put simply, the fact that there exist some limits on academic freedom does not mean that academic freedom does not exist. While I am, therefore, a staunch defender of free speech and academic freedom, I believe that calling for violence against anyone is outside the bounds of speech that is properly understood as an exercise of that freedom.

C. Formalist

While I appreciate the angst of my colleagues as they grapple with the implications of our decisions for the production of scientific knowledge and the survival of our democratic institutions, I respectfully submit that such concerns are not within our ambit. Our task is to apply the rules that have been crafted by others to the factual circumstances presented to us.

As such, I take the question before me to be straightforward. Our rules define discrimination as “singling out or targeting an individual for less favorable treatment because of their protected characteristic.”¹¹¹ I think it obvious that in this case, a group of students was “singled out or targeted” to receive this negative speech. Such targeting violates the non-discrimination policy only if it unreasonably interferes with or limits those students’ “ability to participate in or benefit from the institution’s programs and activities.”¹¹² In my view, the phrases uttered in protest are intended to champion the destruction of a nation and a people. A reasonable person could certainly conclude that the speech unreasonably interfered with an ability to participate in or benefit from our institution’s programs or activities.

There is no doubt that speech is based on the student’s protected religious status, nor is there doubt that the speech was unwelcome. The only question is then whether it was offensive and rose to a level severe enough to warrant discipline. No doubt opinions vary on this question, but in my view, calling for the destruction of a nation that is comprised of a particular religious or ethnic group qualifies as objectively offensive.

Finally, bullying is “harmful interpersonal aggression by words or actions that humiliate, degrade, demean, intimidate, or threaten an individual or individuals.”¹¹³ It is hard for me to understand my colleagues who conclude that the speech in this matter does not qualify. That said, neither harassing nor bullying conduct violates our policies unless it is so “severe or pervasive, and objectively offensive” that it creates an environment that “a reasonable person would consider intimidating, hostile, or abusive and denies the individual an equal opportunity to participate in the benefits of . . . the institution’s programs and activities.”¹¹⁴ And “a single act typically would not constitute bullying.”¹¹⁵ The challenge for us is that the particular speech alleged to be subject to discipline took place on a single day. Thus, ordinarily, it might be

111. HARVARD UNIV., *supra* note 55, at 2.

112. *Id.*

113. *Id.* at 12.

114. *Id.* at 2, 12.

115. *Id.* at 12.

insufficiently severe or pervasive to constitute bullying. Yet, the day of protest in question took place against a backdrop of several weeks of similar protests, themselves occurring against the backdrop of the murder of more than 1,200 Jews in Israel. While the receiving students were subjected to this targeted speech on a single day, other similar students received similar speech on other days. I do not think we can excuse harassment or intimidation just because it occurs one student at a time. The application of our policies warrant discipline in this matter.

D. Neutral

As an observer and participant in academic administration, I have grown increasingly concerned over the past decade. While universities have always been sites of political protest and activism, students, staff, and faculty have in recent years been calling on school deans, professors, and university presidents to put out public statements supporting or condemning particular political causes. Some of these statements have been well-intended recognition that members of our educational community are deeply affected by world events, acknowledging their hurt, and offering support. Others have seemed to me more overt efforts to use the name and reputation of our school to influence politics or advance a particular agenda of social change. Increasingly, there are calls for university leadership to express support or condemnation for a particular group of students and their views. While a statement from our university is rarely likely, in and of itself, to cause widespread change, we ought not pretend that a statement by our university carries no moral force. It is therefore natural that people will try to attach the name of our institution to their side of an active social or political conflict.

My concern arises because, as a school, we often lack a rule, standard, or any metric at all for distinguishing political fights about which we ought to issue statements from those about which we ought not. As the trend of issuing university statements has gained momentum, we are often faced with conflicting calls from different student and faculty groups on opposite sides of an issue. Because all calls for statements come from members of our community, the failure to issue a statement supporting one group on campus inevitably feels like a slight or denigration because our administration has issued statements supporting other groups on campus in the past. Thus, the incentive to issue ever more statements of condemnation or support is at cross purposes with maintaining a welcoming community for all.

Our educational community is diverse. It is comprised of students and faculty with different political views, different personal backgrounds, different ideas, different views of how to interpret history, and different notions of what a just future entails. That heterogeneity is what makes our community intellectually rich and lively, but it also means disagreement and conflict.

Because of this fact, to speak in favor of one group in our community is very often to speak against another. To affirm one group's view is to disaffirm another. Our university does have moral authority, but our authority is undermined when we use it to express condemnation of some of our students at the behest of other students.

The events leading up to our decision in this matter illustrate this conflict. If we punish the Protesters, we will be accused of aligning our university with Israel's conduct and creating a hostile and unwelcoming environment for supporters of Palestine. If we fail to punish the Protesters, we will be accused of creating a hostile environment for Jewish students and supporters of Israel. That much we must accept as the inevitable consequence of enforcing our rules. But a university with students and faculty members with wildly divergent views should not be in the business of offering public statements on hotly contested political conflicts. It does no service to the world, to our mission, or to our students.

E. Complicit

For many years, universities like ours sat on the sidelines as the world burned. Our professors produced research that was used by governments to impose horrific harms in the world. Our faculty's scholarship actively supported the view that some races were superior to others as part of the eugenics movement in the United States and Europe. Our administration often cited the need for neutrality as an excuse to avoid wading into politics. The result was that millions of people died in the Holocaust and World War II. When violence is undertaken by individuals, groups, or nations and our university stands by and does nothing, I find it impossible to avoid the conclusion that standing on the sidelines is morally reprehensible: Silence, too often, produces violence.

It is against this backdrop—the historical backdrop of our university's participation in human harms—that I evaluate the case before us. A vote for discipline will inevitably be understood by those outside our community as the university taking a stand against antisemitism and in support of Israel. A vote against discipline will similarly be understood as a stand against Israel in favor of Palestinians in Gaza. I have no idea which views of which of our students are correct. But I know that no matter what we say in our opinions, whatever careful reasoning we use, the world will understand us to be picking sides.

I cannot abide the pretense that our unwillingness to speak is meaningfully different than were we to send money in support of one side's military or even to pick up a gun ourselves and enter the fray. Any of those actions would be a contributor to human suffering and grievous loss. Neutrality is not an option. To pretend otherwise is an even greater moral failing.

F. Role Determinist

I would view this case differently if I were sitting as a judge in a criminal prosecution or a civil lawsuit for damages. In a criminal matter, I would, of course, ask whether the defendant had the requisite *mens rea* and *actus reus* to be held liable for committing the crime. Because conviction of a crime requires proof of all elements beyond a reasonable doubt, I would have to evaluate the evidence to see whether it met that high bar.

Likewise, were this a civil case for money damages, I would be forced to confront a related, but distinct set of legal questions. In a case like ours, the injured party might well sue the defendant for intentional infliction of emotional distress, a tort sometimes called “outrage.” The legal question in a claim for outrage is whether the defendant acted intentionally to inflict emotional harm on the plaintiff in a way that is so beyond the normal bounds of conduct that it would cause the average member of the community to exclaim: “Outrageous!”¹¹⁶ In this case, it is clear that some members of the community view the conduct as outrageous, but others view it as acceptable. In such a case, it is not clear that the conduct rises to a level that would allow for recovery. But such cases often suggest that when the Defendant had knowledge of a particular emotional vulnerability on the part of the Plaintiff—for example, a fear of spiders or superstitious beliefs—and used that knowledge to inflict emotional harm, such conduct is outrageous and therefore unlawful.¹¹⁷ I would be forced to ask whether the Protesters’ knowledge of particular vulnerability on the part of the Jewish students regarding Israel soon after October 7th was used to target and impose emotional harm.

I raise these issues because, in my view, some of my colleagues are confused about our role. We do not sit as a criminal court deciding on fines and jail. Nor do we sit as a civil court in a suit for money damages. We sit as University adjudicators. Our job is to apply the rules and policies of our school, consistent with any laws. Although they sometimes shadow the criminal or civil law, our University rules have a different function and a different aspiration. Our rules are intended to ensure that no student experiences discrimination, harassment, or bullying. All of those prohibitions serve the goal of facilitating education and learning. The application of those rules in particular cases must proceed with that purpose in mind.

116. See RESTATEMENT (THIRD) OF TORTS § 46 (AM. L. INST. 2012); see, e.g., *Kloepfel v. Bokor*, 66 P.3d 630, 632 (Wash. 2003) (outlining the tort of outrage in Washington state); *Little v. Robinson*, 72 So. 3d 1168, 1172-73 (Ala. 2011) (similar in Alabama).

117. See RESTATEMENT (THIRD) OF TORTS § 46 cmt. d (AM. L. INST. 2012) (“Whether an actor’s conduct is extreme and outrageous depends on the facts of each case,” including “whether the other person was especially vulnerable and the actor knew of the vulnerability”).

G. Particularist

While on their face our rules apply equally to all members of our community, when they are applied to particular individuals in particular cases, part of the relevant context is what roles the alleged injurer and victim have within our community. If the President of the University utters the phrase “From the River to the Sea,” it would have a different meaning than if a young Palestinian activist utters it, which would have a different meaning than when an aging Judaic Studies professor utters it, which has a different meaning from when it is projected by non-university members chanting outside our university gates. The meaning of speech depends on the role of the person speaking within our university.

A teacher at our University inevitably has students from many parts of the world and with divergent views about politics and justice. When a professor teaches that a particular country or group or idea is immoral and warrants condemnation or protest, it has an effect on students because of the speaker’s role as their teacher. The teacher speaks with authority and that authority is derived, not just from their expertise, but also from their status as a teacher at our university. Our school has given this speaker special status, special privileges if you will, to speak, and with that privilege comes certain responsibilities. Such responsibilities carry restraints that would not be reasonably imposed on ordinary speakers like students. Students share a status within our community; they are capable of arguing as rough equals. I am, therefore, much less inclined to impose discipline on students for harmful speech to other students, than I am to impose discipline on teachers for harmful speech to students.

I realize this may be counterintuitive for some. After all, is it not teachers and scholars who most need academic freedom? In their research perhaps, but in their role as teachers, they are subject to a host of rules and expectations that other members of our community are not. This asymmetry is appropriate, in my view, because teachers and university administrators speak from a position of moral authority by virtue of their posts. It is the university’s name behind them that renders their speech more powerful. Thus, while I would not vote to discipline any of the students involved in this matter for their speech, I believe the speech and conduct would clearly be punishable if engaged in by faculty or university administrators.

H. Undecided

Based on the factual record before us, I find myself unable to decide whether discipline is warranted in this case. I recognize it is my job to adjudicate this matter, and even though I myself find the conduct in this matter to be deeply objectionable, I know that it must be punished only if it is a violation of our University rules. My difficulty stems from the fact that our

rules seem to contain both objective and subjective elements. Conduct must be both objectively and subjectively unreasonable or offensive. That means that I must decide not only what this speaker intended and could reasonably be understood to have intended, but also what this listener understood and could reasonably be expected to understand.

As I ask what was actually and reasonably intended and understood, I find my imagination running wild with fantasies about who this speaker and this listener might have been. When I imagine the speaker as closely affiliated with a military organization that executed mass killings and the listener a family member of someone killed in the attacks, I find discipline unavoidable. When I imagine the speaker as an eighteen-year-old freshman lacking any knowledge about Middle East politics or history, seeking to support his friends in protest for social justice, speaking the phrase to a random passerby, the imposition of discipline seems quite inappropriate. When I imagine the phrase yelled from a Jewish anti-Zionist student to a Jewish Zionist student, discipline seems unwarranted. When I imagine the speaker to have grown up in Gaza chanting the phrase, I am again pulled in the direction of no discipline. When I imagine a teacher standing at the front of a classroom ending class with the phrase with a shout to all of his or her students, I am pulled back towards discipline.

All this back and forth makes me think the decision about discipline turns not so much on whether the speech is or is not harmful, hateful, inherently discriminatory, harassing, or a call to violence, but rather a function of my own fantasies about the speaker and listener. On the facts before us, I fear it is my own imagination that is doing the work, not the relation between the legal standard and the actual conduct. As a responsible decisionmaker, I simply cannot vote for or against discipline given that my conclusion changes as a function of my own imagination.

I. Listener

I certainly agree that some speech can be so harmful as to warrant prohibition on campus and punishment when that prohibition is violated. Because all speech is communicative, applying our rules to any controversial speech requires focusing on the recipient of the speech. The key to understanding whether speech is unlawful on campus is focusing on the person to whom the utterance is directed. The permissibility of speech cannot be evaluated without focusing on both the speaker and the listener. The identity of the speaker and the identity of the listener is part of the communicative context. With respect to my colleague, we do not need to “imagine” who the speaker and listener are in this matter. We know precisely who they are, and it is with the knowledge of who they are that our judgment should be rendered.

Textualists have long taught that text or words alone have no meaning without context. That is one reason that it is impossible to say that uttering the

phrase “From the River to the Sea” is always and everywhere a violation of our rules against discrimination, harassment, or bullying. Sometimes it is, and sometimes it is not.

To illustrate, consider an academic presentation containing the following sentence: “The phrase ‘From the River to the Sea’ has been adopted by Palestinian activists and is understood by many to call for elimination of the state of Israel.” That sentence might bother members of our University because it connotes painful ideas and realities, but it does not even arguably offend our University rules.

By the same token, suppose a member of our community identified and then targeted Jewish students as individuals, yelling, “From the River to the Sea” in close proximity, following the students who tried to walk away, and continuing to yell the phrase directly at the student. I have no doubt that such conduct is harassment and bullying under the terms of our policies. That conduct would appropriately be subject to discipline, and that is why I have voted in favor of discipline in this matter.

In between these two easy cases are dozens of other possibilities. A political protest at which “From the River to the Sea” was chanted might not be directed at any particular listener, but might reasonably be expected to be heard by listeners who would reasonably experience emotional distress as a result. Such conduct, we might assume for the moment, is not undertaken with a purpose to inflict emotional harm on Jewish members of our community, but rather to engage in political activism and articulate support for the Palestinian people. Nevertheless, because both speakers and listeners are members of a shared communicative community, that speech could be reasonably expected to impose harm on a listener. The question is how our University rules should balance the ability of a member of the academic community to articulate controversial views—whether we call that a “right” or a “privilege”—when it is reasonably foreseeable that those views will induce emotional harm in other members of the community. I see no way to resolve that question in the abstract other than to note what I take to be obvious: the more severe the harm imposed and the more likely it is to arise, the more the balance should tilt toward protecting the recipient of the speech. Because the Policies admonish that the interests of the speaker should be generally be favored in close cases, I would not impose discipline in this matter.

J. Free Speech Versus Academic Freedom

I fear that some of my colleagues have grown confused about the difference between academic freedom on the one hand and free speech on the other. I write to clarify that while the two ideas are related, they are distinct concepts that have different justifications and applications.

The right to “freedom of speech” derives from the First Amendment to the Constitution. As every law student knows, it restricts the ability of the government to regulate speech, but it does not do so absolutely. The First Amendment allows a wide range of lawful government regulation of and restrictions on citizens’ speech. Our private University is not directly bound by the First Amendment, though of course many of the reasons to guard against government restrictions on speech are also reasons to avoid university restrictions on speech.

Academic freedom, by contrast, guards against restrictions on a broader range of conduct that happens to include speech. The more-or-less free exchange of ideas is a critical part of the process of producing knowledge. An inability to explore controversial, offensive, or even downright peculiar ideas is likely to suppress research and retard the development of science and knowledge. Thus, restrictions on academic ideas, research, and writing should generally be avoided by universities.

A problem arises because our University’s mission is not only the production of knowledge but also the education of students. Often these goals are mutually reinforcing, but it would be folly to pretend that they do not sometimes conflict. An effective learning environment depends on some base level of security. One cannot learn if one is constantly fearing for one’s personal safety. Less extreme threats to security or a sense of hostility or underlying animosity from teachers, students, or administrators can also undermine the educational environment. It may be more difficult for students to effectively learn from a teacher whom they know thinks they are of lesser status, immoral, or even evil.

So too when one’s classmates share those sentiments. Thus, while it may be an exercise of academic freedom to pursue research on whether one gender, race, or religious group is more intelligent than others, it also may undermine the educational environment of our school. Such conflict does not always arise, but it always can arise. Sometimes our debates make it seem that academic freedom does not entail trade-offs or conflicts. It does. As a general matter, I favor more academic freedom, but I do so with the recognition that exercise of that freedom sometimes produces concrete harms on individuals in our community that may undermine the educational environment.

The conflict between speech on campus and our educational mission is somewhat different when an undermining of the sense of student security arises not because of academic research or teaching, but because one group of students seeks to use university property or resources—be it physical and intellectual—to further a particular political end. Outside the university context, this form of political speech is and ought to be the most protected by law. Political protest and the articulation of minority views are critical to our democracy. Inside the university, however, the best rule might be otherwise. When students seek to use university property for goals other than research,

teaching, or learning and do so in a way that undermines the educational environment of other students, I am far less certain that the balance should tilt to protecting the speech of the speaker.

K. Bureaucrat

As if the current controversy roiling our campus were not enough, I write to emphasize what I believe is a second storm coming to our campus. For many years, we have responded to complaints from students, staff, faculty, and alumni by creating new administrative offices dedicated to the problem of the day. Each time, the creation of a new office staffed by new administrators signaled that the issue was important to the University, that it warranted allocating time, space, labor, and budgets to the problem. The response reassured advocates that there would be a permanent bureaucratic apparatus to address the issue, not a temporary measure that would be quickly forgotten.

One might cheer or lament this development in the abstract, but in practice it now means that there will be two administrative departments of our university in conflict with each other. We, like most universities today, have Deans of Diversity, Equity, and Inclusion (DEI), along with extensive staffs. I, myself, championed this new department as I felt our university had long failed to take adequate measures to create a diverse and welcoming community for all of our members. I must acknowledge, however, that when the dimension of diversity in question involves race, sex, or religion, there is a thin line between failing to be inclusive and engaging in discrimination or harassment. The failure to welcome Palestinian political expression is surely a failure of inclusivity. Yet, when Palestinian political expression targets Jewish students for harassment, that is surely religious discrimination. So too, the failure to condemn calls for the genocide of the Jewish people is surely a failure of inclusivity. And, failing to condemn or punish calls for the extinction of the Palestinian people would be an act of bullying, harassment, and discrimination. Part of what it means to “include” is saying or doing certain things or failing to say or do certain things. If the decision to “say or not say” or to “do or not do” those things violates our university rules, then none of us are entirely free to choose whether to say or do those things.

Recently, as a new tide of concern about academic freedom has risen, some of our sister schools have predictably created new administrative departments with academic freedom as their charge. These Deans of Academic Freedom (AF) are charged with ensuring that faculty and students enjoy broad freedom to pursue ideas without fear of retribution or punishment for expressing unpopular or controversial ideas.

Sometimes, of course, the interests of DEI and AF converge. For example, the failure to protect the academic freedom of faculty to pursue research on race, sex, or religion would presumably undermine the interests of diversity

and inclusion. Other times, however, the interests of DEI and AF will conflict. The expression of some ideas by a member of our community will make others feel alienated and less at home in our community. That is not a novel insight; we often value two conflicting principles in law and in life. Yet, when our university has two administrative departments dedicated to serving two conflicting principles, I worry that we are at war with ourselves. If each office has disciplinary rules and authority, and the rules allow discipline for violating AF principles and for violating DEI principles, members of our community are in a bind. They may rightfully worry that our students and faculty will be casualties in a battle between bureaucrats.

Conclusion

The fictional university adjudicators above have a range of views, as we are sure, do our readers. Rather than offering the best or correct view, our goal has been to illustrate how universities policies work when applied to factual disputes. Quite apart from one's view about the right outcome in this particular case and controversy, we hope it is clear that the conflict between academic freedom and free speech interests on the one hand, and discrimination, harassment, and bullying rules on the other, is not going away. Sensible people believe in both protecting academic freedom and guarding against discrimination. Yet, when one person's speech is understood to be another's harassment, any adjudication will protect one party's interests over the other's.

Fuller's essay on the Speluncean explorers laid bare many of the most common forms of judicial rhetoric and tropes of jurisprudence. His goal was not to show that one of them was right, but rather to render the haze of legal analysis more transparent. Similarly, our goal in this Essay has not been to explain why a particular view of campus protest and discipline is correct. Rather, we have sought to clarify the contours of common university policies and procedures and to demonstrate how those policies might be reasonably applied to a set of facts by adjudicators with somewhat different approaches. Our hope is that by clarifying the terrain of disagreement, reasonable minds might disagree somewhat more reasonably.