

HOW THE LAW SCHOOL CAN SUCCEED—AN INVITATION

I have been lucky enough to give many talks at law schools, and whenever I take the microphone—and, inevitably, lower the microphone—the question flashes on people’s faces: “Why *him?*” For one thing, I have no data to share, no findings to report, no technical solutions to offer. And unlike the faculty who have spoken, my experience of the legal academy hardly spans even two years. On the other hand, I have spent those years pushing the most hated conservative position on the most heated political issue at the most socially liberal law schools in the nation. What my experience of the legal academy lacks in length, it has amply made up in intensity.

So you will have to go elsewhere for general and systematic data, with all its probative force. But I hope my remarks do have the motivating force of the personal and anecdotal. In that mode, I will draw on my experience at Yale, and in talks and debates at other law schools, to say a word about our topics: Is there a diversity problem? Should we care? And what should we do?

Finally, I have titled my Essay “How the Law School Can Succeed—an Invitation,” which of course riffs on the title of Duncan Kennedy’s famous 1971 student note, *How the Law School Fails: A Polemic*.¹ I do this first in the hope that my piece, too, becomes a classic, if only through failed Google searches for his. But I also intend the *contrast* between our titles to highlight a shift of emphasis. Professor Kennedy focused on diagnosing the legal academy’s ills.² I will begin there—with its failures of diversity—but my emphasis will be on reasons to improve, and on the evidence that improvement is well within our reach. The fact is that I have loved my time at Yale and visiting other law schools. I am writing not as an alien or exile with idle grievances to air, but as a member of the minority, pushing for reform from within, with all the zeal and hopefulness of a local who intends to stay.

1. Duncan Kennedy, Note, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970).

2. *Id.* at 71.

I. IS THERE A LACK OF INTELLECTUAL DIVERSITY IN LAW SCHOOL FACULTIES?

The problems that bedevil the social science on this question are well-known. What are good proxies for ideological diversity? Along what axes should we measure it? Can we measure it meaningfully across disciplines as different as antitrust and admiralty? In truth, of course, we cannot answer these questions until we know why we care about diversity in the first place. A professor at Yale once told me that she absolutely agreed on the need for conservative faculty. "After all," she said without irony, "we liberals have trouble getting you all internships in Republican administrations."

Now if that is your purpose, then party affiliation is what you should tally. But if your purpose is also to enrich discussions on major issues of the day, then all the law-and-economics scholars from Coase to Calabresi will not make up for the absence of, say, a single pro-life professor. (And as far as I know, Yale has about that many law and economics professors, and *no* pro-lifers.) So there is no all-purpose answer to the question of whether we have a diversity problem, or how to measure it.

But if sociological precision is elusive, and the population of interest—your colleagues—is manageable and familiar, then personal impressions matter more. Indeed, one reason to care about diversity is its effect on classroom climate; yet that is something that personal experience more immediately captures than comparing campaign-donation rates. And from this personal vantage point, I think certain diversity deficits become clear.

A few weeks into my 1L fall, I had to miss an afternoon class to drive down to Seton Hall for a marriage debate. The following Monday, a classmate made small talk by asking where I had been. "A debate!" I said. She cheerfully obliged by asking what the debate was about. I told her it was on gay marriage—at which point she asked, with a knowing smile, "And which side were you on?" When I told her I was against, an immensely long pause followed. She searched and searched, and then her face lit up with understanding. "Ah, so it was one of those debates where you go and they *assign* you a position?"

This classmate is one of the warmest people I know, and has become a friend. But within weeks of arriving at Yale, she had

internalized the social norm: Like other members of the guild, I was to be treated as innocent until *proven* conservative. That was not just the safe assumption; it was the only charitable one. It was also, of course, alienating.

This particular social effect of homogeneity even has a name. Mark Bauerlein calls it the “first protocol” of academic society: In professional settings, you take for granted that all the strangers are liberals.³ If we specify this claim to social liberalism or secularism, it can hardly be denied: Both are presumed by almost all.

That presumption is so pronounced that it even affects people merely contemplating a change of mind. A friend told me that he was once a lone apologist for the pro-life view in a class discussion that had veered onto *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁴ and *Roe v. Wade*⁵—which at Yale can happen in a course on maritime law. A few days later a classmate of his who had been quiet during that discussion sidled up to him and confessed, almost in a whisper, “*I think I might be . . . pro-life.*”

Anecdotal or otherwise, the evidence is clear: Social conservatives and people (believers or not) who draw on religious traditions in developing their normative views are both radically underrepresented.⁶ They are surely just two groups of many, but they will be my focus here.

In short, then, we do have a diversity deficit that affects what people feel comfortable saying, and hence all the social and pedagogical interests that we might want diversity to serve. But what are those interests?

3. Mark Bauerlein, *Liberal Groupthink Is Anti-Intellectual*, CHRON. HIGHER EDUC., Nov. 12, 2004, <http://www.chronicle.com/article/Liberal-Groupthink-Is/6278>.

4. 505 U.S. 833 (1992).

5. 410 U.S. 113 (1973).

6. See James Lindgren, *Conceptualizing Diversity in Empirical Terms*, 23 YALE L. & POL'Y. REV. 5, 8 (2005) (“On most law faculties, the groups that would provide the most viewpoint diversity would be Republicans, conservatives, and evangelical or fundamentalist Christians—none among the groups that were traditionally locked out by the United States’ racist and sexist practices of discrimination.”); Peter H. Schuck & Brian Leiter, *Do Law Schools Need Ideological Diversity?*, LEGAL AFF. DEBATE CLUB, Jan. 23, 2006, http://legalaffairs.org/webexclusive/debateclub_diversity0106.msp.

II. SHOULD LAW SCHOOLS CARE ABOUT INTELLECTUAL DIVERSITY?

A. *Bad Reasons to Care*

I should begin by saying that I do not think law schools have—at least in the abstract—any *duty* to hire conservatives. Liberty Law School is entitled to focus on evangelical Christian hires. It is entitled to be fundamentalist in the sense of enforcing agreement about fundamentals, in order more efficiently to develop Christian legal thought—the social teachings of the gospels of Matthew, Mark, Luke, and John. By the same token, there is no harm in founding a private law school of liberal fundamentalism, dedicated to refining the social gospel of Sanger, Hume, Mill, and Rawls. In fact, it would certainly make distinctive intellectual contributions—by fostering deeper development of one tradition, which enriches the discussion *across* schools of thought. But institutions that want such ideological unity and focus should be open about it, to avoid hypocrisy and complacency and delusions of capaciousness, and to be aware of the costs which bring us here today. I will say a word about three such costs: to career development, knowledge, and friendship.

B. *Career Development*

First, career development. Here I am thinking of my liberal friends; and by career development I mean their preparedness to fight effectively against my views. Knowing your enemies means knowing their arguments. And for that, it is awfully useful to have them around to make those arguments. Otherwise positions grow soft and dull.

On my admitted-students visit to Yale, I had been looking forward to meeting a professor who I had hoped would be a mentor. As soon as he recognized me and remembered an article I had written on marriage,⁷ though, he took me aside for some re-education. Did I know, he asked, that I was on the wrong side of history? That I was pushing the modern equivalent of Jim Crow? That if in 20 years I was not the smartest person on earth, I would be out of a job?

7. Sherif Girgis et al., *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245 (2010).

For perspective, imagine a conservative professor meeting a young pro-choice admitted student who had spent summers at Planned Parenthood. Imagine him telling her that future generations would see her work as having contributed to the wanton dismemberment of innocent babies.

When he had finished, I thought the only respectful *and* respectable reply was to issue a challenge. So I said: “*Newsweek* says we have 500,000 polyamorous households.⁸ Unlike polygyny, they don’t involve gender inequality. Polyamorists find most personal and sexual fulfillment in that openness and variety. They find monogamy heteronormative. They want equal social status and tax breaks. Is the norm of monogamy also a latter-day form of Jim Crow?”

Because I was surprised at his response, I recorded it the same day in an email to a friend. “I haven’t thought as deeply about that issue,” he said, “I just haven’t.”

How is it that the Yale professor who claimed for his own view a monopoly on justice and rationality, and even employability, could be caught off guard by an entirely standard objection? The only explanation, I think, is intellectual homogeneity. And here conservatives have the advantage. To be a conservative at a top law school today is to be silenced or sharpened—there is no middle ground. With more balance, liberals would also be sharpened, and no one would be silenced.

C. Knowledge

What about the costs to the pursuit of knowledge? We all know the marketplace-of-ideas argument.⁹ I will not rehearse it here. I just want to supplement it.

I have discovered that engaging with opponents can do more than give you better answers to the questions you have already posed. It can also motivate new and more fruitful questions, which can enhance your understanding of others’ positions and even your own. Thus, one of the unexpected results of en-

8. Jessica Bennett, *Only You. And You. And You*, NEWSWEEK, July 28, 2009, www.thedailybeast.com/newsweek/2009/07/28/only-you-and-you-and-you.print.html.

9. See JOHN STUART MILL, ON LIBERTY ch. 2 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859) (arguing that a free exchange of ideas promotes truth); see also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market”) (Holmes, J., dissenting).

gaging on the marriage issue has been to uncover much deeper and often more interesting divides.

For example, consider the different ways that both sides of the marriage debate gloss a common idea: that marriage is the bond that unfolds into family life. Social liberals think that what *gives* a union this connection to family life is choice and choice alone. There is no other, more objective criterion.¹⁰ But if that is the case, one might ask why marriage should have any objective link to sex or romance. If two brothers in a platonic bond commit to sharing a life and a home and even child-rearing, why do they not count as *also* having a union that unfolds into family life?

And so the more traditional view holds that marriage relates to family life not by choice but by its very nature: Just as the act that makes marital love also makes new life, so marriage itself is oriented to the making and rearing of new human beings—to family life.¹¹

In other words, liberal individualism would explain the link between marriage and family by autonomous choice; a more Aristotelian approach links bonds to certain goods by their characteristic activities, which cannot be defined and redefined by choice alone.¹² So the idea that marriage and family go together is a statement of apparent consensus that masks a deeper divide.

I do not mean to settle this dispute here, about which much can be said on both sides. I bring it up only to demonstrate one way that debates about issues like marriage can become so polarizing. Using similar-*sounding* premises, people reach radically different conclusions. Each side finds the other baffling, and cannot help but suspect stupidity or bad faith. The academy can offer the leisure, resources, and methods to go deeper. And just so, in academic debates on marriage, my interlocutors and I—including, for example, Professor Andrew Koppelman¹³—have sometimes managed to trace our dispute to deeper debates between Aristotelian and Kantian or other traditions. Of course, those more bedrock questions can hardly be seen as pitting the forces of evil and darkness against those of justice and

10. Girgis et al., *supra* note 7, at 246.

11. *Id.* at 247.

12. *Id.* at 246.

13. See, e.g., Girgis et al., *Does Marriage, or Anything, Have Essential Properties?*, PUB. DISCOURSE, Jan. 12, 2011, <http://www.thepublicdiscourse.com/2011/01/2350/>.

light. So the deeper we go in debate, the easier it is to find civility and respect.

But this is just a corollary to my broader point, about the *intellectual* fruits of diversity: The academic community's pursuit of truth is served not just by having lots of opinions in one room. Diverse conclusions are also a good proxy for methodological diversity. Not in the sense of quantitative versus theoretical methods. I mean what Alasdair MacIntyre would call diverse traditions of rationality—historically situated systems of belief that shape not just our conclusions but which questions we pose, which possible answers we consider, even what we count as good arguments at all.¹⁴ Encountering new traditions in this sense is even more enriching—more conducive to knowledge and understanding—than encountering a variety of policy positions. But as in the example I just gave, these traditions are systems that we rarely *realize* we inhabit. We have to be alienated from them to recognize them as anything other than part of the fabric of the intellectual universe, what all sophisticated people take for granted. And for that healthy alienation, even more than for a quick defense of alternative policy conclusions, there is no substitute for a real-life opponent.

Note that some of these intellectual traditions have been developed for centuries in religious contexts. It would be just as dogmatic to exclude such sources as it would be to include them just because they claim divine sanction. That is why I think a diverse faculty will have thinkers (believers or not) open to drawing on religious sources for their normative views.

Although my own work on marriage has offered secular arguments with roots in ancient Greek philosophy, those roots have been developed by great Jewish, Catholic, and Muslim figures. So even in classes I have attended—and more often in classes I have only been told about—my views have been attributed by name to “religious bigotry,” and associated with arguments for slavery. The combination of ignorance and bravado that produces such comments is toxic to academic life, and against it, some religiously informed scholarship would be the best treatment.

14. See generally ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

D. Friendship

But if intellectual diversity in the academy can help us clarify and diagnose what are, outside the academy, deeply polarizing debates, then it can also contribute to civic friendship. *Grutter v. Bollinger*¹⁵ speaks of law schools' social responsibility to prepare students to work in a diverse populace.¹⁶ By the same rationale, these institutions should both model and foster civil conversations on heated issues for the wider world. If not here, after all, then where?¹⁷

And these two controlling values together—knowledge and civic friendship—will limit the scope of intellectual diversity that we aim for. It will give us a more manageable goal. It counters the objection that if we are going to challenge our most basic conclusions, we will have to hire clever advocates of cannibalism and the like. For even if you see cannibalism and traditional marriage as equally gross deviations from truth and justice and the American way, the communal value of understanding what half your compatriots think will break the “tie” in favor of hearing from the traditional marriage advocate.

But I think, finally, that intellectual diversity can serve friendship in a thicker sense, which in turn doubles back to serve knowledge. This is an unusual justification, but important.

When I first arrived at Oxford, the only people I knew were American Rhodes Scholars. And so, following a venerable Rhodes tradition, I spent my first few weeks almost exclusively

15. 539 U.S. 306 (2003).

16. *Id.* at 330.

17. As Alasdair MacIntyre has noted:

One of the most striking facts about modern political orders is that they lack institutionalized forums within which these fundamental disagreements can be systematically explored and charted, let alone there being any attempt made to resolve them. The facts of disagreement themselves frequently go unacknowledged, disguised by a rhetoric of consensus. And when on some single, if complex issue, as in the struggles over the Vietnam war or in the debates over abortion, the illusions of consensus on questions of justice and practical rationality are for the moment fractured, the expression of radical disagreement is institutionalized in such a way as to abstract that single issue from those background contexts of different and incompatible beliefs from which such disagreements arise. This serves to prevent, so far as is possible, debates extending to the fundamental principles which inform those background beliefs.

MACINTYRE, *supra* note 14, at 2–3.

with them. By word of mouth, everyone had figured out that I was a conservative Catholic. And of course, they found this baffling. What surprised *me* was how much of an obstacle it posed. Over and over, I found myself minutes into a first conversation before a classmate would ask whether I *really* believed that stuff about abortion or marriage—especially marriage. There was no avoiding this conversation, so I decided to just invite it, aggressively, for a month, with whomever. And if anyone stuck around after that, we would move on to becoming friends. It took three weeks for me to get through all but two or three of my thirty-one classmates.

Those conversations taught me two things. First, for that group my social views were so baffling that “the conversation” was a condition of any friendship at all. But second, the same conversation—however heated—was also a way of *building up* friendship. Over the course of my first term in Oxford, a pattern emerged. The students with whom I had the most intense conversations were the ones likeliest to stick around.

Law schools, like other academic institutions, aim to be more than a transient assemblage of instructors and instructed. The goal is academic *community*—a network of goodwill, equal regard, and common purpose. Now it is inevitable that there *will be* conservatives or people of faith, among students if not faculty. But if they are on the faculty as well, then students will not have to have a month of self-explaining, on pain of exclusion from that academic community. A diverse faculty would guarantee that every new class arrived in mid-conversation, so to speak.

Because I did not want to repeat those first conversations from then until I had job security, I decided to write something out on marriage in particular. In those first months at Oxford, I would walk down Holywell Street from the Kings Arms to my Merton College apartment, and start writing what became the seed of an article,¹⁸ and then a book,¹⁹ on marriage. And it was during that process that I saw that friendship is not just a *result* of vigorous disagreement in pursuit of truth. It can also *promote* truth-seeking. For with each sentence I wrote, I heard my Oxford friends’ voices in my head, hemming and hawing and

18. Girgis et. al, *supra* note 7.

19. SHERIF GIRGIS ET AL., *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* (2012). All of my arguments alluded to here are best elaborated in this book.

making sharp rebuttals. And over time I found myself writing *for* those friends, not just in the sense that I wanted to answer their questions, but in the broader and more familiar sense in which friendship—which is built up by sharing—motivates you to produce something *worth* sharing.

III. SOLUTIONS: ENCOURAGING INTELLECTUAL DIVERSITY

So if career development, knowledge, and both civic and personal friendship give us reasons to promote diversity, what should we do about it? Quotas, supervision of academic hiring—these and other structural solutions all have their costs. And anyway, structure always runs out at some point. And where it does, nothing will substitute for the exercise of *virtues* on the part of those applying and those hiring. Both need a measure of charity and daring.

Of course, if MacIntyre is right that even our standards of rational justification are shaped by the traditions we inhabit, then there is a problem. There is no neutral ground from which to judge the basic admissibility of a viewpoint. But you need no neutral ground to ask, for example, how strongly someone's work challenges your own assumptions.²⁰ Hiring committees who *never* ask that question are not, it seems to me, doing their part. But to notice work that might challenge them at all, scholars need to seek it out. That is especially true if the forums for such exchange—journals, conferences, and symposia—suffer from the same diversity problems as faculties.

Now I began on an optimistic note because even on a conservative tundra like Yale, I have seen people exemplify this sort of energetic interest in reading the opposition.

For example, last spring I took Anti-Discrimination Law with Reva Siegel. As far as I could tell, I was the only conservative in

20. Here again, MacIntyre has diagnosed the problem and given us the ingredients of a cure:

In controversy between rival traditions the difficulty in passing from the first stage to the second is that it requires a rare gift of empathy as well as of intellectual insight for the protagonists of such a tradition to be able to understand the theses, arguments, and concepts of their rival in such a way that they are able to view themselves from such an alien standpoint and to recharacterize their own beliefs in an appropriate manner from the alien perspective of the rival tradition.

MACINTYRE, *supra* note 14, at 167.

the room. Professor Siegel could have run the class as an ACLU strategy meeting. So when I found her assigning conservative articles and slowing the class's leftward rush with good objections, I thought she was only trying to make things less awkward for me. Then, one day I asked a question about an issue related to marriage, and she referred me to a piece by Robert George and some coauthor she did not know, who were replying to Kenji Yoshino. That is when I knew she was not just accommodating me: I was that coauthor. It turns out she had just developed the habit of reading and even recommending the opposition.

Likewise, Professor Akhil Amar, while making no secret of his more liberal views, often highlights his dissent—as in *United States v. Lopez*²¹ and guns rights, or the reasoning of *Griswold v. Connecticut*²² or *Roe*.²³ And to keep his co-partisans thinking critically, he reminds them of progressive heroes' historical blind-spots—like Justice Holmes's chilling but then-typical embrace of eugenics.²⁴ These habits and practices on the part of liberal faculty already improve the conversation. They also make it likelier that a conservative might find a faculty home at Yale, or gain the education and support at Yale to teach elsewhere.

But if those hiring have to be daring and energetic in seeking out aspiring conservative academics, we, for our part, have to take the risk of making our arguments, right where that might break our careers. For we will not get hired without, as Professor Paulsen said earlier,²⁵ challenging the lines of reasonability that liberals draw. After all, no one can avoid drawing such ideological limits on hiring altogether. There are *some* substantive views that any potential hire has to have in order to contribute to a healthy academic community at all: commitment to truth, open-

21. 514 U.S. 549 (1995).

22. 381 U.S. 479 (1965).

23. See, e.g., AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 117–124 (2012) (criticizing the reasoning of *Griswold*); *id.* at 291 (criticizing the reasoning of *Roe*); Akhil Reed Amar, *Constitutional showdown*, L.A. TIMES, Feb. 6, 2011, <http://articles.latimes.com/print/2011/feb/06/opinion/la-oe-amar-health-care-legal-20110206> (defending the Supreme Court's decision in *Lopez*); Akhil Reed Amar, *Putting the Second Amendment Second*, SLATE, Mar. 17, 2008, http://www.slate.com/articles.news_and_politics/jurisprudence/2008/03/putting_the_second_amendment_second.html (providing a constitutional basis for moderate gun rights claims).

24. See *Buck v. Bell*, 274 U.S. 200, 207 (1927).

25. Michael Stokes Paulsen, *The Uneasy Case for Intellectual Diversity*, 37 HARV. J.L. & PUB. POL'Y 145, 152–53 (2014).

ness to correction, and goodwill and equal regard for colleagues. We do not want diversity in *these* respects if the point is to enrich the discussion, which no one can do without these virtues.

Of course, these are precisely the dispositions that we tend to think our opponents lack when it comes to the most polarizing debates. Yet it is in those same debates that we could most use the academy's clarifying influence. The resulting conundrum is that it is most important to hear from the very people whose commitment to rationality and equality we are likeliest to suspect.

That, incidentally, is a reason that I chose to join the marriage debate: to convince interlocutors that their own assumptions are unexamined or even unacknowledged, that their opponents are just as systematic and committed to justice.

But in any group of reasonably independent thinkers, *everyone* will have a minority view on something. The more willing legal academics are to reveal and defend such views—or to hear them out—the more the law school will succeed in fostering professionals and intellectuals, civility and friendship.

Sherif Girgis