The "Echo-Chamber Effect" in Legal Education: Considering Family Law Casebooks

Lynne Marie Kohm

Lynn D. Wardle

Follow this and additional works at: http://ir.stthomas.edu/ustjlpp

Part of the Family Law Commons, and the Health Law and Policy Commons

Bluebook Citation


This Article is brought to you for free and open access by UST Research Online and the University of St. Thomas Journal of Law and Public Policy. For more information, please contact Editor-in-Chief Patrick O'Neill.
THE "ECHO-CHAMBER EFFECT" IN LEGAL EDUCATION: CONSIDERING FAMILY LAW CASEBOOKS

LYNNE MARIE KOHM¹ AND LYNN D. WARDLE²

When alternative viewpoints, opinions, and arguments are significantly absent from any community, particularly a university or law school community, it results in an "echo-chamber effect."³ The lack of intellectual diversity results in the community hearing only itself, hearing the ideas it wants and expects to hear, and hearing nothing but echoes of the arguments, and viewpoints it prefers and supports.⁴ Consequently, the discourse in that community becomes narrower and more extreme as it is unchecked by ideas from outside

¹. John Brown McCarty Professor of Family Law, Regent University School of Law. We gratefully acknowledge the work of the UNIVERSITY OF ST. THOMAS JOURNAL OF LAW & PUBLIC POLICY in advance of and during the conference in research and reporting, and the valuable discussions with our many prolife colleagues at the Minneapolis conference that have contributed to this piece.

². Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University. The research assistance of Camille Borg and Savanah Lawrence is gratefully acknowledged. This article is based in part on and stimulated by discussions in a conference convened at the University of St. Thomas School of Law in Minneapolis, Minnesota, November 15–16, 2011, where participants (including both of the authors) examined evidence of, considered reasons for, and discussed possible remedies for bias against presentation of prolife facts, analysis, and commentary in leading Family Law, Constitutional Law, and Bioethics and Law casebooks. Both authors have written and are writing family law casebooks.


⁴. DiFonzo, The Echo-Chamber Effect, supra note 3; see also DiFonzo, Setting the Context, supra note 3.
the closed universe of the ideological group’s “echo chamber.” The resulting polarization fosters intolerance of other ideas and generates extremism. For example, psychology professor Nicholas DiFonzo, writing recently in the *New York Times*, described his research showing that persons segregated by party affiliation into two groups were more likely to believe malicious rumors about the other group. This resulted in “polarization,” but “[w]hen the discussion groups were mixed, this did not happen. Among like-minded people, it’s hard to come up with arguments that challenge the group consensus, which means group members keep hearing arguments in only one direction.”

Echo chambers are not good places to train lawyers. Lawyers work in environments that, unlike echo chambers, are cacophonous, where multiple competing ideas, assertions, arguments, and viewpoints abound and vie for attention and influence. Thus, law students need to learn how to be effective advocates in environments in which many competing viewpoints are present and in which they are trained to recognize, respect, and effectively deal with a plurality of diverse viewpoints. However, if some family law casebooks mirror the state of legal education today, some American law students are being trained in echo chambers.

This essay briefly reviews the “classical” liberal understanding of the importance of the clash of ideas in the search for truth, and also reviews the “classical” or traditional view that such intellectual diversity is especially important in the academy and in legal education. Next, it succinctly examines evidence that an erosion of this value has occurred in American universities and law schools in particular. Then it discusses data from a review of six popular family law casebooks that suggests that there is a profound “echo effect” in law school teaching about abortion issues in family law. It

---

5. “The greatest danger of the echo chambers is unjustified extremism. So it’s a well-known fact that if you get a group of people who tend to think something, after they talk to each other, they end up thinking a more extreme version of what they thought before.” *The Echo Chamber Revisited: Transcript, On Media* (June 17, 2011), http://www.onthemedia.org/2011/jun17/echo-chamber-revisited/transcript/ (quoting Professor Cass Sunstein).


7. Id.

8. Asking why there are no materials on certain topics, features, or viewpoints in some law school classes and casebooks is not a new concern in the legal academy. *See generally* S. Chesterfield Oppenheim, *A Selection of Cases on the Law of Sales*, 46 Harv. L. Rev. 542, 544 (1933) (reviewing Samuel Williston & William E. McCurdy, *A Selection of Cases on the Law of Sales* (1932)).
concludes with some ideas about how the echo effect can be avoided and remedied in law schools, particularly in the context of addressing abortion issues and other controversial topics in teaching family law.

I. THE RISE AND FALL OF THE IDEAL OF ACADEMIC FREEDOM IN AMERICAN LEGAL EDUCATION

Once upon a time, lawyers and legal education in the United States celebrated and were committed to the belief that the clash of ideas was the best method to determine controverted truths. One of the most eloquent expressions of this ideal was articulated by Justice Oliver Wendell Holmes in his powerful dissent in Abrams v. United States, declaring:

*If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, . . . or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.*

Holmes’ dissent rested in great part upon the philosophical principle articulated by Professor Harold Laski, who wrote: “It is ‘in the clash of ideas that we shall find the means of truth. There is no other safeguard of progress.’”

The intellectual pedigree of the clash of ideas traces back through the Reformation when an entire socio-religious movement ultimately altered all religious thought and transformed social and legal relations throughout Europe and the European colonies. This clash of ideas derived its name from the insistence upon “protesting” ideas and positions that it considered to be erroneous. But challenging is not merely a Protestant penchant. Many intellectual traditions in law and secular thought derive from the clash of ideas that occur in religious communities. Indeed, the vigorous exchange of contesting ideas characterizes all major Christian and Jewish traditions and also stimulated Age of Enlightenment secularism. In fact, democratic liberalism (including most prominently the American Constitution) is based upon the first principles of respect for the individual, individual rights, and the organization of individuals into social and political units. Within those units, a
government of the governed operates through the ordered and deliberate clash of competing individual viewpoints. Democracy is inseparable from the principle of the clash of ideas, for such debate and discussion precede and are the necessary foundation for the development of democratic consensus. For example, the great challenge of McCarthyism to academic and broader political freedom in the 1950s lay in the suppression of ideas that were deemed meritless, dangerous, and politically unacceptable (and in the marginalization, oppression, or exclusion of academics and others who discussed them).

A. THE CLASH OF IDEAS AND ACADEMIC FREEDOM GENERALLY

Inviting, cultivating, and providing a clash of ideas is the main raison d'être for academic freedom. The clash of ideas principle lies at the heart of the concept of academic freedom. In this country, the original justification for academic freedom was recognition of its fundamental role as a truth-seeking device. One advantage of the clash of ideas in the academy is that:

13. As the historian Clinton Rossiter observed: “American democracy owes its greatest debt to colonial Protestantism for the momentum it gave to the growth of individualism. The Reformation . . . did as much as the rise of capitalism to spread the doctrine of individualism.” CLINTON L. ROSSITER, SEEDTIME OF THE REPUBLIC 40 (1953).


15. This assertion explained:

Academic freedom developed before modern First Amendment jurisprudence. It was created neither by courts nor by legislatures. As a system of practices and values, academic freedom developed under the aegis of the American Association of University Professors during the early years of the twentieth century. Designed to insulate scholars from the political and religious prejudices of powerful lay trustees, it accommodated competing needs for intellectual freedom and disciplinary accountability through peer review and tenure, which both sanctioned careful evaluation by peers and sharply limited it by others. The core ethical concept was that a scholar could research, teach, and publish without retaliation for the political tendencies of her work.


16. See Paul Horwitz, Grutter’s First Amendment, 46 B.C. L. REV. 461, 476 (2005); see also Risa L. Lieberwitz, The Corporatization of Academic Research: Whose Interests Are Served, 38
[G]etting arguments out in the open, testing these arguments in public debate, and evaluating the implications of various ideas, public dialogue can help change social attitudes and create consensus as one set of ideas gradually gains a majority position. . . . [P]ublic dialogue can spur consensus through the clash of ideas.  

The virtue of the clash of ideas in the process of creating and enacting legislation (as well as applying and interpreting law) is well recognized.  

Ironically, academic freedom may be threatened by educators who see themselves as guardians of institutional reputation, progressive causes, or fashionable ("the right") views. While academic freedom includes other elements and is implicated by a broad range of practices, the cornerstone of academic freedom is preservation of an atmosphere in which presentation of all viewpoints is encouraged and promoted. This especially includes diverse, unpopular, and unorthodox ideas or arguments. Suppression and elimination of relevant but unpopular interpretations, evaluations, viewpoints, and conclusions is anathema to the concept of academic freedom. As Justice Frankfurter noted in his eminent concurrence in Sweezy v. New Hampshire:

'In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—'to follow the argument where it leads.' This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and
hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.

'Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university.

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university-to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'

The rise of academic freedom in American universities was fostered by Protestant institutions of higher education in the mid- and late-nineteenth century. Like John D. Rockefeller, the key benefactor of the University of Chicago, the shapers of American universities in the nineteenth century generally "accepted the premise that a true university would have to allow freedom of expression and that this principle would have to apply to a Christian university as well." As Rockefeller's personal secretary, Frederick T. Gates, wrote in response to a complaint about an anthropology faculty member:

20. Sweezy v. New Hampshire, 354 U.S. 234, 262-63 (1957) (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10-12 (1957) ("a statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand, including A. v. d. S. Centlivres and Richard Feetham, as Chancellors of the respective universities").

21. See generally GEORGE M. MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY 3 (1994) ("In the late nineteenth century, when American universities took their shape, the Protestantism of the major northern denominations acted as a virtual religious and cultural establishment. This establishmentarian outlook was manifested in American universities ... "). Marsden also states that while elements of the principles of academic freedom "could be found among the Jeffersonians and at nineteenth-century German universities, the phrase, as well as most of its twentieth-century applications, was hardly older than the century itself." Id. at 296, 68-100.

22. Id. at 245.
I do not know of any way in the world by which we can arrive at the truth except by letting everybody speak out what he believes to be the truth within the limits of public morality. . . . The fact that such an institution is founded by private money or denominational money seems to me to make no sort of difference and must not be allowed to interfere in the smallest degree with this freedom of inquiry, freedom of opinion, and freedom of utterance.

Thus, "[a]cademic freedom, as originally defined in the United States[,] assumed a universal science that required only open-minded free inquiry to flourish."23 During the nineteenth century, "the freedom for the guild of professors independently to pursue its inquiries, publications, and teachings—became a symbol for an emerging ideal of academic freedom."24 According to the influential 1915 Report of the Committee on Academic Freedom, adopted by the fledgling American Association of University Professors, the tolerance for presentation of divergent viewpoints was critical "to promote inquiry and advance the sum of human knowledge" as well as in instruction of students. "[F]reedom to say what one believed was essential to the integrity of teaching," for "it was ‘better for students to think about heresies than to not think at all.’"25

B. THE IDEAL OF FOSTERING THE PRESENTATION OF DIVERSE PERSPECTIVES IN LAW SCHOOL

The inclusive, intellectual pluralism model of academic freedom initially received a warm welcome in American law schools where students were prepared for the adversarial-method-based legal system, in which the graduates of law school would practice their professional skills as lawyers. Thus, the clash of ideas principle has long lay in the heart of the most important elements of the American

23. Id. at 434.
24. Id. at 153.
25. Id. at 307; see also id. at 308 ("The AAUP committee recognized that academic freedom could not be unlimited but argued that there should always be a presumption in its favor . . . Restraints were sometimes necessary . . . against extreme, scandalous, or irresponsible statements."). Yet, it was widely accepted that "traditional religious viewpoints had a negative effect on ‘the common good.’ They could be tolerated, but only as exceptions to the rule." Id. at 312.
legal system and the substance of the pedagogy of American jurisprudence. As Dean Steven R. Smith put it: "Challenging, unpopular and new ideas cannot thrive unless academic freedom exists and can be relied on within the law school."26

That clash-of-ideas principle once was (or at least seemed to be) the cornerstone of American legal education. Even today, there still is at least nominal recognition of the need for a law school environment that fosters the expression of competing viewpoints (albeit often ideologically applied). Loss of intellectual diversity in the law school environment diminishes legal education. As Dean Smith wrote: "Successful law school instruction relies on the open and free exchange and clash of ideas."27 Likewise, even before he became a law school dean, Professor Erwin Chemerinsky advocated a "big tent" (many audiences) metaphor and insisted that law professors have a duty to engage in the clash-of-ideas scholarship in order to promote law reform:

An analogy can be drawn to one of the reasons that freedom of speech is protected as a fundamental right: the belief that the exchange of ideas furthers the search for truth. Justice Oliver Wendell Holmes invoked the powerful metaphor of the "marketplace of ideas" and wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried

27. Id.; “[D]iversity of ideas . . . is fundamental to the American system,” Hazelwood Sch. Dist. V. Kuhlmeir, 484 U.S. 260, 290 (1988) (Brennan, J., dissenting), and “the examination of diverse viewpoints” is necessary to enable law schools as well as law students “to innovate in a world where the practice of law and legal education [are] rapidly changing.” Alyssa Thurston, Addressing the "Emerging Majority": Racial and Ethnic Diversity in Law Librarianship in the Twenty-First Century, 104 Law Libr. J. 359, 364 (2012). As Dean Johnson noted: “[T]he skills needed in today's increasingly global marketplace can only be development through exposure to widely diverse people, cultures, ideas and viewpoints.” Kevin R. Johnson, The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective, 96 Iowa L. Rev. 1549, 1553 (2011) (emphasis added). See also Cruz Reynoso & Cory Amron, Diversity in Legal Education: A Broader View, A Deeper Commitment, 52 J. Legal Educ. 491, 491 (2002) (“Diversity’ is prominent among the values law schools embrace today.”); Hilary Sommerlad, Minorities, Merit, and Misrecognition in the Globalized Profession, 80 Fordham L. Rev. 2481, 2510 (2012) (globalization has “made diversity a key criterion for establishing the legitimacy of social institutions.”).
out." The argument is that truth is most likely to emerge from the clash of ideas.

John Stuart Mill expressed this view when he wrote that the "peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation—those who dissent from the opinion, still more than those who hold it." He said that an opinion may be true and may be wrongly suppressed by those in power, or a view may be false and people are informed by its refutation. Justice Brandeis embraced this view when he said that the "fitting remedy for evil counsels is good ones" and that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

Although there are strong criticisms of the marketplace of ideas metaphor, the basic notion is that the exchange of ideas advances understanding. This is what should be expected of legal scholarship: that it contributes original ideas and advances understanding. Again, this is not to say that this is the only type of writing with value; rather just it is a type that should be required of all faculty members.28

Whether transactional or litigation attorneys, lawyers practice in an environment in which there are always at least two sides (and often many more than that) that must be considered. Adequate transactional planning requires the attorney to consider the transaction from many different perspectives to properly prepare for and address the major contingencies that may arise in the course of the transaction, enterprise, or relationship. Likewise, trial and appellate lawyers must perceive, grasp, and respond to not only the opposing positions taken and arguments made by opposing parties but other alternatives that the court may raise. Attorneys live professionally in an environment of interest, intellectual, and positional pluralism; interest, informational, and interpretative

diversity characterizes the soil in which their professional practices are grown.

"Law school constantly deals with the most controversial subjects because almost all of them have important legal aspects." Lawyers encounter and must be prepared to respond to the entire range of ideological positions on all issues of importance in order to represent their clients well. Thus, law students also must encounter and must be prepared to respond to the whole spectrum of ideological positions regarding social and political controversies in order to begin to acquire the skills to practice law effectively. Law students need to learn to be comfortable working at top performance levels in an environment in which they hear and must analyze and respond to ideas and positions that they dislike and disbelieve. Preparation of law students to practice their profession in that environment requires that they be regularly and constantly exposed to practicing and developing their skills of advocacy in that kind of an intellectually pluralistic and dynamic setting.

There is another pedagogical dimension to promoting and protecting the clash of ideas in law school. It reflects the methodology of the law. The process of inviting, encouraging, receiving, assessing, providing, and protecting diverse, competing viewpoints is the essence of the legal method. The lawyer’s work environment is the adversarial system; that system is predicated upon basic notions of procedural fairness that guarantee all parties the opportunity to present their cases, their claims, their defenses, their positions, their evidence, their arguments, and their challenges to their opponents’ positions, evidence, and arguments. Preparation of law students to practice their professional skills requires that they also develop a commitment to those qualities of the adversary system. Law students need to learn to be as committed to defending the adversarial methods and processes as they are to promoting any particular substantive idea or position. They must adopt the principle of Voltaire summarized by the well-known epigram: "I disapprove of what you say, but I will defend to the death your right to say it."

29. Smith, supra note 26, at 199.
30. See generally Mark C. Alexander, Law-Related Education: Hope for Today’s Students, 20 OHIO N.U. L. REV. 57, 67–68 (1993) (reviewing the growth of law schools in the 1970s, spurred by recognition of the need to prepare the rising generation to deal with a host of “crises rooted in the clash of ideas”).
31. STEPHEN G. TALLENTYRE, THE FRIENDS OF VOLTAIRE 199 (1907). This quote is often attributed to Voltaire but, as one online commentator notes, because of quote marks around the
Legal education that is lacking or restricted in exposing students to a multiplicity of diverse positions that are strongly advocated deprives the students of the opportunity to develop and test essential professional skills and qualities. Ironically, persons in echo chambers are more vulnerable to opposing viewpoints than persons who live in intellectually diverse communities because, when they hear arguments for alternative positions, they are taken by surprise and are unprepared to effectively analyze and refute or resist them, having been raised in the sanitized environment of ideological sameness. Thus, the loss of intellectual diversity because of the liberal-left dominance of the legal academy and exclusion of alternative (conservative-right) information and arguments substantially disagreeing with the liberal viewpoints du jour produces law students who graduate from echo chambers and are not well-prepared to be excellent attorneys.

One memorable example of how the echo-chamber effect diserves professional ability that I personally observed occurred in litigation about abortion regulation in Utah in the early 1990s. In 1991 the Utah legislature enacted a comprehensive new abortion statute in the interlude between Webster v. Reproductive Health Services, when it appeared that the Court might be moving in the direction of upholding more substantial restrictions of abortion, and before Planned Parenthood of Southeastern Pennsylvania v. Casey, when the Court reaffirmed Roe and adopted a new framework, giving courts a vague new standard allowing the judiciary to continue to liberally invalidate laws regulating abortion. The 1991 Utah legislation permitted abortion at any time only if “necessary to save the [mother’s] life,” “to prevent grave damage to the pregnant woman’s medical health,” or “to prevent the birth of a child that

---

original publication of these words, they are often attributed to Voltaire, though Hall was not actually quoting him but summarizing his attitude with the expression. The statement was widely popularized when misattributed to Voltaire as a “Quotable Quote” in Reader’s Digest (June 1934), but in response to the misattribution, Hall had been quoted in Saturday Review (11 May 1935), p. 13, as stating: I did not mean to imply that Voltaire used these words verbatim and should be surprised if they are found in any of his works. They are rather a paraphrase of Voltaire’s words in the Essay on Tolerance—“Think for yourselves and let others enjoy the privilege to do so too.” Evelyn Beatrice Hall, WIKIQUOTE, http://en.wikiquote.org/wiki/Evelyn_Beatrice_Hall (last modified Sept. 15, 2012) (emphasis in original).

32. DiFonzo, The Echo-Chamber Effect, supra note 3.
would be born with grave defects.\textsuperscript{36} Additionally, an abortion could be performed during the first twenty weeks of gestation in cases of rape or incest;\textsuperscript{37} further informed consent requirements also were enacted, including disclosure of the facts of fetal development (most of these provisions are still in effect).\textsuperscript{38} The 1991 Utah legislation made Utah one of only four states (Louisiana, Rhode Island, South Dakota, and Utah) to enact legislation directly challenging the \textit{Roe} doctrine of abortion-on-demand.

The abortion industry-movement quickly challenged the 1991 Utah abortion legislation, hiring a highly celebrated lawyer as the lead trial attorney representing them in the challenge.\textsuperscript{39} The lead lawyer representing the state, Mary Anne Wood, had been a brilliant and tough law professor at the J. Reuben Clark Law School at Brigham Young University for many years, having recently left the academy to start one of the best law firms in the state. Wood was very knowledgeable about abortion, well-prepared, tenacious, alert, and articulate.\textsuperscript{40} The judge, Judge Thomas Green, had assumed the bench after a long career in litigation and bar-organization activities that had him interacting with the best lawyers and law firms in the nation. Neither attorney Wood nor Judge Green was overawed by the famous lawyer for the plaintiffs.\textsuperscript{41} Because of the echo-chamber effect, it may be possible that the abortion-industry attorney might have grown accustomed to hearing nothing but accolades, to winning easily, or to prevailing on trite arguments that had succeeded elsewhere (in the echo chamber) without having truly been challenged by well-prepared lawyers or tough-minded judges. Thus,

\begin{itemize}
\item[36.] See 1991 Utah Laws Ch. 2, S.B. 4 (codified as UTAH CODE § 76-7-302 (1992)).
\item[37.] \textit{Id}.
\item[38.] \textit{Id}.
\item[39.] That lawyer had won many cases for the pro-abortion-choice cause and had received great accolades. She walked in the courtroom in Utah having lived and worked in the pro-choice echo chamber so long that it seemed like she thought that all she had to do was show up in the remote Utah courtroom and the opponents would wither and the court would swoon at her feet. She quickly learned otherwise.
\item[40.] Wood was the co-author with one of the co-authors of this piece of a book reviewing the history of the regulation of abortion in America and critiquing the \textit{Roe v. Wade} decision and precedents. See \textsc{Lynn D. Wardle & Mary Anne Wood}, \textsc{A Lawyer Looks at Abortion} (1982).
\item[41.] In the first hearing, Wood was so well prepared and impressive that the visiting pro-choice celebrity lawyer almost seemed to reel and stagger, as if dazed, under the barrage of effective preparation and presentation by the lawyer defending the statute. Moreover, the plight of plaintiffs' counsel was compounded by a no-nonsense, impartial judge who didn't race to rescue the plaintiffs with soothing, wink-wink, nudge-nudge questions or comments for their stumbling counsel.
\end{itemize}
initially, the quality and success of plaintiffs’ lawyering did not measure up to the impressive reputation. In fact, Utah won in the U.S. district court (but later lost at the Tenth Circuit, after Casey was decided).

Fostering the presentation of diverse perspectives in law school works to prepare future attorneys to be most prepared at the outset of any case they face. Lawyers are not well taught when trained in echo chamber-like environments without experience in confronting competing viewpoints.

II. THE DEMISE OF THE “CLASH OF VIEWPOINTS” IDEAL IN AMERICAN HIGHER AND LEGAL EDUCATION

In some ways, the current attitude of American academic, especially legal academic, communities turns Voltaire’s epigram upside. The prevailing intolerance of politically unpopular positions (especially relating to abortion and same-sex marriage) in some law schools, and in most family law casebooks (at least about some subjects) reflects a view that is characterized by Eugene Volokh’s word-play on the Voltaire-ian principle: “I disagree with what you say, and I’ll riot if you say it.”

This abandonment or distortion of the original academic freedom ideal probably has not occurred as a matter of widespread conspiracy and deliberate ideological hostility, but as Professor Marsden concluded, “[W]hat we typically find are unintended consequences of decisions that in their day seemed largely laudable, or at least unavoidable.”


44. MARSDEN, supra note 21, at 8.
Sadly, much of the American academy, including many law schools and legal academics, have largely abandoned the traditional clash of viewpoints ideal, replacing it with a clear preference for expressions that are deemed “reasonable and progressive.” These law schools and legal academics have associated bias against the presentation of positions that are considered antiquated or moralistic, as judged by contemporary popularity measures. Today, “[t]he ideological bias of the contemporary American university fosters an intellectual ecosystem that is clearly hostile toward the expression of culturally conservative viewpoints . . . .”\textsuperscript{45} As one review of legal literature about same-sex marriage noted in 1996:

The biased academic environment is the result of “the success of the left in grounding itself within American educational and cultural institutions since 1960.” WILLIAM J. BENNETT, THE DEVALUING OF AMERICA 163 (1994) (“Prestigious, selective, leading universities . . . have a tendency in our time to show a liberal bias.”); see RUSSELL JACOBY, THE LAST INTELLECTUALS: AMERICAN CULTURE IN THE AGE OF ACADÉME 124 (1987) (“[N]ever before in American history did so many left intellectuals seek and find university positions [as in the 1960s].”); see also id. at 112-90 (describing the 1960s and subsequent leftist dominance of American universities); EDWARD E. ERICSON, JR., RADICALS IN THE UNIVERSITY (1975) (tracking the development of the “New Left” movement from students of the 1960s to current members of the academy); cf. RICHARD H. PELLS, THE LIBERAL MIND IN A CONSERVATIVE AGE at vii, 120-21, 287-95 (2d ed. 1989) (while many universities in the McCarthy era got caught up in reactionary anticommmunism and became more conservative, leading leftist intellectuals continued in academia); Bruce Robbins, The Grounding of Intellectuals, in INTELLECTUALS: AESTHETICS POLITICS ACADEMICS at ix (Bruce Robbins ed., 1990); THOMAS SOWELL, INSIDE AMERICAN EDUCATION: THE DECLINE, THE


A recent empirical study found that twenty-nine percent of the law professors in the top twenty-one law schools in the United States are "politically active" (meaning that they donated over $200 to federal campaigns in the last five election cycles preceding the year 2005); of those politically active law professors, seventy-nine percent were exclusively Democratic donors while only thirteen percent were exclusively Republican donors (a six-to-one ratio).

Professor James Davison Hunter has described the "grammar of hostility," "the drift toward bigotry," and "the specter of intolerance," which characterize the expressions, tactics, and mindsets of some educated proponents of "progressive" liberal positions, as well as proponents of some conservative positions. This is seen particularly in the contemporary "culture wars" over issues such as homosexuality. Professor Hunter argues that this intolerance and use of extremely hostile language characterizes both sides of "not


48. Id. The article also reviewed and found similar patterns (pro-liberal distribution) in statements signed by professors and amicus brief filings. Id. at 1174, 1193–94.

only subterranean friction in public culture but open conflict” over abortion, homosexuality, and similar social issues.50

The bias in published articles on controversial social policy issues has frequently been noted.51 The imbalance in published articles on various sides of issues, such as abortion and same-sex marriage, reflects an imbalance in the course materials, and a bias and distortion of discussion that seems to be happening in the law school classroom as well. As Professor McGinnis and his co-authors note, “liberal political ideology . . . dominate[s] the elite legal academy,”52 and there is a rich supply of published liberal intellectual ideas. However, “opposing views do not easily receive the academic or intellectual attention they deserve.”53

[T]he apparent lack of political or ideological diversity at elite American law schools may have implications for the professed use of affirmative action at these schools to further “viewpoint diversity.” . . . [L]aw schools that offer “viewpoint diversity” as a justification for affirmative action, but are unwilling to take such steps to hire conservatives, are perhaps using a convenient and selective definition of “viewpoint diversity” that may itself be ideologically driven. We also suggest that true viewpoint diversity within law school communities is advanced (at least) as much by ideological diversification as it is by ethnic diversification . . . .54

The philosophical imbalance in the American academy, particularly the legal academy, and the resulting diminution of clashing ideas and viewpoints may be a manifestation of Gresham’s

50. Id. at 135, 137–40, 144, 150–52.
51. Id. at 116–20 (discussing the sixty-nine to one numerical imbalance in law review articles favoring and opposing same-sex marriage); see also Lynn D. Wardle, Comparative Perspectives on Adoption of Children by Cohabiting, Nonmarital Couples and Partners, 63 ARK. L. REV. 31, 100–12 (2010) (listing eighty-four articles favoring same-sex partner adoption, forty neutral articles, and two pieces opposing such adoptions published in twenty months).
52. McGinnis, Schwartz & Tisdell, supra note 47, at 1171.
54. McGinnis, Schwartz & Tisdell, supra note 47, at 1198; see also id. at 1203 (“[L]aw schools that have few conservatives, but are publicly committed to the proposition that viewpoint diversity should be a goal in the hiring or admissions process, may open themselves to charges of intellectual inconsistency and special pleading.”).
Law—that “bad money drives out good money.” Professor Smith suggests that “a broader form of Gresham’s Law can operate when the intrinsic and nominal values of something can be separated.” Applied to academic freedom, the effect of Gresham’s Law occurs when formal commitment to the promotion of the clash of ideas (such as commitment in written policies, breast-beating protestations of commitment to that value, and no- or low-cost actions, including invoking academic freedom and intellectual diversity to justify support for or expression of one’s preferred positions on controversial subjects) can be separated from substantive commitment to that value (working to consistently include viewpoints one dislikes or advocates or articles one disagrees with, especially that have substance that might persuade persons away from one’s own viewpoint and policy preferences). Eventually the “bad money” of formal and nominal commitment to academic freedom, intellectual diversity, and the importance of clashing ideas will dominate and drive out the “good money” of the actual practice of intellectual inclusion, pluralism, and diversity that produces the clash of ideas sought by the ideal.

What has happened in legal education in America is but one manifestation of the greater trend in higher education in the United States. As George Marsden has described in some detail, the apparently inclusive nineteenth-century Protestant concept of academic freedom eventually destroyed itself. “Ironically, . . . Protestant universalism (catholicity, if you will) was one of the forces that eventually contributed to the virtual exclusion of religious perspectives from the most influential centers of American intellectual life.” By the last quarter of the twentieth century, academic freedom in American universities had morphed into “a basis for discrimination against religious viewpoints.” Professor Marsden concludes that:

55. Smith, supra note 26, at 171 n.3 (“A good statement, technically, is that bad or less desirable currency tends to drive out (or circulate instead of) good or more desirable currency if both exchange for the same price (e.g., because of legal tender laws).”).
56. Id.
57. MARSDEN, supra note 21, at 5.
58. Id. at 434.
In the nineteenth century the Protestant establishment became informal and declared itself nonsectarian. Today nonsectarianism has come to mean the exclusion of all religious concerns... Only purely naturalist viewpoints are allowed a serious academic hearing... Groups who do not match the current national ideological norms are forced to fend for themselves outside of the major spheres of cultural influence. Today, almost all religious groups, no matter what their academic credentials, are on the outside of this educational establishment...  

The clash of viewpoints, though in demise in current legal education, can be revived with topics that present opportunities for legal controversy in a respectful, intellectual, and challenging fashion. This is particularly possible in teaching family law.

III. FAMILY LAW EDUCATION AS AN ENTRY POINT FOR THE CLASH OF IDEALS

Family law legal education reform has been an important topic of discussion in the legal academy since at least 2006. Methodology for family law legal education has been under serious reconsideration and experienced significant advancement as a result. Yet, we have found that one particular area of law remains one-sided, nearly universally and unilaterally, in its presentation in family law casebooks—abortion.  

---

59. Id. at 440.
62. At the outset, we acknowledge that our critical review of family law casebooks is not perfect. Like all professors, we have our own values, preferences, and experiences that affect our assessments. In particular, we both are very critical of Roe v. Wade, 410 U.S. 113 (1973), and its progeny (the three dozen other major Supreme Court decisions about abortion), particularly the judicially-created doctrine that the Constitution of the United States mandates that all states must allow abortion on demand. We have studied and written about abortion jurisprudence, which has also served to confirm our views. We have personally witnessed and experienced to some degree the kind of ideological hostility to counter-majoritarian positions on abortion and other controversial family law topics that we have discussed. We both also have prepared and taught from our own materials and are the authors or co-author of relatively minor family law casebooks or materials. See infra note 64. Moreover, apart from our own anecdotal observations, our review
Good teaching reflects the interests, values, preferences, beliefs, talents, and experience of the teacher. Good professors profess, and they need teaching material that supplements, complements and counter-balances their own preferences. Thus, no single casebook is ideal for all professors; inevitably, in every casebook there is likely something disappointing or less than ideal for nearly every professor teaching the subject. However, every course seems to need a casebook, so the professor must choose one. Every casebook tends to possess its own angle, identity, or theme, fighting for a share in the marketplace of legal education. In a perfect world, the market would result in a variety of casebooks, each with a different perspective or approach. However, when nearly every casebook in a field tends to deny or reject a particular viewpoint on a controversial legal issue, that may be evidence that the market is
skewed. As noted above in part II, there is abundant evidence that the legal academy has a strong leftward tilt.

Moreover, when one particular viewpoint is largely neglected in most of the major casebooks in a field, the clash of ideas may be compromised. As Professors Beth Burkstrand-Reid, June Carbone, and Jennifer S. Hendricks have recently observed, it is a worthwhile goal in any family law course to remain "open to intellectual exploration of the legal regime" surrounding family law topics.66

While professors should advocate the policies they think are best, they also should demonstrate a commitment to the inclusive clash-of-ideas principle of academic freedom and to the adversary process that gives each side an opportunity to be heard. An adherence to the clash-of-ideas pedagogy in a family law course would require a candid and somewhat comprehensive review of all viewpoints regarding the treatment of family relational and life issues.67 Any exclusionary predisposition in abortion coverage in family-law texts can tend toward a sense of ideological isolation and might work to discredit a text as incomplete and biased. We submit that it is a worthwhile goal in any family law course to openly explore all facets of abortion as substantive legal doctrine for a myriad of benefits that enhance legal education. Sadly, most family law casebooks do not.

A. EXAMPLES OF THE BIAS FAVORING ABORTION AS THE NORMATIVE DEFAULT POSITION

Family law casebooks generally address abortion jurisprudence relatively extensively, using section titles that disconnect abortion from family law and the relationships it


67. Initially, we were asked to consider life issues on both ends of the spectrum of life—at the beginning of life and at the end of life—as they were presented in family law casebooks. Two texts did include a landmark end-of-life family decision-making case, Cruzan v. Mo. Dep’t of Health, 497 U.S. 261 (1990), as a note case. See Harris, Carbone & Teitelbaum, supra note 65, at 151-52; Clark & Estin, supra note 65, at 472-73. Another text included a detailed discussion of the euthanasia issue. See Weisberg & Appleton, supra note 65, at 92-100. See also St. Thomas, Academic Treatment, supra note 62. Though we felt that issues of euthanasia often affect ongoing family relationships, a topic which may be included in family law course offerings, we agreed that abortion was a more central issue to family law subject matter and focused our attentions strictly on beginning-of-life issues, leaving end-of-life issues to other more appropriate courses such as elder law, health care law, and bioethics.
regulates. Broad titles such as *Reproductive Rights and Interests* and *Abortion, Contraception, and Sterilization* were used broadly to discuss abortion jurisprudence, but the context of family law was somewhat detached. These titles and subheadings worked to effectively disconnect abortion from the family relationships it affects.

The problem of bias in substantive presentation of legal principles surrounding abortion is apparent not only in presenting abortion as unconnected to family relations, but in position labeling, which sets a tone of one-sidedness that is decidedly pro-abortion. Word choice was primary in this regard. "Rather than referring to the pro-life side as ‘pro-life,’ many texts more often referred to that group as ‘anti-abortion.’" Motherhood also is not a well-used word in the abortion section of family law casebooks. Rather, *Having Children: The Alternative Choices* is a more accepted categorization.

Comprehensive analysis of abortion jurisprudence was nearly nonexistent. One casebook explored criticisms of the Supreme Court’s abortion jurisprudence in *Roe v. Wade* and a discussion of fetal rights and one other covered harm to women from abortion, both of which were presented in a manner that offered some clash of ideals furthering the legal analysis of abortion law. That casebook had several shorter notes attempting to provoke inquiries into the criticism of judicial activism in *Roe*. "While the citations of these critiques are notable within these two texts, the discussion of these topics was comparatively short, and edited to such an extent it was difficult to fully explore the criticisms of pro-choice arguments." A balanced analytical approach was otherwise absent from most texts.

---

68. See HARRIS, CARBONE & TEITELBAUM, supra note 65 at 134.
69. See CLARK & ESTIN, supra note 65, at 162.
70. "The bias in the texts also presents itself in the language and phrases chosen to convey the issues and the conflicting sides." St. Thomas, Academic Treatment, supra note 62 at 53 (prepared for the conference). The accompanying chart in that manuscript also further illustrates with precise detail the cases and articles discussed in each casebook (on file with Teresa Collett).
71. Id.
72. See, e.g., SWISHER, MILLER & SINGER, supra note 65, at 252 (using the heading *Having Children: The Alternative Choices*).
73. See CLARK & ESTIN, supra note 65, at 178–79.
74. See id. at 179.
75. See WEISBERG & APPLETON, supra note 65, at 51 (citing legal scholarship detailing the harm to women abortion causes).
77. St. Thomas, Academic Treatment, supra note 62 at 53.
Generally, legal opinions favoring protection of prenatal life over abortion were treated with a tone of ridicule, rather than professionalism and respect.78 For an example of what seemed commonly accepted, one casebook provided a summary of the abortion jurisprudence in Gonzales v. Carhart79 by including four paragraphs of the majority opinion, a brief description of a concurrence, and approximately eight paragraphs from a dissent.80 One casebook characterized this abortion-regulating decision with the subheading Burdens on Privacy.81 Another casebook included similar excerpts, restraining a discussion of abortion’s limits.82 Parental notification and parental consent laws were challenged in several casebooks,83 and discussions of informed consent laws seemed to treat the choice of motherhood with some serious disregard.84 Bias was prevalent in casebook “notes selected to further illuminate the jurisprudence and controversy surrounding the cases.”85

These obvious efforts to discuss abortion in a one-sided and advocacy manner seem to deny the robust public debate that is taking place in state law,86 in American public discourse,87 and somewhat in legal academics.88 Family law casebooks’ promotional

78. See, e.g., id. For further examples, see generally id.
80. ABRAMS, CAHN, ROSS & MEYER, supra note 65, at 224–27. For more detail, see St. Thomas, Academic Treatment, supra note 62 at 35.
81. See WEISBERG & APPLETON, supra note 65, at 39.
82. See, e.g., HARRIS, CARBONE & TEITELBAUM, supra note 65, at 136–38 (including small excerpts from the Gonzales opinion and several paragraphs from Ginsburg’s dissent).
83. See, e.g., ELLMAN, KURTZ, SCOTT, WEITHORN & BIX, supra note 65, at 1255–69.
84. See, e.g., WEISBERG & APPLETON, supra note 65, at 33 (focusing on arguments that pro-choice proponents’ embrace of progressive objectives as preferable to “abortion opponents” view of “motherhood . . . [as] the most fulfilling role that a woman can have” (citing KRISTEN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 118, 159–60 (1984))).
85. See St. Thomas, Academic Treatment, supra note 62 at 52.
treatment of pro-abortion jurisprudence as the normative default position for pregnancy not only denies the legal realities of the day but also deprives law students of a comprehensive and open legal education.

B. Why It Is Important to Teach the Clash of Ideals in Family Law

Students can be shortchanged in developing their analytical skills when presented only one side of the abortion controversy. In the genuine clash of ideals, it seems at least intellectually honest and academically respectable to present both sides of the legal debate on abortion. Teaching the controversy can be an instructor's ally. Furthermore, scholarly strength and analytical depth is more easily achieved by presenting conflicting views of any particular area of law. Even if an instructor considers any matter, including abortion jurisprudence, a legal *fait accompli*, he or she might find great benefit from teaching all sides of it as a legal issue. Teaching the debate on any particular area of law helps an instructor to bring out the nuances of the law's application. Rather than simply stating the general rule, teaching the exceptions, accompanying regulatory schemes, and different approaches to that regulation can be immensely valuable. Family law professors deprive their students of the opportunity to be challenged when a minority view or the nuances of law are excluded from discussion.

Presenting material in conflict is also a much more effective way of training a student in essay exam writing and memorandum or brief preparation. In quality legal training it is most common to present majority and minority views when states are free to regulate certain areas of law. As evidenced by *Casey* and its progeny, abortion is one of those areas. A discussion of abortion jurisprudence can be greatly enriched by regulatory comparisons, its connections to relationships within the family, and how the law operates in domestic relations of any state family law scheme. The dilemma presented by abortion bias in family law casebooks offers an opportunity to put forward some potential solutions to this current state of academic affairs.

fosters-pro-life-scholarship/.
IV. SOLUTIONS FOR PRESENTATION OF THE ABORTION CONTROVERSY IN FAMILY LAW

Family law is a rich area of legal education overflowing with opportunity to train lawyers in preparation of all sides of a legal issue. A family law course can be fertile ground for these alternative teaching methods, particularly in covering the topic of abortion fairly to effectively train legal advocates. Even without current casebook amendment, the objectives can be attained. This paper offers some central methods and themes by which a family law instructor may approach the abortion controversy without compromising either the legal jurisprudence or the process of legal education.

A. CONSIDER TEACHING FAMILY LAW VIA STATUTORY STATE CODE

Though federal abortion jurisprudence may appear to some lawyers and law professors to be settled law, regulation of family law and domestic relations is based in and directed by statutory state code. Regulation of abortion in a variety of states is not only permissible but is in continuous transformation. Teaching family law via state statutory code opens a wide array of opportunities for legal training in family law regulation. For example, Mississippi voters recently rejected a state constitutional amendment on personhood. South Dakota law requires that a pregnant woman be told she has an “existing relationship” with her fetus before going through with an abortion. Louisiana has numerous restrictions on abortion just added this year, and that state is not alone in increasing abortion regulations. Many states restrict abortion by requiring

89. “[F]amily matters are not among the enumerated powers of the federal government... State legislatures have traditionally defined the family and enacted the laws that regulate marriage, parentage, divorce, family support obligations, and family property rights.” HARRY D. KRAUSE, LINDA D. ELROD, MARSHA GARRISON & J. THOMAS OLDHAM, FAMILY LAW: CASES, COMMENTS, AND QUESTIONS 19 (5th ed. 2003).
parental notification or consent, waiting period requirements, informed consent, and a host of other regulations. Students might be invited to critique and defend such laws. One instructor of an advanced legal research course has developed detailed supplemental materials in this regard.

Students can better learn the many facets of the abortion issue by doing their own state statutory research, particularly of states they hope to practice law in in the future. That statutory research can also include state and federal case law decisions regarding the interpretation of those statutes. In this way, a law student can analyze his or her home state's trends in abortion regulation. In that process, more abortion jurisprudence is available for student analysis, naturally presenting a fuller picture of the abortion controversy. This choice of primary materials for student learning reflects an essence of non-traditional teaching and learning. When discussing this solution, we (the co-authors) discovered that both of us have used this method in our basic family law course for years because we had independently determined it to be a very effective method of legal training in an area that is state regulated. Professional skills learned in this way are very useful making this an excellent technique of legal training and law-practice preparation.


95. See George Jackson, Researching State Abortion Laws: A Pathfinder for Advocates, Policymakers and Attorneys 7–37 (October 6, 2003), available at www.tc.umn.edu/~g-jack/pathfinders/S03_list4.doc (last visited October 27, 2012). Though not designed for a family law course, Professor Jackson’s methods would be easily transferrable to such a course nonetheless.

96. This process also allows and encourages the student to prepare for the actual practice of law in a state jurisdiction.

97. Apel, supra note 63, at 701 (discussing her own General Practice Program for teaching domestic relations where her syllabus dictates that students will work with primary materials from the Vermont Code).

98. See, e.g., Lynne Marie Kohm, Family Law Syllabus 2 (Fall 2011) (stating “Students will demonstrate how to analyze and assess both the nature and the regulation of marriage, family, divorce, and parenting from a statutory perspective by preparing a statutory outline of the family law code in their chosen state jurisdiction.”). The practical result is that, for example in abortion regulation, students will be able to apply the law of their state jurisdiction to any family law abortion controversy, providing a more thorough analysis of the issues and rules at stake in a given dilemma.

99. For a discussion of the importance of teaching skills in a Family Law course, see Andrew Schepard & J. Herbie DiFonzo, Hofstra’s Family Law with Skills Course: Implementing FLER (the Family Law Education Reform Project), 49 FAM. CT. REV. 685 (2011) (detailing how a
This method also fosters the development of practical skills valued in the esteemed Carnegie, MacCrate, and Best Practices reports. Students benefit from learning the skills that are required to work with state statutory material as a primary resource, those necessary practical skills are further honed in this manner even in a doctrinal course.

B. CONSIDER USING A RELATIONAL FRAMEWORK TO TEACH FAMILY LAW

Teaching family law from a relational perspective naturally provides a means to teach abortion from a variety of standpoints, and, of course, family law is an ideal subject to teach with a focus on relational aspects of the law. An abortion controversy is often raised by the relationships within a family. For example, a comprehensive approach to family law conflicts can be achieved by presenting abortion in the relational context of a parent's right to direct the upbringing of a child and the mature minor's right to abortion. The best interests of the child can dictate the standard for the treatment of a child's protection by parents, in every context except that of personal autonomy where a best interest showing would justify judicial bypass. A family member who can gain rights and liberty interests via family structure may conflict with the personhood of a fetus. Parental autonomy may conflict with the interests held by prenatal children. One might ask whether abortion is a form of child abuse.

Conflicts between parents within a family are presented by a mother's and father's conflicting rights when the abortion choice is or is not informed or exercised. Coerced abortion in the context of

family law skills course is designed and conducted for a better legal education of future family law practitioners).


101. See, e.g., Lynn D. Wardle's approach in his section entitled Non-economic Relations. Wardle, supra note 64, at 550–51 (discussing Supreme Court cases about minors' abortion decisions).


103. See Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476, 493–94 (1983), and later progeny, upholding most state attempts to preserve the life of the fetus.

104. See Wardle, supra note 64, at 440–41 (Father's Autonomy and Interest in Prenatal Children).
domestic violence and child abuse are obvious examples of how interpersonal family conflict can bring out the nuances of fundamental liberty interests. Furthermore, the interplay between state regulation of the family and federal regulation of the family may further demonstrate the significance and importance of individual rights within a family context. Thus, using a relational framework to teach family law can be helpful in developing the many angles of the abortion decision as it affects family members.

C. CONSIDER USING A COURSE SUPPLEMENT TO HIGHLIGHT ALL ANGLES OF ABORTION JURISPRUDENCE

Law professors wishing to handle the law on abortion more fairly may also wish to provide a supplement to students to balance the casebook. Such a supplement might include opposing briefs in a high profile abortion case. Opposing briefs present a relatively thorough review of the arguments on both sides of the matter. Other supplemental materials would include law journal articles that compare positions or presenting two journal articles of opposing views.

Professor Samuel W. Calhoun in his preparation for a two-hour seminar entitled The Abortion Controversy prepared a weekly packet of supplemental materials for use in that course. “The packet, drawn from a variety of sources—books, law review articles, magazines, newspapers, etc.—and maintaining a balance between prochoice and prolife viewpoints, served as the raw material for our discussions (supplemented by video materials that I placed on reserve in the library).”105 There, the supplement was the core of the course materials.

A supplement would be an easy solution to the casebook problem we highlight here, stimulating both student and instructor to a depth of analysis generally not attained from casebook material. Not only might it be prepared by individual family law teachers, but a publisher might offer such material to all interested family law professors. Alternatively, it might be available to scholarly organizations that focus on pro-life issues, such as University Faculty for Life.

D. WORK THE ADVANTAGES OF TEACHING THE DEBATE

Teaching the debate on any particular area of law helps an instructor to bring out the nuances of the law's application. Presenting material in conflict is also an effective way of training a student in essay exam writing and memorandum or brief preparation. In quality legal education, presentation not only of the current majority view is expected, but also presentation of responsible alternative views that may influence the development of the law, especially state family law. Abortion is one of those areas.  

In his article Teaching Harbeson, Professor David K. DeWolf discusses how he takes advantage of the many perspectives presented by a wrongful birth case, not only for its substance but for the nuances it presents as well as the challenges it presented to him as a teacher and a father of a Down syndrome daughter.

One of the benefits... is in seeing how one's views on the merits of ideologically polarizing issues may not translate easily into a legal rule. At the same time, observing the way in which a legal rule plays out may lead to reflection on the truth of basic principles that we might be inclined to assume are self-evident.

We understand that teaching a legal perspective that you are personally opposed to is no easy task. Indeed, Professor Calhoun recounts this difficulty: "As a prolife person striving to be evenhanded in teaching about abortion, I bear an especially heavy responsibility to know and to present the prochoice side of the debate." Presenting the abortion controversy in an intellectually stimulating and honest manner was a challenge.

---

106. See Casey, 505 U.S. at 874–75 (allowing state regulation of abortion).
109. Id. at 530. Professor DeWolf adds:
[I]t reminds me for one brief shining moment that for every name in a casebook, often a victim of some horrific injury or humiliating experience, there is a real person out there. . . . We who teach law weave in and out of the mysteries of love and suffering, parenthood and death. . . . The intimacy we experience with our students must be treated with respect, but also with the same astonishment at our own absurdity that the intimacy of sexuality evokes. 
Id. at 532.
110. Calhoun, supra note 105, at 110.
111. See id. at 100–02 (describing that process).
I do not consider the course as a soapbox for me to proselytize about abortion. Rather, my chief goal is to challenge all students, regardless of their position on the issue, to think more deeply. This will require that the very best arguments on both sides be presented and evaluated.

An important secondary goal is to ensure that the seminar demonstrate the possibility of discussing this most controversial issue in a calm and respectful manner. I hope that the atmosphere will be such that each participant will actually hear other points of view before rushing to assert his/her own.\textsuperscript{11}

The advantages of teaching the debate allow an instructor to be “open to intellectual exploration of the legal regime surrounding” the topic.\textsuperscript{13} Simultaneously, teaching the abortion debate can be uncomfortable and evoke strong emotional feelings, presenting sensitive fertile ground for classroom controversy. Professors Burkstrand-Reid, Carbone, and Hendricks suggest having a plan for difficult discussions that sets clear expectations regarding classroom behavior, discussion decorum, and mutual respect.\textsuperscript{14} “When it comes to presenting a topic that you expect (or have just discovered) to be controversial, you will want to present all sides of the argument.”\textsuperscript{15} They suggest that shifting the focus of the controversy may be quite helpful in teaching any controversial subject. “[E]xplicitly shifting your analytical framework away from rights and wrongs and favoring a different approach of analysis” may be helpful.\textsuperscript{16} Rather than making categorical assertions derived from political talking points, students and professors may want to consider methodically exploring

\begin{itemize}
  \item \textsuperscript{112} Id. at 101.
  \item \textsuperscript{113} Burkstrand-Reid, Carbone \& Hendricks, supra note 66, at 678.
  \item \textsuperscript{114} See id. at 679–80 (discussing how to lay the ground work for a healthy, respectful environment for learning in the courses described, in marketing the course, and in conducting the course).
  \item \textsuperscript{115} Id. at 681. The authors go on to offer specific classroom strategies and resources. Id. at 681–84.
  \item \textsuperscript{116} Id. at 683.
\end{itemize}

For example, Planned Parenthood v. Casey and Lawrence v. Texas both involved challenges to prior precedent (Roe v. Wade and Bowers v. Hardwick, respectively). Class discussion could focus on the importance of precedent in new challenges to abortion rights, specifically using the Lawrence case as an example of reversal of an outmoded opinion. Id.
the implications of both kinds of arguments, which helps students to “slow down their judgment and develop a more complex understanding” of the law.\textsuperscript{117} It is important for any instructor to apply his or her approach to both sides of the argument so as to avoid consequently ridiculing one side of the debate.\textsuperscript{118}

A responsible, respectful debate-focused approach may be aided if the professor sometimes plays the “devil’s advocate” and presents strong arguments contrary to his or her own positions. That may have the effect of encouraging less personal polarization in the discussion. Similarly, students might be randomly invited to assert the best arguments they can think of for the various sides of a controversial issue to encourage appreciation of professional perspectives.

The advantages of teaching the debate can be particularly rewarding in teaching abortion in family law subject matter. It does require honest self-reflection and pedagogical re-examination,\textsuperscript{119} but can work to produce active, engaged, and robust learning. We believe this will inspire better doctrinal learning and can lay a foundation for lifetime professional learning.

\hspace{1em}E. CONSIDER EXPOSING STUDENTS TO ABORTION MALPRACTICE LITIGATION FOR PROTECTION OF WOMEN

An interdisciplinary approach is generally welcomed in teaching areas of family law. Family law easily integrates with criminal law in domestic violence, contract law in marital agreements, property law in equitable distribution, and social science in areas of a child’s best interests. Tort law is another area of integration that relates not only to injury within a family but injury to a particular family member from abortion. Lawyering skills and state regulation of abortion can come together in a comprehensive approach to abortion that seeks to protect women, their bodies, and their legal rights.

Personal injuries to women in the abortion procedure need not be hidden from student view, but can be used to teach methods of compensation to injured women that can foster deterrence from
future bodily injury to women undergoing legal abortion. This allows the instructor to develop additional aspects of abortion and its legal effects on the family. Even if a course syllabus cannot provide a great deal of time to the particulars of abortion malpractice as serious personal injury litigation, it can be important to expose family law students to the existence of abortion malpractice, the process, and its benefits to women and their families when a woman is injured by abortion.

F. APPRECIATE THE SCHOLARLY BENEFITS OF TEACHING THE ABORTION CONTROVERSY

Finally, the scholarly benefits of an instructor’s ability to consider and present both sides can be profound. An instructor’s scholarship enriches his or her teaching; likewise, teaching enhances scholarship. Scholarly depth is more easily achieved by presenting conflicting views of any particular area of law. Even if an instructor considers the matter a legal fait accompli, he or she might find great benefit from teaching the historical perspective of what preceded the current “settled” decision or law. Offering a prospective view of current and possible future events can also enhance pluralistic teaching to afford benefits to scholarship. Likewise, a comparative law perspective discussing how abortion issues are treated in other legal systems (in Europe, Asia, Africa, Islamic nations, etc.) can provide valuable and broadening depth-perception about issues that in a parochial pond may seem to be obvious or settled.

Additional benefits lie in professional identity formation. Both the Carnegie\textsuperscript{120} and Best Practices\textsuperscript{121} reports implicate the need for law schools to promote professional identity initiatives that assist in healthy lawyering ethics and professionalism.\textsuperscript{122} The recommendations of these reports encourage law schools to make professional identity formation a larger component of the law school experience.\textsuperscript{123} Teaching abortion as a controversy allows a student to focus on integrating professional identity training in law school.

\begin{itemize}
\item \textsuperscript{120} Sullivan et al., supra note 64, at 30.
\item \textsuperscript{121} Stuckey et al., supra note 100, at 33.
\item \textsuperscript{122} See Melissa Yatsko, The Stakes of Professional Identity Formation: Why Integration Is Needed, LEGAL PEDAGOGY (Nov. 17, 2011).
\item \textsuperscript{123} Id.
\end{itemize}
V. CONCLUSION: BEYOND THE ECHO CHAMBER

Dean Roger Cramton wrote of "the ordinary religion of the law school classroom," which conveys "certain fundamental value assumptions unconsciously presupposed by most faculty and student participants" that "lurks behind what is said and done." The serious imbalance in the presentation of legal policy analysis and arguments relating to profound issues about abortion in some family law casebooks suggests that, formal commitment to academic freedom notwithstanding, the common religion of such law school teaching materials is biased against pro-life views and lacks serious commitment to the core legal process values of inclusion, diversity, pluralism, and respect for the clash of competing values and viewpoints. If law students "hunger[]" for mature examples on which they can model their approach and conduct, they are being shortchanged by the model of professionalism presented in such casebooks. Those casebooks demonstrate a "social engineer" model of lawyers as "specialists in manipulation" rather than truly committed to the ideal of inclusive, pluralistic academic freedom, and adversarial legal process values.

The problems of exclusionary bias against pro-life viewpoints in family law casebooks used in American law schools is just one facet of a tilted concept of "academic freedom" in American universities that marginalizes and often excludes faith-based morality arguments. It is particularly disadvantageous in legal education because the "clash of competing viewpoints" is the environment in which lawyers practice the skills that they are expected to have begun to learn while in law school. We still live in times in which the sharp

---

125. Id. at 259.
126. Id.
127. Professor Marsden also suggests the need for institutions where the minority viewpoints are generally accepted. His second suggestion is:

Americans should also be building pluralism among institutions of higher learning. . . . Instead of following the pattern of having nonsectarian national standards set by a dominant establishment and then classing dissenting religious perspectives as at best second-rate, it should be recognized that religiously defined points of view can be intellectually as responsible as nonreligious ones.

MARSDEN, supra note 21, at 439.
clash of competing viewpoints drive most of the major global developments and provide the inescapable setting in which critical decisions must be made in our country and in our world.\textsuperscript{128} There is a great need to train lawyers who are equipped with skills that allow them to operate at a high level of competence in an atmosphere of strongly-advocated, divergent, competing ideas.

Crafting a solution to the problem of exclusionary bias against pro-life viewpoints in family law casebooks is a challenging task. Some cures may be just as bad (or just as inconsistent with the academic freedom goal of presenting a clash of ideas) as the problems they try to remedy.\textsuperscript{129} Nevertheless, it is important to attempt to remedy the lack of viewpoint diversity that diminishes academic freedom in law school. That flaw deprives law students of important exposure to perspectives that would enrich their educational experiences, would better prepare them to address competing views about very controversial social policies, and thus would better prepare them to be effective lawyers.\textsuperscript{130}

Professor Marsden suggests several steps that would be helpful to remedy the flawed, exclusionary, and contemporary version of "academic freedom." While his particular focus is on tolerance of the expression of religious viewpoints in universities generally, his suggestions are applicable to the broader concern of inclusion of other non-dominant (generally conservative, especially pro-life) viewpoints, expressions and teaching materials in law schools. Two of his recommendations are directly applicable to the


\textsuperscript{129} For example:

\begin{quote}
[t]he [Academic Bill of Rights] has been denounced by numerous faculty groups and the American Association of University Professors as a violation of the principles of academic freedom. There are three chief elements that elicit faculty ire. First, the [Academic Bill of Rights] places a duty on faculty to present a diversity of views on controversial subjects covered in class. Second, it directs schools to hire faculty members to foster "a plurality of methodologies and perspectives." Third, institutions are directed to establish procedures for implementing these and other principles.
\end{quote}

Byrne, supra note 15, at 942.

\textsuperscript{130} Effective lawyers are concerned for justice; Marsden notes, "Americans who are concerned for justice ought to be open to considering alternatives." MARSDEN, supra note 21, at 440.
concern about the presentation of pro-life perspectives in family law casebooks.

"A first step is that religiously committed scholars who are already present at many universities will have to overcome their own longstanding inhibitions about relating faith to scholarship and establish academic credibility for expressed religious viewpoints." Thus, professors who support the minority pro-life views on various legal issues need to produce high-quality scholarship about those issues (such as relating to when life begins, the "personhood" debate, whether unborn fetuses and embryos are family members ["children"], the respective interests in protecting the life of the prenatal child in utero of different members of the family, whether abortion is a form of child abuse, the rights of mother and father of the proposed target of the abortion, the rights of the parents of teenagers seeking abortions, etc.) These professors must refuse to be silenced and excluded and must persist in quality academic production.

Second, "[o]ther faculty members, in turn, should be receptive to the ideas of individual scholars whose religious perspective may frankly influence aspects of their work . . . ." There must be more recognition of pro-life views in family law casebooks. This would take the form of casebooks presenting such viewpoints, information, and arguments; summarizing them; citing them; and including reference to criticisms of the currently dominant pro-abortion or pro-choice views that are well-presented by pro-life scholars and professionals.

131. See id. at 439.
132. Though the prolife position may not be the minority viewpoint of the general American public, see Lydia Saad, More Americans "Pro-Life" than "Pro-Choice" for First Time, GALLUP POLITICS (May 15, 2009), http://www.gallup.com/poll/118399/more-americans-pro-life-than-pro-choice-first-time.aspx, it is not unfair to state that abortion rights are apparently the majority view in the legal academy as reflected in the official position of the American Bar Association favoring abortion rights, see, e.g., Miers Pushed ABA on Abortion, ASSOCIATED PRESS (Oct. 3, 2005), http://www.foxnews.com/story/0,2933,171103,00.html, and the casebooks used in law schools which were the subject of the efforts of the Conference that triggered this article. See St. Thomas, Academic Treatment, supra note 62, at 35. See also Prolife Center at the University of St. Thomas, Academic Treatment of Abortion and Euthanasia in Leading Bioethics Textbooks, 6 U. ST. THOMAS J.L. & PUB. POL'Y 54, 54 (2011); Prolife Center at the University of St. Thomas, Academic Treatment of Abortion and Euthanasia in Leading Constitutional Law Textbooks, 6 U. ST. THOMAS J.L. & PUB. POL'Y 11, 11 (2011).
133. See MARDEN, supra note 21, at 439 ("Like other American groups, religiously committed scholars and institutions should not be discriminated against on the basis of cultural stereotypes.").
A lack of intellectual diversity results from the echo-chamber effect where a community hears only itself, the ideas it wants and expects to hear, and nothing but echoes of the information, arguments, and viewpoints it prefers. It is difficult for a teacher to see him or herself in an echo chamber; outside views, however, can always be helpful not only to the one trapped in the chamber, but to those listening to him or her teach. Echo-chamber instructors become limited in effectiveness. These degenerative qualities are evident in family law casebooks' treatment of abortion jurisprudence. Stepping out of the echo chamber by using some of the suggestions made here can assist a family law teacher to be a more effective and complete teacher of the law.

Students can be shortchanged in developing their analytical skills when presented only one side of the abortion controversy in any format. Teaching the controversy can be an instructor's ally, no matter his or her persuasion on abortion. This essay has demonstrated how that is possible in a family law course framework. When a family law teacher steps out of the echo chamber by using some of the suggestions made here, that process can also increase a student's professional skill development in significant ways. Echo chambers are not good places in which to train lawyers who will work in environments that, unlike echo chambers, are discordant, where numerous diverse ideas, assertions, arguments, interests, and viewpoints compete and strive for attention and influence. Law students need to learn how to be effective advocates in environments in which many different, discordant, competing viewpoints are present, and in which they are trained to recognize, respect, respond to, and effectively deal with such competitive viewpoint pluralism. However, family law casebooks are like echo chambers and do not generally present a complete, comprehensive, or even adequately fair review of viewpoint pluralism regarding elective abortion.

An understanding of the importance of the clash of ideas in the search for truth, and respect for the view that such intellectual diversity is important in legal education, is necessary for academic rigor. Happily, these ideals seem to be experiencing revival, particularly in pragmatic and identity-formation teaching in law schools. The profound and pervasive echo effect in law school teaching of abortion issues in family law courses can be avoided and remedied in law schools.

The learning process that can take place for both professor and student can be simultaneously challenging, humbling,
stimulating, and mind opening.\textsuperscript{134} When the factual evidence on the matter of abortion proves that there are different ways to think about reproductive rights and the health of women, their children, and their families as a matter of general view, it seems at least intellectually honest and pedagogically pragmatic to present both sides of the legal debate for a robust discussion of abortion law.

Finally, it is well to remember Cramton's gentle admonition: "Law schools and legal educators are inevitably involved in the service of values. For the most part they serve as priests of the established order and its modern dogmas."\textsuperscript{135} They best serve society when they not only espouse what they think is the truth but when they do the truth. The truth of the clash of ideas principle deserves to be done in casebooks and class discussions and not merely honored in abstract statements about academic freedom.

---

\textsuperscript{134} Professor Calhoun notes Professor Charles Black's response to challenging material: "I hope I shall always have the grace of being somewhat unhappy with my teaching." See Calhoun, \textit{supra} note 105, at 112 (citing Charles L. Black, Jr., \textit{Reflections on Teaching and Working in Constitutional Law}, 66 OR. L. REV. 1, 9 (1987)).

\textsuperscript{135} Cramton, \textit{supra} note 124, at 263.