

An unsolicited advice to Dean Chemerinsky of Berkeley Law School



by Lev Tsitrin

The subject of free speech is near and dear to my heart, and so I could not skip the *New York Times*' tantalizingly-titled piece ["At Berkeley Law, a Debate Over Zionism, Free Speech and Campus Ideals."](#) The gist of the story is this: at Berkeley law, "a student group created a bylaw that banned supporters of Zionism from speaking at its events" and a bunch of other student groups followed suit; [the exposure by Kenneth Marcus](#) (a former Assistant U.S. Secretary of Education for Civil Rights) caused a brouhaha among American and Israeli Jews. Berkeley Law school's dean Erwin Chemerinsky (who happens to be a top authority on the subject, having authored in the past

a book on campus free speech) replied to Mr. Marcus – a reply which Mr. Marcus rebutted (we are dealing with lawyers, after all!) Their back-and-forth was attached to Mr. Marcus' original article).

Their respective argument boils down to this: per Dean Chemerinsky, free speech rules allow student clubs full discretion as to which speakers they invite. Hillel does not invite anti-Israel speakers. A pro-Palestinian group is within its right to not invite pro-Israel speakers. So what the brouhaha is about?

It is not that simple, replies Mr. Marcus. Zionism and Jewishness are closely interlinked; exclude Zionists, and you excluded 90% of Jews (hence, the title of his piece, "*Berkeley Develops Jewish-Free Zones*").

I guess I should feel some trepidation when opining on a legal issue on which much greater experts than I already expressed their thoughts, yet somehow I'm not particularly worried of coming across as a fool. If the reader decides that I am, so be it; but having read the argument of both sides, I happened to think that their debate lacks clarity, and should be much more focused. So let me give some – admittedly unsolicited – advice.

First, I would focus on the language of student groups' bylaw. Per the *New York Times*, "In August, Law Students for Justice in Palestine announced that it, along with the eight other groups, had adopted a provision that it would "not invite speakers that have expressed and continued to hold views or host/sponsor/promote events in support of Zionism, the apartheid state of Israel and the occupation of Palestine."" Both Dean Chemerinsky, and Mr. Marcus seem to see it as a merely excluding Zionists from the debate.

I don't read it that way – but see in it a statement of defamation. How else does one interpret the reference to "the

apartheid state of Israel”? It is a lie – Israel is not an “apartheid state” – and hence, the bylaw is an antisemitic libel, pure and simple.

Yes it is pro-Palestinian groups’ right to exclude Zionists, as Dean Chemerinsky correctly argues – but do they have a right to engage in defamation? The applicable law here is the libel law, and not free speech law. Why would US government provide financial support for a university that allows its students to engage in libel against a friendly foreign state? Just for that reason, the Berkeley law school should have fallen on that bylaw like a ton of bricks – teaching the future lawyers a good lesson in law, to boot.

The second – and totally different focus should be on the eight groups which also adopted the bylaw, even though their declared *raison d’etre* has nothing whatsoever to do with being Jewish or Palestinian, but is centered on entirely different set of interests – per their names: Women of Berkeley Law, Asian Pacific American Law Students Association, Middle Eastern and North African Law Students Association, Law Students of African Descent and the Queer Caucus.

What reason do those student groups have to exclude pro-Israel speakers? Would it be OK for a stamp collector group to reject a speaker on such grounds? One would think that the rejection criteria should be in line with the focus area of the group – men not invited to speak at Women of Berkeley Law would be legit, but it would be discriminatory to decline invitation to a female lawyer on the grounds that she is pro-Israel. A stamp collectors’ group has every right to reject a talk by a coin collector; but is it legally OK to reject a talk of a fellow-philatelist on the grounds that he owns a dog? What does it have to do with his qualifications?

A concern for proper mental food served by student groups to its members is very much like a concern for regular food served at their meetings. A caterer who serves pork dumplings

will be rejected by both Jewish and Moslems student groups, and that's legit, for obvious reasons. But is it OK for "Asian Pacific American Law Students Association" to reject him because he supports Israel? That would be illegal discrimination, it seems to me.

So, I think the focus should be on two different aspects of the bylaw, and it should differ for two different kinds of student groups which adopted them. For the Law Students for Justice in Palestine, the focus should be on bylaw's libelous language, while for the other groups it should be on the very fact that they adopted it – which indeed results in illegally making those groups *Judenrein*. In the context of those groups, the bylaw is plainly antisemitic since it is unrelated to those group's stated mission and so indeed, as Mr. Marcus states, it alienates Jewish students, having no other purpose – and certainly, no other effect – than to express anti-Jewish bigotry of the students in that group, and scare away the Jews.

So, here is my advice to Dean Chemerinsky: he should stop school funding for those groups until the pro-Palestinian group amends its defamatory language in its bylaw, dropping all references to Israel's "apartheid," and until the other groups drop the bylaw altogether since it has nothing whatsoever to do with their stated function, and hence is plainly discriminatory.

The fact that those groups have free speech rights is no excuse for Dean Chemerinsky's inaction – if students want to exercise their rights to be bigots, they can certainly do so – but privately, without being funded by Berkeley Law school, or by the government which subsidizes the school.

At the end of its report, the *New York Times* states that "Mr. Chemerinsky ... said he was confident Berkeley was on "strong legal ground"" in not acting against those groups. With all due respect for Dean Chemerinsky's expertise, I am not so

sure.

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