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Hate Speech: What Price Tolerance? Transcript of the Symposium

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The Arlin M. Adams Center FOR LAW AND SOCIETY

Susquehanna University

The March 13, 2003, dialogue on “Hate Speech: What Price Tolerance?” is the second in a series of annual lectures sponsored by The Arlin M. Adams Center for Law and Society at Susquehanna University. Established in 2001, the center focuses on the law and its impact on institutions and people, providing a rich learning and experiential resource for students, faculty, visiting scholars and members of the community.

The family of Sigfried and Janet Weis and The Degenstein Foundation of Sunbury, Pa., with support from the Annenberg Foundation, founded the center in honor of prominent Philadelphia jurist Arlin M. Adams whose distinguished legal career includes 17 years on the bench of the 3rd U.S. Circuit Court of Appeals.

The center explores the significant place law occupies in our ever-changing social, political, economic and cultural life. It provides a forum for thought-provoking examination of contemporary issues in areas such as human freedoms and civil rights, social responsibility, technology and privacy, and constitutional interpretation.

Susquehanna’s emphasis on undergraduate liberal arts education and pre-professional studies offers an ideal home for the Adams Center which supports activities and resources that expose students to the theory and practice of law through internships and field experiences, networking, professional seminars, independent study, research projects, and enhanced library resources. The interdisciplinary programs and activities of the Adams Center enrich and inform civic life in the Central Susquehanna Valley and nationally.

Introductory Remarks

Dr. Michelle DeMary

The Arlin M. Adams Center for Law and Society is dedicated to furthering understanding of “the law and its impact on institutions and people,” a fairly broad commitment. This raises a challenge as members of the center’s steering committee try to choose a theme for our annual lecture – how to choose among all possible themes which could fall under this mission. For the inaugural lecture the task was made easier because our speaker, Judge Adams, the man for whom the center is named, has a long-standing interest in religious freedom. As a result the choice of a topic fell into place. In preparing for this, the second annual lecture for the Adams Center, it was decided to follow the lead provided by the judge and investigate another one of the freedoms guaranteed under the First Amendment to the U.S. Constitution, freedom of speech. And to make the topic particularly pertinent to the university’s goal of fostering a diverse learning community, the question of regulating hate speech was chosen.

Hate speech is defined by Lee Epstein and Thomas Walker in their text *Constitutional Law for a Changing America* as follows.

Expression based on hatred goes well beyond offending the standards of appropriateness or good taste. It arises from hostile, discriminatory, and prejudicial attitudes toward another person’s innate characteristics: sex, race, ethnicity, religion, or sexual orientation. When directed at a member of a targeted group, such expression is demeaning and hurtful. Hate speech tends to be devoid of traditional commentary on political issues or on the need for changes in public policy. Instead, its central theme is hostility toward individuals belonging to the target group.¹

¹ Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, 4th ed. (Washington, D.C.: CQ Press, 2001), p.271

Whether or not such speech should be regulated cuts to the core of our understanding of the relationship between law and society. This issue covers questions of constitutional theory – does the First Amendment prohibit the regulation of hate speech or might the 14th Amendment require such regulation? It covers questions of political theory – how can we balance the democratic value of liberty, which is implicit in guarantees of free speech, with that of equality, which may require some regulation of speech? And it is central to the challenge of fostering free inquiry which lies at the heart of a liberal arts institution like Susquehanna University. How can we create an environment free of hostility and yet promote the kind of open dialogue which is vital to a search for knowledge?

These questions are explored in the pages which follow by two well-known constitutional scholars, Mari Matsuda and Nadine Strossen. Mari Matsuda is professor of law at Georgetown University Law Center. While she has written and researched in a variety of areas of law, her work which is most pertinent to this discussion is *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, a book which she co-authored with Kimberle Crenshaw, Richard Delgado, and Charles Lawrence. In the pages which follow, Professor Matsuda presents a view of the challenges which hate speech poses to equal rights and to the free speech rights of those against whom such speech is exercised.

Nadine Strossen is a professor of law at New York Law School and has served as president of the ACLU since 1991. While she, too, has written on a variety of legal questions, the book which she co-authored which relates directly to this topic is *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights and Civil Liberties*. She presents an argument for the value of unfettered speech, despite its costs.

Michele DeMary

Director, Arlin M. Center for Law and Society

Assistant Professor of Political Science

Susquehanna University

The Dialogue

Mari Matsuda's remarks:

Thank you very much. Thank you, President Lemons and Mrs. Lemons, for a wonderful dinner and for welcoming us so warmly to this university. I had the honor tonight of speaking with Judge Adams and meeting Mrs. Adams. When you actually meet a jurist who is such a sharp thinker and has such independence of thought, you gain a lot of faith in our legal system. It is really an honor to be at the center tonight. I'd also like to thank the steering committee. I know how hard you worked organizing this.

As I was organizing my thoughts, I set them up as good news/bad news. I'll start with the good news. The good news is that there is no hate speech when racial subjugation is complete. The fact that hate speech is still a problem, the fact that the debate over the appropriate response to hate speech continues, suggests that we are indeed a country on the road to racial equality.

When slavery was firmly entrenched there was no Ku Klux Klan. The Klan was a product of Reconstruction, of the 13th and 14th amendments, of first national statement of the personhood of black Americans. When Reconstruction ended, with black codes, Jim Crow, sharecropping – a number of structures and institutions that reinforced conditions of black servitude – the Klan went into retirement and we didn't see the Klan again until the turn of the century when it rose once again to assault the new immigrants – the Catholics, the Jews – who were the perceived threat to nativist racists. When there is no progress on equality, there is no hate speech, no backlash, no Ku Klux Klan. When gays and lesbians are firmly in the closet, no one shouts out homophobic epithets on the university commons. If there are no black students at the university, no one spits out the "N" word from a passing car in the night. It's the assertion of equality, the demand for personhood, that brings about the tension from which erupts the ugly words. The good news is we have no quietude because our

unique status as a country of the many, a country bold enough to travel the road to equality, is still intact. The bad news is that it is a very long road.

I started writing about hate speech over 20 years ago. This was in the period after the Supreme Court decided the Bakke case. That was the first Supreme Court case upholding, in a divided opinion, affirmative action in college admissions. Women and people of color began coming to the universities in significant numbers for the first time. For the first time! When I went to law school, there was no one who looked like me teaching in a law school anywhere in the country. When I went to law school, I graduated without having a woman professor. I never got to see a woman in the front of the classroom talking about the great ideas generated from our legal system. With affirmative action, the picture changed. People of color entered the universities, first as students, then as professors and administrators. Women and gays, watching blacks and Asians and Latinos expressing racial pride, examined their own social condition for the first time and people previously presumed incompetent, inferior, deviant, suddenly demanded a place at the university and, more significantly, demanded epistemological change. They challenged ways of thinking and talking and knowing that had formerly seemed invaluable. They brought change, they brought conflict, and then came hate speech.

“I hope you die of AIDS” shouted out at Stanford. “I want Asian cunt” scrawled on an elevator wall at UCLA’s Asian American Studies Center. Progress toward integration generated backlash, which generated demands for response to that backlash, and that brings us to this debate over free speech and hate speech. This is not a debate that we come to as a matter of abstract legal principles. It’s a debate that we are brought to inevitably as we move to full and equal citizenship for all. The first woman to go to work on an oil rig is greeted with sexualized hazing. The first openly gay firefighter, the first black secretary of state, the first Asian American chancellor – all know that someone somewhere is threatened by the shift in the hierarchy and will respond with a joke, an epithet, a whispered comment, an anonymous e-mail. We can predict which words, which images will be used – they’re part of our culture, a lexicon of derogatory insults, the visual characters used to demarcate social hierarchy, who’s inside, who’s unworthy of trust and regard. We learn these words as children along with the thousands of nouns we carry around in our head to make sense of the world.

Here’s the good news: we use these ugly words because we are social. It is so important to our survival to belong to the group. There is no way to survive without

our interhuman connections. We value and need connection so much that we live in constant fear of disconnection and this governs our psyches, driving us to call those who are different not us, not human. The hate monger needs so desperately to belong that any incursion by outsiders threatens his survival sense, so he picks up the phone and makes that call to the person who's not supposed to be there and whispers an epithet and hangs up. The same impulse that drives the fear could also turn the hate around if we could just learn that we need each other so much that we cannot afford to hate. If we could learn this we could lay down not only the epithets, we could lay down our guns.

Here's the bad news: we are so far from learning this truth that people who speak of peace are called dreamers. I digress, but not further than I intend to, because the small question of what to do about hate speech is part of the big question about the human condition, about our social structures, about our chances for survival. We have learned in this season something we might have already known if we had been paying attention – there are people out there that hate Americans so much they would like to kill us. We learned what it was like to be a target of such hate. It doesn't happen without speech. It doesn't happen without ideology. Human beings don't kill one another for sport. I have enough faith in human nature to proclaim that as a fact. Humans who harm humans operate from a world view under which the harm is valorized. This is why I take speech seriously. It forms the social world that makes harm possible. There is no genocide without supporting propaganda. There is no rape without misogyny; there is no gay bashing without homophobia. There is no lynching without the "N" word. This is not a poem; I mean it as a statement of fact. Without the language that says "this is not a person." It is typically not possible for human beings to harm other human beings. We aren't made that way. We require justification and dehumanizing myths before our hands can lift a baseball bat and bring it down full force on another human being.

My father was interned at Heart Mountain, Wyoming. This was during World War II. He was a United States citizen born in Los Angeles, so loyal to the United States that he volunteered for combat duty from behind barbed wire. A relentless wave of propaganda made it possible to treat citizens like my dad as the enemy, to lock him up with machine gun towers facing in toward the tarpaper shacks where my grandmother waited, with a star hung in the window, for her son to come home alive, from Anzio, from Monte Cassino, from the places where the Japanese Ameri-

can 100th infantry battalion suffered record casualties. Every member of my father's squad, except himself, died in that war. He's the only one who made it home to his mother, who waited behind barbed wire. Do you know the word that made the internment of Japanese Americans possible? J-A-P. It meant, "not us," not someone we could ever trust. So I must confess to you that I do not come to this debate about hate speech from a neutral place but rather from an experience that tells me words have tremendous power to do harm.

Respect for words also fuels the traditional civil libertarian position. Words are the means of democracy. They must remain free and unrestrained. I am a civil libertarian, a dues-paying member of the ACLU for over 20 years, and I agree that the First Amendment is central to a free and democratic United States. I thus work from a precarious place and I need to be in dialogue with everyone in this room to do that work. I start as a constitutionalist. I do not want to live in a world ungoverned by the peaceable processes that we are entitled to as Americans. It's called the rule of law and if you've ever been to a place in the world where it is absent, it's not something you will discount.

Our constitution embraces a theory of democracy. The people are sovereign, the people must speak, disagree, persuade, argue, examine and reexamine in the search to answers to questions such as "Should we wage a preemptive war against Iraq?" For democracy to go to war without debate is a shocking thing. The more momentous the consequences, the more imperative that our choices withstand public scrutiny. We do this together as a nation. As one of my fellow citizens in DC said during one of the weeks when people were filling the streets in demonstrations, "I think they're wrong, but I'm glad they're marching. I wouldn't want us to go to war without a lot of people raising questions about whether we're doing the right thing." Democracy requires this and speech is democracy's prerequisite. We also need everyone's contributions, everyone's ideas. This goes back to Mills – the truth, the best course, the right idea could come from anywhere. We need all ideas in the conversation in order for the best ideas to rise up in the debate. Mills could not predict tonight's debate, since in his time the ideas that were considered the relevant ideas from the relevant people were such a small subset of the human experience. It would be judging him anachronistically or out of his historical period to say he should've predicted this, but we have a country that is deeply and richly diverse in ways that he could not anticipate.

In today's America if our goal is to have all participate in the process of democ-

racy, and this all is a great unwieldy and divided mass of all, we are impeded by vast chasms of inequality. I see inequality as a barrier to the very goals that are the genesis of the First Amendment. If people are not heard because structures of racism or sexism or homophobia or poverty make it hard for them to project their voices into the national conversation, we do not have all the ideas we need in the marketplace.

If people do not participate because they lack the means, the education, the access to effective self-governance, we have a weakened democracy. Equality promotes speech, inequality limits it. This makes the response to hate speech a problem for democratic theory. The assault of hate speech affects speech in many ways. It reduces the quality of speech in the marketplace. Rather than robust exchange of ideas we have escalating explosions of hatred. It reduces the quantity of speech. People who are assaulted with hate speech become reluctant to speak out. And to the extent that hate speech reinforces limitations on opportunity, then the speech of people who have their opportunities limited loses volume in the conversation.

Let me explain this in less abstract terms by putting it in the university setting. I support limited restrictions on hate speech on campus because of what I've learned from students – their right to an education, their right to participation, is infringed when hate speech is considered free speech on college campuses. Their loss is also the community's loss—we hear less from them, obtain less in the currency of active and robust intellectual exchange. Students have told me their stories. A white woman walking to a moot court practice with a black partner in Texas had the word “n-i-g-g-e-r lover” yelled out at her from a passing car. A gay student discussing gay rights issues in a restaurant was approached by a stranger who demanded “are you a f-a-g?” Anti-gay epithets and a shoving match followed and that student tells me he's more careful now about what he'll say in public places. A Jewish student told of leaving her library carrel for a break and coming back to find that someone had drawn swastikas in the margin of her books and her notes. I've heard of the calls in the nights, the notes under the doors, the e-mails, the messages through campus mail, the ugly picture pasted on your door. The reaction of the recipient is “someone on this campus hates me for what I am. This person knows where I am, who I am – I'm not safe.” I have received these notes and calls myself, spewing venom, words of excrement, vicious hatred – all the words and images people can find to assault Asian women.

It is not true that words do not hurt. The anonymous note-writer chooses the target, selects words calculated to wound – this is the intent, this is the effect – and both the perpetrator and the victim know this. When you get one of these calls, you double lock the door, look over your shoulder, draw the drapes, think twice about whom you’ll talk to, whom you’ll associate with. When a campaign of harassment is particularly relentless, students have been forced to move out of the dorm, change majors, leave school, particularly on those campuses where the official policy is non-intervention with assaultive speech. Students have a job to do – they need to study, go to class, take notes, take that physics exam. We need to protect their right to do that job, not only because it is their right, but also to preserve the university’s most important function, as a center of critical inquiry. We need now more than ever for our students to ask hard and probing questions about race, to challenge one another, in order to prepare them for the problems of this beleaguered planet.

There are legions out there who are now convinced that we Americans are evil. We are educating the generation that will have to go out and solve that problem. Multiculturalism is not just a “do good, feel good” charge. We must learn something about differences, cultural conflict or we will not thrive as a nation. How will we run the classes, have the debates, encourage the hard conversations across great divides of ideology, experience and perspective if our campus is poisoned by hate? And if we can’t do that at the universities, how will we carry that necessary, intercultural conversation out into the world so that Americans can be seen as the people we are – not evil, not the enemy, not deserving of violent wrath. At Harvard Law School recently, a first-year student threw a verbal hand grenade – the “N” word – into an on-line torts discussion. This is a conversation-ending move. It made it much more difficult for black and white students to talk and work across racial lines in the predictable environment of animosity and distrust that followed. Those students were deprived of the opportunity to compare world views, to disagree, to knock heads on the topic of race and to do that in an atmosphere of mutual respect. I don’t want to argue that it would be easy to set up the rules of engagement for this kind of conversation, but I do suggest that we need rules.

Our speech in academic settings is already governed by a host of rules. Any lawyer in this audience can tell you that there are many things that I can’t say from this podium. I couldn’t pass off the words I’m saying as my own if I stole from an academic colleague and they were actually someone else’s – that’s plagiarism.

Similarly, I couldn't pass these words off as mine if they were copyrighted by someone else. I couldn't lie to you or perpetrate economic frauds or tell you I've got snake oil in my pocket that I could sell you that would cure cancer. I couldn't give out secrets that you could use to make money on the stock market. I couldn't make threats. I couldn't engage in obscene acts, although the ACLU would probably defend me if I did. I also couldn't, instead of talking about hate speech, start talking about astrology and visitors from outer space because I have an implicit, contractual agreement with this university that I will speak on the topic. All of these are ways in which we routinely, through law, restrain speech.

Universities are not neutral. Just as we have taken a position against plagiarism, we have taken a position on equality. When this value is in conflict with absolute free speech, we have to measure and weigh and construct careful limits incorporating legal devices such as due process, mens rea, that's the state of mind that would make it sufficient to have a violation, and careful statutory construction so that students are on notice of what kind of verbal assaults are prohibited. The work of discernment and limit setting is the work of the law. We have done this in the law of defamation, balancing the right of the speaker to express disparaging views about others with the right of the target to protect their reputation. In my view, we've not always cut that balance the right way, but we have not considered the fact that the lines are hard to draw a reason to declare open season on our citizens' good name. Under current law, racism, anti-Semitism, misogyny, homophobia, are not considered defamatory in the same way as calling a doctor a quack. I would like to see that change. My right to be known in my community as fully human is as important to me as my right to be known in my community as an honest lawyer.

Let me close by telling you that in speaking tonight I have no immediate hope that my view will prevail before this audience or in the law. What I would like instead is a recognition that debate on this topic is worth having and that the argument from equality and democratic theory is tenable. I know from having had the honor of sharing the stage with Professor Strossen before that she is going to make strong and persuasive arguments on the other side. Her arguments come from an absolutist's free speech tradition that I admire and respect. It echoes Justice Black, one of the most fascinating figures to have ever graced our high court. He was an absolutist. He would not have allowed suits even for defamation against flat out prevaricators who deliberately destroy the mental peace and reputation of their targets. You have to ad-

mire that level of commitment to the absolute protection of the First Amendment. I admire the work of Professor Strossen and her ACLU colleagues, particularly at a historical moment when fear is driving an abandonment of fundamental constitutional ideas such as habeas corpus and due process. It is for me a season of longing for the absolutist's allegiance to constitutional principle. No exceptions, ever, to the rights given in our foundational documents be it code orange, code red, or when bombs fall. As the Star Spangled Banner stood in the rocket's red glare, may our Bill of Rights stand in the season of fear. I am thus glad for the company of absolutists at this time even as my commitment to democracy suggests a different cut on the question of hate speech and equality.

Thank you.

The Dialogue

Nadine Strossen's remarks:

I feel as if I have the best of both worlds because I was absolutely entranced as an audience member, listening to that absolutely fascinating presentation, and now I also get to exercise my free speech rights!

I want to join my colleagues in thanking everybody who has made this evening so special. I am overwhelmed by the hospitality and by the large turnout of students. I'm honored to participate in this important forum named after such a distinguished jurist. The subtitle of tonight's dialogue refers to our country's "constitutional...commitment to...free and unfettered speech." No one has described that special commitment more eloquently than Judge Arlin Adams himself. In a 1973 opinion, he declared, "Freedom of ...expression occupies an exalted niche in the empyrean of personal liberties guaranteed by the Constitution."¹

Judge Adams also recognizes how controversial that generalization is when it comes to particular, problematic types of expression, such as hate speech. Accordingly, tonight's dialogue promotes the very type of robust exchange that Judge Adams has expressly celebrated. As he wrote in a 1984 decision:

Spirited exchanges are likely to arise over virtually any First Amendment issue, and...the very existence of those exchanges demonstrates the vitality and value of the Amendment's guarantees!²

I'm also glad to share the podium with my colleague Mari Matsuda, and that tonight's program is a dialogue – fostering thoughtful discussion between two human rights advocates who have mutual respect for each other – and who both respect BOTH sets of constitutional rights and values at stake: not only freedom of

speech, but also the equally important right to equality.

And, Mari, I would consider – forgive the first name; we’ve known each other for a long time – I would consider myself an absolutist on the right to equality every bit as much as I do the right to freedom of speech.

All of us who believe that all human beings are entitled to full and equal rights hate the diametrically different ideas conveyed by hate speech. And that’s another connotation of the term “hate speech” – I hate the ideas that it conveys.

But this hateful content does not justify suppressing such speech. To the contrary, as former Supreme Court Justice Oliver Wendell Holmes famously explained, “[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is ...freedom for the thought that we hate.,³ This core speech-protective precept – of “viewpoint neutrality” – has been hailed by the Supreme Court as “the bedrock principle” underlying our cherished First Amendment freedoms.

It means that the government may never bar speech just because of disagreement with – or repugnance at – the viewpoint it conveys. That’s what distinguishes the hate speech exception from all of those other free speech exception that Mari laid out, under which speech is restricted for completely different reasons such as copyright violation, violation of privacy or trade secrets, and so forth. None of these exceptions is based on disagreement with or disapproval of the idea or the viewpoint that the speech conveys.

Government may restrict speech only if necessary to prevent a clear and present danger of actual or imminent harm to some important interest, such as personal privacy or property rights. Examples of speech that can and should be sanctioned within this speech-protective framework, beyond the examples that Mari gave, include: threats of violence; targeted verbal harassment, focused on one individual or a small group; and intentional incitement of imminent violent or illegal conduct.

I singled out those exceptions because it’s important to note that many disturbing incidents involving hate speech, including some that Mari recited, do fit within these parameters, and therefore constitute torts or so-called “hate crimes” for example, assaults where the victim is intentionally selected for discriminatory reasons. As the ACLU has argued and the Supreme Court has held, there is no First

Amendment problem with punishing such wrongful conduct. Illegal actions are not immunized just because they involve some expression. First Amendment problems arise only from efforts to go beyond these existing concepts and to punish expression itself—because of the adverse psychic or emotional impact of its ideas.

I wholeheartedly agree with Professor Matsuda and her co-authors that “words” do, indeed, wound – and I speak from personal experience here too, involving anti-Semitic epithets that deeply wounded my own spirit. Mari, as you were giving examples of hate speech that has targeted various minority groups, I was thinking that I and the ACLU are regularly subject to hate speech because we defend the freedom of all of those groups. It’s not only members of the groups themselves who bear the brunt of epithets, but also those of us who defend their rights, and stand up for their humanity.

One especially painful example occurred within my very own law school community. Right after the September 11 terrorist attacks on the World Trade Center—just eight blocks from New York Law School- I had hate mail, hate speech taped to my door. It necessarily came from members of the New York Law School community—students, faculty, or staff – since at that point, they were the only ones who had access to the building. These hateful messages attacked me and the ACLU for defending rights of Muslim and Arab immigrants since, according to the hate mail, they are all terrorists. So I do have plenty of personal experience with hate speech. I know that words do, in fact, wound.

The reason we don’t let government suppress speech in light of these psychic or emotional harms is that, to quote an old saying, “The cure is worse than the disease.” Both for society as a whole and for individual citizens, having to hear upsetting and offensive expression is the lesser of two evils. Far worse would be empowering the government, or a majority of our fellow citizens, to take away from us our freedom to make our own decisions about what we say and what we see or hear.

Throughout the ACLU’s 83-year history, our signature mission has been to neutrally defend all fundamental freedoms for all people. Accordingly, we have always defended the right to engage in any expression that doesn’t constitute a clear and present danger, including hate speech.

And please note that one person’s hate speech is another person’s cry for justice. Throughout the ACLU’s extensive experience, we’ve often seen that a message

that has been deemed hateful in one time and place is diametrically opposite from a message that has been deemed hateful in another time and place. Let me illustrate this with a pair of cases that the ACLU handled in different places within the very same metropolitan area – Chicago – at the very same time – about a quarter century ago.

It is well known that, at this time, the ACLU defended the free speech rights of neo-Nazis to bring their message of white supremacy to the streets of Skokie, Illinois, with its large population of Jews and Holocaust survivors – where their expression was seen as hateful, threatening, and disruptive.

It's not nearly as well known, though, that shortly before this – relying on the same robust First Amendment principles – we also defended the free speech rights of civil rights activist Dick Gregory and his supporters to bring their message protesting Mayor Daly's policies on race issues – which the protestors attacked as entrenching white supremacy – to the streets of white, ethnic, working class city neighborhoods – where their expression was seen as hateful, threatening, and disruptive. Thanks to the same time-honored viewpoint-neutrality principles, we won both cases.

Throughout the ACLU's history, we also have always championed equality for members of racial minorities and other disempowered groups. To cite one fairly recent example, about half a dozen years ago, working with a coalition of civil rights groups, we spearheaded a campaign against racial profiling – which has been widely credited with raising widespread awareness of this pervasive problem, and making major inroads against it.

Since September 11, we have continued to lead the fight against the very same kinds of discriminatory injustices, also perpetrated against “the usual suspects.” The only difference is that now the major “crime” has shifted from “driving while black” to “flying while Middle Eastern or Muslim.”

Given the ACLU's historic and ongoing commitments to defending liberty and equality for all, about a dozen years ago, when Professor Matsuda and others made powerful arguments that hate speech threatened equality, including on our nation's campuses, we undertook a critical re-examination of our established hate speech position. However, based on that analysis, the ACLU resoundingly reaffirmed our traditional speech-protective position. We did so not because we elevate free speech rights above equality rights-but rather, because we concluded that censoring hate speech would not in fact foster equality.⁴

This point is worth stressing. Mari and I, and those of you in the audience, may have different points of view as to whether that assessment is correct as a factual matter. But it is not a disagreement over principles here; it is a disagreement about how to promote those principles most effectively.

The ACLU's conclusion on this point – that censoring hate speech does not, in fact, advance equality – this was also the conclusion of the 1995 book that I co-authored on this topic.⁵ It is a collection of essays, including several by leading members of minority groups and advocates of their rights – for example, Henry Louis (Skip) Gates, chair of the Afro-American Studies Department at Harvard. Every essay concludes that censoring hate speech may well do more harm than good to the vitally important causes of promoting equality and combating discrimination.

Given our ongoing problems of discrimination and discriminatory violence, which Mari Matsuda has eloquently recited, I think it's tragic that so much energy has been spent on the most superficial manifestation of the deep-seated problems of racism and other prejudices: namely, a few words. I say –"a few," because even advocates of restricting hate speech recognize that we can and should punish – at most – only the most blatant, crudest expressions of bias; the more subtle, and hence more insidious, expressions will not be affected.

My co-author Skip Gates memorably made this point in our book. He wrote: In American society today, the real power commanded by racism is likely to vary inversely with the vulgarity with which it is expressed. ..Unfortunately, those who [advocate restrictions]...worry more about speech codes than coded speech.⁶

Instead of banning a few of the crudest, most superficial symptoms of discriminatory attitudes, we should turn to more effective, constructive measures to counter the root causes of such attitudes, as well as actual acts of discrimination and violence.

What I've already said summarizes not only my position – and the ACLU's –on the important questions posed for this forum – but also the position that the Supreme Court has consistently upheld, consonant with core First Amendment principles.

In my remaining time, I'd like to briefly elaborate on a couple key points – first, the vital free speech principles at stake. In recent years, the Supreme Court has steadfastly enforced the fundamental viewpoint-neutrality principle to protect speech that conveys ideas that are profoundly upsetting to many, if not most, of us;

for example, burning an American flag and burning a cross. So this core principle is firmly entrenched in American law. But it still meets a lot of public resistance, at least on first impression.

I can illustrate this through a story about my own beloved father. Based on the moving information that Mari shared with us about her father tonight, I realize that her father and mine had a lot in common, as I'll explain in a moment. My own father, who sadly died four years ago, would have been 81 years old today. After he retired, Dad moved to San Diego. About 15 years ago, I was invited to give a lecture there, following some well-publicized, ugly incidents of anti-Semitic and racist expression.

I was asked to explain why the ACLU defends free speech even for racist and religious bigots, and why we win those cases. My father came to hear my talk. Now, mind you, he was not a card-carrying ACLU member! But he still came because he had not heard me give a speech since my high school commencement address – which, incidentally, he also disagreed with! That was an anti-Vietnam War tirade.

Anyway, he listened very attentively. Afterwards, he came up to me and said, “I appreciate that excellent explanation of ACLU positions and constitutional law. I now understand that the ACLU is correctly interpreting the First Amendment. Thank you for making it clear to me that the problem is the First Amendment.”

The viewpoint-neutrality principle reflects the philosophy that the appropriate response to speech with which one disagrees in a free society is not censorship but counter speech – more speech, not less.⁷ Accordingly, the appropriate response to hate speech is not to censor it, but to answer it.

This counterspeech strategy is better than censorship not only in principled terms – and consistent with free speech values – but also in pragmatic terms – and consistent with equality values. That is because of the potentially empowering experience of responding to hate speech with counterspeech. I say “potentially,” because I realize that the pain, anger and other negative emotions experienced by individuals who are targets of hate speech could well have an incapacitating effect on some of them, preventing them from engaging in counterspeech – at least right away.

Even in such a situation, though, other members of the community can and should immediately engage in counterspeech, and that is likely to have a more positive impact than a censorial response. On a university campus, that counterspeech

should come from as many leaders and members of the campus community as possible – from the president on down. Once other community leaders and members denounce the hate speech, it should be easier for individuals targeted by that speech to join them in doing so. In the campus context, counterspeech transforms students who would otherwise be seen – and see themselves – largely as victims –into activists and reformers – indeed, leaders in their own right.

One excellent example of the effective, empowering use of counterspeech comes from Arizona State University. And I saw from your biographical write-up in tonight’s program that you went there as an undergraduate, Mari. Under the leadership of a law professor there, Charles Calleros, ASU rejected a proposed code that would have outlawed or punished hate speech. Instead, it adopted an educational or counterspeech response.

As a Latino, Charles Calleros is himself a member of a minority group and often has been on the receiving end of hate speech. But he always believed that stifling or punishing hate speech is no better for equality than it is for free speech. And, based on ASU’s actual experience with the non-censorial, more-speech response to hate speech, Professor Calleros holds these beliefs even more strongly.

Let me share with you his description of the first such experience on his campus, which is typical.

[F]our black women students...were understandably outraged when they noticed a racially degrading poster near the residence of a friend they were visiting in a campus dormitory. ...The students knocked on the door that displayed the racist poster and expressed their outrage in the strongest terms to the occupant who answered the door. ...He agreed that the poster was inappropriate [and] removed it. ...

[T]he four black women students then. ...set up a [meeting] for all residents of the dormitory. ...

[A] capacity crowd showed up The black women. .explained. .why the poster hurt them deeply. ...The Anglo-American students assured the black women that they did not share the stereotypes reflected in the poster, yet all agreed that they would benefit from learning more about other cultures. The group reached a consensus that they would support ASU’s Black History events and would work toward developing multicultural programming. ...The entire campus then poured its energy into similar efforts, including a peaceful protest of the poster. Within days, the ASU Faculty Senate passed a previously proposed diversity course requirement.....8

One of the students who led this constructive college-wide response was Rossie Turman, who was then chairman of the African-American Coalition at Arizona State University. In his words,

When you get a chance to swing at racism, and you do, you feel more confident about doing it the next time. It was a personal feeling of empowerment, that I don’t have to take that kind of stupidity. ...The sickest thing would have been if the racists had been kicked out, the university sued, and people were forced to defend these folks. It would have been a momentary victory, but we would have lost the war.

To paraphrase Rossie Turman, censoring hate speech is flawed not only from a free speech perspective; it's equally flawed from an equality perspective. For now, I only have time to list some of the most important reasons for this conclusion. If you want more, please buy the book. Yes that is a promo! I'd be delighted to elaborate on any during the discussion period.

Censoring hate speech increases attention to, and sympathy for, bigots. It drives bigoted expression and ideas underground, thus making response more difficult. It is inevitably enforced disproportionately against speech by and on behalf of members of minority groups. It reinforces paternalistic stereotypes about members of minority groups, suggesting that they need special protection from offensive speech. It increases resentment against members of minority groups, the presumed beneficiaries of the censorship.

Censoring hate speech undermines a mainstay of equal rights movements, which have always been especially dependent on a robust concept of free speech. An anti-hate-speech policy curbs candid intergroup dialogue concerning racism and other forms of bias, which is an essential precondition for reducing discrimination. Positive intergroup relations will more likely result from education, free discussion, and the airing of misunderstandings and insensitivity, rather than from legal battles; in contrast, anti-hate-speech rules will continue to generate litigation and other forms of controversy that increase intergroup tensions. Last but far from least, censorship is diversionary, making it easier to avoid coming to grips with less convenient and more expensive, but ultimately more meaningful, strategies for combating discrimination. Censoring discriminatory expression diverts us from the essential goals of eradicating discriminatory attitudes and conduct.

I should also note that the ACLU's policy opposing campus hate speech codes also lays out alternative responses, which we think have been demonstrably more effective than censorship. These range from vigorous affirmative action programs to multicultural educational offerings, to university leaders not only speaking out strongly and immediately against hateful messages, but also acting strongly and immediately to prevent and punish any discriminatory conduct. And the ACLU has energetically acted to promote these alternatives.

To cite one current, important example, we have been representing minority students and parents who are defending the embattled affirmative action program

at the University of Michigan, which will be the subject of historic Supreme Court arguments in less than two weeks.

In conclusion, I'd like to again cite my dear father, whose experience offers a very striking parallel to what Mari told us about her father. It also is an experience that arises from World War II. My father was in a concentration camp in Germany and ironically he was liberated by Americans. I say "ironically," because I now realize that your father, Mari, who was also in Germany at that critical time, could have liberated mine. Yet people in this country could not have liberated your father from an American concentration camp. I and my ACLU colleagues tried to do that, through the courts, but we failed, due to the Supreme Court's extreme deference to military authorities.

My father was born in Germany on today's date March 13 in 1922. As what the Nazis called a half-Jew, he was sent to the Buchenwald concentration camp where he narrowly escaped death. And so, from very similar experiences, Mari and I reach very different conclusions. I support free speech for Nazis and other anti-Semites not despite my background and my first-hand experience with the evils of anti-Semitism, but rather, precisely because of that fact.

I would like to close with two powerful statements explaining this perspective from two American Jews, both of whom like my father were persecuted in Nazi Germany in their youth but escaped to the United States. The first is the eminent constitutional scholar Gerald Gunther, who taught at Stanford Law School and strongly opposed the hate speech code that school adopted in 1990. Here is a portion of his powerful plea:

Lest it be said that I unduly slight the pain imposed by expressions of racial or religious hatred let me add that I have suffered that pain. I empathize with others who have, and I rest my deep belief in the principles of the First Amendment in part on my own experiences.

I received my elementary education in a public school in a very small town in Nazi Germany. I was subjected to vehement anti-Semitic remarks, from my teacher, my classmates and others. "Judensau" (Jew pig) was far from the harshest.

My own experiences certainly have not led me to be insensitive to the myriad pains offensive speech can and often does impose. But the lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes-difficult path of denouncing the bigots' hateful ideas with all my power yet at the same time challenging any community's attempt to suppress hateful ideas by force of law.⁹

The second statement, with which I'll close, comes from Aryeh Neier, who was the ACLU's executive director at the time we handled the controversial Skokie case. In his superb book about that case, he wrote:

The most frequently repeated line of all in the many letters about Skokie that I received was: "How can you, a Jew, defend freedom for Nazis?" ...The response I made most often began with a question: "How can I, a Jew, refuse to defend freedom, even for Nazis?" Because we Jews are uniquely vulnerable, I believe we can only win brief respite from persecution in a society in which encounters are settled by power. As a Jew, therefore, I want restraints placed on power. I want restraints which prohibit those in power from interfering with my right to speak, my right to publish, or my right to gather with others who also feel threatened. To defend myself, I must restrain power with freedom, even if the temporary beneficiaries are the enemies of freedom.¹⁰

Notes

1. Alderman v. Philadelphia Housing Authority, 496 F. 2d 164 (1973).
2. American Future Systems, Inc. v. Pennsylvania State University (1984).
3. U.S. v. Schwimmer, 279 U.S. 644, 655 (Holmes, J., dissenting).
4. See Free Speech and Bias on College Campuses, Policy Guide of the American Civil Liberties Union, at Policy No. 72a (adopted by the ACLU National Board of Directors, without dissent, on October 13, 1990).
5. See generally Henry Louis Gates et al., Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties (1994).
6. Id. at 47.
7. See, e.g., Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring): To courageous, self-reliant men, with confidence in the power of free and fearless reasoning. ...no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If 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.
8. Letter to the Editor, African-American Women Respond to Poster with Courage, Intelligence, State Press, Feb. 15, 1991, at 5.
9. Letter from Gerald Gunther to George Parker, chair of the Student Conduct Legislative Council, Stanford University (Mar. 10, 1989), reprinted in Stanford Univ. Campus Rep., Mar. 15, 1989, at 17.
10. Aryeh Neier, Defending My Enemy: American Nazis, The Skokie Case, and the Risks of Freedom 4-5 (1979).