Questions and Answers

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QUESTIONS AND ANSWERS

Ms. SMABY: Professor Farber, let me begin with you. Let us assume that R.A.V. lived on a university campus. What sort of First Amendment issues are raised in light of the "special obligations and powers of a university?"

PROFESSOR FARBER: I like teaching better because I get to ask the questions; other people have to answer them.

The Supreme Court has created a special set of rules about regulation of speech on government property under which what the government can do depends on what kind of property it is and what its other uses are. So one thing to think about here would be the nature of the property that is being used. This is presumably not an area which is set aside for speech purposes—not an area that's commonly used like a public park or some place else for speeches and demonstrations—and that gives the government a lot of additional leeway. Actually, I worked on an amicus brief with the ACLU arguing that that set of rules doesn't make any sense, but those are the rules right now.

There also may be some rules—although I don't think the Court has ever really dealt with this landlord-tenant situation—which give special powers to the government in connection with its own employees because the government has the right to make sure that its offices work and that the business gets done. Similarly, within high schools, the school's obligation to keep the educational process going gives it more power to regulate speech within the school than it has outside.

I think you can make a similar argument about the landlord-tenant relationship; the school has the ability to ensure that its tenants don't harass each other or disrupt each others' lives. So it's very hard to say exactly what the lines would be because clearly the First Amendment just doesn't disappear within the dorm. I think the government probably would have more leeway.

PROFESSOR JONES: In Doe v. Michigan, the district court considered a plan that embraced a three-zone notion with differ-

ent speech rules in each of the different zones. One would be the residential area where students lived. Another would be the educational facilities, the classrooms, the libraries, and so on. And the third would be the general campus areas. The court suggested that its plan was a rational way of dividing up the campus. It has many interests, it has many different functions taking place. The district court did not reach the question whether that division of the campus made any sense. Do you think that it makes sense or not?

PROFESSOR FARBER: Yes, I think so. I think something along those lines does make sense. Not necessarily what was specifically done in that case, but it seems to me that there are common-sense differences between saying something in a class that somebody else doesn't want to hear and breaking into their dorm room and saying the same thing. I think that in all these situations, we still have to keep in mind the value of free speech, and so there can be some difficult problems about how far to go in these different situations. But it seems to me that it does make sense to consider some of those factual contexts.

Ms. SMABY: Michael Sandberg, I'd like you to respond to a statement from an editorial in the Chicago Tribune. They wrote, "The danger in singling out specific symbols or expressions, no matter how odious they are, is that the list only grows longer as political and social tides turn."

MR. SANDBERG: I think that the editorial correctly recognizes that speech-based or expression-based prohibitions very likely will have that result. The uses of the campus conduct codes at issue in the University of Michigan case were, in some cases, overwhelmingly political. They had little to do with conduct that was genuinely disruptive of campus operations.

The difference between that kind of approach—it's hate regulation but it's an upside down regulation where you start with the hate and then take a few examples and outlaw those, which is really what the St. Paul ordinance does—is problematic from the inception. That is why we have started with the crime and then added the penalty when the crime is proven to have been motivated by hate. There's a cross burning prosecution that reached the Eighth Circuit, the federal circuit court of appeals governing the area. United States v. Lee, involved a cross burn-

ing adjacent to an apartment building, and the facts at trial showed that it was directed for racist reasons at an African American family that moved into that building. And there, the language of the statute talks not about arousing anger or alarm or resentment, but rather about conduct that will result in injury, oppression, a threat, or intimidation of a person or a group of persons in the exercise of federally protected rights, such as the right to vote, the right to occupy a dwelling, and the right to have a fair trial and a jury trial. Taking criminal conduct at the core will avoid most of, but not all of, the discussion about First Amendment issues and problems. Because we will be focusing on things that we all agree are examples of breaking the law. Lots of things that could theoretically be prosecuted by a prosecutor who is unlike the one currently in office would be things that none of us in the room would believe break the law.

Ms. SMABY: Mr. Foley, why did you prosecute under the ordinance rather than under, for example, the arson statute?

MR. FOLEY: We did charge under the assault statute and that count is still pending until the resolution of the United States Supreme Court case.

But I'd like to get back to looking at the difference between what is speech and what is conduct. In this particular case, this was conduct that violated the fighting words standard as adopted by the Minnesota Supreme Court. The Minnesota Supreme Court doesn't outlaw all cross burnings or all offensive speech or conduct. It clearly says: "The challenged St. Paul ordinance does not on its face assume that any cross burning, irrespective of the particular context in which it occurs, is subject to prosecution. Rather, the ordinance censors only those displays that one knows or should know amount to fighting words. Conduct that itself inflicts injury or tends to incite an immediate violence."

That's what we're talking about in this case. This is conduct that was targeted at a particular African American family and directly caused fear, intimidation, threats, and coercion. You have to look at the context—the placing of a cross in the fenced yard of the only African-American family in the neighborhood in the middle of the night where they cannot retreat. The family didn't ask for them to come into their own yard; they're a captive audience. That is a direct threat to those indi-
viduals. If they wanted to give a political speech or stand at the state capitol and burn a cross, as offensive as that might be, it would not be illegal under the Minnesota Supreme Court's interpretation. This is conduct and not speech.

Ms. SMABY: There seems to be more agreement among the panel members about the appropriateness of such an ordinance if hate speech is targeted. And yet you argue that regulating targeted speech is not appropriate?

Professor STROSSEN: As I said at the outset, I think there is widespread agreement on this panel that the underlying conduct was appropriately subject to prosecution under a number of laws, and that, as written, the St. Paul ordinance under which it was prosecuted is unconstitutionally overbroad.

The ACLU disagrees with the Minnesota Supreme Court's attempt to rewrite the ordinance simply to incorporate, in very conclusory ways, U.S. Supreme Court doctrines. That "interpretation" departs so radically from what the St. Paul City Council did. And so, for reasons of democratic governance, it's appropriate to have an elected governmental body decide how to rewrite the statute.

But—more importantly, perhaps, from a constitutional law point of view—there is a serious free speech problem with the ordinance even as rewritten by the Minnesota Supreme Court: the problem of vagueness. A reasonable person looking at the law and looking at the Supreme Court's revision of the law has no clear notice as to exactly what is prohibited. You cannot simply view this conclusory legal label "fighting words," as to which reams have been written, and determine exactly what it means. Likewise with the incitement test. Therefore, we think it has to be rewritten even more specifically. And what's interesting to me is that, as I understand Mr. Foley, he probably would agree with our suggestions about how it should be rewritten. So why not say that in black and white? Give clear notice to all people who are subject to prosecution under that the statute. Don't use conclusory labels such as "fighting words," but talk about the specific indicia that we seem to agree on: that it's targeted at a specific individual, that there is actual intent, and that there is a reasonable fear of violence.

Ms. SMABY: Do you agree?

Mr. FOLEY: I think even the American Civil Liberties Union is on record as supporting the concept of fighting words as it
applies to college speech codes. So if you talk about a direct targeted threat against an individual, yes, that is criminal conduct and that’s what this ordinance says. You can’t read the ordinance, unfortunately, as written. You have to read it as interpreted after the judicial construction. So we are arguing fighting words; this is a fighting words case. The Supreme Court hopefully will give us some guidance in how to define the type of legislative codes we’re talking about. I agreed with Ed Cleary that, as written, it’s very vague and overbroad. But as narrowed, it is very constitutional and applies only to targeted conduct that is a direct threat against an individual.

Mr. Cleary: The response that Tom has just made, I think, is a mistake. Tom is incorporating the attempt to threaten and the intent to intimidate into the law, and that isn’t what the fighting words doctrine says. Actually, I challenge anyone to tell me what it really says. In any case, it’s out there, and when you resort to it in the context of this law, as Nadine has just said, you openly invite selective enforcement of the law because of its vagueness. And you’re again going to have problems with community standards as to when such a law should be enforced. If you take fighting words and you incorporate it into a political law like this, good luck.

Ms. Smaby: Mr. Cleary, why isn’t the First Amendment implicated when an accused is given an enhanced penalty for committing an underlying criminal offense with a hateful motive?

Mr. Cleary: That’s actually very interesting. We could have another debate about that.

I have some problems with the enhancement laws. I did not choose to challenge this one because it requires different constitutional scrutiny, and I didn’t feel that the Court was ready to accept certiorari on that. I do have problems, as Michael and I talked earlier about, with some of the aspects of biased enhancement laws because I think, again, you have some vagueness problems when you say someone has assaulted someone or threatened someone “by reason of,” or “because of,” their race, religion, or gender. Where do you draw the line as to how far back you go into their past, their friendships, or the literature they’ve read? The cases we usually hear about are the ones on the street where someone has uttered really ugly racial epithets, so we know the conduct is probably ra-
cially based. But the law isn’t limited to those situations. The law leaves it open as to how far back you’re going to go into their feelings on religion or race or gender, and that opens up some pretty questionable areas.

It’s also rather vague in terms of who’s going to enforce that law. I think the experience—and I think Nadine would agree with me—with these laws is that they are very often are turned around on the very groups that seek their protection. She made that point earlier today, and that’s true. That’s been true with student speech codes as well.

Ms. SMABY: I had an opportunity to briefly review a summary of the 1992 crime bill passed by the Minnesota Legislature. I believe there was a provision in there with respect to hate crimes. I think that the provision was that a law enforcement officer can no longer determine on his or her own whether a hate crime has been committed, but rather must forward to the prosecution the victim’s assessment of whether that crime was motivated by hate. Now what kinds of questions does that raise in all of this?

MR. CLEARY: They’re obviously trying to get away from the police determination as to whether it’s a race issue or a religion issue, etc. out of a suspicion that the police may be insensitive to claims of bias. I think there are minorities present here who would agree with me that for very good reasons they don’t always trust the police, and they may not give them the assessment that they’re looking for, particularly in the ambiguous area of certain hate crimes. And it also raises the issue, as far as I’m concerned, with areas like religion and gender. Are we going to start having prima facie cases if it’s a Jewish victim and a Catholic assailant? Are we going to guess as to whether or not the crime was related to religion? What kind of evidence is necessary to bring it to a hate crime status? If we take that determination out of the hands of the police, which may be a smart thing to do, we’re still going to have the problem with the victim doing the assessment. My guess is that the people who are going to feel empowered enough to tell the police they are bias victims are not going to be the people for whom these laws were created.

MR. SANDBERG: A couple of points. I spend a lot of time now with law enforcement professionals who are training officers on new laws. Most, if not all, of these hate crime statutes
are basically new laws, and they require of law enforcement something that the ordinary underlying investigation of a criminal offense, like an assault or a battery, does not require. To investigate an assault, I don’t really need to know anything about why A has assaulted B. I really don’t need to know why. To determine whether a hate crime has been committed, I really do need to know why. I need to know about statements made by the perpetrator during the time surrounding the incident, whether they are in writing or out loud, about the kinds of other evidence that would suggest a particular intent on the part of a perpetrator. There are questions that law enforcement officials usually don’t have to ask. They do have to ask them in this area. One of the most difficult things that we’ve encountered in large and small police departments is trying to ensure that the questions are asked in a way that’s designed to get at the information.

I have one example, if I may, in the case of the victimization of someone by virtue of sexual orientation. While our statistics are disturbing in anti-Semitic incidents, organizations such as National Gay and Lesbian Task Force, who have begun to attempt to monitor instances of harassment and assault against gay and lesbian victims, suggest that the growth is geometric in those kinds of incidents, partly because they are only newly being reported and partly because they are truly on the increase.

Suppose you are a law enforcement officer and encounter a man who is on the ground just a few feet away from a bar or establishment that you know, because you patrol that beat, has historically catered to a gay male clientele. Do you walk up to the person who is lying there on the ground and injured and say, “All right, we’ve got to get a report going on this. Listen: who hit you, and do you think that he hit you because you’re gay?” Number one, that may be taken by the victim as yet a second victimization. Many cities and states don’t have human rights statutes that offer protection for housing, employment, and public accommodation—a very separate discussion. Some do. Very few do. No federal law does. So a person whose sexual orientation up to that time has been his or her own business may now be confronted by a law enforcement officer who might not be showing much in the way of interest or concern or sympathy but has a report to fill out.

We’ve suggested that the questioning can proceed. There’s no magic answer to this. You may need to confront that victim
and say, "Let's try to get some information so that we can catch whoever did this to you," and start in on the questions and at some point during the questioning say, "We've had some reports at the police department of some instances of gay bashing in this area that we, as a department, plan to address very seriously." And then you can move on to whatever the next question is. If you've made a statement as a potential advocate of this victim, the person might open up to you. In the case of victims who have been targeted by virtue of religion or race, that reluctance is not there to the same extent, with the exception of some new immigrant communities where, again, trust in law enforcement is either nonexistent or at low levels.

We've told law enforcement audiences—at least I have—that in the hate crimes area, they're in a very high risk, very high reward field. The risks are obvious. With new reporting requirements, you don't want to say, "Well, we had three in Minnesota last year," only to have a multitude of civil rights organizations and others who attempt to monitor this say there were 373. Where were you on the other 370? You risk a troop of people marching to the chief's office or the mayor's office saying that law enforcement is unprofessional or inappropriate. These are serious risks. You risk media coverage, some of it very responsible, some of it hyped up and less responsible. But the rewards are there too because we found that when hate crimes are dealt with professionally and seriously, new friendships can emerge in minority communities with law enforcement where they previously had very chilly relationships.

Ms. SMABY: Let me move to Professor Jones and Professor Winer with the next question. How do you respond to the assertion that the hate crime laws, whether constitutional or not, are simply ineffective?

PROFESSOR JONES: I think what we are experiencing in our society is a rise in fear and a rise in hatred and the expression of hatred. That has very, very deep and profound roots in the culture. And law is not going to be the end-all answer to curbing this kind of activity. But I think that one thing we have to rely upon is the use of criminal law to establish a standard, a principle of behavior or conduct which serves as a deterrent to most people who are willing to conform their behavior to the norms of the law. Now that's something that I think is very important. I think that's something that we really simply have to trust.
Professor Strossen: If I can interject something: I think one problem we have is that all the laws on the books that would already prohibit assault and these various other crimes are not being zealously enforced with respect to minority groups, including African Americans and gay men. A lot of the problems would be solved if we could simply vigorously and neutrally enforce the existing laws.

Mr. Sandberg: But we can't and we won't because I don't expect that kind of police attention. I'll use an example that I frequently use: somebody sprays on my garage, "Laimbeer was right; Bulls will be eliminated." I'm a Chicago Bulls fan. I was before Michael Jordan joined the team. This is blasphemous, to borrow from Ed's opening remarks. But I don't really expect, and probably shouldn't expect, police to canvas my neighborhood to see whether neighbors might have been awake between two and five a.m. when this is likely to have happened. I don't expect the police to turn a community upside down or inside out to dig into the roots of what is criminal to be sure, but really a prank.

If my garage door says "Hitler was right; Jews will be eliminated," I'm going to expect a different kind of law enforcement and community attention and support. And I'm hopeful that I'll get it. But I really ought to have the statutory equipment that ensures that I will get it. I ought not leave that to chance. And I'll tell you, initial indications are that victims are beginning to get the kind of law enforcement support and attention that they deserve. These things are not being treated as jokes or pranks. They are being treated as the serious crimes that they are. Under preexisting law, the Laimbeer spraying and the Hitler spraying were the very same crime: misdemeanor criminal damage to property. I live in Chicago, we have however many million people there, and I will tell you the result when we go to court, even if somebody is caught at the end of the Laimbeer spray painting, everybody will go back home. No one will have any other place to report to other than home.

Mr. Foley: If I might just say that the harm being done when you say "all Jews will be eliminated" isn't only to that individual; the harm is done to the whole minority population to which that individual belongs. The whole community suffers as a result of these targeted crimes. So we have to pass legislation which addresses the harm and injury done to these...
individuals and to the community and the minority populations that they represent.

**Professor Winer:** On the question of effectiveness, your view depends on your view of the intended effect of the statute. There are, I think, at least three rationales that legislatures can use. I'm not going to sit here and argue that every state should pass a hate crimes statute. What I will say is that there are rational, responsible bases that a state legislature can have for doing so. And you've heard some of them alluded to, and let me list them—another thing that lawyers do.

The first possible rationale is that there should be greater punishment to take account of the greater injury. Remember that when a person is a victim of a hate crime—say a battery that's a hate crime—the mere offensive touching is not the only injury that's taken place. There's been a substantial psychological injury, too. And the law does, in many contexts, notice psychological harm. Harassment laws are an example of that. So the injury is greater to the individual than the mere criminal act itself.

Secondly, the injury is greater to the individual's community than to the individual. Lynching is a classic example of that. The person who is hanged is not the only victim of a lynching. That's the second rationale.

The third rationale is that, unfortunately in this society, as Mr. Abrams indicated, there is a lot of bigotry out there. A lot of multidimensional bigotry. And you can view that as being an extra impetus, an extra motivation to commit this particular kind of crime. If there's the extra motivation to commit that particular kind of crime, the theory can be that you need an extra degree of deterrent to counteract that extra degree of impetus.

So there are three distinct reasons why a competent, rational, responsible legislature might want to pass a hate crime law. There are already statutes on the books against harassment and assault and battery, as I've indicated. Those kinds of laws will spark symposia such as this, potential victims will become aware of their rights, and law enforcement officers will become aware of what is expected of them. You have those effects as well as the strictly legal effects.

**Professor Jones:** I agree with the distinctions that Professor Farber drew earlier. One reason why I would not like to
see the Supreme Court remand the case to the St. Paul city council to rewrite the statute is because drawing a statute that deals effectively with this particular kind of harm is a problem that should be entrusted to a very small number of very, very highly specialized experts in constitutional adjudication, which is our Supreme Court of the United States, not a city council.

I think the Supreme Court is probably going to say, "What we're really dealing with, or must deal with, is not offensiveness but harm." And there's a real distinction to be drawn, and one thing that lawyers like to do is define things. A moral philosopher, Joel Feinberg, defines harm as a setback to interests. Now that's a very simple definition, but I think to some extent it's what some of us have been alluding to. What sort of harm are we talking about? Obviously, those interests that are legally protected would be included. We would all agree that a communication with that effect would be subject to criminal proscription. If it is an invasion of one's psyche and it causes predictable harm, or measurable harm, it would seem to me that we're saying that the law ought to reach that kind of a situation. So I think that the Supreme Court can do that, and I think that the obligation on it now is to do that very precisely so that when other legislators and city councils draft these kinds of statutes, they know a little bit more about what they're doing.

Ms. Smaby: You would like the U.S. Supreme Court to do that, but our next question is: Why not abolish all speech and let the Minnesota Supreme Court decide how much is allowable or prohibited? Are you comfortable with that?

Professor Strossen: I think the question makes a very good point through an extreme example, one that is really only somewhat further along the continuum than the St. Paul ordinance at issue. Everybody, including Tom Foley, has acknowledged that we started with a law that is very overbroad. It banned, or purported to ban, much protected speech. It's analogous to the hypothetical posed by the question: St. Paul has banned a lot of speech that everybody agrees is protected and then asked the Minnesota Supreme Court to carve out a little area of protection within that. This approach is not appropriate in terms of free speech principles, and it's not appropriate in terms of democratic governance principles.

Mr. Foley: All speech is not protected. There are a number
of limitations on free speech. You can’t say, “I’m going to kill you” because it’s a direct threat. In the libel area and the pornography area, there’s speech and expression that is clearly limited. Protection for fighting words is very limited, and the Minnesota Supreme Court did an excellent job limiting the St. Paul ordinance to say, in this particular area, it is not protected.

Ms. SMABY: Mr. Abrams, I want to throw a question to you. Would the First Amendment allow the prohibition of first, the placement of an offensive object or sign on the property of a white homeowner by an African American or, second, placement of an offensive sign on the property of an African American if it targets a white person? Why or why not?

MR. ABRAMS: Clearly, there is no constitutional right to place anything on the private property of others without their consent. So I think that takes care of the first one. An African American would have no right to place an offensive sign on the private property of a white family.

Now as to whether or not an African American can place an offensive sign aimed at whites on his own property; maybe. And I think it may depend on what the sign says and what’s involved.

Earlier someone talked about the flag burning case. I wonder what would happen if someone targeted someone who served in World War II or Vietnam and was known to be very patriotic. And they thought the way to get that S.O.B., who is so patriotic, is to burn a flag in front of his door. If you target that person that way and say, “I’ve got the Supreme Court on my side, I can burn the American flag,” I may have some problems with that.

MR. SANDBERG: An interesting problem is that of a person or victim with a low threshold for pain caused by bigotry. Let’s go away from the flag because I think it raises another question. I’d like to address my question, which builds on that, to Professor Steenson. Your proposed civil remedy for verbal expression of bigotry, I take it, would certainly include completely non-criminal, non-prosecutable utterances of bigotry. That’s the verbal fist that in no way amounts to an assault. Is that correct?

PROFESSOR STEENSON: Yes, I would include conduct. I
would include conduct that’s not subject to criminal prosecution.

Mr. Sandberg: I think the eggshell-skull doctrine of tort law, which lawyers and law students are familiar with, says that we take our victim where we find him, infirmities and all. The civil remedies adopted by the model codes and state statutes basically provide a private right of action based on violation of the stated criminal law. They’re not as inclusive as your civil remedy would be. How do we handle the victim who comes to the table with a low threshold for tolerance of bigotry when it is directed at him or at her?

Professor Steenson: In lots of situations, it depends on the nature of the charge—whether it’s a racial epithet or whether the verbal attack is based on sexual orientation of the individual. The point is, in cases involving intentional infliction of emotional distress the gist of the claim is finding out what the weakness is and, in a sense, taking advantage of it. What is a peculiar susceptibility in this context?

I’m not suggesting that everyone who has a peculiar susceptibility or is unusually aggravated by certain sorts of conduct should have a claim for the intentional infliction of emotional distress. Those claims arise under circumstances where one individual recognizes a weakness in another individual and exploits it. It seems to me it can almost be done on a group basis. If we talk to each other a little bit more, we’d probably have a pretty good idea which buttons we could push on which people. Everybody has a certain threshold, a certain weakness, a certain susceptibility. And if you find it and exploit it, the person who is exploited certainly is going to have a claim for the intentional infliction of emotional distress.

It seems to me that it might operate on a broader basis. If you pick on someone because of the person’s sexual orientation and you know what it is and your intent is to inflict severe emotional distress through the use of loaded words, or if you pick on someone because of that person’s race, it’s quite clear that the person has a certain threshold and susceptibility. There are certain cultural biases, social biases, that exist. You use those words to exploit that bias. It seems to me that those sorts of claims are ready-made under circumstances where the exploiting individual knows about the susceptibility.

Ms. Smaby: Professor Jones, I’ll call on you in just a mo-
ment, but I want to do a quick follow up with Professor Steen-son. Under one of your proposed remedies, doesn’t that place the burden on the individual, the victim, to seek redress as op-posed to having Tom Foley charge up on a horse to pursue the cause in a criminal action. And if that is correct, then how ef-fective do you think your remedy would really be? How many individuals would be willing to come forth?

PROFESSOR STEENSON: I don’t know. I don’t know how ef-fective it’s going to be, but a civil remedy under the circum-stances can’t be less effective than the criminal remedy in the R.A.V. case. The individuals who were subjected to that action undoubtedly would have a claim, not only for trespassing and the consequent emotional distress, but probably for the inten-tional infliction of emotional distress. I’m not suggesting that it would be a panacea. It’s a remedy in addition to the criminal remedy. The two are not by any means mutually exclusive.

MS. SMABY: Professor Jones, do you have something to say?

PROFESSOR JONES: The problem I have with an exclusive re-liance upon intentional infliction of emotional distress, even as a standard to inform what “fighting words” means, is that it doesn’t address the magnitude of the harm. It addresses only one part of it, the injury to the individual. What’s important here is that the scope of the harm, if we look at it in the context of the R.A.V. case as it’s being duplicated around the country, is that these kinds of instances arise very often when African American families and couples are moving into formerly white neighborhoods. The violence is directed at them, in part, to resist their moving into those neighborhoods. It’s not person-ally targeted because of a particular dislike of the individual. It’s directed at them because of their race, their sexual orienta-tion, or some other kind of class identity which makes it a so-cial injury and therefore much more appropriate for criminal treatment than a tort remedy. Tort remedies obviously are helpful and useful, but I think the standard has to be a crimi-nally enforced standard.

MR. CLEARY: I actually have a question for the panel because of what I’ve been hearing here. Professor Jones and Professor Steenson, are you in favor of a return to the whole idea of group libel?

PROFESSOR JONES: That’s a great question, and I’d like to respond to it. It’s clear that the present Supreme Court, and
probably any Supreme Court that we could constitute in these times, would not decide *Beauharnais* the way it was decided. This is true largely because it made an assumption that certain kinds of expression are outside the scope of protection of the First Amendment. Now, I don't think that any of us, at least not I, would argue for the application of *Beauharnais* in that way. I think that the Supreme Court could profit from some of the things that Justice Frankfurter did in that case. For example, he took account of the fact that, in Illinois, there had been a large number of racial conflicts. Justice Frankfurter said the legislature could take that into account and pass that kind of criminal statute to redress that kind of injury.

What I'm suggesting is that there is a parallel in our society now that the Supreme Court can take judicial notice of the fact that what we're dealing with is not so much a problem of free speech but a problem of racial and ethnic conflict. It is something within the purview of the legislature to criminalize that kind of speech. And I think that the underlying premise of *Beauharnais*—that we have to take our value to a large extent from the groups with which we identify and by which we are identified—is very much applicable now.

**Professor Strossen:** Justice Frankfurter decided—incorrectly, in my view—that it is constitutional for the local government to punish group libel, because he deferred a great deal to local government units. He then went on, however, in dictum, to pointedly say that he really questioned the wisdom and the efficacy of this approach. It doesn't seem to me that it's something that is likely to be effective and, in fact, the history of Illinois' enforcement of that statute is completely consistent with the enforcement pattern of all similar statutes around the world throughout history. It was used disproportionately to target minority groups, including religious minority groups, and that is what ultimately persuaded the Illinois legislature to repeal the statute, even though the Supreme Court said they had the authority to keep it on the books.

**Professor Jones:** I think that was a very sad event in our history. I hope that the present Supreme Court does not articulate an opinion which causes state and local legislatures to duck these problems in the same way. It seems to me, if we

take some of the message of *Chaplinsky*\(^4\) into account, the alternative to taking the immediate infliction of harm into account as a basis for a criminal statute is that we must resort to self-help.

Now I went to interview the Jones family yesterday. And I talked to them at length as to what they experienced in the cross-burning affair. And I think they probably would not be upset by my telling you that their experience was what I would have experienced that day. Mr. Jones has a very beautiful family—a beautiful wife and five children. His natural inclination was to take a bat and go out and deal with the people who had threatened the security of his home. He restrained himself, in large part because he says that is irrational, and if he had done that, he would have engaged in the same kind of irrational behavior that he was subjected to.

It seems to me that if we do not have adequate legal enforcement of criminal statutes to protect the victims, then we'll have to take the law into our own hands and seek justice by acts of private vengeance. Then we'll have not more speech but an escalation of terror.

**MR. CLEARY:** The Jones family has consistently indicated that they were threatened and terrorized. I'm sure that's what they told you. There is a terroristic threats law available which could have addressed these facts in a tougher manner than this approach without implicating the First Amendment. I think we can address the victims' concerns through the criminal code in this fashion and still send a message to the community that such conduct will not be tolerated without leaving open what you leave open.

When you talk about group libel and *Beauharnais*, you discuss these ideas in terms of psychic injury or harm. I find that very frightening as a concept—that expression would be rated on the basis of whether or not it could harm or injure a group. That alone—if you think about race, religion, and gender—could silence political debate.

**PROFESSOR JONES:** I don’t see cross-burning as an invitation to debate. I don’t see wearing swastikas as an invitation to political debate. I’m suggesting to you that the harm here is not an attempt to communicate an expression of discomfort or

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dislike. If that were what we were talking about, I would com-
pletely agree with you that you cannot criminalize that.

I don’t think that you can criminalize expressions of facts,
values, opinions, and beliefs. But that’s not what we’re in-
volved with. This ordinance, it seems to me, can properly be
limited so that it’s talking about communications which are
harmful in the sense that they cause a definable injury. They
are situation-altering, you might say. They change relation-
ships between the communicator and communicatee in a way
that I think society should not permit. They are not intended
to invite the expression of beliefs in response. They intend to
provoke some kind of behavior from the victim, like leaving the
community they just arrived in or coming out and fighting to
protect their honor and dignity. And I think that’s very
distinguishable.

Ms. SMABY: Unfortunately, I need to bring this to a close,
though we still have some excellent questions up here. I hope,
if you all participate in the reception that will follow, you will
find one of these panel members and ask your question. We
do wish to end, however, by giving each of the panel members
anywhere from thirty to sixty seconds to give some sort of final
comment or concluding remark or final pitch. We will return
to the original order.

Mr. Foley, would you like to begin?

MR. FOLEY: The First Amendment was never intended to
protect an individual who burns a cross in the middle of the
night in the fenced yard of the only African American family in
the neighborhood. The City of St. Paul had the right to pro-
hibit and prosecute such conduct. The ordinance at issue in
this case has been interpreted by the Minnesota Supreme
Court to prohibit only conduct that inflicts injury, tends to in-
cite immediate breach of the peace, or provokes imminent law-
less action. I think the construction by the Minnesota Supreme
Court should be upheld and the law is valid. Thank you.

MR. CLEARY: I hope the United States Supreme Court finds
in favor of the petitioner. There, I used just ten seconds.

Ms. SMABY: Do you wish to predict?

Mr. Cleary: No, I don’t.

Professor Jones: We’re not always able to do what’s wise.
We very often are required to do what we feel is necessary. It
seems to me that in our present times it may be very necessary,
even though not as wise as we’d like, to prohibit certain kinds of behavior that really do inflict harm to try to stem the tide of rising hate in our society.

MR. SANDBERG: Hate crimes are akin to a cancer growing in the kind of America in which we want to live. Those few who will actually target law-abiding citizens for the commission of criminal acts by virtue of who they are, what race they belong to, their religion, their ethnicity, their sexual orientation—those are especially dangerous, corrosive criminals in our society. We’ve got to treat them that way. We’ve got to make clear that those who indulge themselves, whatever their biases or personal bigotries might be—we all have them—that those who translate them into criminal attacks have to pay a heavier, more serious price.

PROFESSOR STROSEN: I think I can do no better than to read to you the closing of the ACLU brief in this case:

It is tempting to say that the message conveyed by even the public burning of a cross during a political rally is so offensive, so hurtful, and so antithetical to the ideal of equality, that it ought to be subject to prohibition without the need for rigorous scrutiny of whether it crosses some First Amendment line from protected advocacy to unprotected threats or intimidation. The Constitution, however, does not tolerate such shortcuts.

At the same time, it would be wrong to ignore the undeniable fact that our history is replete with unfortunate incidents in which unpopular groups . . . were coerced into forfeiting their constitutional rights because of threats or intimidation that often went unremedied and, during more disgraceful periods, were tacitly condoned.

The task facing our nation is to promote the values of both free speech and equality without sacrificing either. . . . [T]hat goal has not been met by the St. Paul ordinance at issue in this case.5

PROFESSOR WINER: With respect to hate crime statutes as distinct from hate speech statutes, I think it might be a little unfair to criticize them for being ineffective to the extent you’re expecting them to eradicate bigotry. Nobody’s saying that if you pass a hate crime statute, then all bias and bigotry will go away. And if you say that there will still be bias and

bigotry after you pass one, I don’t think that’s an adequate argument against one.

You might say that hate crime statutes, as some people do, make bigotry worse by encouraging resentment. It’s not clear to me that the same argument couldn’t be made with respect to the Civil Rights Act of 1964, and that doesn’t mean that was a bad idea.

Mr. Abrams: I hope the City of St. Paul prevails in the Supreme Court, and then I hope that the Court writes an opinion that would allow us to understand and appreciate that the First Amendment is not the only amendment to the Constitution, that there are other amendments, and there are other rights involved. A nation does not survive by speech alone; there are other things.

Professor Steenson: I hope that the United States Supreme Court can reach the accommodation that Professor Strossen just mentioned by resort to the first prong of the Chaplinsky standard, the injury standard. With respect to the accommodation between free speech and equality, in my own mind I keep coming back to what Justice Blackmun said in Bakke. I’m using race to include other target groups. In order for race to be relevant in the future, it has to be a factor now.

Ms. Smaby: And finally, Professor Farber. Can you make sense of all of this?

Professor Farber: In thirty seconds, no. I mostly want to respond to, and not necessarily to disagree with, something Mr. Sandberg said about hate crime as a cancer in our society. I don’t think that’s quite right. I think it’s the underlying current of hatred and bias that’s the cancer. Hate crime is a symptom, maybe a symptom that we need to treat, but I wish we knew what to do about the underlying disease.

Ms. Smaby: Ladies and gentlemen, that must conclude this symposium. Please thank the members of our panel for us. Thank you all very much.
