



**SPEECH LIMITS IN PUBLIC LIFE:
AT THE INTERSECTION OF FREE SPEECH AND HATE**

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SESSION 2: Difficulties of Responding to Hate Speech on College and University Campuses

Introduction by Wayne Batchis, Associate Professor of Political Science and the Director of the Legal Studies Program, University of Delaware

PANELISTS Timothy Shiell, Professor of Philosophy, University of Wisconsin – Stout

Rodney Smolla, Dean of Widener Law School

Samantha Harris, Foundation for Individual Rights in Education (FIRE) Vice President of Policy Research

Keith Whittington, William Nelson Cromwell Professor of Politics, Princeton University

Transcript of Event

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UNIDENTIFIED: [Indiscernible.]

MR. BATCHIS: All right, why don't we get started. Am I; do I need to talk into this mike, ah, even though I have a mike on?

UNIDENTIFIED: [Indiscernible.]

MR. BATCHIS: Oh, hold this as well. Okay. Got you. All right, well, thank you all again for, for coming, um, out this morning. My name is Wayne Batchis, I'm a professor, associate professor of political science and the Director of the Legal Studies Program here at University of Delaware. I couldn't be more thrilled to be hosting, ah, moderating this, ah, phenomenal panel called Difficulties of Responding to Hate Speech on College and University Campuses. Let me just say a few words about our panelists. Ah, Rod Smolla, all the way on the left there, is the Dean of the Widener Delaware Law School. He is a former President of Furman University and Dean of Washington and Lee and the University of Richmond Law Schools. He's the author of multiple books, ah, and legal treatises on freedom of speech. He's argued First Amendment cases in many state and federal courts including the U.S. Supreme Court. He was lead counsel in one of the Supreme Court's major hate speech cases, a case I teach and probably a good number of us are familiar with Virginia v. Black. Um, that was a challenge to Virginia's cross burning law. He served as the constitutional law advisor to the Virginia Governor's Task Force investigating the events in Charlottesville and the University of Virginia in the summer of 2017. And, recently he finished a book, manuscript, exploring those events. Um, Samantha Harris, I'll go in this order and then we're going to, I think we're going to mix things up a little bit when



we, ah, when we, ah, start the conversation. Samantha Harris is an attorney with the Foundation for Individual Rights in Education, also known as FIRE. For more than 13 years she's advised students, faculty, administrators and attorneys on issues of free speech and due process on campus. She lectures regularly about student rights at campuses and conferences around the country and is a frequent op-ed contributor and radio and TV commentator on issues pertaining to students' rights. Ah, she's sitting next to Keith Whittington who also happened to be her professor at, at Princeton.

MS. HARRIS: [Laughter.]

AUDIENCE: [Laughter.]

MR. BATCHIS: Ah, Keith Whittington is the William Nelson Cromwell Professor of Political Science or Politics rather, ah, at Princeton University. His most recent books include *Speak Freely: Why Universities Must Defend Free Speech* and *Repugnant Laws and Judicial Review of Acts of Congress from the Founding to the Present*. He is currently completing two books: *Constitutional Crises – Real and Imagined*, and *The Idea of Democracy in America from the American Revolution to the Gilded Age*. Ah, and then finally we have, ah, Timothy Shiell who is a Professor of Philosophy and Director of the Free Speech and Civil Liberty Focus Center for the Study of Institutions and Innovation at the University of Wisconsin Stout. The Center funds events and activities at 22 public and private universities and colleges in the Wisconsin, Wisconsin network. His 1998 book, *Campus Hate Speech on Trial*, ah, went to a second edition in 2009 and *African Americans and the First Amendment* if forthcoming in September 2019. All right, well with, with that said, ah, why don't we begin, and I think we'll begin with, ah, ah, Dean Smolla.



MR. SMOLLA: Thanks very much. I think that you'll, um, see that my thoughts flow pretty naturally from the elegant discussion we just heard from Nadine Strossen and John Powell. You heard John, um, allude to the complexity of free speech law. Um, he talked about it not being one concept but many concepts. And as a lawyer that litigates these cases and a law professor that writes about them on an aider or abettor and that complexity for, for good or for evil, I contribute to it. And, just to illustrate I have, I write many, many legal treatises on civil rights and civil liberties issues and I have one on freedom of speech, it's multiple volumes, thousands of pages, 27 chapters and hundreds and hundreds of sections. And then I have a, a, another treatise on one little tiny area of free speech law, the law of defamation. You heard John Powell mention that. Its also got 27 chapters and hundreds of sections and so on. However, I'm going to, um, suggest that notwithstanding the doctrinal density of First Amendment law, which resembles tax law in its complexity, that you could if you wanted reduce all of American history's debate over the meaning of free speech and you could if you wanted distill all the discussion we have on our campuses about free speech to a contest between two elegant beautiful powerful ideas. But the two ideas are intention and I'm going to give them nicknames. Ah, I'm going to call one the order and morality theory of free speech and I'll call the other the marketplace theory. You heard John Powell warn against using these labels. But I'm just going to use them as nicknames for convenience and just talk a little bit about each of them generally and then in a context of our campuses. The order and morality theory which has been part of American thinking about free speech is at least 200 years old but its most famous moment came in a 1942 case called



Chaplinsky v. New Hampshire. Ah, Walter Chaplinsky was a Jehovah's Witness. He was preaching in a small town in New Hampshire. He was upsetting people because a lot of his statements seemed to be attacking others on the basis of their religious identity. The police officer was perfect. The police officer did just what you would want, didn't want to arrest Mr. Chaplinsky, just wanted him to chill and kind of defuse the situation, and said can you just kind of move on down the road. And, Walter Chaplinsky said no, I got a right to keep on talking. And, ultimately the police officer said, you know I'm going to have to remove you from the situation because we're going to have disorder. At which point he lost his temper. Now, there's a division in the record here. According to the government he said to the police officer, you're a God damned fascist and the whole city are God damned fascists. Mr. Chaplinsky says he did say fascist, but he didn't swear.

AUDIENCE: [Laughter.]

MR. SMOLLA: In any event, he takes his case to the Supreme Court of the United States and says I should have had a free speech right to do this. I shouldn't have been arrested. And my insult to the police and my insult to the mayor and so on wasn't enough to throw me in jail. And in one of the most beautiful, beautiful expositions of free speech ever written, ah, Justice Frank Murphy reduces the problem to one or two elegant sentences. He says there's certain kinds of speech that have never been protected under our constitution and he gives a list and it's, it's kind of a dumb list. He talks about the profane and the libelous and so on. The list is not what I want to talk about. But then he gives the theory as to why this speech shouldn't be protected and it's a beautiful theory. He says he's; he's going through this list



and he talks about a lot of these kinds of things. One of the famous examples is fighting words. And he says those are words which tend to result in immediate breach of peace or which by their very utterance inflict injury. And I've always been mesmerized by that second phrase. If you think back to what John Powell and Nadine were talking about, they were talking about this, this distinction between the punch in the nose, the, the speech which tends to inflict some sort of violence. And the idea that a, that words just by saying them can inflict injury. He then goes on in the next sentence, in one sentence, to lay out the whole theory. He says its been observed that these sorts of expression are no serious contribution to the exposition of ideas. Notice he's suggesting that free speech is about ideas. That's one important point. And, then he says and whatever slight contribution they might make to the discovery of truth that is outweighed by society's interest in order and morality. And what I love is if you think about that earlier part that I mentioned, the, the, the order connects with the breach of peace and the morality connects with the idea that some words inflict injury because they offend our values inherently, just the saying of them does it. The order and morality theory dominated American free speech law as late as 1952. And Nadine Strossen has talked about the famous Skokie case in Martin Luther King's marchers through Cicero. Ah, let me tell you about another famous Illinois free speech incident. In Chicago, my home town, a case called *Beauharnais v. Illinois*. And I want you to think about *Beauharnais* in the context of Charlottesville and all that we're been talking about. This was a racist group in Chicago called the White Circle League that was distributing vicious attacks on African Americans, that's not the word they used, throughout the southside of Chicago, a heavily African



American neighborhood, one of the great African American neighborhoods in the United States. It's where Michelle Obama grew up. And it happened that Illinois had a law making it a crime to disparage groups on the basis of their religion and their race. It wasn't a, a hate speech law. It was a criminal libel law. Mr. Beauharnais was the leader of this group. He was arrested. He was convicted for distributing racist leaflets. That's all he did. The Illinois Supreme Court affirmed his conviction and then it went to the Supreme Court of the United States where the Supreme Court of the United States said that Mr. Beauharnais' leaflets were not protected by the First Amendment. The opinion was written by Justice Felix Frankfurter, the only Jewish member of the Court at the time and he openly alluded to the Holocaust and the Third Reich and the possibility that racist speech can cause an entire society to degenerate into mass genocide. And then he said but Illinois didn't have to look to Germany, Illinois didn't have to look beyond it's borders, it had its own sad history of racism. And that it could decide that racist speech, and he was echoing and quoting Chaplinsky, not only had a tendency to create an immediate breach of peace but racist speech ate at the fabric of Illinois' values, ate at the fabric of society, ate at our sense of decency and inclusion and equality in a way that undermined the very social morality, not just order, but morality. So that was 1952, Beauharnais v. Illinois. At that point in American history the order and morality theory had its ascendancy. And then in the 1960s everything changed, and Nadine Strossen and John Powell and I remember the 1960s and how everything changed. And, among the things that changed was a lot of our constitutional law flipped upside down including our conceptions of free speech law. And a theory that had been a loser for the last 150 years



suddenly gained dominance. And, we heard John Powell mention the marketplace theory and the worries about being too glib using these theories, I, I won't try to, I'll try to be quick and but not glib. This is a theory that we tend to associate with Justices Holmes and Brandeis. Justice Holmes was a late comer to this. His early opinions on the Supreme Judicial Court of Massachusetts and his early opinions on the Supreme Court were very anti-free speech but in one of the most famous passages in the history of our constitutional law in a dissenting opinion in *Abrams v. United States* he articulated the marketplace theory where he said we have to tolerate speech that we loathe and believe fraught with death – I mean those are powerful words – unless an immediate check is necessary to save the country. I mean that's powerful, powerful language. And then Justice Brandeis would later reinforce it with a little more analytic rigor, particularly in a famous case called *Whitney v. California*, where he talked about the dangers of submitting to fear. He said, men feared women and burnt witches. And he talked about how we don't want our law built on paranoia. And he also introduced what I like to think of as the Kudzu theory, having spent a lot of time in the south [laughter] –

AUDIENCE: [Laughter.]

MR. SMOLLA: Kudzu is this weed that grows everywhere and the last thing you ever want to try to do is whack it down at the top because it just gets stronger. And the idea was that when you suppress hateful speech, when you suppress the Richard Spencer's of the world or the David Duke's of the world you only make them stronger. And that also eventually in the 1960s gain told. Now, sometimes when there's a cataclysmic flip in our constitutional law we can point to the case and to the day. We know *Obergefell v. Hodges* brought



us same sex marriage. We know Roe v. Wade was abortion. We know Brown v. Board of Education overruled Plessy. Not so clean when it comes to speech. It wasn't one case, one time. It was a series of cases. Maybe 20 of them. A number in the 1960s like New York Times v. Sullivan in 1964, or Brandenburg v. Ohio in 1969, but then a string through the 70s, through the 80s, and even in the most recent last decade a number of very strong pro-free speech by the Supreme Court of the United States. What I want to suggest to you that the two theories both have a lot to commend themselves. And I'll wrap it up in the last minute. I'll wrap it up this way. I have, um, five kids, one a young lawyer in Nashville, one a recent graduate of Yale, one in college now, and two in high school. And, um, my daughter was at Yale in the midst of the recent tremendous, um, explosion on that campus over hate speech. And, she was on the order and morality side of those arguments. She didn't think of free speech the way her old-time dad did [laughter.] She thought of it much more in the way that Frank Murphy did, and that Felix Frankfurter did in those earlier cases. And I think I heard an echo of this in some of John's comments and Nadine's comments, but I will tell you its true for me. It's really caused me to personally reexamine exactly where I'm coming from.

[Laughter.]

AUDIENCE: [Laughter.]

MR. SMOLLA: And, the events in Charlottesville were very powerful. And I've come to talk about it in a slightly different way and I am with these two points. When I, when I was at Yale one of my professors was a wonderful guy. He taught, he taught Dante. He later became the Commissioner of Baseball. Can you believe the Commissioner of Baseball –



AUDIENCE: [Laughter.]

MR. SMOLLA: -- was a Dante scholar. [Laughter.] His name was Bart Giamatti. He also was that for awhile the President of Yale. And he described the campus as a free and ordered space. What a fascinating juxtaposition between the two theories. And what I've come to see on all the campuses I've been at, when I was a university president, law school dean, all the public and private campuses, that we have a, we have a conflict about our identity in terms of how to think of the campus. Or, maybe how to think of different spaces and places and moments on the campus. And there are times when that morality theory has a powerful grip on it because we believe in inclusion and we believe in human dignity and we believe in equality. And there are times we think of the campus as a super ultimate marketplace of ideas. And what I've come to see in talking with my own daughter, who had a great debate at one of these events with Bob Corn Revere who is the lawyer for your organization FIRE. I was proud of my daughter. She just went boom, boom, boom against this famous free speech lawyer for half an hour [laughter.]

AUDIENCE: [Laughter.]

MR. SMOLLA: I came to say it's wrong for me to say this generation doesn't understand free speech. They just understand it differently. I'll stop.

AUDIENCE: [Applause.]

MR. BATCHIS: Keith, would you like to –

MR. WHITTINGTON: Yeh, sure. Um, so I just want to make, ah, four basic points, some of which echoes, um, some of what we heard in the very beginning, um, and our initial inquiry and some we just heard as well. I'm trying to setup, ah, then some further discussion. Um, first point, um, relates



to, um, the, the inclination I think of some who want to emphasize the importance of free speech and downplay the significance of hate speech, um, in the context of these debates. Um, to dismiss hate speech is, ah, not potentially, ah, problematic, not being particularly harmful, um, not being particularly injurious. And I think that's the wrong approach. I think we have to recognize that hate speech often does, ah, come with real dangers associated with it. It often comes with real harms associated with it and the right approach is not to, ah, simply dismiss those as imaginary, um, or fanciful but to take them seriously. It would be an easy problem, um, if there weren't actual harms involved here. Um, I think it's a hard problem and because there, there are genuine harms here. Um, and then the question is, well, if there are genuine harms, ah, why not, um, go ahead and try to, ah, regulate or suppress hate speech and I think that's, ah, where things, ah, become, ah, difficult and, and complicated. Um, the second point is, um, I often struggle in conversations about hate speech because it's hard to know what people are actually talking about. Um, the hate speech, um, term, um, as a concept is extraordinarily vague and covers a wide range, um, of different, of very different, um, ah, kinds of, um issues, um, and concerns. And so, it's often, ah, it makes a lot of sense when you start having these kinds of conversations. Um, it starting to get very specific about what exactly are you concerned about, ah, what's on the table that we ought to be concerned about regulating and what are we not yet -- ah, ah, eventually might wind up there -- but what are we not yet at least, um, arguing about, um, and debating about. Um, some of the stuff that falls within this broad category of hate speech, um, I think are actually, ah, much more open to, ah, regulation from the perspective of a civil



libertarian than other things. And so, it's worth, ah, trying to distinguish those things. And so sometimes, ah, when we talk about hate speech the thing we have most in mind, um, or things that we might consider, ah, true threats, um, or things we think are genuine incitements to lawless action, um, or things that we think of as harassment. Um, and those things I think are much more easily regulatable. Um, there's a larger concern though there's a lot of stuff that falls within the category of hate speech that people want to reference as being hate speech. Ah, really, it starts encompassing a range of ideas, um, that they find, um, disturbing that will lead to, um, um, problematic social movements, um, ah, dangerous policies, and the like. Um, and that I think we, um, would want to, um, protect and there's good reason to want, uh, to protect it in the university context as well as, um, ah, a larger context. Um, and so, I think it's worth unpacking, then when we're concerned about hate speech, what exactly are we concerned about when we're talking about it. The third, um, question is one of what are the risks associated with trying to start, um, regulating, um, these concepts. I think in the university context as well as in other context what we see when there is a movement to start, um, developing policies to try to regulate, um, a hate speech, um, that much like the, ah, anti-Semitism, ah, resolution that the House was considering, um, the other day, ah, we quickly start adding new categories, um, to the thing we start, we started off with maybe a very narrow target, a very specific thing that motivated us, ah, to want to adopt these policies in the first place and we wind up with a, ah, much larger, ah, much more elaborate, ah, much more complex, ah, policy that covers a much wider range, um, of speech, um, as a consequence. And, um, as a consequence, um, ah, dampens the possibility of free speech, um, to a



much greater degree, um, than the initial thing we might have started off with. Moreover, I think there's a genuine concern in this context of hate speech as there is a concern in other kinds of context where we're thinking about how to regulate and suppress, um, speech that once you empower somebody, um, to go about the business of identifying speech that they regard as particularly hateful, um, or disturbing, or dangerous that needs to be, um, suppressed, um, you've now empowered somebody to make some pretty important discretionary decisions. Um, and they will often make, and they're making decisions in the context of things that are intrinsically controversial. Ah, they're making decisions in the context of, ah, debates in which people are disagreeing about, ah, what speech exactly is valuable and what speech exactly, um, is dangerous, um, and harmful. Um, and in general then I think we ought to be extraordinarily cautious about trying to empower people; whether empowering government officials, or empowering campus officials, um, to, um, be able to make those decisions and make those choices for us, um, as to which speech we find, ah, particularly disturbing and dangerous, um, and which speech is not. It's very easy to imagine, ah, when we start thinking it would be a good idea to regulate speech, um, that we would also be the people making the decisions about which specific speech, um, we want to suppress. It's a much tougher call if instead we want to say yes, we should institute a power to make the decision to suppress speech, and by the way Donald Trump would be the one making the call, ah, for us. Or Jeff Sessions –

AUDIENCE: [Laughter.]

MR. WHITTINGTON: -- will make the call, ah, for us. And then the calculation



becomes I think a trickier one, ah, about whether or not we still think it's a good idea, um, even if we think the end goal, um, is a reasonable one the way in which we, institutionalize it, um, is complicated. And then the final point I'd want to make, um, is, is specific to the university context. Which is the universities are complex spaces. Um, we do lots of different things in the university context. I think the free speech, ah, rubric is, is, um, awkward, um, in talking about the university context because it doesn't actually capture, um, a lot of what it is we're concerned about, ah, relative to speech. Um, in the university context there's some tensions, ah, between, ah, notions of free speech, for example, and notions of academic freedom, um, that matter in other context. And we should think though that, I think also in the context, I think the thing about hate speech and how we ought to, ah, regulate it and deal with it, um, on a college campus, um, that the response has to be different I think in different kinds of context on campus. So, we'd be thinking about these things very differently if we're talking about a classroom or a scholarship, um, context. For example, as opposed to the public square as opposed to again a dorm, um, or a dining hall. Um, and our responses ought to be different, um, in those different contexts. I don't expect students, um, to say the same kinds of things in my classroom, um, that they might well say, um, in the dining hall or in the dorm. I expect that to be a more moderated, ah, different kind of discussion, ah, when some things are off the table and not acceptable in ways that are less true, um, on the public square, um, itself. And then when we're thinking about what kind of policies are appropriate, um, to be developed and applied, and not only just sort of policies in terms of disciplinary regulations but also norms and practices of behavior more generally, we ought



to think about these different spaces are going to work differently, um, on a college campus. There's not going to be a single, ah, way of approaching these issues that's appropriate, um, across the board. So, thank you.

AUDIENCE: [Applause.]

MR. BATCHIS: Tim, would you like to go next?

MR. SHIELL: Um, sure. I was going to –

UNIDENTIFIED: You might have to [indiscernible.]

MR. SHIELL: [Indiscernible.]

UNIDENTIFIED: [Indiscernible.]

MR. SHIELL: This way?

MR. BATCHIS: Here why don't you try mine.

MR. SHIELL: Hey, there we go. Ah, I was going to start with a joke about it's always sunny in Philadelphia –

AUDIENCE: [Laughter.]

MR. SHIELL: -- but in view of last night's massacre, ah, I'm going to instead start by bowing my head and just having a moment of silence.

[MOMENT OF SILENCE]

MR. SHIELL: Ah, I have a lot of points to get through and not much time so, ah, I'm a philosopher by training. I think in terms of arguments, ah, and analyzing arguments and deconstructing arguments. So, I'm going to present to you, ah, a kind of an argument. Ah, and I do not have time to support my premises; it's just going to be kind of an argument laid out for you in short order. So, my starting point is universities, ah, especially public universities but I think also private universities, have both a legal and an ethical obligation, duty, to protect and promote both free speech and equality for historically



disadvantaged and marginalized groups. Ah, so I don't want to frame this as an either or. The universities aren't supposed to choose between the two; they're supposed to accomplish both. I think we have not done a terrifically good job of accomplishing both or even one or the other. A, I think largely we're failing to do a good job protecting free speech and I think we're largely failing to do a good job promoting equality for historically disadvantaged and marginalized people. I don't have time to talk further about that. [Laughter.]

AUDIENCE: [Laughter.]

MR. SHIELL: So, my journey on this started in the late 80s. Um, you know the era that John and Nadine were talking about where there's the Doe v. Michigan case, where there's the University of Wisconsin hate speech case in '91, and, ah, I was on the law and order side more or less of that debate as Rodney described sort of that view. And, so when I started researching it I, I started discovering all kinds of things I hadn't really thought through before and, ah, a couple of years into my research I, I switched positions. Um, I switched to what Rodney and others are sort of calling the marketplace of ideas position. Ah, I wrote a book it, *Campus Hate Speech on Trial*. You might find interesting if you take some time to take a look at it. So, one of the things that became very clear in that era and has followed for the next 30 whatever years is that courts are going to strike down policies and enforcements of policies that go beyond the standard existing categories of banned speech. You might think that's good; you might think that's bad. That's their clear view and there's no sign that's going to change anytime in the future. So, that's a fact universities sort of have to live with whether they like it or not. Ah, but what that means is that the vast, vast majority of what



people call hate speech incidents on campus can't be touched legally. And they'll have to be addressed in other ways. Ah, a lot of people have come to believe throughout this time then that that means that free speech and equality are, are at some kind of loggerheads. Right? That there's some sort of fundamental conflict that you can't have both. And, and that's again the message I want to contest. I think you want both and we can have both. Ah, so my work as a scholar and as an activist on my campus has been to try to spread that message in whatever ways that I can. Whether that's, you know, talking to a faculty member, um, on a tenure committee about whether they should tenure or not somebody for some controversial thing they said in a faculty senate meeting, or whether that's talking to an administrator about a student poster that went up on a display area, ah whether that's with the American Philosophical Association's committee for the professional rights of, defense for the professional rights of philosophers in all these different ways. So, people say well, how, how can free speech and equality be together. How can we see them as being united and, and there I think Nan Hunter has said some really powerful things. Ah, I think she is correct in saying both free speech and the push for equality have in common their opposition to orthodoxies, oppressive orthodoxies. Both contest those. Both demand inclusion and part, participation for others. A broad participation and inclusion. So, my catch phrase, if you want to call it that is that, um, robust free speech presupposes there is a robust diversity of ideas. You don't need protections for free speech if everybody agrees. It only makes sense if people have robust strong disagreements. And the flip side is true. You can only have and sustain robust diversity of ideas and opinions if you have strong protections



for, for speech. Ah, I think that's what ties them together and that's what we need to do a better job talking to people about. Now, of course free speech and equality can and do conflict. There are tensions. That's undeniable. Um, but there I want to appeal to the arguments – I think Nadine has championed some of the arguments, others on this panel have championed – and that is that it's the historically marginalized and disadvantaged who are most in need of these protections. They're the ones who will most suffer from increased censorship. Or most likely to. Um, I would encourage you take a look at Carlos Ball's book on the First Amendment and the LGBTQ equality movement. It came out in 2017. He does a fantastic job explaining how free speech played an absolutely crucial and a central role in winning greater equality rights for the LGBTQ community. Um, their future gains depend in significant measure on strong First Amendment protections for them. Ah, I attempt to do the same thing, ah, in my forth coming book *African Americans and the First Amendment*. So, where this brings me to is two questions, ah, I would pose to you and that I'm thinking about and working with some of my students on. One of them is so how can universities do a better job promoting both free speech and equality. And as I said, I, I don't think we're doing a very good job. How can we do better? And the second question, ah, and this one I'm working on in my latest research project, and that is how can the historically marginalized and disadvantaged do a better job using free speech and other First Amendment rights to gain greater equality? Ah, and I'll stop at that. thank you.

AUDIENCE: [Applause.]

MS. HARRIS: So, in addition to the fact that I am the least illustrious



member of this panel by an order of magnitude, ah, the reason that I wanted to speak last is because I want to take this discussion a little bit from a more philosophical and legal place to, ah, a more practical place of what we actually see happening on campus, the kind of speech that we see being censored or threatened on campus, and how that relates to this debate that we are having. Um, because, you know, when it comes to the kinds of speech that we see threatened on campus it goes far beyond, ah, you know, the Charlottesville and the Richard Spencer. Ah, ah, for every Charlottesville and Richard Spencer, ah, incident that we see on campus there are hundreds of questions about what students and faculty should be allowed to say, um, when someone finds that, ah, conversation subjectively offensive. And I think that that's something that we need to take into account. And it really stems from a problem that, ah, Professor Whittington identified which is that the idea of what is hateful and what is offensive, um, is very vague and very subjective. And there's not necessarily any sort of self-limiting principle. So, although it's very easy to think about how these things could or should be regulated from the standpoint of speech that we can all universally agree is hateful or offensive, we also have to think about how that, how any regulations that we make in those areas are going to trickle down to other kinds of speech. And I think that, um, Dean Smolla when he was talking about the controversy over hate speech at Yale, ah, you know, that controversy actually stemmed from an email by a professor who is a specialist in early childhood education and she was asking students to consider the question of whether it is the appropriate role of a university to mediate and supervise debates over what types of Halloween costumes students should be allowed to wear. So, she was inviting



students to think about and discuss a provocative topic but if you actually look at the email that she wrote to the students that sparked so much controversy and if you haven't actually had the opportunity to see that email it's, it's posted on FIRE's website because we, ah, gave this controversy a lot of coverage. There's no question, I don't think any reasonable person would disagree that her email, um, was a sensitive and thoughtfully worded invitation to debate. U, so you know, there was that. And, and so I want to go from that into a few more examples from recent months of things that we have seen, um, censored or threatened to be censored on college campuses in the name of protecting people from what I'll call subjective offense. And I'm not really going to prescribe any answers, I just want to sort of get people thinking about these things because these are some of the issues that are going to arise when we talk about regulating hate speech on campus. Um, so recently, for example, the University of Georgia launched an investigation into a graduate student instructor named Irami Osei-Frimpong because of tweets and Facebook posts he had made that were critical of white people. Um, in one post he made following the Democrats 2018 Gubernatorial loss he argued that it was time to "go to war on the white electorate" and "dismantle the institutions that made crappy white people," their churches, their schools, their families. And its obvious if you read these posts, particularly in context, that he's not threatening literal war or physical harm, but that he's, he's talking about, you know, making systemic changes to institutions that he believes perpetuate racism and injustice. Um, and the University initially did defend his free speech rights but when it came under pressure from donors and alumni it later announced that it was launching an investigation and "vigorously exploring all



available legal options.” Um, and this story had echoes of another situation that FIRE was involved in last year at Rutgers University where a tenured professor there, a white professor, was found guilty of discrimination and harassment over an anti-gentrification Facebook post announcing that he hated white people and wanted to “resign” from the white race. So, this professor who is white but who lives in Harlem complained on Facebook that “I don’t, I just don’t want little Caucasians overrunning my life. Remand them to the suburbs where they and their parents can colonize every restaurant.”

AUDIENCE: [Laughter.]

MS. HARRIS: Um, so Rutgers eventually did reverse the punishment against this professor but only from a letter from FIRE who was legally representing him reminding them that this, that punishing him for this Facebook post, which was clearly protected political speech, ah, would be a violation of the First Amendment. Um, sort of on the flip side, um, FIRE has also seen several incidents in recent months involving instructors who have used the N word in the context of classroom discussion of the word in context. So, for example, a professor at Augsburg University was suspended indefinitely from the classroom after he discussed a passage from the book by the African American author James Baldwin, Baldwin that contains the word, and he repeated the word in the context of a discussion about its use in that book. Um, but a group of Augsburg faculty wrote an open letter refuting the idea that this professor’s punishment was a threat to academic freedom stating that “we believe that further conversations about academic freedom can only take place after we acknowledge the harm that has been done to these students.” Um, and similarly when Emory law professor Paul Zwier used the



word in discussing the fact of a civil rights case where the word was used, he was suspended and investigated by the university. And in order to be reinstated, ah, Zwier agreed to forego teaching mandatory first year courses and to undergo sensitivity training. So, these are just a few examples of, ah, in which faculty or graduate student instructors have been investigated or suspended or even terminated for speech that violated no laws and that was wholly protected at least at a public university by the First Amendment but that others found offensive. Um, and we see students regularly facing this kind of censorship as well. So, for example, at Texas State University the independent student newspaper there found itself in trouble, ah, after it published an editorial by a student columnist who argued that whiteness “is a construct used to perpetuate a system of racist power.” Ah, the editorial was called “Your DNA is an Abomination” and the author said of people who choose to identify as white that “I hate you because you shouldn’t exist.” Are these harsh words? Obviously. You know, are they hurtful? No doubt that they were hurtful to some people, but this editorial was also undeniably political speech. The author was arguing that whiteness, not defined purely by skin color, but by acquiescence in a system of privilege et cetera was oppressive and needed to be dismantled. Meanwhile, ah, a group of Syracuse University fraternity brothers staged a private satirical roast of fellow members that included offensive jokes. Um, one of the skits was making fun of a frat brother for his conservative political beliefs and they made fun of him by a skit about a hypothetical fraternity full of racist, racists and sexists. Um, so in the skit there was racially, and sexually offensive language used but the intent of the skit was very clearly to mock the conservative student. Someone leaked a



video of the private event to the school newspaper and the fraternity was permanently banned, 18 students were charged with serious disciplinary offenses for their participation and a number of them are now currently suing Syracuse for breaking the promises of free speech they've made, um, in the handbook. So, these are just examples, ah, sort of related to either the teaching of challenging material or the engaging, whether through political speech or through satire with difficult topics. And, I, I bring these examples up just to sort of demonstrate that if we allow speech to be censored or punished because someone finds it subjectively offensive or even hateful our ability to explore these difficult issues will be compromised, you know, either through the censorship or because people will refrain from discussing them. So I think, you know, it's important as someone who has worked with students and faculty for many years and seen many, many example, many more examples of censorship and punishment arising in these more nuanced situations than in the extreme situations that make it very easy to want to jump to, ah, restriction and regulation, I just think that this is something that, ah, needs to be considered as we discuss this. So, I will leave that; I will leave my remarks there.

AUDIENCE: [Applause.]

MR. BATCHIS: Well, I have a lot of questions I could ask you and I think we could talk all day. Um, what a, what a great panel. Um, we don't have a whole lot of time left. Ah, why don't I, maybe I'll, perhaps I'll ask one question and then I'll, I'll throw things to, to the audience because I'm sure there are many questions for you, um, from the audience as well. Um, just, just, let me ask a question that, that, um, here, here we are at the University of Delaware.



The University of Delaware is a state affiliated institution. Um, for anyone who, who studies the First Amendment you know that, that, that, or studies constitutional law, we know that, that the constitution limits state actors, governmental actors. Um, it doesn't limit private actors. And, ah, so, so I wanted to, to address that question because we live in a country, ah, with, with thousands of universities and colleges; many of them are private, many of them are state affiliated. Um, FIRE, for example talks a lot about how, ah, free, free speech values should be extended even to the, the private sphere, ah, private schools that, private universities that are, aren't required to comply with the constitution. Um, but I, but I also, I wanted to ask you this because I think there's been a lot of emphasis on how hate speech can mean many things and this is part of the problem of the aspect of, of this idea of hate speech. It, it can mean something to, to one person and something very different to someone else. Um, is there a place for private schools, private universities and colleges to, to reflect the diversity of views, ah, when it comes to what is hate speech? So, for example, while we might agree that state institutions must comply with the constitution and protect free speech across the board, um, should we allow room for the Evergreens and the Oberlin's to have a, a particular definition of hate speech? And then to promote a, a, a particular atmosphere on campus by regulating one definition of hate speech? And, and the Liberty University's and the Regents and, and the, and the, perhaps the, the, you know, the, ah, um, you know, religiously affiliated schools to have a different definition of hate speech and also foster a, a different atmosphere on campus and then let the market take care of the, the results. And when students are looking at colleges, right, they, they can



choose based on the, the different climate on various campuses and they can choose a state institution if they want, an institution that protected by the constitution. Is there a place for that kind of diversity in higher education?

MS. HARRIS: Can I take a crack at that one?

MR. BATCHIS: Sure, sure.

MS. HARRIS: Does anyone mind? Um, so, yes, there is a place for that diversity and, and, you know, FIRE's position on private schools is one of truth in advertising. So, you know, private schools actually under the First Amendment have a right to freedom of association and that includes the right to associate around a set of shared values. So, for example, you know, Brigham Young University bans anything that's blasphemous against the Mormon Church and they're, they're a Mormon institution. They do have the right to do that. The problem at a lot of private universities is that they, they seem to want to have it both ways. Right? And not everybody is going to want to go to BYU or Liberty, for example, because they know that there, you know, the range of intellectual exploration is going to be limited by the, the set of values that that university has, has laid out pretty clearly. But at Harvard or at Yale, you know, at, at these institutions that make these robust promises of free speech and that claim to ascribe to free speech values, it's a little bit of a bait and switch if you go there expecting, you know, to be able to explore a very wide range of ideas and then find out that your ideas are not, you know, able to be expressed there without fear of punishment. So, what I would say with regard to private universities is if they truly wish to define hate speech, ah, in a way that, you know, does limit dialogue and debate the way some, for example, religious institutions do they have to define that clearly and they have



to make clear those expectations of students so that people can make an informed decision and say choose to go to a state institution where they know their First Amendment would be protected. But to try to attract people based on a promise of robust and open debate and then sort of subjectively define what can and can't be debated I think is, is a, is, you know, it's, it's false advertising.

MR. SMOLLA: I, I'll offer a quick opinion dissenting in part and concurring in, in part. Um, when, when I was president of Furman, which is a, a liberal arts university in the south, in Greenville, South Carolina, was once Baptist but when I was president it was non-religiously affiliated. So, it was no BYU, it was no Liberty University. Um, when we had free speech controversies, we would do it this way. I would say, well, I can kind of give you an idea of how I think this would turn out at Clemson, a state university, or the University of South Carolina, but we have shared governance, we have a shared community, we can form our own identity. I mean, John Powell was talking about stand for something. What do we stand for? And let's have a discussion about what we stand for. So, I, I'd just be careful about the false advertising because in university worlds our value system is a work in progress and it's perfectly permissible, I think, too if you're Duke or Yale as far as I'm concerned, the two schools I went to, to evolve in your conceptions of it. I think you have to be transparent and open, but I don't think you're stuck in time, um, on, on any one conception.

UNIDENTIFIED: [Indiscernible.]

MR. SHIELL: Ah, I guess I would just push a little further than either Samantha or Rodney want to go and say free speech is a legal doctrine because there



are ethical reasons that support it. It didn't appear out of nowhere, it appeared because there are good moral, ethical reasons for free speech. So, I would say those good reasons apply to private universities too.

MR. WHITTINGTON: So, just briefly on this, ah, so I, I'm basically a pluralist on this. I, my view is that universities can do what they want to do. I'd prefer they be transparent. I think it's reasonable to think they might evolve over time, um, as well. Um, but there's a real difficulty with how they evolve in the sense of, ah, both this, I think that, that it's crucial to the mission of a university, I think, in, in the proper sense that in fact they be quite open. And so, I think the BYU's and the Liberty's are not institutions I'd want to have anything to do with precisely because they're not robust universities in a meaningful way and I think lots of other institutions don't want to go, ah, down that route. My concern with sort of saying well, but things might, ah, be in flux and they might change over time is, is like the Marquette situation, ah, where you've entered into a contractual relationship with the faculty, um, in which you've promised them, ah, robust protections [indiscernible] freedom, um, but then you say oh well it turns out we're, we're evolving, um, and we're not going to fire you, um, give, despite the fact the we've had this contractual relationship with you and we made these promises both to faculty and students who, who are there.

MR. SMOLLA: I agree with that.

MR. WHITTINGTON: So, yeah, I think, so I think to, to trans, I think its reasonable to think these are long term discussions, things might move, um, over a long period of time, um, but we've got to be cautious about, um, how we think about the evolution, ah, within this context of, of contractual relationships and, and transparency.



MR. SMOLLA: So, can I add one more real quick point on evolution? I think in terms of the perspective of the whole conference a lot of what we're hearing, we're hearing about how science is teaching us new things about the injury certain kinds of speech can cause. Ah, I lived for a long time in the city of Richmond next to the Robert E. Lee monument and I would play frisbee in front of my kids in front of that monument and I had an absolute blind spot to the effects of that monument to my friends of color. I just didn't understand it until after Dylann Roof's massacre in, in the church in, um, in Charleston. But here's two movie moments that show you evolution that I think is fascinating. One is from Spike Lee's movie of the BlackKkKlansman – I hope you get a chance to see it; it's a masterpiece. And the other is from what I would call a masterpiece – you might not – The Blues Brothers. And that's from 1980.

AUDIENCE: [Laughter.]

MR. SMOLLA: Now, in, in BlackKkKlansman there's this interesting, um, I don't want to give away the movie, but there's this interesting portrayal of David Duke in the 1970's. And, um, and to some degree David Duke, Duke is made to look a little goofy and, and, and dopey in the movie but, um, there, but there's a, a genuine sense of menace that the Klan has in Colorado Springs in the 1970's. The Blues Brothers came out in 1980. I love it. It's a great movie. There's a, there's a scene in The Blues Brothers though in which, um, Jake and Elwood see a bunch of Chicago Nazis marching led by this dumb comedian Henry Gibson and, um, John Belushi says I hate Illinois Nazis and they drive the Blues Brothers, the, the, right across this bridge and they scatter and they fall and, you know. So, why do I bring it up? Well, in Spike Lee's movie at the very end he cuts to images of Charlottesville. And, you have no



doubt of the sense of menace of groups like Richard Spencer's group. But at the time of the Blues Brothers, right near the Skokie litigation, it was in 1978, it was a cultural joke. It was like nobody takes the Nazis seriously. And, to me there's a little message there. I think there's more menace today than there was in the 1970's and I think the, I think the Klan and the, and those supremacist groups they were around but they, but they, they seemed disorganized and puny and silly. It wasn't the Klan of the 1920's and the 1930's that was truly a, a reign of terror. But I feel [chuckle] there has been an evolution there is more danger and there's more menace and it's things like the capacity to organize under the internet, the sophistication, the slickness with which the message is portrayed, the resonance with the, some of the larger messages of the current president that, um, it's, it's a, it's an evolution. And I think free speech doctrine is, is subtle enough to take it into account. You don't have to change the doctrine but when you decide what's a threat, what's an incitement you can, you're allowed to take into account this, this background of menace.

MR. BATCHIS: Do we have time for a question or two from the audience?

UNIDENTIFIED: I think two questions.

MR. BATCHIS: Okay, two questions from the audience. Do we have our microphone, ah, helpers?

Q: Ah, so I'm the, my name is Caleb Owens. I'm the editor-in-chief of the student newspaper here. So, I was refreshed to hear at least one if off-handed mention of a student newspaper in a debate about campus free speech. Ah, [chuckle.]

AUDIENCE: [Laughter.]



Q: But, you know, um, among those examples you provided, Samantha, the, you know, three of them I think were, had to do with social media posts and one had to do with, ah, an op-ed published in a student newspaper. And to me there seems to be a, somewhat of a fundamental difference between speech taking place, um, via those, those different media. Um, social media posts tend to be spontaneous, um, unpredictable, tends to, you know, and meet certain criteria of what generally qualifies as hate speech, whereas an editorial is going to be pre, it's going, premeditated, it's going to be fully argued, um, generally, and ah, ideally adhere to some of the ethical and professional constraints of, of, of journalism. So, my question is insofar as those criteria are met, insofar as, ah, a publication has taken pains to make sure it's not libelous, that the, the, the information presented in the editorial is factual and so on and so forth, could it even be hate speech?

MS. HARRIS: I mean, I think that your question really highlights the, the issue of hate speech, the, the concerns with trying to define hate speech because we don't have, you know, in this country, in, in many countries in Europe, right, whether or not something is hate speech depends on whether it, ah, plays into stereotypes or calls into disrepute members of a particular racial or religious group. So, for example, you know, the editorial on your DNA is an abomination, under European hate speech laws that say, you know, any speech that calls into, you know, that calls into disrepute a group of people based on their racial characteristics. Yes, that could be hate speech. But I think, you know, I think it's a good thing personally that we don't, that that is not how we define hate speech in this country and that we do have higher standards, um, in terms of, you know, yes, you can express an opinion that



people might find subjectively hateful so long as it is not libelous or an incitement to violence or so on and so forth. I mean, I think, you know, that many people would say yes, it absolutely can be hate speech but that's a different and should be a different question from, ah, you know, whether or not it can be censored or a newspaper's editor can be fired for publishing it.

MR. SHIELL: Um, I just thought it's usually a good idea to try to keep some distinction between the law and morality. So, there are plenty of things, um, there are plenty of things that are legal that might not be ethical and there are plenty of things that are ethical that might not be legal. There are things that are unethical that we should not have the law reach to. So, um, I, I think that's a crucial question we have to think about. It's easy to think, well, that's wrong so we need a law and, and I think that's a mistake to make that quick move. That should be a, a slow move, not a fast move.

UNIDENTIFIED: Somebody over there.

MR. BATCHIS: I think we have one question over here. Oh, I see. Well, we'll have to take three questions.

AUDIENCE: [Laughter.]

Q: Okay. So, I want to; my question is specifically on like hate speech, um, and the educational, like, um, spheres or environments. Um, earlier this year I'm in a discussion with, um, Frederick Douglas' autobiography *Narrative of the Life*, the N word comes up multiple times because of who Frederick Douglas was and what he had to go through. Um, and the N word was said in, um, my class, um, room, um and I just want to argue the point that whether or not the, specifically with the N word, um, and other words that, like, that could go under the realm of hate speech do not



necessarily have to be used to convey the message or the themes in the, the text. Or, um, the lesson the teacher to, um, convey to the students can be, can be clearly illustrated without the use of the hate speech or the N word or words like it.

MR. SHIELL: Um, I'll jump on that one. Um, ah, many of you who work in this area are familiar with, ah, law professor Jeff Stone at the University of Chicago. Um, Jeff Stone has in his talks for many years used the N word to illustrate its use, not to use it as a pejorative or as a racial slur, um, but as a basis for discussion of a legal case or something else. Ah, as a result of recent conversations with students he has decided he is no longer going to do that. Okay? Um, I think personally that's a good move on his part. Ah, I agree with you that it is not always necessary for people to use that language to make the points they want to make. On the other hand, um, academic freedom is something that's important. Faculty can set rules for discussion in their classroom. In my classroom I don't allow, um, students to get away with hasty generalizations or uncivil arguments. Um, we get to argue, we get to debate, we get to do that fiercely, but you don't get to call people names, okay? So, um, you know, as, as Keith was pointing out that's one of the tensions on a campus, is you have both free speech and academic freedom and, and they don't always fit together and you, you do have to allow for some discretion, ah, amongst people on how they're going to handle that in their classroom. There isn't necessarily one right way, um, but I, I would just say I personally support Jeff Stone's change of mind.

Q: Um, so, um, I teach political philosophy and, um, I also cover the topic of, ah, free speech, ah so the way I do that is by, ah, basically



just talk about, ah, arguments from both sides. [Indiscernible], Tim Scanlon (phonetic spelling), um, Katherine [indiscernible] and Stanley Fish (phonetic spelling) et cetera. Ah, it's overly abstract, ah, and last semester I think, um, if you work at UD you might have think that. So, ah, last semester, you know, ah, there was I think a very short period of time, ah, when I was parking at the parking lot I see those stickers that says, um – you know, it's very small – it says it's okay to be white. Ah, I was thinking that, um, you know, as, um, educators it's something that, um, seems to be relevant to my class, ah, but it doesn't sound like hate speech. I, I'm not sure if it is. And then I wonder, ah, you know, ah, I, I'm pretty sure that, you know, it's still, not just me but also other people, um, my students probably have also, you know, seen those stickers, and I was wondering if, you know; what would be a good way to talk to students about this, um, kind of speech and also I think what happened – I'm not sure exactly what happened, ah, but I think the university, ah, maybe take the stickers away. Ah, is that now platforming? Ah, does that, um, I, I don't know if that's a good solution because I think I remember seeing somewhere that, you know, ah, people talking about the university taking the stickers down and then seems to feel that people's speech has been suppressed.

Mr. SHIELL: I, I'll have to answer that at least in part and then the other panelists can jump in with other things. But universities can enforce time, place and manner restrictions on speech. So, you can't just say anything anywhere on campus without the potential for legal consequences. So, ah, on my campus for example, you can't just run around and put stickers on people's cars or doors or willy nilly whatever you want. If you want to put up a sticker,



sticker there are spaces where you can just put up whatever you want but there's relatively few and in most cases you're going to have to get somebody's permission to put it up on that poster board or on that wall or that door or whatever. So, I, I don't know the, the facts of that case but my guess is the university might well have had the legal authority to remove them because they were in a place that required permission and they didn't have the necessary permission. Now, the, the other thing that's important is there are lots of places to have conversations to engage in speech and not every place is the right place to do it. So, as I said, one of the things I'm interested in now is what are the right places to have the conversations to make them most effective. Ah, I'm a big believer in teachable moments. Ah, I might well have taken that chance as a teachable moment and taken a day off from [indiscernible] to just have them talk about that.

MR. SMOLLA: Since I know we're out of time I'll just add one thing about it. It's okay to be quiet. I used to run conferences at a university and then I was also on the circuit where I would be a panelist everywhere –

MS. HARRIS: Its okay to be white is what it is.

MR. SMOLLA: Okay to be white. Well –

MS. HARRIS: [Laughter.]

AUDIENCE: [Laughter.]

I want to talk about something else.

AUDIENCE: [Laughter.]

I thought, I thought, I thought it was okay to be quiet.

AUDIENCE: [Laughter.]

And since, and since we're getting signals to, to be, to be



quiet –

AUDIENCE: [Laughter.]

MR. SMOLLA: -- I'll just tell you this story. I used to run conferences and I stopped going. And I, I, I quit the job I had at William and Mary and I, and I refused to go to conferences because I never saw a single person ever change their mind. And I just got allergic and I couldn't take it anymore. Um, so I was just quiet for a couple of years. And then, um, and then I started, and then I came back so like I found, I'm not allergic anymore to going to conferences.

AUDIENCE: [Laughter.]

MR. SMOLLA: Um, ah, but, um, what, what I've learned is, um, ah, that we are evolving in a positive way. There are more conversations and less debates in at least some settings of American society and I remember when I used to run conferences, I would say this is the time to have these conversations during the break so that the next panel can get up. [Laughter.]

AUDIENCE: [Laughter.]

UNIDENTIFIED: [Indiscernible.] One of our administrators would like to –

MS. HENDERSON: I just want to add to that, um -- oh here we go – add to that conversation, ah. Good morning. I am Dr. Carol Henderson, Vice Provost for Diversity, and the Vice President for Student Life and myself in the incident that you're mentioning in conversation with the administration, those signs were taken down because they were in the wrong place and it wasn't with the content. There is an article online that explains our reasons for doing what we did, and we did engage in conversation with students. I think what the panel, ah, was very good at pointing out is its always great to get the right



information, um, around the context of the conversation so that things do not spread like wildfire inappropriately. Thank you.

AUDIENCE: [Applause.]

UNIDENTIFIED: So, take about five minutes and we'll reconvene.

UNIDENTIFIED: [Indiscernible.]

UNIDENTIFIED: [Indiscernible.]

UNIDENTIFIED: [Laughter.]

MS. HARRIS: Thank you.

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