

Michael Poliakoff:

Nadine Strossen, an Emerita professor of constitutional law at New York Law School is here with us today on Higher Ed Now. I'm Michael Poliakoff, the president of the American Council of Trustees and Alumni. And it is a great joy to welcome a friend, a very admired friend, a friend of ACTA, a friend of free speech to Higher Ed Now. She served as president of the American Civil Liberties Union from 1991 to 2008.

Although now an Emerita professor, her tireless advocacy for freedom of speech continues at a breathtaking pace, and I do mean breathtaking with many appearances both within the United States and overseas. Nadine Strossen's devotion to free speech as the bedrock of human flourishing is deep and passionate. Yet she models the openness of mind and heart that brings civility and grace to even the most difficult conversations on the most contentious of topics.

ACTA is grateful to her for her illuminating presentations at our conferences and most recently for the speech he gave in the inaugural season of the LEVY FORUM for Open Discourse at the Palm Beach Synagogue. Nadine, at the very end of your new book, *Free Speech*, just appeared Oxford University Press. Well, I should give the subtitle, *Free Speech: What Everyone Needs to Know*.

You wrote, "No matter what your previous understandings of and perspectives about freedom of speech might've been before you consulted this book, I hope they have been expanded by your grappling with the book's questions and answers. I deliberately use the phrase grappling with rather than the more passive term reading because my aim has been to stimulate your critical thinking."

And I noted as I went back to your 2018 book, also with Oxford University Press, *HATE: Why We Should Resist it With Free Speech, not censorship*, you call on the readers with admonition not to rest on their laurels. So here we are and I thought we might begin as I turn this over to you to talk about how your new book builds on the admonitions, in some ways, really the warnings of your very, very fine and detailed study on the dangers of suppressing hate speech in ways that will come back to bite us.

Nadine Strossen:

Michael, first of all, thank you for that very warm welcome. I'm honored to be a return guest on your illustrious podcast and it has been wonderful to be a colleague and collaborator with you and with ACTA in seeking to reinvigorate classical intellectual and liberal values on our nation's campuses. So if I can approach that question by telling you why I wrote the new book, I think it will segue into your specific question.

As you noted in your kind introduction, I have long been an educator as well as an advocate. As an educator, it won't surprise you abhor the concept of indoctrination. My mission and my professional obligation as I see it is to open my students' minds to all perspectives. My mantra for my students is, and it's a mantra I do repeat in my new book, is that my goal is not only for them to answer every question, but to question every answer.

And in contrast, my philosophy and approach as an advocate is to try to persuade people to adopt a certain perspective, right? So when I'm teaching about First Amendment cases, I demand that my students be able to make the strongest anti-free speech arguments as well as pro-free speech arguments. Whereas in my advocacy capacity, I try to emphasize and persuade why the pro-free speech arguments should prevail.

However, as I've been traversing the country and the world since 2018 when my hate speech book came out, Michael, as you alluded to, I've been making about 200 public presentations per year and they're always at my request in the form of interviews, not monologues. And that means that instead of the traditional opening remarks standing at a podium, they will be elicited for me by one question or a more questioners and followed up by audience, open-ended audience questions and answers.

So I literally have been fielding tens of thousands of questions since 2018. And I realized that the questions kept falling into the same categories. I kept hearing the same questions over and over. And that's not a complaint. I never get tired. If somebody is interested enough to ask the question, I am interested enough to provide the answer.

But I discovered that there was a large overlap between my educator role and my advocacy role in this sense, Michael, that the more information people had about free speech, about what its doctrines and tenets and principles actually are as opposed to a distorted caricatured version that is often attacked by those who say they're against free speech, the more they understood what the history was that gave rise to those principles, what the consequences were of censorship before those principles were adopted, what the benefits have been since those speech protective principles were enshrined, the more supportive people become.

In other words, information and education about free speech tends to lead to support for free speech. So recognizing this, I said to my dear husband, "I ought to write Free Speech for Dummies. That would really go a long way towards shoring up support for free speech." And one of my friends who's a literary agent said, "Well, I think you can do better than that." Oxford University Press has this series, a trade name series called, What... The subtitle is, What Everyone Needs to know.

And even though the series had existed for 15 to 20 years, they still didn't have a book about free speech. So it was just a perfect opportunity for me. The format of the series is question and answer, so I could basically put on paper what I had been doing orally through tens of thousands of speeches. And it gave me an opportunity to answer the pressing questions that people have.

Michael, not only about hate speech, which remains one of the most hated, most targeted for censorship categories of speech, but in the process of writing the book, not surprisingly, my own understanding crystallized in ways that were illuminating to me.

One very important fact that I recognized that I hadn't before was that the arguments in favor of censoring hate speech and the arguments against censoring it are exactly the same as the arguments for and against censoring every other kind of controversial speech, whether it be disinformation in social

media, whether it be speech that is extremist or terrorist in the context of the current conflict in the Middle East, whether it be pornography, which continues to be one of the most demonized forms of expression.

Different rubrics and rhetorics are used, but when you analyze them, they all come down to the same basic presumptions and assumptions, one of which is that it's a false syllogism, speech is harmful, therefore censoring speech is good.

Michael Poliakoff:

Much, much there to explore. Let me start actually with Germany. I did some postgraduate work at the University of Cologne and one day there was an article, an outraged article in the newspaper, the campus newspaper that a hakenkreuz, a swastika had been written, whatever, carved into a university building. And I discovered of course that that is transgressing the sense of freedom of expression in Germany.

It's illegal, it's a prosecutable offense. And so also to be an Auschwitz [inaudible 00:09:54], a liar about Auschwitz is a punishable offense. You wrote about the failure of European laws to essentially curtail extremist rhetoric. Could you give a few more details about that? And I realize you are also of German Jewish heritage, so this is something that's close to home.

Very much so, Michael. And before zeroing in on your question, I need to provide a very important legal point of background which I haven't yet made. And that is that in some context, under some facts and circumstances, speech with a hateful message along with speech with any other controversial message can and should be punished consistent with First Amendment free speech principles.

The bedrock free speech principle as the Supreme Court has called it, is viewpoint neutrality or content neutrality. That means government may never punish speech solely because of its content, solely because the content, the message, the viewpoint, the idea is disfavored, is hated and is considered hateful. But when you move beyond the content to the context, if in all the facts and circumstances the speech directly causes or imminently threatens some serious specific harm, harm that is independent of disagreement with or dislike of the message of the speech, then the speech can and should be punished.

So vandalism, graffiti, whether it's a swastika or whether it's the Star of David or anything else, regardless of its content, is punishable expression because it is interfering with the property rights. It's defacing the property on which the graffiti is [inaudible 00:12:19]. So that's really important. It's regardless of the message, that particular example is punishable. Now the other example that you give is please remind me of, I'm sorry.

Michael Poliakoff:

The Auschwitz lie-

Nadine Strossen:

Okay.

Michael Poliakoff:

... to deny the Holocaust.

Nadine Strossen:

To judge the other example that you give that speech should be punished simply because of its content. It's not doing any other specific harm. And this is the crime of Holocaust denial or trivialization, which exists in Germany and many other countries now. All of these kinds of laws that go beyond punishing speech because of a specific direct harm that it causes such as vandalism of property. And if I may, let me give you a couple other examples.

If the speech directly targets a particular individual or small group of individuals and intends to instill a reasonable fear that they are going to be subject to harm, that is considered a punishable true threat. So I can imagine a particular context in which somebody among other things was saying to a Jewish student, "Auschwitz is all a lie," and does it with intimidating gestures, maybe menacing the student physically.

And unfortunately, I'm thinking of some examples that have occurred on campuses recently in that context that hateful speech may be punishable targeted harassment or bullying or threats. The reason why we should not go beyond that and give the government or the university more latitude to punish speech either because we disapprove of its content or because we fear that it has a more indirect speculative connection to potential harm, is that that simply gives too much discretion to whoever is enforcing the law.

Discretion that we can predict based on logic and confirm based on history, we can predict that that discretion is going to be used disproportionately to favor the voices of majoritarian interests and powerful groups and to disfavor the voices of those who are members of minority groups or who hold minority perspectives. That's what has happened throughout history. Now let me say something about the history of the Weimar Republic in particular, Michael, which you allude to.

Many people cite what some of us call the Weimar fallacy that during the Weimar Republic from 1918 to 1933 during which Hitler rose to power, "Oh, if only, if only Weimar, Germany had punished hate speech, had punished an outlawed Nazi speech, Hitler wouldn't have risen to power and the Nazis wouldn't have taken over. The Holocaust would never have happened. If only, if only." History shows that during the Weimar Republic there were many very strict anti hate speech laws that were very strictly enforced, enforced not only through criminal prosecutions but also through civil actions.

There were multiple laws, I've read, translated versions of them, laws against insulting religion or religious groups which did explicitly apply to Jews, laws against defaming certain groups which also applied to Jews. And there was a very strong Jewish organization that seemed similar in function to the Anti-Defamation League in this country, looking at the name, Anti-Defamation League, that had chapters in cities around Germany that hired lawyers and had lawyers on staff and recruited other lawyers to actually enforce these laws by bringing civil lawsuits as well as instigating prosecutors, bringing complaints to prosecutors.

And that did lead to many prosecutions and many convictions of Nazis, including I think the most famous or infamous was [inaudible 00:17:03], the publisher of the infamous [inaudible 00:17:06]. And he was actually convicted at Nuremberg as well. Hitler himself was literally banned from public speaking for two years and he turned that into a propaganda coup.

There were posters all over Germany that showed Hitler with a gag and saying, "Of the millions of people in this country, only one is not allowed to speak," turning him into a free speech martyr. And the Nazis loved the trials because they became propaganda platforms. They received attention that they otherwise would not have and garnered sympathy that they otherwise would not have. Now, I do not mean to compare today's fascists or extremists to Nazis. They are not calling for the genocide.

They're not expressly calling for the genocide of Jews or anyone else, but they do use similar strategies celebrating the opportunity to bask in the limelight that descends upon them when they are subject to censorship. So ironically, those who want to de-amplify hateful messages and therefore try to de-platform speakers or shout them down or shut them down, ironically, they're playing right into the playbook of these people who are seeking the attention.

If I can say one other thing about the Weimar Republic, Michael, the tragedy there is that while the Nazi speech was substantially suppressed, the Nazi's violent actions went largely unpunished. So they literally got away with murder and assaults and beating up of not only Jews but communists, socialists, other political opponents.

Michael Poliakoff:

I want to spend some time today talking about the problem of the DEI, the diversity, equity, inclusion offices in this and the rather chilling call for their expansion. Now in light of the rather late discovery that antisemitism is a problem on campus, but let's explore something we were talking about before the podcast where we have bright lines and where we have situations where really it's going to be fact driven about whether we're seeing transgressions of the law.

You talk about Charlottesville as a place where direct threat was certainly at issue and for that reason people marching around with tiki torches and calling for their racist and antisemitic plans. That actually constituted a direct threat. And then getting onto some very, very difficult and timely territory. On campuses, we are hearing things that are really rather frightening. And I'm trying to think about the failure of our three presidents, Penn, Harvard and MIT, to give a really good and clear answer about whether a call for genocide would be acceptable.

And I've read it through my mind in many different ways. If the call were something more familiar to my ancestors' pogrom, they would've known exactly what that meant and the clubs would've been very much at hand, the trenches, the weapons. A call for bringing back lynching is a terroristic threat I would think. You're shaking your head, so I really want to hear how you would deal with that one.

So are there bright lines that apply there? Are we looking at things that are threatening violence on campus that really call for serious disciplinary action or are these expressive rights? I'm very, very eager to get your guidance on that one. I know you brought up the Whitney versus California case there. Again, I think ultimately these issues are fact-driven, situational. So I turn this back over to you.

Nadine Strossen:

So I continue to have the reaction as I did in our pre-interview conversation that there aren't really bright lines or if there are any, they are few and far between and do not provide the answers to the questions that are difficult enough that they're worthy of debate. Right? By definition, the issues we're talking about are issues where even if we can agree on the legal standard, reasonable people can often, if not usually or always disagree about how they apply in particular factual circumstances.

That is a matter of judgment. And given the limitations of human language and perhaps other human limitations, it's very difficult if not impossible to craft absolutely precise language in terms of the standards. And I think that's fine. I think to have rigid rules that are not sensitive to factual nuances would be very problematic.

You're a philosopher, Michael, so this is drifting a little bit into the realm of philosophy as I understand it as a layperson, the difference or the complimentary role I should say of the legal system versus the equity system that evolved first in England and has been interwoven into our system. The rule of law is very much reflected in the old saying that we are a system of laws, not of men, not of people. In other words, there's a rule and it's not for individuals to tamper with the rules one way or the other because that's unfair.

It means that law is going to be unequal depending on who's enforcing it against whom. On the other hand, we've always had the understanding that the law should be tempered by mercy, right? It shouldn't be absolutely rigid. We should take individual facts and circumstances into account. And to me this is a philosophical conundrum in the sense that each approach has its merits but also its limitations. And I think those two intention concerns are reflected in the standards we've developed that are quite specific but not completely.

And so do allow some room for judgment, but not too much room for judgment and discretion. One word that recurs throughout American law is the concept of the delicate balance, right? So it's a delicate balance. In terms of, let me take the Charlottesville example because I think that will illustrate both the extent to which the law imposes constraints on what expression may be punished and the extent to which reasonable civil libertarians may disagree, even looking at the very same facts and circumstances.

So in Charlottesville in 2017, when the Unite the Right demonstrators, who by the way were represented by the American Civil Liberties Union, many people say, "What's happened to the ACLU in the 1970s? You defended free speech for Nazis demonstrating in Skokie, Illinois, a town with a large Holocaust population." And many people don't realize that 50 years later in Charlottesville, we did exactly the same thing with a huge amount of criticism.

So the ACLU, I think correctly, and then we won before the courts said that they have a right to demonstrate regardless of their odious viewpoints, which are antithetical to our own civil libertarian viewpoints, but freedom for the thought that you hate. When they were demonstrating and chanting, "You will not replace us. Jews will not replace us," my blood curdles every time I say that line.

But loathsome as that viewpoint is, that now this is clear bright line, that viewpoint alone is not enough to justify punishing them. And by the way, that is exactly why we won our lawsuit defending their right to demonstrate because there was absolutely no evidence that they had planned any violence, that they would engage in any violence.

The chief of police testified at the hearing that they had no evidence, they had been doing investigations. And by the way, if there was any violence, the police were completely prepared to deal with it. So the only rationale that was offered at trial for stopping the demonstration was communications for members of the city council saying their ideas are loathsome.

We revile their ideas. And that's clearly violates the viewpoint neutrality principle. But as things actually evolved on the Friday night, I believe it was August 16th, someday in August 11th, someday in mid-August in 2017, not only were they chanting those words, but they did so while marching toward a group of counter demonstrators who were ringed around the Thomas Jefferson statue on the campus of the University of Virginia. Approached the counter demonstrators at a menacingly close distance, leaning in toward them, waving lighted tiki torches.

Now, the legal standard for a punishable true threat as it's called in the law is did the speaker intend to instill or recklessly instill a reasonable fear, that is an object of fear, on the part of the audience member that they're targeting, that they would be subject to harm. And note that the speaker doesn't have to intend to cause the harm to actually act in a violent manner.

The mere fact that you instill a reasonable fear already greatly harms even if not physically, psychologically chills the speaker from, I'm sorry, the target, from engaging in his or her free speech and let alone freedom of movement and privacy. Now, it seems to me that that standard of a punishable true threat was satisfied by what actually happened.

I do have to say that I have one, at least one friend who's a First Amendment expert whose views I deeply respect, who questions that conclusion. He thinks it might not have been a punishable true threat, that it didn't necessarily rise to that level. And I would say that would be a question that would be put to a jury and maybe reasonable people can disagree.

Michael Poliakoff:

These are hypotheticals of course, and you have every right as a professor of law and as an attorney, not to deal with hypotheticals. But when you've got a campus of mixed races, I'll use the lynching example now, people carrying posters hypothetically with pictures of nooses and shouting things that are not necessarily targeting directly, but creating an atmosphere in which people could have reasonable fear for their lives if they happen to be of that demographic or conversely Pogrom Now or Genocide Now.

And I realize we're talking about things that are not entirely historical examples, but close. I mean, you had the nooses and the bananas hanging from the trees. And a call for Intifada Now is not so different from pogrom. At what point are we, and here I'm going to do something that a law professor will scold me for.

Is it unreasonable to extend the Davis standard, which has to do with sexual harassment properly, that a neutral third party observer would say this is persistent and severe enough to be an infraction. And hence, that there would be some reasonable grounds for the president or the dean of student life not to fall back and say, "Well, it's contextual." Well, of course we know it's contextual. If it were in a classroom and you were talking about the history of genocide, how we stop it, that's the place where you discuss things.

But on that open forum of the campus to be saying Intifada Now or to be adumbrating that horrible period of American history, which it's a great shame on our country, to say, "No, wait a second, this is not contextual." Time, manner, place would say you could have a historical discussion in the classroom, but not a call. I'm sorry, I'm kind of just rambling here.

Nadine Strossen:

No, you're not rambling, Michael. And because there are different strands of free speech doctrine that your excellent questions and ruminations raise. So please bear with me because I think I need to address at least three major points to be responsive.

Michael Poliakoff:

It's great to have a professor of law here.

Nadine Strossen:

It's wonderful to have a philosopher here and not to mention podcaster. So number one, the pogrom example, which you've used twice and that's very important. That illustrates another category of speech that is contextually punishable in addition to what I've already defined, a punishable threat or targeted harassment or bullying. This falls into the category or potentially falls into the category of when one speaker is punished because of inducing an audience member to undertake violent action. So it's a different kind of harm than the threat or the harassment, which is harming the directly targeted speaker.

Here, the intermediary, the harm is inducing the intermediary. And of course the intermediary who actually carries out the pogrom or whatever other violent action is called for is punishable. The question is, at what point should the speaker be held culpable? And in 1969, the United States Supreme Court unanimously held in an ACLU case, Brandenburg versus Ohio that even advocacy of violent or lawless conduct is not enough to justify punishing the speaker.

In that case, it was a leader of a local Ku Klux Klan group that was having a rally and they were brandishing firearms and he called for vengeance against black people and against Jews sending them out of this country and so forth. And unanimously across a very ideologically diverse court, the court

said that could not be punished. And before I say, well, let me say what could be punished according to the Supreme Court, only intentional incitement.

So they're using the word incitement as distinct from advocacy and it has to be intentional incitement of imminent violent or lawless conduct that is likely to actually happen imminently. So many requirements. And let me say Michael, that for all of the different men and women who have sat on the Supreme Court since 1969, every single one has agreed with that standard.

Which doesn't mean it's correct, but it is kind of interesting given the vast ideological diversity among those justices. It shows that the belief that this is the very speech protective standard that should be invoked before we punish somebody for inducing illegal or violent conduct is widely shared across very different partisan and ideological views. And so that's point number one.

But point number two, which you admirably raise, you recognize the requirement of that this speech has to be targeted because it has to intentionally incite and not to mention, be likely to imminently incite violence. But you ask, "Well, what about a more diffuse situation where you have a campus environment that's permeated by hostile and intimidating language?"

And I use the word hostile advisedly. You also refer to a concept that we tend to be most familiar with in the context of sexual harassment. But it does also apply to other kinds of discriminatory harassment, if not on the basis of sex or gender, on the basis of religion, nationality, race, and so forth. And the concept is called hostile environment harassment.

In the Davis case to which you alluded, the Supreme Court set out an appropriately strict definition of hostile environment in the educational context specifically, which I and my colleagues at FIRE, the Foundation for Individual Rights and Expression believe must be the same standard that is enforced with respect to any kind of hostile environment discriminatory harassment. And that is that the conduct, which can include expression, but often it goes beyond expression.

But even if it's based on expression, has to be, so first of all, it has to be objectively and subjectively offensive to the complaining individual. It has to be unwelcome to the complaining individual. And it must be so severe and pervasive that it effectively bars the targeted individual or group from enjoying and equal educational opportunity. That is an appropriately strict standard.

And the reason why it's important that it be so strict is if you go beyond that, you basically are descending into the territory that has been predominant on campuses where students say somebody is, "There's an invited speaker whose views I disagree with," or, "I'm being asked to read Huckleberry Finn and it's got a word that I consider triggering," or there's a student who posted something on social media. This is creating a hostile educational environment.

And we know that the DEI bureaucracies have had an extremely expansive view that equates ideas that are disliked or offensive, subjectively offensive, equated that with creating a discriminatory environment. So it behooves those of us who have long argued against such pretext for reducing

freedom of speech that we be rigorous in insisting that this be an opportunity, the awareness of antisemitism be an opportunity for appropriately enforcing standards against discriminatory harassment. Excuse me. And that means not lessening the standards either for anti-semitic speech or for any other kind of speech that is accused of being discriminatory.

Michael Poliakoff:

And of course that has been one of the kind of grim reminders, the inconsistency, especially on campuses that I think if I'm not misremembering, the FBI on one point noted that there are four times as many antisemitic events. This is FBI, not the DEI office talking.

Nadine Strossen:

Right.

Michael Poliakoff:

In comparison with the anti-Islamic events.

Nadine Strossen:

Oh, yeah.

Michael Poliakoff:

And yet how many DEI offices in the past decade up until the opportunity arose to expand after October seven, had anything to say about that. And that does bring me to the question that I have been so eager to ask you. Let's turn back the clock to October seven, one of the most appalling crimes against humanity that we have witnessed. And there have been, sadly in our lifetimes a number, but in its barbarity, something that just shocks the conscience of the world.

And I know you and your husband were in Israel fairly recently. And then we come to October eight, or perhaps we should wind the clock back even further, Palestine rights and Roger Waters. I think fair to say, kind of certified witnessed antisemite, with his antics, is going to be part of that. If Penn and Harvard in particular could have a do-over, what would it look like?

Nadine Strossen:

Oh, how interesting. Well, first in the interest of factual accuracy, my husband, who is an Israeli citizen as well as an American citizen, did go to Israel a few weeks ago and I did not go, Michael. I still think it's a war situation, and I just didn't think that the risk small as it might be, was worth it when I didn't think I had anything particular to contribute to my Israeli friends.

But at some point, I definitely will go and do whatever I can to help repair the economy. So what should have been done? I don't know if you have in mind the pro-Palestinian anti-Semitic conference that Penn was hosting to great controversy in the fall. How long ago it seems now. I have to have the same response I had to the Nazis in Skokie and the Unite the Right in Charlottesville, I hate what you say, but I defend to the death your right to say it.

But that is not enough. You kindly refer to my book HATE and the subtitle is even more important than the main title, Why We Should Resist It With Free Speech, Not Censorship. The book is at least as much about resistance through free speech as it is not invoking censorship because censorship isn't an effective form of resistance.

That's the case that the book is making. And it's not enough to just say, "Oh, we can't censor that speech," especially when the standards for free speech have historically at Penn and elsewhere been very result oriented, right? If it's speech that they're ascended progressive factions disfavor, there are all kinds of efforts that are made often successfully to censor it. So that's just a pretext.

But even assuming that there had been a consistently solid defense for speech that certain members of the campus community found offensive, the university has to go beyond that to foster a free speech response to the ideas that we hate, to foster events that feature speakers with different perspectives, to foster educational opportunities that will shed light on history and politics and culture and other factors of which so many of the campus demonstrators seem woefully ignorant.

So that they could not just be spouting slogans or aligning themselves with a so-called victim class, but really analyze who is the victim here, who is the oppressor here, is it legitimate to decry Israelis as settlers and or colonialists. The students who have been demonstrating against Israel famously use this word, which I think forever now after it's going to have a certain connotation now, but the word context that we can't look at October 7th alone, right?

We have to look at it as context. But how far back does their context go? It certainly doesn't go back the thousands of years. And people have been asking some of these demonstrators, "Well, from which river to which sea?" And they don't even know what they're talking about.

Michael Poliakoff:

What happened in 1948? Do you know kids? Do you know? Any sense?

Nadine Strossen:

And that's their sense of ancient history by the way.

Michael Poliakoff:

Right.

Nadine Strossen:

And so I say this as somebody who really wants to give the benefit of the doubt to young people, I admire their idealism, I admire their activism, but my responsibility as an educator is to help them to act and form their ideals based on information and knowledge and truth, and not just on, I suspect was sort of a popularity contest on campus, that the cool kids and the with it groups.

And because of intersectionality, if I want to be active in one progressive group that I've got to support all of them. And that means if I want to be a feminist or an environmentalist, I have to be pro-

Palestinian. And there seems to be not much more basis, I'm not even going to use the word reason, for these associations.

I'm all for extremely vigorous debates about the causes of the problems, the complex history, the thorny difficulties we face with various potential resolutions. But I feel to see these groups of students shouting slogans at each other is at least as depressing to me in my educator role as is depressing to me as a Jew and the daughter of a Holocaust survivor.

Michael Poliakoff:

Yes.

Gaby Anglin:

Okay, there you go.

Michael Poliakoff:

Breaking news for our Higher Ed Now audience, of course, by the time you get this podcast, all of you will know this, but sitting here with Nadine and with my colleague Gaby Anglin, we just heard the news that Claudine Gay, the president of Harvard, has resigned. Pressure over her alleged plagiarism, pressure over her mishandling of antisemitism on campus, and her poor answer to representative Stefanik's question about genocide.

Undoubtedly, there'll be much analysis of that, but I thought we would talk a little bit about it. And I'd like to frame it in the realm of what President Lee Bollinger did when suddenly he has Ahmadinejad invited by I guess one of his deans to speak on campus. Ahmadinejad, of course, a Holocaust denier, a anti-Semite leader of the revolutionary regime in Iran. Hard to think of a more unwelcome presence on Columbia's campus.

So Lee Bollinger, and of course there was some pushback from free speech advocates for what he did, but in my mind rather brilliantly said, "Fine, he has the right to speak here, I'll introduce him." And by the end of President Bollinger's 10-minute introduction, it was a rather rattled Ahmadinejad who had to respond to his rhetorical questions about antisemitism, about Holocaust denial, and I think also anti-gay policies. So I myself thinking in terms of what we were just talking about, the do-over, what would it have looked like at Harvard if Claudine Gay had exercised the kind of leadership that she might, this is leaving aside entirely the very serious allegations of plagiarism.

Nadine Strossen:

Yes, as we were saying before, the breaking news interruption, the answer to speech we dislike is not only not to censorship censor it, but also to answer it, to argue against it, to persuade other people not to adhere to it, perhaps even to persuade the person who's espousing the idea to abandon it.

In my book, I give many examples, Michael, of even former leaders of hatemonger organizations who have been persuaded to see the error of their ways, never because they've been punished, never because they've been shamed or shunned or ostracized, but rather because they've been engaged with

in a patient, compassionate way by people who have different perspectives. In other words, an educational approach rather than a punitive approach.

So Bollinger certainly in general conformed to that basic tactic of more speech, countering the idea that is hateful and not at all tolerating or succumbing to the pressures that he was under to cancel the appearance of Ahmadinejad. You're absolutely right that people have quibbled about whether he exercised his free speech, counter speech rights in the most effective way, in the most persuasive way, the most courteous way.

I think courtesy is kind of irrelevant at that point, but some people complained when you're introducing somebody, it's discourteous to be putting him down. But basically he did the two things that are most important. He did not succumb to pressures to censor by de-platforming, by revoking the invitation. This at a time when such disinvitations were rampant. And certainly there was enormous pressure on Bollinger.

So I give him enormous positive credit for having resisted those substantial pressures. I suspect the pressures came from very influential people, including donors and other powerful interests that had some leverage over the university. So kudos to him. As to the exact method for engaging in a conversation, there are other ways it could have been done, but I think that's like 2020 hindsight.

In terms of what the professor, the presidents should have done in response to the questions that Congress asked them, I think that the emphasis was completely wrong. But to start by saying that and end by saying it all depends on the context. I saw the answer that FIRE had given, I think before the October 7th attacks just on whether advocacy of genocide because this had been happening in some other demonstrations, could be punished.

And I thought FIRE got it exactly right when it said, "Yes, if the advocacy is targeted at particular individuals and reasonably creates fear that they're going to be subject to attack or is targeted harassment or bullying or if it constitutes discriminatory harassment because it's sufficiently severe." So to recognize that there are many situations where the answer is yes, many contexts sadly, which exists on our most prestigious campuses after all.

Shortly after October 7th, the FBI arrested a Cornell undergraduate and he's been subject to indictment and criminal investigations by US attorneys and by state authorities I believe as well, for posting what they consider to be punishable true threats on social media that were targeting and intimidating Jewish students at Cornell who were patronizing the Hillel Society and a kosher dining hall.

So number one, there should have been recognition of that there are limits on such advocacy, that the limits are being transgressed on our campuses, or at least there are serious allegations and we're doing something about it. I mean, I've heard a lot of complaints that there isn't even investigation of what we've seen viral videos of an Israeli student being, to all appearances, unless there's been enormous doctoring of the videotape, being harassed and bullied and intimidated, surrounded by menacing groups of students.

And at Columbia, an Israeli student was physically attacked. And I've read a very detailed report of vandalism and violation of content, neutral time, place and manner regulations that the major library at Harvard Widener Library with all kinds of pro-Palestinian, anti-Israeli chanting and shouting and sloganeering and banners, making it really impossible for Jewish students or for that matter, for any student to study during exam period.

Why does Harvard let this go on? If we are to have a truly flourishing free speech environment and culture it is important both that the officials not punish protected speech and that they do punish unprotected speech. Now, that may sound paradoxical for a free speech advocate to say, "You've got to impose some limits here," but it's not.

Because the expressive conduct that is not protected is not protected precisely because it has an adverse impact on other people's speech, the right of the person not to be intimidated and to speak and the right of audience members to hear the message. So that was a second failure on the part of the presidents including Gay.

And the third, probably most people had this in mind as failure number one was the blatant hypocrisy to be invoking a newfound, as you said earlier, commitment to free speech when it just happens that the speech that's protected is anti-Semitic speech against a record of abysmally failing to protect every other kind of controversial speech to the extent that FIRE and College Pulse, which for years now have been doing very thorough surveys of the free speech situation on campuses in the United States a few months ago had issued the most recent report, it ranked 248 campuses in the United States.

And as to free speech climate, number 248, the worst of the worst was Harvard. And ranking only one place above that as second worst in the United States was Penn. So I mean, it's almost laughable that these presidents cite support for free speech as the reason for not intervening against anti-Semitic speech. So I have to say, I'm not accusing anybody of being antisemitic, but I do associate myself with many critics who have said, "Can you imagine analogous messages being voiced about any other minority in the world and the president's having the same answer?" And it is unimaginable.

Michael Poliakoff:

The silence of Claudine Gay when that video appeared on Twitter of the young man wearing a kippah, a yarmulke, finding himself surrounded by anti-Israel demonstrators and not being given rite of passage, to me, it's one of the most culpable failures of any university leader. And you're quite right. If that had been a protected minority or one that Claudine Gay would've recognized as a minority to be protected, should have had the police, if not the National Guard out there. This would've been the kind of campus-wide scandal that it should be. And it wasn't.

Nadine Strossen:

And I think the elephant in the room, of course, is that she's Harvard's first black president and she's a black woman, and that gives her, it makes, as somebody in the New York Times said, the optics are not good if Harvard fires its first black female president. But I have to say, hats off to our mutual friend and colleague, John McWhorter, who was honored, justly honored by ACTA recently, had a wonderful New

York Times column about this in which he said that he had for a long time been hoping that things would go better for her.

He did not jump on various earlier bandwagons, including earlier plagiarism and other accusations as to why she should be removed. But he finally said, "We've hit the point where it's doing far more harm than good to equality causes and racial justice and gender justice to be invoking her sex and her race for double standards."

That I think he even came down quite hard on the plagiarism, as I recall, just based on the acknowledgements that had been made by the Harvard Corporation about misattribution or non attribution, and pointing out that that alone would've been enough to punish a student under Harvard's rules and how unhelpful it was to Harvard and to her and to black people and women to somehow hold her to a lesser standard.

Michael Poliakoff:

Yes. Yes, indeed. And ultimately I'll invoke Dorian Abbot, merit, fairness, equality have to be principles that are operating principles of the university. When we take away the merit standard, we're left in a world where the educational goals are seriously threatened.

Nadine Strossen:

I have to speak up for my liberal instincts here. I'm still a political liberal as well as a classical liberal, and I do acknowledge that the concept of merit as it goes back to a major theme of ours, Michael, it's not objective. There are no bright line standards, and I have no doubt that with all of our cognitive biases, we human beings may devalue the merits of certain groups, including Jews maybe and other minorities.

And so I all in favor of trying to correct for that. So maybe I should say recognizing that it's an aspiration that we have often fallen short while invoking the concept that we're enforcing merits based standards are not really that there are other kinds of biases, even unconscious biases that are at play.

Michael Poliakoff:

I could not agree more to the point that I have quietly begun to advocate some serious challenges to university leadership over search committees and tenure and promotion committees. We're drifting a little bit from our theme, but it's always wonderful to explore these things with you.

Nadine Strossen:

Well, it comes back to the first big question that you asked me about, are there any bright line standards?

Michael Poliakoff:

It would be inconceivable today and properly so for a search committee or a tenured promotion committee, at least I hope it would be inconceivable to be made up entirely of Caucasian males the way it used to be. And there's a good reason for that, which is not the optics but the difficulty of confirmation bias. I actually wrote an article with Hank Brown and John Cooney, John Cooney being a top flight cognitive psychologist.

And he pointed out that the fMRI studies show that the brain lights up when it's on familiar territory, so that when a person hears the voice of a beloved parent or a beloved teacher or of friends, and I know Jonathan Haidt has talked about this, the elephant and the rider, the rider may think that he or she is in control, but it's the elephant unless you do something to counteract that, something to counteract your confirmation bias.

And that's why search committees need to be not homogeneous, but heterogeneous. And it bothers me that it's totally okay to have a search committee or a tenure committee for a political scientist or Lord, spare us, an economist without a single classical liberal or conservative or horror of horrors, a Republican, as the department chair once said in that joke, "Republicans, we don't even know any."

So this is what we're up against within the university, and we can see it reflected in many surveys. So yes, merit is a difficult thing at times to ferret out. We can see extreme merit and we can see lack of merit. But some of these places with the complexity of the human mind, I recognize that it's not simply an algorithm, but you get around that with these ways of fighting your own confirmation bias. And DEI offices have been extremely poor about recognizing confirmation bias.

Nadine Strossen:

I think this is completely analogous to the free speech issues that we've been talking about because we're talking about John Stuart Mill, famous edict about subjecting every single belief, every single idea, no matter how strongly you accept it, no matter how passionately you believe it to be true, it must be subject to the most rigorous evaluation and examination.

And you can do that most effectively by subjecting it to questioning and argumentation by somebody who rejects it, right? Somebody who is exactly ideologically the opposite. And you're talking about the same kind of critical inquiry scientific method in making every important decision, including decisions about who will be teaching and researching at our universities.

Michael Poliakoff:

I should also note another fact of your biography. You were the state champion in debate competition, and I can well see how that happened and always done with grace and civility, but absolute intellectual rigor, which is a wonderful thing. Nadine, are there topics that you particularly want to talk about from your book or books or many articles or appearances? I want to be respectful of your time. I realize that there's another sibling agency, IHS, that is eager to have you there a little later on this afternoon.

Nadine Strossen:

Well, since you are so nice as to refer to my recent book, Michael, let me say a word about that and also about a new three-part documentary film series about free speech and on which I worked very hard last year, but also came out recently. So I highly recommend my book *Free Speech: What Everyone Needs to Know*. Seriously, I wrote it for a general audience to be as accessible as possible, but without at all dumbing down.

In fact, I grapple with the hardest issues. And the very first substantive chapter in the book is the 12 hardest, strongest arguments against free speech and my best answers. But I do begin the book by saying, "I'm not trying to preach to you. I'm trying to make you think. So I want you to, again, question my answers," as I say to my students. But if I do say so as a result of writing a book and the process of writing it, I synthesized a lot of free speech law that I hadn't previously done.

And I think in a way that I haven't seen any other free speech scholar or advocate do that makes the principles actually quite simple and commonsensical to understand. And again, not because of oversimplifying. So one of the conclusions that I came to that hadn't really crystallized in my mind until I wrote the book was that our law for all of the accusations, we hear that about First Amendment exceptionalism and absolutism, it really accords very much with common sense, that the government is empowered to outlaw and punish the speech that is actually the most dangerous.

But the government is also disempowered from engaging in the censorship that's the most dangerous when the censorship is based on dislike of an idea or some generalized fear of the idea. So I came to have a much greater appreciation for free speech as a result of writing the book, and I certainly hope that readers would have a greater appreciation as a result of reading. And because it's in Q and A format, you can dip in and out. The table of contents can point you to what you need to know, as the subtitle says.

One of the audiences for which I wrote it were journalists. I'm regularly interviewed by even quite knowledgeable journalists who really don't know very much about basic free speech principles that they have to invoke to evaluate any situation that they're covering. And again, I'm cheerfully happy to answer the same, go through the same explanations many times, but I thought they might find it convenient to have a written reference to answer those kinds of basic questions.

Then if I could say something about the film series, it was produced by a company called Free To Choose Network in honor of Milton Friedman, about whom they had done a documentary many years ago. It's called Free to Speak. It's a three-part series that was released on public TV in October, freely available on YouTube, various online sources, and it is phenomenal. I can say that because I just have a minor role as the narrator.

But the filmmakers were the ones who did the amazing work of research and traveling all over the world. And they have episodes, dozens of episodes from dozens of countries, every single continent except Antarctica, illustrations involving people of every possible demographic group, age, ethnicity, religion, race, gender, sexual orientation, you name it, and about speech of various kinds, about science, about health, about art, about academia.

And the old saying that a picture is worth a thousand words, I would say a film is worth a million words. Just seeing in living, breathing color human beings and what they actually suffer when they don't have free speech and what ideas are thwarted and what human potential is thwarted. And conversely, the enormous liberating and equalizing power of free speech really comes through.

The website for Free to Choose Network has wonderful resources where they break the film down into very small segments. So excellent to use in schools or community organizations if you're interested in a particular topic. And for each segment, there's a list of discussion questions and resources for reading. So it's really, as the hope for my book, not to answer all of your questions, but to start your thinking and to stimulate your interest for further exploration and to facilitate the further exploration.

Michael Poliakoff:

And something that is desperately needed today, because in a crisis, the temptation to overreact and to abandon core principles is very great, very understandable. And having those caveats, knowing where the guardrails ought to be is something that's of enormous service. And I'm so grateful to you for coming in to talk to us about that. Look forward to sharing this podcast widely, and it's always a joy to talk to you, Nadine.

Nadine Strossen:

Right back at you, Michael. Thank you so much.