FREE SPEECH AND CIVIL DISCOURSE IN THE 21ST CENTURY

KEYNOTE ADDRESS

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ROD SMOLLA: Andy, thank you. That was an extraordinary gracious introduction. To quote Lyndon Johnson, it's an introduction that my father would have loved and my mother would have believed.

I have two tasks tonight. I'd like to first try to make the case that if you look back over the first 100 years of American free speech law, you can reduce the central problem of American free speech thinking to a battle between two very elegant, very powerful, but opposing conceptions of freedom of speech. And I'm going to talk to you a bit about how my own thinking about free speech has evolved and how I migrated from the view that one of those conceptions was certainly correct and the other certainly wrong, to now, in a different epoch of my life believing that it's vitally important that they both remain important parts of our thinking in our formal law with regard to freedom of speech.

I'm then going to shift and talk not about law and not about First Amendment doctrines or values or theories, but about our culture and about the problem of improving the civility of our discourse on political issues and all of the issues of public concern that capture our attention as a country. And I'm going to attempt to demonstrate in that second stage of my talk that of the two approaches to freedom of speech, one is vastly superior to the other as a code of personal moral conduct, as a way to conduct one's life as a professional, as a lawyer, as a member of a university community, as a serious participant in the democratic experiment.

So let me begin by talking to you about these two opposing central conceptions of free speech law in the United States. Those of you that are law students and have taken courses in

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constitutional law and freedom of speech or mass media law—including some wonderful Charleston students that I've heard today in a moot court exercise in which I was a judge—know that it is extraordinarily complex and compartmentalized.

If you open a case book on freedom of speech of the kind that some of tomorrow's panelists have authored, or if you open a treatise on freedom of speech, you'll find scores of areas compartmentalized with individual sets of equal doctrines governing each particular free speech area. And even within an arena, even within a chapter, you can find extraordinary complexity to the sub-compartments within the chapter. So if, for example, you were to look at one of the subjects of tomorrow's panels, a typical chapter in a free speech case book, "The Intersection of Tort Law and First Amendment Principles," you would find that within that chapter there is undoubtedly going to be many complex divisions, a whole body of law dealing with the law of libel, and how First Amendment law has impacted the law of libel. And even that you'll see subdivided into many different compartments, depending on the nature of the libel and the nature of the plaintiff. And you could go on to see separate doctrines that govern the invasion of privacy in the First Amendment, and even there see that that it is likely to be divided among different kinds of invasion of privacy, with one set of First Amendment doctrines dealing with things like intrusion and another with publication of private facts, and another with appropriation of name and likeness, and another with false life invasion of privacy.

And you would go on in the tort chapter and you would see a whole body of law dealing with intentional infliction of emotional distress, and even there you would be invited to see nuances in which you might think that there would be one set of First Amendment rules involving infliction of distress on public figures and another involving infliction of distress on private figures. And these doctrines are tremendously difficult and wrenching. To take the emotional distress problem, the Supreme Court has an extraordinarily difficult case in front of it right now, one of the first cases in which it heard oral arguments in this term, the Westboro Baptist Church case involving the very graphic and hateful protests that those church protestors tend to stage outside the funerals of fallen American soldiers.

And so you have that extraordinary complexity. But I'm going to try to persuade you that cutting across it all, cutting across all the distinctions you've learned between content-based and content-neutral regulation of speech, prior restraints and subsequent punishments, cutting across all of that are really two simple ideas that have been intentioned for at least the last 100 years. And more than that, I want to try to convince you that you can take all of the hundreds and hundreds of Supreme Court decisions involving free speech, and there have been several hundred Supreme Court decisions involving free speech, and you can distill them to two opinions, two opinions that encapsulate the tensions that have characterized all of American debate in free speech law.

And more narrow still, you could reduce those two opinions to two paragraphs, one paragraph in one opinion and the other paragraph in the other, and honing down even more, to just one sentence, one sentence in each of the two opinions. So I'm going to test this idea out on you and try to demonstrate for you that these two sentences capture in extraordinary ways very important, very persuasive, but opposite conceptions of freedom of speech. And then I'm going to talk to you a bit about how those two ideas have fared in this battle between each other over the last 100 years.

I am betting that those of you that have been into the American free speech experiment probably have in your heads right now the two opinions, the two authors, the two paragraphs, and maybe even the two sentences. I'm guessing that most folks in the room have guessed that the first, perhaps the most famous opinion in the history of American free speech law, must be the dissenting opinion of Oliver Wendell Holmes in Abrams versus United States. You get double CLE credit if you guessed that. How many of you guessed that? You should all be raising your hands right now.

You may remember that in 1919, Oliver Holmes dissented in *Abrams v. United States*[1] from the conviction of persons who were involved in protest again World War I. And in the center of that dissent, it's just a few pages long, is that famous paragraph. It begins with the statement that the persecution for the

1. 250 U.S. 616 (1919).

expression of opinion is perfectly natural, and he talks about how the natural impulse of government is to sweep away opposition in law. And then he has that sentence that most of you remember in which he says: "But when men have realized that time has upset many fighting faiths,"[2] and he goes on to describe how they may come to realize that the best test of truth is the power of the idea to get itself accepted in the marketplace. That paragraph has come to be thought of in our history as the place where the marketplace of ideas metaphor first took hold in American life.

He then, in a typical Holmes haunting way, talks about how this is an experiment, as all life is an experiment. And then he utters the sentence that I want to read to you, one of the most significant sentences ever written about free speech law. He says: "While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions,"[3] and now listen, "that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[4]

Now, that's a power-packed sentence. He is telling us that you cannot move against opinions even though you are certain that they are "fraught with death." "Fraught with death," even though you loathe them. And that even speech that is evil must be allowed to go free, unless you've got to intervene immediately. How many times in that sentence does he talk about "immediately," the instantaneous quality of it? And not just any old evil either. In an extraordinary rhetorical flourish—it must be rhetorical; he can't be serious—he says and even with all that, you've got to restrain yourself unless you've got to check the speech right now to save the country. Now, that is a radical, extreme, extraordinary commitment to freedom of speech. It essentially says the most evil speech imaginable, speech that you hate, it disgusts you, and you are certain it is a carrier of violence and evil and death, you cannot move against it absent a close connection between that speech and extraordinary catastrophic

2. *Id.* at 630.
3. *Id.*
4. *Id.*

harm, bringing down the nation.

That view of free speech law has been in constant tension with another entirely different and equally beautiful and equally powerful understanding of what free speech law is. It is best encapsulated in an opinion from Justice Frank Murphy in 1942, a case called *Chaplinsky v. New Hampshire*.[5] How many of you guessed that as the second case? Hands are up everywhere.

You may remember that *Chaplinsky* involved one of the first Jehovah's Witness cases to reach the United States Supreme Court. A Jehovah's Witness is speaking from a soapbox in a public area, engaged in speech that is highly offensive to many people, a religious diatribe offending many others around him on the basis of religion and identity. A crowd is beginning to assemble, and they don't like it, and they're beginning to stir and get restless. And a police officer comes to try and just calm the water and get Mr. Chaplinsky sort of out of this position. And he doesn't like it. The police officer tries to walk him away, not immediately arresting him. And Mr. Chaplinsky turns his anger on the police office, and he describes the city fathers as "a bunch of damned fascists."[6] He calls them all "God damned racketeer[s] . . . damned Fascist[s]."[7] And like a referee calling a technical foul in a basketball game, the officer places him under arrest and he's charged with disturbing the peace.

Now, if Holmes's test were applied, you could do nothing to Mr. Chaplinsky. I mean, he's been a bit vulgar. He's been a bit rough. But to call somebody a "damned fascist" hardly is speech that you loathe or believe fraught with death. It's relatively low on the offensive scale. And there's no plausible argument that an immediate check was necessary to save the country. Yet, in *Chaplinsky*, a unanimous Supreme Court led by Justice Murphy affirms the conviction and uses language in which the Court says that "speech such as this poses no First Amendment problem."[8] One of the powerful things about *Chaplinsky* is the Court's sense of dismissal, that you can't really be serious in your claim, Mr. Chaplinsky, that this is what the First Amendment is all about.

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5. 315 U.S. 568 (1942).
6. *Id.* at 569.
7. *Id.*
8. *See id.* at 571–72.

And then there are two fantastic sentences. The first sentence, many of you remember this, the first sentence says there are these narrow categories of speech that have never been thought to pose any problem under the First Amendment. And the Court gives a number of examples: the profane, the libelous, the vulgar, the fighting words. Some of you may remember that Chaplinsky today is often described as "the fighting words case." Don't ever call it that. It doesn't do it justice. It trivializes the case. That's what it is often remembered for today.

When the Court is describing those sorts of things—libel, profanity, lewd, fighting words—there's a fascinating construction to the sentence. There's a dash and there's an intermediate phrasing. And the Court says, "these . . . [are words] which by their very utterance inflict injury or tend to incite an immediate breach of peace."[9] And that little phrase, that little parenthetical phrase, is fascinating, because it's an "or;" it can be either. It can be words that when you say them, boom, there's violence that's going to come right away. That's how *Chaplinsky* still lives on as meaning. You go up to somebody at a bar and you put your finger in their face and you insult them and then they punch you in the nose. Those are fighting words, the idea that just saying it has an immediate physical reaction. Note, you could fit that within the Holmes formula. That's not inconsistent with the Holmes formula.

But it's that other phrase in *Chaplinsky*, the idea that there are words that inflict injury merely by saying them. The words are themselves the harm agent, they are themselves the evil. And then comes the next sentence. It is, I think, an amazing packing of a powerful idea into one simple sentence. Justice Murphy gives us the theory behind his claim that this kind of speech is not at all protected by the First Amendment. Because I have such reverence for the sentence, I'll read it. He describes this kind of speech as, quote, "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[10]

9. *Id.* at 572.
10. *Id.*

Now, that beautiful sentence stands in absolute repudiation of the Holmes view. Holmes is saying the government has no business telling us what is true and what is not true. That's for the marketplace. Holmes is telling us that our moral sensibilities have no business interfering with free speech law. Holmes is telling us it's not good enough that you loathe the speech. It's not good enough that you're convinced that the speech is fraught with death. That won't do it. And Holmes is insisting that you meet this extraordinarily high burden of demonstrating a connection between the words coming out of my mouth and the evil, the harm. And it's got to be a huge evil.

And Justice Murphy is saying exactly the opposite. Justice Murphy is saying that the government, that a decent society, that a civilization, does have jurisdiction over truth and falsity, and can reach the judgment that certain expressions have no plausible claim to being even ideas at all, let alone ideas that are in a serious way an attempt to advance social progress towards truth. And then he's saying, even if you can squeeze a scintilla of idea out of certain kinds of speech, the evil that they cause, the injury that they cause, so outweighs a good society's interest in morality, which clearly Justice Murphy thinks is a central purpose of the government, and order, that you may ban the speech.

Now, I want to tell you a story about my own odyssey with regard to these two conflicting ideas. As a young lawyer I was convinced that the story went like this. Holmes was right in 1919. Holmes started off with the *Chaplinsky* view. Holmes started off believing that any speech that had a general tendency to be corrosive of order, to be in some way a possible threat to the rule of law, could be banned. And in the early Holmes opinions, he sent people who were protestors to the penitentiary because their speech arguably had a bad tendency, and it was the intent of the speaker to advance a bad cause. So in *Schenck v. United States*[11], he sent the protestor to the penitentiary, and in *Frohwerk v. Missouri*,[12] he sent the protestor to the penitentiary.

11. 249 U.S. 47 (1919).
12. 249 U.S. 204 (1919).

In the most famous case, *Debs v. United States,*[13] he sent a famous political figure, a social leader, a labor leader, Eugene Debs, to jail. He crushed his life. He sent Debs to jail for ten years. Debs was a broken man. He was finally pardoned posthumously, but he never recovered. He sent Debs to jail for an anti-war speech he made in Canton, Ohio, in which there was no conceivable claim that there was any danger to society by Debs' speech other than the general tendency to obstruct the war effort and to discourage people to report for the draft.

Then Holmes flipped, had a conversion experience, and adopted this radical view that you see in *Abrams*, this extraordinary commitment to freedom of speech. And what I used to believe is that Holmes got it right in 1919, but he could get no takers. Everybody believed in that alternative theory, that moral theory, that orderly theory of free speech. And why wouldn't they? That was the theory that the rest of the world believed in. Europe followed the *Chaplinsky* conception of free speech if it had any conception of free speech. In fact, today, most of the world follows the *Chaplinsky* rule.

Furthermore, *Chaplinsky* encapsulated the common law. If you read Blackstone's conceptions of freedom of speech, if you read the early common law lawyers conceptions of freedom of speech, *Chaplinsky* seemed to have it right.

So Holmes dissented, but he was a voice crying in the desert. Nobody else heard him. Except soon Louis Brandeis came onto the Court, and he did hear it, and he did buy in, and he supported Holmes. And he added the additional argument that you actually are safer under the Holmes view than under the *Chaplinsky* view, because you create an outlet for people to vent their anger and to vent their dissent. You don't make their dissent stronger by suppressing it and driving it underground.

And then I said what happened was the country just couldn't handle it. The country wasn't ready for it. And so in 1942, you get the *Chaplinsky* case, and that still is the law of the land. Neither Holmes or Brandeis would live long enough to see their views finally become the enlightened views of the country. And some time in the 1950s, right around 1952, 1953, the *Chaplinsky* view reached its apex. And then, as we went through

13. 249 U.S. 211 (1919).

McCarthyism and the Communist witch hunts, people began to have second thoughts. The Supreme Court began to go back and read its Oliver Wendell Holmes and its Louis Brandeis. A younger generation of Justices ascended to the Court. And in the late 1950s, early 1960s, all the way 'til today, the Court repudiated *Chaplinsky* view and adopted the Holmes view. And the Holmes view now governs America.

And as a younger lawyer, I thought this was good. And I thought my job as a scholar, my job as a litigator, my job as a teacher of free speech law was to get everybody behind that project, and to get all the little vestiges of the *Chaplinsky* that stood around like stubborn weeds stamped out. So you still found little pockets of *Chaplinsky*-like thinking in some free speech law, and I would rail against them as inconsistent with the enlightened Holmesian view. And I even was so arrogant as to think that any society in the country truly dedicated to freedom of speech would embrace the Holmes view and that the Europeans and the English and all the new emerging nations that came after the fall of the Soviet Union ought to read their Holmes and read all the modern cases that have enforced that view and get with the American free speech project.

I've since come to think that I was entirely wrong, that my description of what had in fact happened was in error. And it didn't explain the cases and the decisions and the reality, that instead what happened was something a bit more complicated. What happened was that the *Chaplinsky* view, which had always been the dominant strain in free speech law, did reach its ascendency in 1952. In a minute I'll tell you the 1952 case. But in the late 50s and early 60s what happened is free speech law got cut in half. There was a huge cleavage. And the Holmes took over for one part of American life. I'll call it "the marketplace," the great open American marketplace.

So that was a cataclysmic change. That was a tectonic shift in the plates. Holmes overcame Murphy in the general American marketplace. But what then developed over the next 40 or 50 years were a series of cases that carved out sub-communities, sub-places, in which it wasn't the Holmes view, but the *Chaplinsky* view that was nourished and flourished and expanded. So you had the general marketplace, the open-air spaces of American society, and then you had places like this

auditorium, places with roofs, places with domes, programs and communities and settings in which the community view, the moral view, the orderly view of what free speech law was supposed to be took hold and became equally powerful. And that currently modern free speech law is largely a border dispute—it's fussing over where we are on the borders and when we are governed by the Holmes view, because we're talking about speech in the open marketplace, and when we are governed by the *Chaplinsky* view, because we are talking about speech in this special setting.

Now, I'm going to describe the special settings for you in a minute. But before I do, it's worth reminding us all of that 1952 case that represents the ascendency of the Justice Murphy view. It's a case often lost in American casebooks, often relegated to a footnote in our discussions of free speech. It ain't right. It may be the single greatest free speech decision ever representing the Murphy position. It's a case called *Beauharnais v. Illinois*.[14] It came out of my hometown, Chicago.

The state of Illinois, like so much of America, has long dealt with intense racial conflict. And the city of Chicago was long famous for the intense racial enclaves and the rivalries among the different ethnic groups: the Irish, the Italians, African Americans, Poles, et cetera. It was part of Chicago's identity, and, of course, there was much racism in Illinois and the city. The state of Illinois passed a law that it passed largely because of the Holocaust and the extermination of Jews in Nazi Germany, which Illinois believed showed you where hate speech takes you, that it was Hitler's hate speech, it was the hysteria of the Third Reich that sent an entire nation into a mass destruction adventure of evil and genocide. And so the fundamental idea was you've got to stamp out hate speech, because if you don't, it leads to hateful violence. And so Illinois passed a criminal law making it a crime to disparage any group on the basis of their racial identity.

Mr. Beauharnais was a white racist supremacist from the south side of Chicago. He distributed leaflets for a group called the White Circle League, a group like the Ku Klux Klan or the Aryan Nation. But these were the Chicago Nazis. You may

14. 343 U.S. 250 (1952).

remember them in *The Blues Brothers*. He distributed the leaflets, and he was arrested and charged with violating the Illinois statue, and he was convicted. His case went to the Illinois Supreme Court, and in the Illinois Supreme Court he said to the state of Illinois: "You can't convict unless you prove that my leaflets posed a clear and present danger of racial violence."[15] So he was inviting Illinois to treat the Holmes view as the law of the land. The Supreme Court of Illinois rejected his claim. It then went to the Supreme Court of the United States, and the Supreme Court of the United States rejected his claim as well.

I invite you to go back and Google and read Justice Felix Frankfurter's eloquent and emotional and powerful opinion in *Beauharnais v. Illinois*. The only Jewish member of the Court at the time, there are allusions in the Frankfurter opinion to Nazi Germany and the Third Reich. And then he says, "The state of Illinois could reach the subject that this kind of racist trash doesn't contribute anything of serious social value to the marketplace of ideas. It's just hate, and as likely to tear at the social fabric, as likely to injure order and injure morality, the idea of equality."[16] I mean, this was the Land of Lincoln. And the Supreme Court, in a powerful exposition of the *Chaplinsky* idea, said you can put an Illinois racist in jail because his words alone carry that potential to cause injury and tear at the communal and moral life of the state.

It wasn't that long after *Beauharnais*, however, that a cascade of opinions would reject *Beauharnais* and would reject the entire *Chaplinsky* project in the general marketplace of ideas. There are scores of cases I could cite to you. Let me take three easy ones, because they are factually identical to *Beauharnais*, yet the results come out exactly the opposite.

Brandenburg v. Ohio[17], a classic famous free speech case involving a protest by the Ku Klux Klan. The state of Ohio tries to convict the Klan members for their racist speech, their cross burning. The Supreme Court says "no," and then restates the Holmesian type methodology, saying that you can only move against such speech if it is directed to the incitement of imminent

15. *See id.* at 252.
16. *See id.* at 256–57.
17. 395 U.S. 444 (1969).

lawless action and likely to produce such action. Very reminiscent of the Holmes language.

In another famous racist case, *R.A.V. v. City of Saint Paul*,[18] a cross burning case, the Supreme Court strikes down an ordinance identical in all respects to the Illinois law and reverses the conviction of someone who burns a cross in an African-American family's backyard.

And then in a case that I argued in the Supreme Court of the United States, a more modern case, *Virginia v. Black*,[19] the Supreme Court said that the state of Virginia could not declare all cross burnings to be presumptively threats. Some cross burnings could be threats, but you couldn't simply say, because cross burning is so evil, because it's associated with the Ku Klux Klan, you can ban the burning of a cross and create a presumption that it had an intent to discriminate.

I could cite another twenty cases, but the fact of the matter is that in the general marketplace, it was not the *Chaplinsky-Beauharnais* view that prevailed, even though it exists in the rest of the world today, but the Holmes view. But now let me talk about the special settings. First of all, what kinds of settings am I talking about? Perhaps the strongest example involves speech by public school students. In the public school setting, such as public high schools, the Supreme Court rejected the Holmes view, in favor of a jurisprudence much more like that of *Chaplinsky*. The Court held that public school officials could discipline students for vulgar speech, sexually suggestive speech, speech disruptive of the educational environment, and speech that appeared to advocate illegal activity, even if that advocacy was largely abstract or even comical. As a father of five, I can tell you that that's a difficult project sometimes, but those school officials could do that. And then in government employment settings, the Supreme Court said, that the government as an employer has huge latitude to impose rules of conduct and decorum and decency and civility on the speech of government employees. And in numerous other settings in which there was a more intimate set of relationships, in which there were values that were clearly there to allow the particular entity to carry on

18. 505 U.S. 377 (1992).
19. 538 U.S. 343 (2003).

some serious function, in which there was a quality of moral jurisdiction over what took place within the setting, the Supreme Court let the *Chaplinsky* rule reign rather than the Holmes rule.

Now, I want to expand on this a little bit by first getting you to see that in the private spheres of American life, in a place like the Charleston School of Law, a private center of higher education, or Furman University, or any private organization, a church, a fraternal organization, a civic organization, it would of course be the case that you could organize yourself under the *Chaplinsky* rule. Because there is no state action, the First Amendment does not apply—you can require civility, you can require respect for human dignity, you can require that ideas contribute to morality and order. And so religious traditions will make certain speech sinful, will banish people from the congregation because the speech is damaging, it is evil, it is immoral.

But beyond that, even in settings like a private employment setting, a McDonald's or IBM or Boeing, the private employer may say: "Check your vulgarity, check your racist hate speech, check your hostile environment-creating language at the door. We're a private company. We have a code. We don't know Holmes from Shmolmes. We're going to be *Chaplinsky* folks here." They can do that. But the powerful thing is that the Supreme Court said even public entities, even government agencies, even the government as employer, even the government as educator, may, when it is not regulating the open marketplace, but dealing with its functions, which can include moral inculcation in it's smaller sub-settings, can make itself a *Chaplinsky* organization.

So you have the marketplaces on the one hand and the moral places on the other, and they both coexist in modern American free speech law. They coexist powerfully and comfortably. And although we fuss at the barrier, we fuss at whether you're on one or the other sometimes, because it's not always easy to tell whether you belong classified in the open marketplace or belong classified in the private spaces. When you get deep into either country, the rules are very solid.

Let me give you an example of the peaceful coexistence of this. I'll just take two opinions from Chief Justice John Roberts, a brilliant lawyer, a brilliant justice, whatever you think of his

jurisprudence, whether you support or don't support his general tenor, an absolutely wonderful, magnificent, thoughtful, reflective Chief Justice, a serious legal intellectual. Two opinions from recent years, both written by the Chief Justice, each partake deeply of one of the two views. Chief Justice Roberts last year wrote one of the great Holmes marketplace opinions of modern times, and just a few years before, in a school case, wrote one of the great *Chaplinsky* opinions, and never had any doubt about the validity of either of those, nor saw any contradiction, was perfectly comfortable with the idea that these two different approaches should govern these two different realms.

The marketplace opinion was one from last summer, the *United States v. Stevens*,[20] a gross case. This case involved a federal law that made it illegal to traffic in violent images involving the violence or destruction of animals. The law was enacted by Congress in response to what are called "crush videos." Crush videos are so disgusting that it's one of those things that tests our mettle as lawyers to even describe them to an audience. Crush videos were a sexual fetish in which small animals—hamsters, cats, et cetera—were crushed to death by women in high-heeled stilettos, and it was a sexual fetish for people to watch these poor animals get destroyed in this gruesome way. Congress saw this and didn't see any contribution to the marketplace of ideas and reached the *Chaplinsky*-like judgment that whatever scintilla of contribution it arguably had was far outweighed by our sense of morality, so it banned the trafficking in these images, and quite cleverly, I thought, tied it to the notion that the act itself had to be illegal where it took place.

In a fascinating legal drama, the administration of President Obama was called upon to defend the federal law in the Supreme Court of the United States. The former dean of Harvard Law School, the Solicitor General, Elena Kagan, now Justice Elena Kagan, was the person responsible for advancing the argument of the United States in the *Stevens* case. She wrapped her theory entirely around *Chaplinsky*. And why not? She argued to the Court that there is no serious intellectual purpose here, no plausible claim that these kinds of images are in any way part of

20. 130 S.Ct. 1577 (2010).

the pursuit of truth, that whatever modicum of value they had is far outweighed by the interests in law and morality. And then she said, "And that list, you know, that *Chaplinsky* list, it was never intended to be exclusive. A decent society can add to it. And maybe Frank Murphy thought that libel was a good example and lewdness was a good example and profanity was a good example. Now we know crush videos are a good example and they should be added to the list."

It's the same point, a perfectly solid intellectual argument. The striking thing is that the argument was rejected unanimously by the Court, although there is one very sort of soft concurring opinion by Justice Alito. But Chief Justice Roberts said, not only is this protected by the First Amendment, but he wagged a finger at his later colleague Justice Elena Kagan, he chastised the United States and the Solicitor General's Office for the extremity of its argument, and said, "Your argument is dangerous." Those are fighting words. That's a mean thing for one lawyer to say to another lawyer. That's kind of personal. Not just that it's just wrong as legal doctrine; it's a dangerous argument. And he said, "It's dangerous, because under your theory, the government would have jurisdiction to decide what's in the pursuit of truth and what's not, what's moral and what's not. Who knows where it's going to stop?" So it was at that moment that you could see that Chief Justice Roberts was a passionate disciple of Holmes in the open marketplace. And it's a gutsy opinion. I mean, the Justices didn't get rave reviews in American newspapers and so on—"The Supreme Court Says Crush Videos Protected by the First Amendment." But it was a powerful endorsement of that view.

Now, Chief Justice Roberts is also the author of a case called *Morse v. Frederick*,[21] affectionately nicknamed the "Bong Hits for Jesus Case." You may remember the Bong Hits case. This is the case in which the Olympic torch was running through Alaska. You know how they always run the torch from one end of the world to the other and then it arrives at Salt Lake City or wherever it was. So they were running the torch through, and so it had to go right by Juneau High School. So the Juneau High School administrators got all the students out to line the street.

21. 551 U.S. 393 (2007).

They had the band, they had the cheerleaders, they had everybody out as the torch and the Olympians came through. Which is cool. I like that. Well, some rambunctious seniors, led by Mr. Frederick, decided that just as the torch would run by Juneau High School and the CNN cameras are looking and so on, they would unveil a large banner, and the banner said, "Bong Hits for Jesus." Principal Morse didn't like it. Principal Morse went marching to the seniors. Everybody scattered except Mr. Frederick. None of his friends hung. Mr. Frederick hung there, and the principal marched him to her office, and she eventually suspended him for 14 days. He claimed he had a First Amendment right to put out "Bong Hits for Jesus."

The case drew a lot of national attention. Ken Starr, former special prosecutor, dean of Pepperdine Law School, now president of Baylor University, volunteered to represent the school and Principal Morse. And it was quite a First Amendment battle. First Amendment pundits were very uncertain as to how the case would come out. Mr. Frederick hurt himself a bit, because on the stand, when asked, "What does 'Bong Hits for Jesus' mean?" did what any red-blooded American teenager would do, say, "It doesn't mean nothing. I don't know. It doesn't mean nothing. I didn't mean nothing." "Well, what were you about, Mister?" "Oh, we just wanted to get on television." That actually turned out to haunt him in the litigation, because he then had no plausible claim that there was any serious exposition of ideas there. I mean, if he'd said, "I was challenging the heavy hand of the law dealing with the transcendental experience that sometimes comes from the use of Native American in order to make a religious point of protest against Alaska's authoritarian—" He would have looked better, but he says, "It didn't mean nothing. I didn't know what I was saying."

And Chief Justice Roberts, in a very powerful opinion, said, "We totally back the school board. We back the principal. She was reasonable in reaching the judgment that this was a sort of expression in favor of marijuana, in favor of bong hits. We don't know what the 'for Jesus' means. She didn't have to know. The point of the matter was she could have said this was advocating drug use. No clear and present danger. No *Brandenburg* test. Nothing had to be proven. It was enough that schools struggle to keep children from using drugs and enough that the school could

stand for the moral principle that we don't talk that way, we don't advocate that kind of thing in school.

Now, I think it's very healthy and good for society that the two regimes both exist. And I'm going to end by talking a little bit about our culture, a little about the Tucson shootings, and a little bit about the role that we play in American society as lawyers and leaders and educators.

Let me first say that if you think about the role of families in American life, I think you can see a perfectly good example of the two regimes. I doubt that most of you grew up in homes, or if you're parents or grandparents, I doubt that you assert moral authority in your homes under the Holmes view. I mean, most of us do believe that there are words which by their very utterance inflict injury. You see vulgar words on television and you put your hand over your child's ears. Your child makes a smart remark and you say, "We don't make smart remarks." Your child says something that disparages somebody on the basis of race or their religion, you may say, "You know, you've got to think about that. I don't think those are our family values."

We operate that way in families. Not without dissent sometimes. I appreciate that. Actually, we had a moment at the Smolla household a few weeks ago in which one of our children engaged in some expression that I thought was inappropriate. And I came down a little hard, and suddenly all of my children were regular civil rights lawyers.

[Laughter]

"Dad, what about academic freedom?" And I said, "No, that applies on the Furman campus. We're in the house now." And they said, "Well, technically, Dad, Furman owns this house. It's part of Furman University." I then pulled out the heavy artillery. I said, "Listen, the president's house at Furman is to Furman University's campus what Guantanamo Bay is to the government of the United States, all right?"

[Laughter]

That's as far as your free speech goes.

If it is true that in our families we adhere to the *Chaplinsky* view, even though when we walk out the door and go into the park or when we're on the Internet or when we're in the vast marketplace of American ideas, we accept that other Americans are free to utter things that we loathe and believe are fraught

with death. We should then ask ourselves the following moral question. When we are participants in the marketplace, what is the moral code that governs our own decisions as to what we will say or not say? And here is where I think I have really evolved and really matured. I believe that although it's good for the country to have our formal laws governed by the Holmes view in the marketplace, as individuals we should feel as if we are governed by *Chaplinsky*, and we should comport ourselves that way. And as leaders inside law schools, as leaders inside schools, as leaders of a legal profession, as members of a learned calling that believes in the rule of law, we should follow habits that speak not to fellow citizens in tones that are fraught with death, but rather we should follow habits of genuine listening, of respect, of open-mindedness, of an attempt to find common ground, of a way to understand that you may deeply, deeply, deeply disagree on passionate matters of politics and religion and ideology and economics with a fellow lawyer, with a fellow leader, with a fellow student, but that doesn't diminish the common humanity that the two of you share.

Before I end, I want to very briefly reflect on the aftermath of the Tucson shootings. And indeed I think it's interesting for us as Americans to think about that and to think simultaneously about the events in Egypt in the last few weeks and the ongoing events throughout the Middle East. I will tell you that I was at moments encouraged and at moments discouraged by our political discourse after the Tucson shootings. I thought it was a positive thing that we heard from so many American leaders—conservatives and liberals, Republicans and Democrats and Independents—that it would be better for the country if we toned down the virulence of our rhetoric and the polarization of our politics. I thought that was good and healthy. I hope it sticks a little bit. I hope it lasts a little bit. But then I felt disappointed as people got into a blame game that I thought defeated the purpose of the civilized discourse project.

So many of you know that within hours of the shootings, people were pinning the blame on the Tea Party and on Governor Sarah Palin, pointing out the crosshairs that appeared on one of her images on her webpage. And I'll say to you I thought that itself was a kind of destructive attack. It's utterly implausible that Governor Palin would ever wish harm in a physical sense on

any fellow American, and certainly a political rival, utterly implausible that she meant anything serious by the use of crosshairs. I'm sure it was a figurative, graphic use of speech, probably played into her world as an outdoors woman in Alaska and so on, and her commitment behind guns and the Second Amendment and all of that, whatever you think of it. And more than that, the idea of cause and effect when we're dealing with people as crazy as the shooters that will act out violence in scenes like Tucson or Virginia Tech or many of the other acts of violence that we've witnessed in our lives as Americans, the idea that you could ever prove that this speech caused this person to commit this crazy act isn't causation in the way that science knows causation. It's not even causation in the way that law knows causation. And to try to poke fingers at one another and say, "You're naughty. You engaged in this excessive rhetoric, and now look, we have people killed and we have people that are wounded," doesn't depolarize our society, doesn't add to the civility of our discourse. It just makes it seethe more.

So I thought that was a kind of false argument. And I thought that the debates that followed about the extent to which hateful rhetoric causes hateful speech, to some degree we're asking the wrong question. A much better question, a much better way to phrase it, is simply to say hateful rhetoric diminishes the democracy. Hateful rhetoric diminishes reason. Hateful rhetoric diminishes relationships. Hateful rhetoric is corrosive of morality. Hateful rhetoric makes us less able to find a way to govern our way out of many of the difficulties that we face. So we should tone things down and listen and be more civilized in our discourse, not because we have to, because Holmes says we don't in many of these settings, not because we think that it will trigger violence, because maybe it does, maybe it doesn't, very hard to prove that, but because it's the better thing to do. It's the better way to govern. It's the more moral way to govern. It's the better way to comport oneself.

And we're here tonight in a legal setting, a great law school, people that are soon going to become lawyers, people that have been a part of the profession, that have supported this school, helped nurtured it, helped it grow, helped it get its accreditation, helped lead it and teach in it. The law has historically in the United States been an example in which we as lawyers in the

way we talk to another, in the way in which we solve disputes, in the way in which we shoulder for other citizens the solving of disputes, have shown our faith in Holmes as an overriding First Amendment value, but our conduct has been grounded in *Chaplinsky*. Our conduct has been grounded in respect and civility and rationality and self-restraint.

You need only look to some of the traditions that we have in the bar. Recently we had the South Carolina Court of Appeals conduct oral argument at Furman. And the Court of Appeals follows a wonderful ritual, after every oral argument, the judges come down from the bench so they're on an equal plane with the lawyers, and the judges cordially and graciously congratulate all of the lawyers on both sides of the case. The United States Court of Appeals for the Fourth Circuit, the federal circuit that stretches from Maryland down through South Carolina, has that same tradition, one of the only federal courts in the country that has that tradition. That is the way to lead. That's the way to encourage the progress of a democracy. That's the way to help other folks elevate our discourse. That's what I hope the subject of this symposium will be concerned with over the next few days.

Thank you for your patience in listening tonight. It's been a pleasure to be with you.

[Applause]