

**CANADIAN
HUMAN RIGHTS
TRIBUNAL**



**TRIBUNAL CANADIEN
DES DROITS
DE LA PERSONNE**

BETWEEN/ENTRE:

RICHARD WARMAN

Complainant

le plaignant

and/et

CANADIAN HUMAN RIGHTS COMMISSION

Commission

la Commission

and/et

MARC LEMIRE

Respondent

l'intimé

and/et

ATTORNEY GENERAL OF CANADA;
CANADIAN ASSOCIATION FOR FREE EXPRESSION;
CANADIAN FREE SPEECH LEAGUE;
CANADIAN JEWISH CONGRESS;
FRIENDS OF SIMON WIESENTHAL CENTER
FOR HOLOCAUST STUDIES;
LEAGUE OF HUMAN RIGHTS OF B'NAI BRITH

Interested Parties

les parties intéressées

BEFORE/DEVANT:

ATHANASIOS D. HADJIS

CHAIRPERSON/
PRÉSIDENT

ROCH LEVAC

REGISTRY OFFICER/
L'AGENT DU GREFFE

FILE NO./N° CAUSE:

T1073/5405

VOLUME:

17

LOCATION/ENDROIT:

TORONTO, ONTARIO

DATE:

2007/02/27

PAGES:

3675 - 3988

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CANADIAN HUMAN RIGHTS TRIBUNAL/
TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

HEARING HELD IN THE PARIS ROOM OF NOVOTEL HOTEL
3670 HURONTARIO STREET, MISSISSAUGA, ONTARIO
ON TUESDAY, FEBRUARY 27, 2007 AT 9:06 A.M. LOCAL TIME

CASE FOR HEARING

IN THE MATTER of the complaint filed by Richard Warman dated November 23rd, 2003 pursuant to section 13(1) of Canadian Human Rights Act against Marc Lemire. The complainant alleges that the respondent has engaged in a discriminatory practice on the grounds of religion, sexual orientation, race, colour and national or ethnic origin in a matter related to the usage of telecommunication undertakings.

APPEARANCES/COMPARUTIONS

Giacomo Vigna	For the Canadian Human Rights Commission
Barbara Kulaszka	For the Respondent
Simon Fothergill Alicia Davies	For the Attorney General of Canada
Douglas Christie	For the Canadian Free Speech League

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1 Toronto, Ontario

2 --- Upon commencing on Tuesday, February 27, 2007

3 at 9:06 a.m.

4 MS KULASZKA: I would like to call
5 Dr. Donald Downs as my next witness.

6 THE CHAIRPERSON: I notice some
7 people are not with us.

8 MS KULASZKA: I'm being deserted
9 completley. Mr. Christie has gone back home, left for
10 B.C. Mr. Fromm won't be here for days.

11 THE CHAIRPERSON: More than tomorrow?

12 MS KULASZKA: I don't think so, no.
13 The trial is going on for at least three days.

14 THE CHAIRPERSON: My only concern is
15 that we have to complete his cross-examination at some
16 point.

17 MS KULASZKA: It will be finished
18 today. Dr. Downs has to go back today.

19 THE CHAIRPERSON: No, I meant
20 Mr. Fromm. He's in the middle of his evidence.

21 MS KULASZKA: I believe I can't tell
22 you.

23 THE CHAIRPERSON: I understand.

24 MR. FOTHERGILL: While we're on that
25 subject I received a message from Mr. Kurz yesterday

1 saying he would not be available until Thursday
2 afternoon. And in an attempt to apportion our efforts
3 evenly it was decided amongst us that Mr. Kurz would
4 cross-examine Mr. Fromm. So if there is any way that
5 we can accommodate Mr. Kurz's availability on Thursday
6 afternoon, that would be very much appreciated.

7 THE CHAIRPERSON: We'll have to see
8 if Mr. Fromm frees himself up from the other litigation
9 he's involved in. And Mr. Lemire will be away for the
10 day I was told. Is that true as well, Ms Kulaszka?

11 MS KULASZKA: He's just busy right at
12 the moment.

13 THE CHAIRPERSON: Not a problem. I
14 just wanted to make it clear for the record.

15 SWORN: DONALD A. DOWNS

16 EXAMINATION-IN-CHIEF BY MS KULASZKA

17 MS KULASZKA: I'm tendering Dr. Downs
18 as --

19 THE CHAIRPERSON: My apologies, I'm
20 sorry, I've had a little bit of a computer malfunction.
21 So I'm going to have to reload. Just give me two
22 minutes, please.

23 You gave me some documents that you
24 said we could produce today. The first one was the
25 article from the Globe & Mail, and that was Turkey and

1 Hrank Dink.

2 THE REGISTRAR: Article as described
3 will be filed as respondent exhibit R-7.

4 EXHIBIT NO. R-7: Article by
5 Hrank Dink entitled "Turkey and
6 Hrant Dink"

7 THE CHAIRPERSON: And then we had had
8 article by Sidney Hook, "Philosophy and Public Policy".

9 THE REGISTRAR: As described, will be
10 filed as Exhibit R-8.

11 EXHIBIT NO. R-8: Article by
12 Sidney Hook entitled
13 "Philosophy and Public Policy"

14 THE CHAIRPERSON: Is there anything
15 else?

16 Ms Kulaszka, in fact let me ask you
17 one thing. We left quickly. I do want to say on the
18 record when we had all those conference calls way back,
19 there was an understanding there be would cooperation
20 on each side of the debate in terms of getting the
21 evidence in. Like, right now they are saying they want
22 Mr. Kurz to deal with the evidence of one person. And
23 that's how we set down the time lines to the benefit of
24 all.

25 Now, there's Dr. Downs. We will be

1 finished with him today. Everyone has to make that
2 undertaking. You had some of the documents you put in
3 front of me. Was it important that these things be
4 included in your case? Are you going to get to them
5 with that witness but for the time that ran out?

6 MS KULASZKA: We didn't get to them
7 so I don't want them in.

8 THE CHAIRPERSON: Okay. I'm saying
9 maybe the documents themselves would have served some
10 purpose for you in final argument and I would be
11 prepared to consider their being entered into the
12 record, subject to any comments or objections aside. I
13 would not be opposed to that if the documents
14 themselves would serve some purpose for you.

15 MS KULASZKA: Okay. If I could look
16 at them at noon.

17 THE CHAIRPERSON: I think it's only
18 fair. So at least you could say -- quite often with
19 most of this documentation we knew or what I sense
20 where the answer was going to go, but the significance
21 was that you were putting it to the individual, like
22 the article regarding the Turkish case.

23 So if there was something in this
24 material you wanted to put to this is witness and you
25 were unable to do so, I would be prepared to consider

1 putting it forward, subject to any comments of course
2 from the other side.

3 MR. FOTHERGILL: I'll offer a comment
4 right now. Many of these are secondary sources. They
5 obviously could be tendered in the course of argument
6 simply as published works.

7 THE CHAIRPERSON: Yes, I know. I try
8 to tend to draw the line at authorities versus any
9 published work. If it comes from the realm that's not
10 related to law, I don't tend to allow it to come in at
11 that moment. It's better that it be entered in the
12 course of evidence.

13 I haven't looked at them, so I don't
14 know what it is exactly. I'll keep them on my desk
15 here, Ms Kulaszka, so when you go through them if you
16 want to put them to me in evidence that's fine. So
17 let's go back slowly. It's coming.

18 We'll just go with -- and whenever it
19 comes on it comes on. Go ahead.

20 MS KULASZKA: I would like to tender
21 Dr. Downs as an expert in several areas. Depending on
22 the position of my friends, I can make it very, very
23 specific or perhaps I could just put on the record what
24 I would like is just a very broad expertise. It would
25 be philosophical, political and social aspects of free

1 speech, its theory and practice.

2 THE CHAIRPERSON: One moment.

3 Philosophy, political and --

4 MS KULASZKA: And social aspects of
5 free speech, its theory and practice.

6 THE CHAIRPERSON: Just a second.

7 MS KULASZKA: And that would
8 encompass what is in his expert reports. I don't know
9 if my friends would go along with that or not. If not,
10 I would divide it into very specific areas.

11 MR. FOTHERGILL: I would require
12 greater particularity than that. There are some
13 aspects of Dr. Downs' expert report that I suspect are
14 likely outside his expertise.

15 THE CHAIRPERSON: This expert?

16 MR. FOTHERGILL: Well, the expertise
17 that I see reflected in his CV -- there's no question
18 he has an expert in many areas of free speech and
19 responses thereto, specifically in a university
20 setting. Not limited to university setting, of course.

21 But, for example, and this may assist
22 my friend, I very much doubt he has much expertise in
23 the analysis of historical events and commenting on the
24 extent to which hate speech was or was not a
25 contributing factor in those events, the sort of thing

1 Dr. Tsesis was addressing yesterday.

2 I don't see anything in his CV
3 currently that would allow him to express an opinion on
4 that, because that is an issue that is likely to be
5 contentious in this hearing. That's something I think
6 will need to be established in --

7 THE CHAIRPERSON: You see it as
8 falling into this definition that's been given to us,
9 this expertise?

10 MR. FOTHERGILL: Yes, on the basis Ms
11 Kulaszka said she wishes to tender him as an expert to
12 address the opinions contained in the expert report.

13 THE CHAIRPERSON: Oh, it's the report
14 more than --

15 MR. FOTHERGILL: Yes, there are a
16 number of opinions in the expert report that I suspect
17 may very well fall outside his expertise, but of course
18 that's something we need to explore.

19 MS KULASZKA: Okay. Then I'll make
20 it more specific.

21 THE CHAIRPERSON: Go ahead.

22 MS KULASZKA: Number one, the
23 purposes and types of discriminatory and hate speech
24 laws.

25 THE CHAIRPERSON: The purposes and

1 types of --

2 MS KULASZKA: The purposes and types
3 of discriminatory and hate speech laws.

4 THE CHAIRPERSON: I want to be clear
5 on that. So the purposes and types of discriminatory
6 and hate speech laws?

7 MS KULASZKA: And restrictions.
8 Number two, the relationship between discriminatory and
9 hate speech and hate crime.

10 THE CHAIRPERSON: Between
11 discriminatory or --

12 MS KULASZKA: Discriminatory/hate
13 speech and hate crime. So it would be the -- maybe
14 it's clear, relationship between hate speech and hate
15 crime.

16 THE CHAIRPERSON: Between hate speech
17 and hate crime.

18 MS KULASZKA: Right. Relationship
19 between hate speech and other harms.

20 Relationship between free speech and
21 the movement towards equality.

22 Five would be practical and
23 consequential aspects of the enforcement of laws
24 against hate speech.

25 THE CHAIRPERSON: Practical and

1 consequential aspects --

2 MS KULASZKA: Practical and
3 consequential aspects of the enforcement of laws
4 against hate speech and their effects on freedom.

5 THE CHAIRPERSON: On?

6 MS KULASZKA: On freedom of speech.
7 The existence and effectiveness of
8 alternative approaches to combatting racism.

9 The empirical concerns of broad hate
10 laws, including cause and effect, misapplication.

11 THE CHAIRPERSON: Hold on, hold on.
12 Wow, this is really getting detailed. Are you reading
13 from something that's already in the material?

14 MS KULASZKA: These are the areas he
15 deals with in his expert report.

16 THE CHAIRPERSON: But they are not
17 formal chapter headings?

18 MS KULASZKA: No.

19 THE CHAIRPERSON: Okay. Let's go.

20 MS KULASZKA: Empirical concerns of
21 broad hate laws including cause and effect,
22 misapplication.

23 THE CHAIRPERSON: Hold on. Cause and
24 effect, misapplication?

25 MS KULASZKA: Misapplication, undue

1 censorship and effectiveness.

2 THE CHAIRPERSON: I'm sorry, the
3 under censorship, is that under hyphen censorship or
4 under censorship?

5 MS KULASZKA: Undue censorship and
6 effectiveness.

7 THE CHAIRPERSON: I preferred the
8 first choice.

9 MS KULASZKA: I thought the first
10 choice was -- and I would like just to add in
11 philosophical, political and social aspects of freedom
12 of speech.

13 THE CHAIRPERSON: What you said
14 earlier?

15 MS KULASZKA: Yes.

16 THE CHAIRPERSON: Free speech, its
17 theory and practice. That part as well?

18 MS KULASZKA: Yes.

19 THE CHAIRPERSON: Just give me a
20 minute because the computer is working.

21 MS KULASZKA: Dr. Downs, you heard
22 the areas I wish to qualify you as an expert in. I
23 wonder if we could go through your CV and establish
24 your credentials in that area.

25 THE CHAIRPERSON: Hold on. You

1 haven't filed his book yet.

2 MS KULASZKA: Sorry. I thought we
3 had it.

4 THE CHAIRPERSON: I did peruse his
5 report over night, over the weekend but I have not had
6 the --

7 THE REGISTRAR: Book of documents of
8 Dr. Downs filed as Exhibit R-9.

9 EXHIBIT NO. R-9: Dr. Downs'
10 Book of Documents

11 THE CHAIRPERSON: We'll proceed in
12 the ordinary fashion, Ms Kulaszka, with regard to the
13 tabs.

14 So the curriculum vitae is found at
15 tab 1?

16 MS KULASZKA: Tab one.

17 THE CHAIRPERSON: Is this your
18 curriculum vitae, sir? You prepared it?

19 DR. DOWNS: Pardon?

20 THE CHAIRPERSON: This is your CV?

21 DR. DOWNS: Yes, it is.

22 THE CHAIRPERSON: It forms part of
23 the report itself too, Ms Kulaszka?

24 MS KULASZKA: There should be another
25 tab in there. Unfortunately, there isn't a tab. But

1 it goes to page 9. So it's pages 1 to 9. I would like
2 to produce that CV.

3 THE CHAIRPERSON: Pages 1 through 9,
4 that's produced.

5 MS KULASZKA: Would you tell us what
6 your education is.

7 DR. DOWNS: 1971 I received a
8 Bachelors degree from Cornell University; 1974 Masters
9 from University of Illinois; then I worked for a couple
10 of years and we went back to school, got my Ph.D at
11 Berkeley, 1983 political science.

12 MS KULASZKA: What was your BA in?

13 DR. DOWNS: History.

14 MS KULASZKA: And your MA?

15 DR. DOWNS: Political science.

16 MS KULASZKA: Was there any specially
17 in your MA?

18 DR. DOWNS: Political philosophy.

19 MS KULASZKA: What was your thesis
20 for your Ph.D.?

21 DR. DOWNS: I was out at Skokie for a
22 speech case, which took place in 1978. 1977 Skokie,
23 Illinois. It was a case study that dealt with the
24 psychological, political aspects of the case and
25 concluded with a legal analysis of the constitutional

1 issue in that case.

2 MS KULASZKA: Could you explain to
3 the Tribunal what the Skokie case was about?

4 DR. DOWNS: In 1977, a small Nazi
5 group on the south side of Chicago decided to hold a
6 rally in Skokie, wanted to make -- it's 150 page book,
7 180 page book. To make it short, wanted to hold a
8 rally in Skokie. And Skokie is the home of about 800
9 or 1200 Holocaust survivors. Out of 70,000 people at
10 the time Skokie had 30,000 Jewish residents.

11 And the assimilated Jewish residents
12 decided to let them come in and speak, don't pay
13 attention, it's the best way the deal with people like
14 that. Don't give them a platform.

15 But to the survivors it was the
16 nightmare come back. And they stood up and said, not
17 in our neighborhood.

18 So they pressured the Skokie
19 government and Skokie decided not to let the Nazis
20 demonstrate. And overnight it became a national
21 sensation, international sensation. And after a year
22 of legal maneuvering the Nazis won their right to
23 demonstrate in Skokie, but they never showed up. So
24 the book is about that.

25 And I looked at the social,

1 political, psychological consequences, and I did some
2 legal analysis as well.

3 MS KULASZKA: What positions have you
4 held since you obtained your Ph.D.

5 DR. DOWNS: I had a -- well, before I
6 finished the dissertation I had a lecturing position at
7 Michigan. I was a lecturer at Notre Dame for
8 two years, then I was an assistant professor at Notre
9 Dame, then assistant professor at University of
10 Wisconsin Madison, and I've been there since 1985. I'm
11 now a full professor.

12 MS KULASZKA: What research --

13 DR. DOWNS: I should mention, too, I
14 have an affiliate professorship in the law school in
15 journalism as well, political science department.

16 MS KULASZKA: Does your work involve
17 studying issues in free speech and censorship?

18 DR. DOWNS: Yes, to a large extent.
19 Not entirely. I did a book on criminal law and
20 domestic violence and syndrome defences. The other
21 work has dealt with either free speech issues or
22 academic freedom issues.

23 MS KULASZKA: Could you describe the
24 books you published in this area?

25 DR. DOWNS: First was, "Nazis in

1 Skokie: Freedom Community and the First Amendment
2 1985", that was based on the dissertation.

3 The second book was "The New Politics
4 of Pornography", in 1989. And that was a book that
5 dealt with censorship and pornography. There was whole
6 new set of arguments for why pornography should be
7 censored, coming from sort of a left progressive
8 position rather than that the more traditional,
9 conservative position. And I analyzed that, and I also
10 dealt with some of the history of pornographic
11 censorship.

12 And the next book was, "More Than
13 Victims: Battered Woman, the Syndrome Society and the
14 Law", which dealt with the rise of so-called syndrome
15 defences in criminal law in the United States.

16 And I dealt with a broad number of
17 syndrome defences, but I focused mostly on battered
18 women syndrome and domestic violence as an issue. And
19 the book has been described as pro-battered woman
20 skeptical of syndrome defences as a way to do justice
21 in those cases.

22 The next book was really more of a
23 history book. It was about an upheaval at Cornell
24 University in 1969, which took place when I was there,
25 in which some African-American students took over the

1 student centre with the rifles. And so it was a very
2 sensational case and it posed stark tensions between
3 racial justice issues and academic freedom issues. I
4 wrote about that.

5 So the first time anyone had really
6 ever gotten to the inside story about what happened,
7 and then I talked about the implications of that at the
8 university.

9 And my last book is "Restoring Free
10 Speech and Liberty on Campus" which is sort of four
11 case studies and theoretical analysis concerning the
12 status of academic freedom, its relationship to
13 political advocacy on campus.

14 MS KULASZKA: And in regards to
15 speech codes, does it --

16 DR. DOWNS: Yes, right.

17 MS KULASZKA: What are these speech
18 codes?

19 DR. DOWNS: Speech codes are broad
20 restrictions on speech on campus, basically prohibiting
21 speech that demeans or disparages people based on race,
22 religion, national origin, sexual orientation, so the
23 usual categories in that area.

24 MS KULASZKA: So did you do --

25 DR. DOWNS: Some speech codes are

1 more narrowly defined. Some are fighting words type
2 speech codes that if you say something hostile or
3 offensive to someone and it causes immediate breach of
4 the peace, that would be a fighting words kind of code.
5 That would fit more with the established American
6 exception of fighting words. That's the trouble
7 exception under First Amendment law, but still on the
8 books.

9 Others are broader kinds of
10 harassment codes, and some basically prohibit offensive
11 rhetoric, so it may be broader.

12 MS KULASZKA: Did you do a study of
13 various cases?

14 DR. DOWNS: Yes, I did. I looked at
15 a lot of cases across the country and I did four case
16 studies involving my institution, Wisconsin, Columbia
17 University. Actually that wasn't a speech code
18 chapter. That was chapter on the due process issue
19 involving sexual misconduct. And I looked at
20 University of California Berkeley and free speech
21 status in the public forum at Berkeley, and I looked at
22 the University of Pennsylvania in which a relatively
23 narrow speech code was applied very broadly, in some
24 cases.

25 MS KULASZKA: And I see you got a

1 book in progress. Could you tell us about that.

2 DR. DOWNS: Book in?

3 MS KULASZKA: Book in progress?

4 DR. DOWNS: Yeah, actually I sort of
5 modified it since I started the research on it. I'm
6 looking into the university's relationship to the
7 military and how it's evolved over the years in
8 particular after Vietnam, and the post 9/11 especially.

9 MS KULASZKA: Could you take us to
10 the articles that you have written which deal with free
11 speech?

12 DR. DOWNS: Sure. In many ways these
13 are offsprings of the books that I've done. Do you
14 want me to talk about each one in particular?

15 MS KULASZKA: You could simply point
16 them out, just give a short precis.

17 DR. DOWNS: Well, the Skokie
18 Revisited was a Notre Dame law review. That was an
19 expanded version of the book because it had much more
20 legal analysis than the book had.

21 And the next article, the "Attorney
22 General's Commission on Pornography", that was a piece
23 in the American Bar Foundation Research Journal on the
24 Meese Commission in 1986/1987 in which the Commission
25 recommended broader measures to restrict pornography.

1 "Beyond Modernist Liberalism"
2 was an essay in a major edited
3 book on new perspectives on the
4 constitution. And actually, in
5 that book, in that essay I
6 adopted probably the broadest
7 position that ever taken, on
8 recommending censorship. And I
9 sort of backed off sort of
10 changing my views after that
11 piece came out.

12 "Racial Incitement Law in the
13 United States" was one essay and
14 a book that dealt with racial
15 incitement laws around the
16 world. If I recall, it was in
17 Germany, England, France,
18 Israel, the United States, maybe
19 Australia, I don't recall. And
20 I wrote the chapter on the
21 United States, which was the
22 outlying chapter in that book
23 because United States policy is
24 different.

25 The review of Todd Fogelson was on

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1 "Judicial Review in the Soviet Union, International
2 Law". Not relevant this is.

3 "Speech codes in Michigan
4 University" represented my turn
5 toward looking at the issue of
6 academic freedom and free speech
7 at universities. Because
8 beginning -- the 1960s were --
9 well, I'll talk about that
10 later.

11 The battered syndrome essay occurred
12 in a book in which people that were major figures in
13 various aspects of domestic violence contributed
14 articles, and I wrote a piece on battered women
15 syndrome.

16 Censorship since World War II.
17 There's a series called "The History of the Book" that
18 was published by Cambridge University Press, now North
19 Carolina Press has taken this over. And I wrote the
20 chapter on "Censorship in the United States since World
21 War II". So it deals with some of the issues we'll be
22 talking about, but also broader lines.

23 "Politics and Civil Liberty on
24 Campus", is an analysis of how
25 political advocacy on campus can

1 contribute to free speech.

2 Next the article is an expanded
3 version of that. "A Response to Anthony Lewis: Civil
4 Liberties in a New Kind of War" is my analysis of legal
5 policy that's required after 9/11.

6 The "Battered Woman Syndrome" article
7 which follows is similar to the one I mentioned
8 earlier, somewhat revised.

9 "Whose OX Is Gored: Free Speech
10 Universalism in Post-September
11 11 America" is an essay about
12 the status of academic freedom,
13 and free speech on campus after
14 9/11. I conclude it's actually
15 fairly strong compared to what
16 some people were thinking.

17 And "Political Mobilization and
18 Resistance to Censorship" is a piece in an edited
19 volume on academic freedom in the post 9/11 era.

20 In other pieces are encyclopedia-type
21 pieces, which are briefer.

22 MS KULASZKA: Have you done research
23 into the cost -- what I think you called the cost
24 benefit analysis of hate laws versus free speech?

25 DR. DOWNS: It's entailed in a lot of

1 the work that I've done. I haven't written a separate
2 piece on that issue outside of the report that I gave
3 to the Commission. But certainly I have done research
4 into it and it's been a part -- part and parcel of the
5 broader work that I've done.

6 MS KULASZKA: You've done
7 encyclopedia type articles. Did any of those deal with
8 the issues of free speech and censorship?

9 DR. DOWNS: Yeah. I mean, 11
10 articles in the Oxford Companion. Go down the list,
11 "Freedom of Assembly and Censorship" did. I published
12 some articles on obscenity and pornography, in various
13 encyclopedias. And I have a piece that's coming out in
14 the new encyclopedia -- International Encyclopedia of
15 Political Science Congressional Quarterly on hate
16 speech itself, but that hasn't appeared yet.

17 MS KULASZKA: Have you read --

18 DR. DOWNS: That's not in here, by
19 the way. That's something that was just came, was just
20 done so I didn't have it in this particular CV.

21 MS KULASZKA: Have you read, Dr.
22 Tsesis' book?

23 DR. DOWNS: Yes.

24 MS KULASZKA: And you've read the
25 various book reviews of that book?

1 DR. DOWNS: Yes.

2 MS KULASZKA: Those are my questions.
3 If you could answer the questions by my friends.

4 CROSS-EXAMINATION BY MR. FOTHERGILL

5 MR. FOTHERGILL: Good morning, Dr.
6 Downs.

7 DR. DOWNS: Good morning.

8 MR. FOTHERGILL: Your education dealt
9 with history and political science; is that right?

10 DR. DOWNS: Yes.

11 MR. FOTHERGILL: And you're currently
12 a professor -- you said a full professor University of
13 Wisconsin. Am I right in assuming that that's in
14 political science?

15 DR. DOWNS: Yes, it is.

16 MS KULASZKA: Then you are also
17 affiliated, and correct me if my terminology is wrong,
18 with the faculty of law and the faculty of journalism.

19 DR. DOWNS: Yes.

20 MR. FOTHERGILL: Out of curiosity,
21 how does one become a professor of law without having a
22 legal education?

23 DR. DOWNS: It's an affiliate
24 position. And since I publish in the area of law and
25 publish in some law journals, they wanted to have me on

1 their list as an affiliated professor. So -- I don't
2 have voting rights in the department but -- or in the
3 school, but I get Westlaw and get to participate in
4 various events.

5 MR. FOTHERGILL: If with we look at
6 your books, the first book that you called "Nazi in
7 Skokie" deals with freedom community and the First
8 Amendment, or indeed that's the subtitle.

9 DR. DOWNS: Right.

10 MR. FOTHERGILL: And so clearly in
11 that book you do deal with free speech issues in the
12 context of hate speech.

13 DR. DOWNS: Absolutely, sure.

14 MR. FOTHERGILL: If we look, however,
15 at the next book, "The New Politics of Pornography", am
16 I right in assuming you are dealing with free speech
17 issues in the context of pornography?

18 DR. DOWNS: That's correct. But
19 there is a link. Because both pornography and hate
20 speech are seen as offensive, and new interpretations
21 of pornography's effect portray it as something that
22 harms women and contributes to the discrimination of
23 women.

24 MR. FOTHERGILL: Yes, being --

25 DR. DOWNS: So hate speech against

1 women.

2 MR. FOTHERGILL: There's a potential
3 analogy is what you are telling us, but certainly in
4 that book you were not specifically concerned with the
5 harmful effects of hate speech, per se.

6 DR. DOWNS: That's correct.

7 MR. FOTHERGILL: Similarly, when we
8 look at "More than Victims: Battered Women, the
9 Syndrome Society", this has nothing whatsoever to do
10 with free speech at all, does it?

11 DR. DOWNS: Not directly, no.

12 MR. FOTHERGILL: Then we turn to
13 Cornell '69, "Liberalism and the Crisis of the American
14 University" and all "Restoring Free Speech and Liberty
15 on Campus". And both of these studies take place
16 within a university context; isn't that right?

17 DR. DOWNS: Yes, they do. Though I
18 do discuss broader societal aspects of that.

19 MR. FOTHERGILL: All right. You've
20 got a book research in progress which is going to draw
21 on sociological and psychological research as well as
22 political theory; is that right?

23 DR. DOWNS: Not necessarily. It's
24 going to look really at citizenship and how
25 universities and military presence on campus can

1 contribute or detract from the University of Michigan
2 to turn out citizens.

3 MR. FOTHERGILL: Yes. I'm just
4 reading from your CV:

5 "It will draw on the
6 sociological and psychological
7 research concerning fear and
8 emotions as well as political
9 theory."

10 DR. DOWNS: Yeah.

11 MR. FOTHERGILL: What I'm getting at
12 here is the methodology. So you're using a
13 sociological approach there, correct?

14 DR. DOWNS: To some extent.

15 MR. FOTHERGILL: Psychological
16 research. You, of course, are not a registered
17 psychologist.

18 DR. DOWNS: No.

19 MR. FOTHERGILL: So when you talk
20 about using psychological research, essentially you are
21 reading studies in psychological journals about the
22 psychological effects of certain stimuli on the
23 recipient?

24 DR. DOWNS: Right.

25 MR. FOTHERGILL: But you don't

1 contribute anything in terms of expertise to
2 understanding psychological effects?

3 DR. DOWNS: Not directly, no.

4 MR. FOTHERGILL: If we look at your
5 articles, "Skokie Revisited" obviously is a piece about
6 free speech in the context of hate speech, correct?

7 DR. DOWNS: Hmm-hmm.

8 MR. FOTHERGILL: But then we have a
9 piece on pornography and other various subjects. I
10 think you told us your articles are in some ways
11 abstracts of your books so we can assume it's similar
12 themes that are being explored.

13 DR. DOWNS: For the most part.

14 MR. FOTHERGILL: Let's turn then to
15 your outside service, on page 6 your CV. And you've
16 given numerous lectures on campus and across the state
17 and nation on issues concerning free speech and civil
18 liberties. And I'm going to assume that that's in the
19 similar context we've seen, that it's a range of
20 contexts ranging from hate speech, but I would suggest
21 focusing perhaps more on pornography and free speech
22 issues on campus. Is that fair?

23 DR. DOWNS: In recent years that's
24 correct, but not before that.

25 MR. FOTHERGILL: The bottom of the

1 page I see that you were consulted, or that you
2 consulted with state legislative leaders on such
3 matters as indecency legislation, camping finance and
4 First Amendment issues.

5 DR. DOWNS: Right.

6 MR. FOTHERGILL: I take it you never
7 consulted any laws dealing specifically with hate
8 speech?

9 DR. DOWNS: I have consulted with
10 universities, two or three universities on speech
11 codes.

12 MR. FOTHERGILL: My question was in
13 the context of what appears here, "Consulted with
14 state legislative leaders"?

15 DR. DOWNS: No.

16 MR. FOTHERGILL: I see that "Nazis in
17 Skokie" still has certain currency, does it? You
18 were -- did a one-hour interview with Korean national
19 television over the book Nazis in Skokie and that was
20 shown in 2003?

21 DR. DOWNS: Correct.

22 MS KULASZKA: Then if we look another
23 your professional conference papers and participation,
24 would you agree with me that as we move from 1986 to
25 the present day we see increasing focus on free speech

1 in a university setting.

2 And indeed once we're past around
3 2002 -- I'm sorry, even earlier than that -- 1999
4 onwards, we deal with academic freedom, crisis of the
5 American University. In 2001 you gave a lecture about
6 civil liberties and higher education. I see you spoke
7 at Concordia in 2002 on free speech and campus.

8 DR. DOWNS: That's right.

9 MS KULASZKA: Then I do see a
10 reference to "Female Mentally Disorder Offenders", but
11 I'm going to suggest as we move through your
12 presentation up to the present day we see
13 reoccurringly, "Restoring Free Speech on Campus",
14 "Restoring Free Speech on Campus," Restoring Free
15 Speech and Liberty on Campus", and in fact this is very
16 much the context of your present work; is that right?

17 DR. DOWNS: It's moved in that
18 direction, absolutely. But I should add that the
19 context is about things like hate speech and offensive
20 comments on campus, to what extent should they be
21 regulated.

22 MR. FOTHERGILL: Yes, I understand.
23 But if we talk about harmful effects of hate speech,
24 beyond Nazis in Skokie, I suggest it hasn't really been
25 a major subject of your inquiries.

1 DR. DOWNS: I would say it has been
2 when it comes to the campus.

3 MR. FOTHERGILL: Yes, all right.

4 DR. DOWNS: But the orientation has
5 been somewhat different. But -- so I think I stuck
6 with it in the campus context, which is a broad
7 context.

8 MR. FOTHERGILL: Yes, all right. In
9 particular, you conducted no studies of major
10 historical events in order to determine what role, if
11 any, hate speech played in bringing about those events?

12 DR. DOWNS: That's correct, not
13 directly.

14 MR. FOTHERGILL: Having read your
15 report, as the Chair has as well, you provided us with
16 a kind of causation analysis, if I can describe it that
17 way. But that's not itself an area of your expertise.
18 You're not an expert in causation theory?

19 DR. DOWNS: No, I'm not. But I'm
20 familiar with it and when I teach criminal law and
21 justice I spend a week on the issue of causation.

22 MR. FOTHERGILL: That's because
23 causation is fundamentally a legal concept; isn't that
24 right?

25 DR. DOWNS: Yes, though it draws on

1 scientific thinking as well. It is in legal context.

2 MR. FOTHERGILL: I'm going to suggest
3 to you that in fact you offer us no greater expertise
4 in matters of causation than a legally trained person
5 might be able to bear on the subject.

6 DR. DOWNS: Probably not.

7 MR. FOTHERGILL: Thank you. Those
8 are my questions.

9 THE CHAIRPERSON: Mr. Vigna?

10 MR. VIGNA: I have questions, just a
11 few clarifications.

12 CROSS-EXAMINATION BY MR. VIGNA

13 MR. VIGNA: Dr. Downs, about speech
14 codes, fighting words, harassment codes and offensive
15 rhetoric, all of this was always in the context of the
16 university context?

17 DR. DOWNS: Except for the Skokie
18 research, and the essay in the book on inciting hatred,
19 the book edited by Levitt.

20 MR. VIGNA: What's the difference
21 between these four, if you can explain to us briefly:
22 Speech codes, fighting words, harassment codes, and
23 offensive rhetoric?

24 DR. DOWNS: Offensive speech is a
25 broader term that embraces anything that offends

1 somebody, that upsets somebody because of its context.
2 It could embrace harassment codes, could embrace the
3 fighting words code.

4 Fighting words is a very limit
5 technical term. You say something that a reasonable
6 person would be so upset at that they might fight back,
7 and therefore it would cause a disturbance of the
8 speech. Sort of a direct cause and effect.

9 Offensive speech is a broader kind of
10 category.

11 Harassment, it depends on how you
12 define it and how it's applied.

13 Sexual harassment has a very concrete
14 meaning. Quid pro quo, for example. You know, have
15 sex with me or I'll fire you and we'll get promoted.
16 There's also a hostile environment aspect of sexual
17 harassment in which too much sexual display in the
18 workplace that makes a women uncomfortable. But in
19 that context, it's tied more or less to the sexual
20 context.

21 I forget the other kind of code you
22 mentioned. So really it has to do with what is the
23 content. Is it racial, is it sexual, is it something
24 else? Is it narrowly defined in terms of something
25 concrete indirect, or is it more an environmental kind

1 of harm that we are talking about.

2 MR. VIGNA: And you're presently at
3 the University of California?

4 DR. DOWNS: No, Wisconsin Madison.

5 MR. VIGNA: You're teaching how many
6 courses there?

7 DR. DOWNS: Two courses a semester.

8 MR. VIGNA: In political science?

9 DR. DOWNS: Yes.

10 MR. VIGNA: Which courses?

11 DR. DOWNS: This year I taught a
12 course in constitutional law, a course on the Supreme
13 Court, a graduate course on the Supreme Court and
14 constitutional politics, a course on criminal law and
15 justice and a course criminal law and jurisprudence.

16 MR. VIGNA: And the political science
17 at the university where you are teaching is part of the
18 social sciences faculty?

19 DR. DOWNS: Yes, it is.

20 MR. VIGNA: Just out of curiosity,
21 final question. Your book on "Battered Women Syndrome,
22 Tools of Justice or False Hope and Self-Defence Cases",
23 this is an issue dealing with criminal law?

24 DR. DOWNS: Yes.

25 MR. VIGNA: And by the title, "Tools

1 of Justice Or False Hope in Self-defence Cases," do I
2 have to come to the conclusion that do you espouse the
3 battered women syndrome?

4 DR. DOWNS: No, I'm skeptical of it.
5 I think the battered women vary too much in the
6 responses to domestic violence, and I think it
7 undermines a legitimate self-defence claim.

8 MR. VIGNA: And American law, is it a
9 defence which is accepted despite your skepticism of it
10 or is it a defence that was not accepted?

11 DR. DOWNS: It depends on the
12 jurisdiction. We have 50 states with their own
13 criminal law. Some states permit it more than others.
14 There are degrees of skepticism, both in literature and
15 in the courts, but it varies state by state.

16 MR. VIGNA: But you are of the school
17 of thought that's skeptical of this defence.

18 DR. DOWNS: Yes. At least as broadly
19 applied.

20 THE CHAIRPERSON: Mr. Vigna has a
21 criminal law background, that's why he's asking these
22 questions, I think.

23 DR. DOWNS: If it's tied to
24 psychological incapacity defence, then it makes more
25 sense.

1 MR. VIGNA: And you are aware that
2 this defence is accepted in Canadian law?

3 DR. DOWNS: Yes, I have read that.

4 MR. VIGNA: I don't have too many
5 questions. I'm almost finished.

6 DR. DOWNS: I might add, it's the one
7 book I've written that had very few critical reviews.
8 Some of my books have been hit from both sides. So I'm
9 entitled to one book that everyone liked.

10 MR. VIGNA: That's it.

11 MR. FOTHERGILL: I might suggest the
12 witness be excused.

13 MS KULASZKA: I just wanted to ask
14 one question.

15 RE-EXAMINATION BY MS KULASZKA

16 MS KULASZKA: The studies you've made
17 of the speech codes in universities, where you've
18 learned from those case studies, do you think they have
19 a broad application to society in general?

20 DR. DOWNS: In the United States
21 over the last 50 or 60 years we have had group libel
22 laws on the books and other measures restricting racist
23 rhetoric and -- but we never really took them
24 seriously.

25 The university context, beginning the

1 later 1980s, is a first time that American institutions
2 truly tried to apply codes that restricted the racist
3 rhetoric and things of that nature. And the experience
4 that I had and is documented, albeit anecdotally,
5 historical kind of analysis, is that that experiment
6 was very troubled. Codes were applied much broader
7 than we were intended to be applied. They were showing
8 effects on many campuses, as reported by many faculty
9 and the experience counsels against taking those kinds
10 of -- enforcing those kinds of laws.

11 MS KULASZKA: Thank you.

12 THE CHAIRPERSON: So before we --
13 would you please step outside just for a moment while
14 we discuss the issue.

15 (WITNESS RETIRES)

16 (DISCUSSION OFF THE RECORD)

17 THE CHAIRPERSON: Would you like to
18 add anything at this point, Ms Kulaszka?

19 MS KULASZKA: No, I think Dr. Downs'
20 studies in free speech as set out in his books, he'll
21 be a very a valuable witness about the effects of these
22 laws, effects -- problems and definition, the harms
23 they have caused to free speech, whether they were
24 effective, the empirical concerns concerning them and
25 whether they were alternative ways of dealing with the

1 harms they were meant to combat.

2 And that's what he studied in these
3 case studies and it would be very valuable evidence for
4 the Tribunal and that's his expertise.

5 THE CHAIRPERSON: I gather from your
6 last question it is your position that although it may
7 be focused on the smaller -- some of his research may
8 be focused on smaller environments like a university
9 setting, some of his findings or his opinions may be
10 extrapolated to a larger setting, society as a whole?

11 MS KULASZKA: Yes. That would be for
12 you, obviously, to say.

13 THE CHAIRPERSON: Right.

14 MR. FOTHERGILL: If we just take the
15 proposed areas of expertise in turn, we would be in
16 with purposes and types of discriminatory and speech
17 laws and restrictions.

18 And in my respectful submission, a
19 particular expertise in that area has not been
20 established. These are also quintessentially legal
21 concepts, and Dr. Downs is not a legal expert and
22 certainly not any greater a legal expert than you are
23 yourself, or anyone else in the room. So in my
24 submission that particular expertise has not been made
25 out.

1 Secondly, the relationship between
2 discriminatory hate speech and hate crime has been in
3 no way a focus of Dr. Downs' study and hasn't even been
4 the focus of the question this morning.

5 So there is no evidence before you,
6 in my respectful submission, that would allow you to
7 conclude Dr. Downs has any particular expert in the
8 subject of relationships between discriminatory or hate
9 speech and hate crime.

10 THE CHAIRPERSON: Didn't that form
11 part of his report in any event?

12 MR. FOTHERGILL: That I'm not sure
13 about on top of my head.

14 THE CHAIRPERSON: I don't want us
15 to --

16 MS KULASZKA: He gets into cause and
17 effect.

18 THE CHAIRPERSON: In the broader
19 sense.

20 MS KULASZKA: Yes. Because this is
21 his field of study. That's the problem, we're trying
22 to make it so restrictive. You know, the end, I don't
23 know how really helpful this is to the Tribunal where
24 you make it -- I was specific but he -- this is his
25 area of expertise. He's done studies on it. He's

1 reviewed the literature. He should be allowed to give
2 testimony.

3 MR. FOTHERGILL: I might be able to
4 propose a practical solution. Perhaps we should revert
5 to the initial proposal, philosophical, political and
6 social aspects, theory and practice. I'm prepared to
7 object, if necessary, to opinions that, in my
8 respectful submission, do not fall within his
9 expertise.

10 There are two exceptions I wish to
11 establish now, however, based on the evidence that's
12 been presented.

13 In my respectful submission, Dr.
14 Downs has not demonstrated any particular expertise
15 about the long-term effects of hate speech. That
16 simply hasn't been a subject of study for him.
17 Specifically, in relation to major historical events.
18 He admitted that, frankly.

19 So in my respectful submission, he
20 should not be permitted to express a view on the extent
21 to which hate speech did or did not contribute to
22 particular atrocities in the past.

23 I would also say, again, as Dr. Downs
24 frankly admitted, he has no expertise in the theory of
25 causation which he agreed was essentially a legal

1 concept, and something which the legally trained
2 individuals would have an equal expertise, and I would
3 object to any attempt to lead Dr. Downs' opinion on
4 theories of causation as appears in his report.

5 But if you wish to recognize him as
6 an expert generally in the philosophical, political and
7 social aspects of free speech, theory and practice,
8 subject to the limitations of his expertise that might
9 be identified in the course of his testimony, that is
10 acceptable from my perspective.

11 THE CHAIRPERSON: He doesn't get into
12 the history very much in any event, does he, Ms
13 Kulaszka?

14 MS KULASZKA: Certainly if he's done
15 a review of literature of various positions, such as
16 Dr. Tsesis, versus what other scholars in the area
17 believe, I think he should be allowed to tell you that.
18 He's done a study of it.

19 On cross-examination, my friends are
20 free to explore the basis of his knowledge, just how
21 strong is it.

22 He hasn't done a study like Dr.
23 Tsesis, but he's read his book and he's done a review
24 of the literature concerning the opinions on Dr.
25 Tsesis' book. Whether they are scholars, what are

1 their position. It would give you an idea of what is
2 going on out in the field.

3 THE CHAIRPERSON: To be consistent,
4 I've allowed that type of in evidence in through the
5 other experts in the past, subject to cross-examination
6 and argument.

7 MR. FOTHERGILL: But with respect,
8 that's because it's their subject of expertise.

9 THE CHAIRPERSON: Sorry?

10 MR. FOTHERGILL: It's within their
11 subject -- their area of expertise, whereas Dr. Downs
12 has acknowledged he has not conducted any sort of
13 historical analysis of events to determine whether or
14 not hate speech was a contributing factor, and the fact
15 he has familiarized himself with the book reviews or
16 other literature doesn't assist you, because anybody
17 can present that to you. Ms Kulaszka can, Mr. Christie
18 can.

19 THE CHAIRPERSON: Here's the problem
20 I have. We're running this in a very -- efficient way
21 because if it were to go to follow this to its ultimate
22 conclusion, the only way I can ever get any of this
23 material before a Tribunal, something that establishes
24 some record on the broader issues than pure legal
25 issues that we can derive from jurisprudence, I have to

1 bring in a dozen experts in each time to refer to each
2 authority or text that may have been presented on the
3 point.

4 We have people who, both Dr. Tsesis
5 and all the other experts, who have a familiarity with
6 it. It may not be technically an expertise, per se,
7 but they are more familiar than I be.

8 And if you were in final submissions
9 to hand up to me -- I do draw the line on authorities
10 that you mentioned earlier. I would not accept an
11 extract from Political Science Digest or something and
12 accept it as an authority. I'm not in a position that
13 say whether it is or isn't an authority, but it's
14 evidence that comes before me. It's in a different
15 light, subject to cross-examination.

16 I think it's an efficient way for us
17 to get some of this information out there and leave it
18 to debate. And it has come in with the other witnesses
19 to some extent. He acknowledges he doesn't have an
20 expertise in history. I'll see how it comes in. I'll
21 let you make your objections as you go along.

22 At this point, I'm not prepared to
23 exclude anything. He clearly has a philosophical and
24 political science background in the area of hate speech
25 and I am prepared to allow Ms Kulaszka to argue that

1 one can extrapolate from a smaller environment to a
2 larger environment. We'll leave it to you to work it
3 out subsequently, but -- in final argument.

4 But he's drawing on the American
5 perspective and we all know in the States the situation
6 is a little different. According to him in the
7 cross-examination earlier on his expertise, he
8 indicated that one of the areas where there has been an
9 experiment, if you will, on hate speech laws has been
10 in the smaller environments of the -- in university
11 settings.

12 I'm not prepared to exclude him on
13 that.

14 On the issue of causality. I must
15 admit when I was reading the material on causality, Ms
16 Kulaszka, I know that. I had that sense. You know,
17 sine qua non, probability, possibility. These are all
18 principles we all know.

19 On the other hand, I'm not afraid of
20 letting him make references to areas that we know, if
21 it enables the discussion to go to whatever other level
22 that he may want to take. I'm not afraid of hearing
23 this, the theories of causality, because they are so
24 obvious, as you indicated.

25 And I don't know how much of an

1 essential component it makes up of this report. I
2 don't remember how many pages there were. That one
3 didn't trouble me as such as -- it was more uh-huh,
4 uh-huh. It was more of an 'uh-huh' situation. I don't
5 know how that translates on the transcripts.

6 MR. FOTHERGILL: In that case, in my
7 submission, he should be recognized as an expert in the
8 general way that Ms Kulaszka initially proposed. I
9 actually think that her particularization is more
10 problematic because she imputes to him expert that, in
11 my respectful submission, he doesn't actually have in
12 many instances.

13 I don't object to him being
14 recognized as an expert in the philosophical, political
15 and social aspects of free speech, theory and practice,
16 subject to the limitations that may be revealed --

17 THE CHAIRPERSON: I would prefer
18 that. I hope you all appreciate what I try to do here,
19 try to work out an arrangement that everyone can live
20 with. I think it's the best way to go about it.

21 Object if you really feel it's an
22 area that shouldn't even be dealt with in his evidence,
23 or just save it for cross-examination and then final
24 argument, as I've done with the other experts. It will
25 be simpler for us to work on it on that basis, and I'm

1 comfortable with the general -- definition his
2 expertise. So we'll work with that. Okay?

3 THE CHAIRPERSON: Philosophical,
4 political and social aspects of free speech; its theory
5 and practice.

6 (WITNESS RESUMES)

7 MS KULASZKA: You've been accepted as
8 an expert and in the philosophical, political and
9 social aspects of free speech, its theory and practice.

10 THE CHAIRPERSON: We've gone with the
11 broader definition, it's easier to work with.

12 MS KULASZKA: I would like you to
13 turn to tab 1 and turn to just past your CV, there is a
14 report that you did, approximately three pages long.
15 Do you see that?

16 DR. DOWNS: Yes, I do.

17 MS KULASZKA: And that was your first
18 report.

19 DR. DOWNS: Yes, it was.

20 MS KULASZKA: I would like to produce
21 that.

22 THE CHAIRPERSON: Yes. Two reports,
23 weren't there?

24 MS KULASZKA: If you turn to the next
25 report, this was a much longer report which you filed.

1 DR. DOWNS: Right.

2 MS KULASZKA: Do you recognize that?

3 DR. DOWNS: Yes, I do.

4 MS KULASZKA: I would like to produce
5 that.

6 THE CHAIRPERSON: Okay.

7 MS KULASZKA: We'll just go to tab 2
8 and produce these articles as exhibits. If you go to
9 tab 2 it's a book review. Do you recognize this.

10 DR. DOWNS: Yes, I do.

11 MS KULASZKA: What is it?

12 DR. DOWNS: It's by my colleague Anuj
13 Desai at the University of Wisconsin law school, it's a
14 review of Alex Tsesis the book "Destructive Messages".

15 MS KULASZKA: I would like to produce
16 that.

17 Tab 3, entitled "Kindly Inquisitors".
18 Do you recognize that?

19 DR. DOWNS: Yes, I do. Jon Rauch's
20 book on the negative effects of speech codes but he
21 calls a liberal model of science which is the process
22 by which we determine truth through critical evaluation
23 of sifting and winoweeing (ph), of ideas and facts.
24 And it's mini classic.

25 MS KULASZKA: Do you rely this book

1 in giving your opinion?

2 DR. DOWNS: Absolutely.

3 MS KULASZKA: I would like to produce
4 that.

5 THE CHAIRPERSON: Yes.

6 MS KULASZKA: Tab 4. "Restoring Free
7 Speech and Liberty to Campus". If you can just turn
8 through that. Do you recognize this?

9 DR. DOWNS: I hope so, I wrote it.
10 That's a book I published in 1985. It came out in
11 paper -- in 2005 and came out in paper back in 2006.

12 MS KULASZKA: And I believe this is
13 just the first two chapters, correct?

14 DR. DOWNS: That's correct.

15 MS KULASZKA: I would like to produce
16 that.

17 DR. DOWNS: Provides the background.

18 THE CHAIRPERSON: Yes.

19 MS KULASZKA: Next tab 5,
20 "Understanding the Harm of Hate Crime" by Boeckmann.
21 What is this?

22 DR. DOWNS: It's an article that
23 deals with some of the effects of hate crimes on the
24 individuals that was published in the symposium of
25 2002.

1 MS KULASZKA: Does this form the
2 basis also for your opinion?

3 THE CHAIRPERSON: Okay

4 DR. DOWNS: It contributes to it.

5 MS KULASZKA: I would like to produce
6 this.

7 THE CHAIRPERSON: Okay.

8 MS KULASZKA: And tab 6, "Words That
9 Kill". Do you recognize this?

10 DR. DOWNS: Yes, I do. This is a
11 working paper by Dhammika Dharmapala and McAdams,
12 which -- it a formal model that talks about the ways in
13 which hate speech might contribute to hate crimes.
14 It's now been published in a journal. When I submitted
15 this, it hadn't been published yet.

16 MS KULASZKA: I would like to produce
17 that.

18 THE CHAIRPERSON: Okay.

19 MS KULASZKA: And the next tab, tab 7
20 is "Hate Speech and Constitutional Protection". Do you
21 recognize that?

22 DR. DOWNS: Yes, I do. That was in
23 the same symposium I just mentioned.

24 MS KULASZKA: I would like to produce
25 that.

1 THE CHAIRPERSON: Yes.

2 MS KULASZKA: And lastly, that 8,
3 "Critical Social Policy", "Legislating Against Hate".
4 Could you tell us what that is?

5 DR. DOWNS: Yeah, an article by Paul
6 Iganski dealing with outlined racism, anti-Semitism in
7 Britain.

8 MS KULASZKA: I would like to produce
9 that.

10 If we could turn back to your second
11 expert report.

12 MR. FOTHERGILL: Mr. Hadjis, before
13 we begin, I wonder if I could request some guidance
14 from the Chair about timing today, because you recall
15 from yesterday I spent perhaps 20 minutes with Dr.
16 Tsisis on his qualifications and 40 minutes on his
17 examination-in-chief in order to give my friends a full
18 opportunity to cross examine.

19 And I would like you to direct, if
20 you agree, that the examination in-chief of this
21 witness must be completed by lunch in order to give the
22 afternoon to Mr. Vigna and myself to conduct any
23 cross-examination that we might think is appropriate,
24 particularly given the fact you have already read Dr.
25 Downs' report.

1 THE CHAIRPERSON: Ms Kulaszka, will
2 you be able to meet that target?

3 MS KULASZKA: Yes, I hope so and I
4 would like the cross-examination to start after lunch
5 so I would be able to have lunch with Dr. Downs,
6 otherwise he's alone.

7 THE CHAIRPERSON: Yes, of course, we
8 could vary the lunch time. If you are done by 11:30,
9 I'll break at that point for lunch. But try to target
10 that. It's only fair. As I said yesterday, what
11 happened yesterday will happen today.

12 Yes, the report is -- and the report
13 is self-evident. But it will be helpful if we could
14 proceed quickly.

15 MS KULASZKA: Dr. Downs, do you adopt
16 the opinions set out in both of your reports?

17 DR. DOWNS: Yes, I do.

18 MS KULASZKA: Now, in your studies of
19 restrictions and laws against offensive speech, can you
20 identify what harms were targeted by these restrictions
21 and laws?

22 DR. DOWNS: Okay. Well, I think they
23 are really two or three levels of harm. The first is
24 immediate impact. Hate speech, especially when it's
25 targeted, which was the focus of my book Nazis in

1 Skokie. Though that book I used the term targeting
2 very broadly. You could target a whole community. And
3 that's a position I backed off from.

4 I still believe the same doctrine I
5 have in that book, but I would apply it more concretely
6 to specific targeting of individuals or discrete groups
7 rather than a whole community. But the harm there, its
8 psychological, emotional, discussed in some of the
9 articles here.

10 For Holocaust survivors, it was the
11 nightmare reborn. And for many of them I would
12 argue -- not a professional psychologist but reports I
13 had, semi-psychotic kinds of states, people imagining
14 they saw actual Nazis. Others it's more question of
15 trauma and a sense of insecurity. That had to do with
16 direct harms to individuals who are exposed to this,
17 especially when it's targeted at them in particular
18 rather than just broader rhetoric that they happen to
19 read.

20 MS KULASZKA: You're talking about
21 actual physical face-to-face contact?

22 DR. DOWNS: Physical, face-to-face or
23 perhaps if someone reads it even though they are not
24 physically confronted with it, that can have an effect
25 but it wouldn't be -- probably wouldn't be as

1 traumatic.

2 The second kind of harm is some sort
3 of moving from a more specific to a more general level
4 is -- does it encourage people to commit hate crimes.
5 And this I'm suggesting in the report, yes and no.
6 It's a complex question.

7 And the piece by McAdams in the
8 materials that were provided. They engage in a kind of
9 cost benefit analysis to look at the incentives that
10 people have to commit hate crimes based upon the esteem
11 they want from their peer groups. It's a very complex
12 essay based on formal modelling. I'm not a formal
13 modeler.

14 But the bottom line is, they take
15 into consideration the costs of committing a hate
16 crime, compare that to the benefits that they derive
17 from it, especially the esteem they get from their
18 community, and if the benefits outweigh the costs they
19 would be inclined to do it.

20 The essay looks at whether or not
21 hate speech, in the prevalence of hate speech, what
22 kinds of messages does that send to them so they can
23 make that cost benefit analysis. And the authors in
24 that do conclude that under certain conditions hate
25 speech can contribute to more hate crime.

1 The question then one would come to,
2 well, okay, but does that outweigh the downside effects
3 or the possible costs of a broad hate speech
4 regulation.

5 The third kind of harm is the
6 broadest kind, it's the kind that Seesis (ph) talks
7 about. And that is, to what extent does did existence
8 of hate speech lead to more racist attitudes, acts of
9 discrimination, and maybe hate crimes down the line.
10 Does it create a kind of environment where things like
11 the Holocaust could occur?

12 And that's the broadest, longer range
13 kind of harm that can exist. And my argument is very
14 much based on -- and I agree with the Desai on this.
15 Is that really depends, it depends on the context.
16 Modern day America and modern day Canada are not Nazi,
17 Germany.

18 A look at the United States last
19 week, the famous basketball player Tim Hardaway, gave
20 an interview and he said that he hated gays. And
21 overnight American cable TV and all the news outlets
22 were in an uproar. This guy is a homophone. And I
23 think about what happened when Kramer -- I always
24 forget his real, Richards?

25 THE CHAIRPERSON: Michael --

1 DR. DOWNS: Michael Richards went
2 into that racist tirade at that club in Florida. There
3 was an out roar in response to that. That's quite a
4 different kind of cultural context from Nazi Germany.
5 But those are the harms.

6 Discrete, two individuals who are
7 targeted by it, those who are exposed to it. And then
8 you have the sort of incitement. Those were encouraged
9 to do bad things because of it, either more or less --
10 in a short time frame or longer range.

11 MS KULASZKA: So there's various
12 levels.

13 DR. DOWNS: Absolutely. And as we
14 move from one level to another, cause and effect
15 becomes much more complicated. And I would argue that
16 this move from the concrete to the more general, the
17 more alternative remedies to fight things like racism
18 can be effective.

19 MS KULASZKA: Okay. What are the
20 several key issues which you have identified concerning
21 broad prohibitions of hate speech? And I'm looking at
22 page 2 of your report. And the first one is
23 definitional. What kind of problems arise?

24 DR. DOWNS: Well, first of all, you
25 have to define it. It could be a very racist rhetoric.

1 You could have a broader definition, you can have a
2 more specific definition which is linked more to the
3 direct kind of harm that I said was the first type of
4 harm.

5 The broader you define it in terms
6 of, say, hostile attitude, negative attitude, hate in
7 general, the more difficult it is to apply the more
8 discretionary, the more discretion is going to be
9 taking place in terms of this application. And I go
10 back to Seesis' book. There is a dilemma that in many
11 ways his analysis shows how deeply embedded racism can
12 be in cultures like Nazi Germany.

13 But it's not just the most overt
14 kinds of things that Adolf Hitler said that contribute
15 to that. You know, Shakespeare in the Merchant of
16 Venice. It's societal attitudes, it's a variety of
17 things that are deeply ingrained. How do you get at
18 those?

19 So the more narrow you define it, the
20 more you are not going at the deeper problem. The more
21 broadly you define it, the more difficult application
22 is, and the more you are going to move towards kind of
23 police state to have to deal with it. So sort of a
24 dilemma in definition.

25 MS KULASZKA: In terms of --

1 DR. DOWNS: One final point. I found
2 this in university and elsewhere. We called it the
3 Mark Anthony problem. That if you prohibit, say, an X
4 then the hate group can say Y instead and get around
5 the letter of the law but end up saying the same thing
6 or, as one article that I think I cite in my report
7 goes back to 1968 in Britain, the more persuasive that
8 argument might become because when it comes through
9 extreme racist kind of opinion in our contemporary
10 democratic societies nobody takes that seriously except
11 fringe people.

12 MS KULASZKA: So, in fact, the hate
13 law has the effect of, what, toning down the rhetoric?

14 DR. DOWNS: It can, it can. And so
15 what you end up having is, the clever people find their
16 way around it, and those who are either stupid and
17 don't know how to become Mark Anthony, or those who are
18 just obstinate stick onto their guns but they might get
19 punished, or people who are just simply trying to be
20 intellectually honest about what they really think end
21 up getting punished.

22 MS KULASZKA: Now, in the context of
23 the university in the speech codes you've studied, can
24 you give us any example of how their interpretation of
25 the code became very problematic?

1 DR. DOWNS: I'll give you a couple.
2 There's many we could choose from. And I cite the
3 books that you could look at.

4 One was at Yale back in the middle
5 1990's. Guy named Wayne Dick. And Yale decided do
6 have a gay pride day. And so they had various speakers
7 and things like that. And they had a gay pride parade.
8 And Wayne Dick -- and I'm not sure of his motivation --
9 was either that he didn't like gay pride day, maybe he
10 was homophobic. But he put up a sign making fun of gay
11 pride day in a public forum. In the United States it's
12 classic protected speech. And he was punished for
13 harassment under Yale's harassment code, and he had to
14 go through the ringer.

15 Had he put up a sign that said, I
16 love gay pride day, there would have been no
17 punishment. But for taking the so-called wrong side of
18 that issue -- and it's one I personally consider the
19 wrong side -- he was punished, which means the
20 marketplace idea was loaded.

21 If you had the social justice view,
22 you are protected; if you have the contrary view you
23 are not. And the danger with that is it's two-fold,
24 the second danger being greater.

25 The first danger is that someone is

1 going to be punished for an honestly-held belief that
2 is not directly causing any kind of major harm. The
3 second is people that are trying to provide
4 constructive criticism to various groups can be lumped
5 in with that first category because what they say could
6 be seen as offensive, especially if the group that's
7 being offended is politically organized and wants to
8 make a big point out of it, then it's going to be very
9 difficult for those who enforce these things to ignore
10 that.

11 I consider the Wayne Dick case to be
12 very bad example of that sort of thought control.

13 Second example, and I have a chapter,
14 is the water buffalo case at the University of
15 Pennsylvania. Probably the most famous case of its
16 kind. And it ended up when I wrote my book, it had
17 already been talked in about 800 articles.

18 It was a freshman student at the
19 University of Pennsylvania named Eric Jacobowitz, and
20 at 1:00 o'clock at night a group of African-American
21 women students, a sorority, were out -- I guess they
22 were out to a bar and were kind of loud and making lot
23 of noise. And people were either trying to sleep or
24 they were trying to study.

25 And knowing college students -- I

1 won't make any judgment. And several people yelled out
2 at them, "Be quiet". And Jacobowitz yelled, "Be quiet,
3 you water buffalos", which is the famous water buffalos
4 case. It ends up he got singled out because he was the
5 only person -- students, they were offended, they
6 thought it was a racist comment.

7 They went into the dorm and asked who
8 said what. Everyone denied saying anything and there
9 is one person whom I happened to run into for an
10 interview who pointed out, it was down in the hall in
11 Jacobowitz's room. So he confessed he had said it.

12 And he was prosecuted -- excuse me,
13 prosecution is not the correct term. He was
14 investigated and charged formally under Penn's speech
15 code, which actually was a very narrow intent-based
16 speech code which should not have been applied to this
17 case -- for making a racist remark with the intent to
18 harm the students.

19 And they did a lot of research and
20 nobody could figure out what the term water buffalo
21 meant. There was very little indication it had any
22 kind of racial meaning. And eventually he was pursued,
23 investigated, he was charged and the charges were
24 dropped at the very end of the very bizarre process
25 that I outlined at length in my book because of public

1 exposure. And this was a classic misapplication of the
2 code.

3 I had a professor, a colleague who I
4 talk about in my second charter in my last book who was
5 investigated, though not charged, but investigation
6 itself was an example of crime being the punishment,
7 for saying to two graduate students who had been
8 badgering him for a long time, "Seig Heil comrades".

9 MS KULASZKA: Pardon? What did they
10 say?

11 DR. DOWNS: They were badgering him,
12 and he said, "Why don't we just call a truce, we don't
13 like each other, go your own way." And they refused to
14 comply. So he turned to them and, "Seig Heil
15 comrades".

16 So he was trying to be even balanced
17 between the left and right in terms of his comment.
18 And they went to the university and the university
19 conducted an investigation of racism against him for
20 saying that because one of the student's wife was
21 Jewish and another one's cousin had been gypsies in
22 Nazi Germany.

23 And he had just said what people -- I
24 don't know, maybe in Canada maybe you don't use this
25 term as much. Down there we call people comrades or

1 Nazis all the time for acting inappropriately. That
2 would be another example. But there's long list of
3 such cases.

4 Now, I will confess it's anecdotal
5 evidence. And I recently wrote a blog on a web page of
6 an academic group in the United States which I called
7 for the need for more systematic investigation to find
8 out what has been the impact of these codes. Mine is
9 more anecdotal, experiential, I would say educated
10 impressionistic.

11 But it's not systematic, and one
12 attempt has been made along those lines by a guy name
13 Jon Gould, who is a friend of mine, who is at George
14 Mason University, but it is not definitive.

15 MS KULASZKA: Now --

16 DR. DOWNS: But the anecdotal
17 evidence is pretty -- is very suggestive.

18 MS KULASZKA: It might help us to
19 understand origin of these speech codes, especially in
20 the United States.

21 DR. DOWNS: Right.

22 MS KULASZKA: Could you tell us about
23 that?

24 DR. DOWNS: Well, in my second
25 chapter I try to talk about why. And I think I touch

1 on some of the major reasons why, but I still haven't
2 fully grasped it. Very interesting kind of question.

3 And one reason is political advocacy,
4 that with identity politics become an important
5 phenomenon especially on American campuses.

6 Groups are now organized to be
7 offended by things. And I'm not saying that offence
8 can be genuine, it can be politically contrived.
9 Depends on case. I'm not trying to dismiss it.

10 But somehow -- to me the Skokie case
11 was a watershed in American law because it was a first
12 time in a major way that we started seeing calls for
13 censorship coming from the left rather than the right.
14 And history of censorship -- in this room I work on
15 pornography fits into the issue at hand in terms of the
16 effects of censorship.

17 Censorship of pornography was always
18 from the conservatives and from the right. Censorship
19 at university was always from outside forces from the
20 right.

21 McCarthyism. My university was one
22 of the few universities that stood up for Joe McCarthy.
23 He wanted -- at Wisconsin. The faculty centre said, go
24 below. Because he was a bully, he backed off.

25 But then somehow in the mid-sixties a

1 famous philosopher from the Frankfurt school, Herbert
2 Marcuse, wrote an essay called "Repressive Tolerance",
3 and he argued in a society that is ridden with racism
4 and sexism and what he called technologism or
5 something, it's a repressive society and to allow the
6 marketplace of ideas to exist is only going to
7 perpetuate the status quo because the society is
8 already rotten to the core.

9 He never asked the question of who is
10 going to make these decisions, and I think he was
11 overly pessimistic. Look at all these -- lot of
12 changes we've had in the positive socially progressive
13 direction since then.

14 But Marcuse made the -- he said --
15 when John Stuart Mill wrote on liberty, freedom of
16 speech was a liberating idea because of clericism,
17 history of the church and repression, it was a
18 liberating ideal linked to equality.

19 And somehow as we move into sixties
20 and seventies, that idea became problematic. And
21 people from left starting saying, well, if America
22 really is such a bad place, you know, maybe freedom of
23 speech only protects those who are already powerful.

24 And so he argued for what he
25 called -- the term I used, I might have been the first

1 one to use it but I didn't make a big deal out of it, I
2 should have -- progressive censorship, censorship in
3 the name of progressive causes.

4 And Marcuse's essay sort of sat there
5 percolating for a long time. Then Skokie hit. And
6 Skokie was a big deal. American Civil Liberties
7 Union -- by the way, it was a Jew who represented the
8 Nazi party, and he took a lot of grief for it.

9 David Goldberger, now a law professor
10 at Ohio State. For the -- ACU lost one-third of its
11 members. And people on the left who had already said,
12 we want free speech because free speech -- talk about
13 later -- was the vehicle for the civil rights movement
14 in the United States.

15 Racial minorities didn't advocate for
16 speech codes and restrictions on speech. They
17 advocated for more free speech because their speech is
18 being suppressed in the south because it was considered
19 offensive to the racist regimes of the south.

20 But as we move into the seventies,
21 that changed and suddenly people say, well, wait a
22 minute, here's a Nazi group and they are getting free
23 speech protection, and look at the impact it's having
24 on the Jewish community there.

25 I should mention parenthetically --

1 actually, in the long run the Skokie case was great for
2 the Jewish community except for those individuals who
3 were overly traumatized, because everybody rallied
4 behind the Jews. And they end up had the Nazis come to
5 Skokie, there would have been a counter demonstration
6 of 50,000 people. And sometimes these figures are
7 exaggerated.

8 There was a guy from L.A. who had
9 1200 people, reservations on a plane to fly to Skokie
10 to counter protest. That's just one person.

11 And so Skokie actually was an example
12 of how a positive social political environment makes a
13 big difference when it comes to the impact of hate
14 speech.

15 But getting back to Skokie. Wait a
16 minute, this isn't what free speech is supposed to be.
17 Maybe free speech is a problem, maybe Marcuse was
18 right. And so Skokie was a real watershed.

19 Five years later there was a new
20 feminist argument for the repression of pornography,
21 engineered by Catherine Mackinnon, famous feminist who
22 has some experience with the Canadian law, because
23 feminist bookstores were affected by Canadian's hate
24 speech law in the early nineteen hundreds.

25 And Mackinnon said, pornography is

1 women's Skokie, and it's a harm to women as a group.

2 So we start getting these arguments
3 coming from the left that hate speech, pornography,
4 things of that nature, perpetuate the subordination of
5 women and minorities, et cetera. We need progressive
6 censorship now to break out of this problem. That's
7 one reason.

8 I'd argue there's also intellectual
9 reasons. I don't know if you want me to get into those
10 here. Post-modernism, various other kinds of things
11 where we start seeing discourse as the ultimate truth.

12 So the fundamental policy distinction
13 between speech and action, which has been in an
14 important aspect of free speech policy around the
15 world, especially in the States, started being
16 questioned.

17 So for a whole variety of reasons,
18 plus I would argue because it's universities, at least
19 more elite universities, tend to be dominated by left
20 liberal types of people, who suddenly have less to fear
21 from censorship, that they would be behind. For a
22 variety of reasons, among others.

23 MS KULASZKA: Who lobbied for the
24 speech codes at universities?

25 DR. DOWNS: It was really two things.

1 Students, minority students. A lot of minority
2 students disagree, as I talk about. But the organized
3 groups tended to lobby for them. And administrators.
4 Once you had some of the major schools -- Michigan,
5 Wisconsin, Stanford -- they're like three of the
6 pioneers in speech codes.

7 And I acknowledge right here. I was
8 in the faculty senate when Madison passed its first
9 speech codes, and I voted for them. I was a supporter
10 of them at that time.

11 And once those schools started doing
12 it, they did in a very famous way down there. This was
13 written about all over higher education and the
14 newspapers. Then it became sort of, keep up with the
15 Joneses. So it was sort of a combination of advocate
16 politics and keeping up with the Joneses and a kind of
17 new administrative ethos that I talk about in the book.

18 Administrative who -- we had fewer
19 administrators who had come up the ladder of teaching.
20 And if you were a teacher you become more concerned
21 about these things because you are in class to
22 challenge and to stretch the intellectual imagination.

23 And with codes, it becomes more
24 difficult to do that. So there was a -- we now had
25 administration that had less background in the ethos of

1 teaching.

2 MS KULASZKA: Why did you support the
3 speech codes?

4 DR. DOWNS: I thought that a fair
5 balance could be drawn between protecting minorities
6 and equality and free speech.

7 MS KULASZKA: Do you still believe
8 that?

9 DR. DOWNS: Only if the policy is
10 based on what I talk about at the beginning of my
11 report. I'm much more doubtful, at least when it comes
12 to a broader kind of code, based on my experience and
13 the things I've already talked about.

14 MS KULASZKA: Now, the organized
15 groups that lobbied for these codes, did they very
16 strongly self-identify as being members of a racial or
17 religious group?

18 DR. DOWNS: On the whole, yes. I
19 mean, that's part of American higher education now.
20 We have identity politics kind of groups. So, yes, to
21 a large extent.

22 But I think there were two basic
23 arguments. And this is still a tension that goes on in
24 the field between those who are more, I don't know, I
25 use the Kantian universalist. Believe in human dignity

1 and liberty for everybody.

2 And then you have identity politics
3 which tends to be more group-based and ethnic-based.
4 And there is a tension there. The Kantian types tend
5 to be more pro free speech because that's where the
6 universalism -- everyone has equal rights. But there
7 were some arguments for that restriction.

8 Nazi versus Skokie, my argument for
9 restricting targeted hate speech, which I still
10 endorse. I can give you an example of a real case, was
11 based on Kantian logic. And I didn't think the
12 argument that vilification based on race and other
13 attributes but especially race, does create a distinct
14 kind of harm. I sort of backed off that. It depends
15 on the context now.

16 Some of the literature shows that
17 because that -- if someone is assaulted and beaten up
18 because of their age they are going to be traumatized
19 probably just as much as if they are beaten up for
20 their race.

21 But the difference between -- the
22 issue with race is people can't change that. You are a
23 certain race, it's part of your identity. It's more
24 than that, it's part of what you are made of. And to
25 vilify somebody for that violates the basic Kantian

1 norm of the autonomy and free will of individuals.

2 So I haven't backed off of that.

3 There's a case that happened in Galveston Bay, Texas,
4 in the early nineties or early eighties where a group
5 of Vietnamese fisherman, the boat people that came to
6 America after Vietnam. And they are out there fishing
7 and they fished harder than the local residents of
8 Galveston Bay.

9 So they started catching all the
10 fish. The established fisherman were upset about this.
11 And so they started engaging in some racist thoughts,
12 et cetera. And the Ku Klux Klan heard about this, and
13 they smelled blood like a shark smells blood. So they
14 started circling the ship, the boat of Vietnamese
15 fisherman about 150 feet away with a effigy of a
16 Vietnamese fisherman hanging from a noose, and they had
17 unloaded brandished rifles.

18 The Vietnamese fishermen went to
19 court to get an injunction against them for
20 interference with their business and for engaging in,
21 they called it fighting words but it was really a
22 threat.

23 And both the Federal District Court
24 and the Court of Appeals ruled that this was not free
25 speech. This was intimidation, this was threat. I had

1 no problem with that. As a matter of fact, I would
2 have a problem if this weren't the case.

3 Targeting a whole village called
4 Skokie is a different matter. That's really more
5 rhetorical speech, and I would protect that.

6 So it's a question how you fashion
7 these things. Speech codes ask, as it came to be
8 known, were basically punishing people for saying
9 offensive things. And most of them were -- ones that
10 were applied badly were of a broader variety, though at
11 Penn it was a very narrow code.

12 As a matter of fact, Penn went to a
13 law professor, Edwin Baker, who has written a lot about
14 free speech theory, and asked him, can you come up with
15 a code that will pass constitutional muster?

16 He said, "I'll do it under one
17 condition, this narrow intent kind of code." Penn said
18 fine, and then they applied it to the water buffalo
19 case.

20 THE CHAIRPERSON: Ms Kulaszka, maybe
21 it would be a good time to take a small break at this
22 point. We have been going since about nine. And we'll
23 break for 15 minutes.

24 --- Upon recessing at 10:30 a.m.

25 --- Upon resuming at 10:50 a.m.

1 MS KULASZKA: We were talking about
2 the origin of what you've termed progressive
3 censorship.

4 DR. DOWNS: Right.

5 MS KULASZKA: Is it -- where does it
6 really come from? Is it simply a philosophy? Did this
7 failure -- they lose their belief in free speech? Is
8 that what happens?

9 DR. DOWNS: Yeah. To an interesting
10 extent. And this is one of those cases where you
11 actually can't trace a concept to a very specific
12 origin. That was Marcuse's essay in 1965.

13 But just -- it sat there for a long
14 time until the seventies when -- I think the Skokie
15 case is one of the major cases that suddenly got people
16 thinking that way. And with reason. There's logic to
17 it.

18 MS KULASZKA: Now, what is the
19 relationship between the group libel laws in the U.S.
20 and the later speech codes?

21 DR. DOWNS: Well, the United States
22 has had three periods, three different kind of
23 definitions of the harm.

24 Back in the twenties when the concern
25 about this started -- because before that racism was

1 such an accepted part of fabric of society that people
2 just sort of, you know, didn't make a big deal out of
3 racist speech in the same way that they were to do
4 later.

5 In the twenties it was called race
6 hate, and there were some measures against it but it
7 was really more criticism. Then, of course, World War
8 II was the turning point in western democracy for human
9 rights, and we began the human rights era of
10 jurisprudence in law and politics.

11 And during the Second World War,
12 concern about Nazis being in the United States and
13 elsewhere. Several states passed group -- what we call
14 group libel laws. And group libel laws, similar to the
15 Canadian law, intent is not required, the effect, truth
16 is not a defence. And -- but they were pretty much
17 unenforced.

18 There's one state case in New Jersey
19 where a court struck down New Jersey's law. But the
20 Illinois law was tested after World War II and
21 neighbors -- oh, no. And the Supreme Court 5-4 upheld
22 it.

23 But interestingly, rather than
24 leading to a wave of group libel prosecutions -- group
25 libel was a new way of defining it as opposed to race

1 hate.

2 And group libel -- Illinois law said
3 anyone who casts aspersions -- I don't know the exact
4 wording -- but casts aspersions on groups based on
5 race, religion, national orientation, et cetera, in a
6 way which subjects them to ridicule is guilty of group
7 libel.

8 But rather than that leading to a
9 wave of group libel prosecutions, there were very few,
10 if any.

11 The reason, according to Samuel
12 Walker, who has written about this, history of hate
13 speech in the United States, is that advocacy groups
14 didn't push for it.

15 There's some research on Supreme
16 Court decision-making that suggests to some extent,
17 some meaningful extent, the Supreme Court positions are
18 shaped by the advocacies that are brought before them
19 in hearings.

20 The briefs and the arguments by
21 counsel, Friend of the Court Brief, Amicus Curiae, et
22 cetera. And for the most part, minorities in the
23 United States at this time, they wanted more free
24 speech rather than less, I mentioned earlier, because
25 they were getting punished.

1 The Jehovah's Witnesses are crucial
2 to the development of American law, and just as an
3 illustration. Not that American is the only way to
4 think.

5 That they were persecuted, all sorts
6 of free speech cases involve the Jehovah's Witnesses,
7 religious minority. They wanted more free speech. And
8 the civil rights movement, people like Martin Luther
9 King and others, they wanted more free speech not less.
10 Their idea was, let's protect free speech for everyone,
11 including those who hate, so we'll be protected.

12 It's a classic, we don't want
13 anyone's OX to be gored. I will protect the speech
14 that I hate, sort of the Voltaire idea.

15 Both may be in terms of principle,
16 but more importantly pragmatically.

17 So groups like the Southern Christian
18 Leadership Council and other minority groups did not
19 press for censorship and so it didn't come up. So free
20 speech expanded during the civil rights rather than
21 detracted. And that was one of the reasons that groups
22 were able to go in the south and confront their enemy.

23 It wasn't until the seventies that
24 this started changing, and then we got into cutting of
25 the speech code kind of idea. And I would argue

1 probably because it took place in universities. We
2 sometimes tend to be a little self-righteous.

3 And people -- since this was largely
4 being used against people that dissented from the
5 social justice kind of ideas, most supporters of codes
6 figure, it's not going to come against us.

7 So the whole politics changed and you
8 started having advocacy groups on campus that were
9 pushing for these. A much different kind of political
10 context than there was before. So the first time in
11 American history we started seeing student groups
12 calling for censorship and people from the left arguing
13 for censorship, sort of unprecedented.

14 MS KULASZKA: What's the situation
15 today? Is it changing?

16 DR. DOWNS: That's the \$64,000
17 question. I think you have to go institution by
18 institution, context by context.

19 In Wisconsin we've managed to I think
20 draw a good balance. We have a free speech movement
21 I've written about, book was partly about.

22 THE CHAIRPERSON: When you speak of
23 Wisconsin, you are speaking of University of Wisconsin,
24 not the state?

25 DR. DOWNS: University of Wisconsin

1 at Madison, right.

2 We have a unique faculty group called
3 the Committee For Academic Freedom and Rights, and we
4 also sort of become a little metastasized on campus.
5 We have -- one of my leaders in that group was on the
6 Equity and Diversity Committee on campus, other members
7 of the university committee which runs the university
8 from this faculty senate side.

9 And we're very strong free speech
10 advocates. And sometimes we manage to prevail, other
11 times we've drawn principle compromises between free
12 speech and sensitivity.

13 University of Pennsylvania had some
14 of that with Alan Cors (ph). Other schools that don't
15 have that had more problems.

16 And it's a big debate now whether --
17 so-called political correctness. Is it still alive and
18 well? Some claim that it's waned with a times. Others
19 have claimed it's metastasized rather than waned and so
20 it's made its presence felt in less overt ways.

21 I think it's a problem, still is a
22 problem, but we have to be as precise as possible about
23 it.

24 MS KULASZKA: You touched on how free
25 speech helped minorities. Can you expand on that?

1 DR. DOWNS: Well, in some ways it's
2 almost by definition because minorities are partly
3 defined by those who are not part of the mainstream and
4 lack power. If you lack power, censorship policies can
5 easily come back and be used against you. So that's
6 the basic logic.

7 About during the 1960s, anti-war
8 movements, social justice movement, civil rights
9 movements, these are all bucking up against the grain
10 of established authority. And it was by expanding the
11 freedom of speech they were able to get their voices
12 heard.

13 In the United States gay activists
14 tend be very, very pro free speech.

15 There's an essay written by -- I
16 forget whose name, a book edited by Frederick Schauer,
17 about eight years ago, about how the gay rights
18 movement has ridden the back of free speech to get its
19 points across.

20 If you think about it back 20,
21 30 years ago, gay rights was much more controversial
22 than now. I would even argue in the United States we
23 have all these issues concerning gay marriage. And
24 marriage is sort of a special thing. If you look at
25 general public opinion about gay rights, it's much more

1 favorable than it used to be. Even the gay marriage
2 thing, much depends really how recent a court has
3 ordered that there be gay marriage. If it's been a
4 while then support for gay marriage actually goes up.

5 And gay rights, sexual practices that
6 are different from the mainstream. They had to buck
7 the tide, and they needed free speech rights. Go back
8 into communities, gay communities, look at their
9 magazines, look at their literature. It was very
10 political, very sexual, very much out there on the
11 margin often.

12 And to allow censorship based on some
13 notion of offence would have possibly hurt them. So a
14 lot of gay rights activists are very much inclined to
15 have a lot of free speech because they think they can
16 then prevail in the long run. And exactly the same
17 logic applied to the civil rights movement in the
18 sixties.

19 MS KULASZKA: We've heard the
20 testimony of Professor Tsesis here and we have had an
21 article put in evidence, both by himself and by you,
22 attacking Brandenburg with history.

23 I wonder if you could just review the
24 state of the literature concerning Dr. Tsesis' thesis
25 and the response by the academic community.

1 MR. FOTHERGILL: Excuse me. Before
2 Dr. Downs answers, this is the objection I highlighted
3 earlier.

4 Dr. Downs has no particular expertise
5 that would allow him to present to interpret this
6 particular article for you. It's essentially the main
7 source, as I see it, for his causation analysis
8 provided in his expert report. And we can all read
9 that book review and Ms Kulaszka and Mr. Christie can
10 make what use of it, what use of it they wish in
11 closing arguments, subject to, of course, to their
12 failure to have actually discussed the book review with
13 Dr. Tsesis when they had the opportunity to do so.

14 So there's also a simple fairness
15 issue here. You will probably have inferred from my
16 comment that this article is somewhat critical of Dr.
17 Tsesis' methodology.

18 My friends chose not to put this
19 written critique to Dr. Tsesis. And, in my submission,
20 having failed to do so, they cannot now ask Dr. Downs,
21 who has no particular authority or expertise in that
22 form of analysis, to present or comment upon the
23 critique that's found in that book review.

24 So I object entirely to Ms Kulaszka
25 attempt to have Dr. Downs discuss that particular book

1 review.

2 THE CHAIRPERSON: I'm more concerned
3 about the later point, Ms Kulaszka. I asked numerous
4 times Mr. Christie yesterday to move on -- that he was
5 going in circles and circles over the same point, and
6 if you were to criticize that witness's findings, this
7 should have been put to him.

8 I was surprised, in a way, because
9 there was some illusions to some third party criticism
10 of Dr. Tsesis' views, and yet I never got to that
11 material. I don't want to hear because we ran out of
12 time, because time was used as a tool by Mr. Christie
13 yesterday.

14 It's clear. It's not fair. That's
15 the whole point of this principle like Brown and Dunn.
16 You have to put it to the witness first before you
17 go --

18 MS KULASZKA: Could I ask him about
19 the state of the literature and if he avoids Dr. Tsesis
20 and the response to his thesis concerning long-term
21 harm?

22 MR. FOTHERGILL: Again, with respect,
23 that's not a matter that's within Dr. Downs' particular
24 expertise. We discussed what his qualifications are.
25 I think he's certainly capable of addressing us, as he

1 has been doing, about the history of civil rights
2 movement and the sort of things he publishes upon.

3 But he has no expertise in the kind
4 of work done by Dr. Tsesis about historical events and
5 the extent to which -- pardon, hate speech may have
6 been contributing factor. So he is no better qualified
7 than anybody else to review or comment on the
8 literature.

9 MS KULASZKA: Maybe I can try and
10 establish a foundation for that testimony.

11 THE CHAIRPERSON: I'm not prepared to
12 agree with your proposition completely here,
13 Mr. Fothergill, because this gentleman clearly has
14 reviewed hate speech issues in his history.

15 The Skokie case is in history at this
16 point. So I can't make that kind of a general comment.
17 I think -- let's go on a more specific basis, and
18 really it may be something you can address in your
19 cross-examination later on. I don't know. Let's just
20 see.

21 On the other issue, I don't think
22 it's fair to actually directly go after Dr. Tsesis'
23 positions if we never got there yesterday.

24 MS KULASZKA: Okay, Dr. Downs, we're
25 not going to talk about Dr. Tsesis' book or the

1 response to it.

2 But I would like to talk about the
3 research into the harm done to society by very broad
4 hate laws. And we're not talking here about a
5 face-to-face situation, but in a situation where
6 somebody reads something and is it caught by these laws
7 and what harm -- what harm to free speech, what harm to
8 society.

9 DR. DOWNS: Yeah. I mean, the big
10 issue is misapplication. I would argue -- it's
11 two-fold.

12 If you have a very broad law, even if
13 it's applied conscientiously it's going to have a broad
14 kind of scope. The other issue is enforcement that
15 goes beyond that. There's a recent piece by Gerrard
16 Alexander in the American Enterprise Institute Journal
17 in which he talks about the misapplication of some of
18 Europe's anti-hate law, especially their anti-Holocaust
19 denial or various genocide denials.

20 MS KULASZKA: Do you have article?

21 DR. DOWNS: I have it upstairs. I
22 don't have it with me here.

23 MS KULASZKA: It should be in one of
24 the binders in front of you. Just hold on. I'll get
25 it for you.

1 THE CHAIRPERSON: Which binder?

2 MS KULASZKA: The Karen Mock binder.

3 Would be R-4, I think.

4 Dr. Downs, there's a series of

5 binders there --

6 THE CHAIRPERSON: Which tab is it?

7 MS KULASZKA: It's tab 13. Is this

8 the article you were referring to?

9 DR. DOWNS: Yes.

10 MS KULASZKA: You've read that

11 article?

12 DR. DOWNS: Yes, I have.

13 MS KULASZKA: Could you --

14 DR. DOWNS: It's very recent and some

15 of this stuff has been fairly recent in Europe, so I

16 think it's timely.

17 MS KULASZKA: Could you discuss it?

18 DR. DOWNS: Let me read the quote he

19 has in box -- I think it's from the next page, but it's

20 in a box form on page 2.

21 "The real danger posed by

22 Europe's speech laws is not --"

23 Wait a minute, that's not it. There

24 it is. On page 3.

25 "Laws against any speech that

1 causes 'offense' --" and this is
2 the Jonathan Rauch's thesis.
3 Think about Al Gore who just for
4 the Academy Award for the film
5 "Inconvenient Truth". I'm
6 certainly not an expert to talk
7 about that, but maybe campus
8 climate in terms of speech but
9 not ethological climate.

10 But the idea there is that we don't
11 want to hear this, it's inconvenient. Truth the often
12 inconvenient. I think back in my country, how many
13 religious people just hate the theory of evolution.
14 It's deeply offensive to them. It hurts them.

15 And so that's a very important point,
16 that offence alone can't be grounds for censorship
17 unless we want to end up not being able to discover new
18 truths. I'm quoting Alexander:

19 "Laws against any speech that
20 causes 'offense' are biased
21 because they have the insidious
22 effect of conflating bigoted
23 speech and constructive
24 criticism".

25 MS KULASZKA: Are you reading from

1 the article?

2 DR. DOWNS: Yes.

3 MS KULASZKA: Where is that?

4 DR. DOWNS: It's in the big box quote
5 on page 3.

6 MS KULASZKA: Okay.

7 DR. DOWNS: I'll start again:

8 "Laws against any speech that
9 causes 'offense' are biased
10 because they have the insidious
11 effect of conflating bigoted
12 speech and constructive
13 criticism, two kinds of speech
14 that should be sharply
15 distinguished from each other."

16 And I think that's really a great
17 point, and I mentioned the Wayne Dick case, other kinds
18 of cases. Especially when you have a highly emotional,
19 politically charged kind of context.

20 That constructive criticism -- for
21 example, criticizing aspects of Islam because of its
22 links to terror. If we make offence a grounds for
23 prosecution then we've basically given Islam a free
24 pass. You can't criticize them. And, of course,
25 that's an unreasonable kind of proposition, just as

1 would blanket criticism of Islam be unreasonable.

2 In Europe, he mentions Bernard Lewis
3 who, is one of the America's most esteemed -- the
4 world's most esteemed scholars of the Middle East who
5 was -- made a comment, was asked in an interview, I
6 think it was, what -- he gave a speech. He was asked,
7 what did you make of the Armenian massacre or genocide.

8 He said, of course it occurred. The
9 only question for scholarly debate is whether or not it
10 was pre-meditated or not. If it's pre-meditated it's
11 genocide; if it's not pre-meditated it's a massacre.

12 That is a scholarly debate for people
13 seeking the truth. It's not denied anything about the
14 result. And he has had to answer simple charges that
15 he denied the genocide in Armenia.

16 Similar case involved a gentleman
17 from France. I have to look at his name here. Alain
18 Finkielkraut, distinguished philosopher, and last
19 November -- it's on page 5 of the AEI report. --
20 Israel's Ha'aretz newspaper interviewed him about the
21 French riots. And he talked about how they were
22 certain aspects of the minority Islamic community in
23 France that were responsible for this, not simply
24 because they were oppressed but because of their
25 ideology. But it was a very measured kind of thing.

1 He wasn't painting it with a broad bush. Now he's run
2 afoul of the French law concerning that.

3 That's a huge problem. And what
4 Alexander points out, is now you have -- politics is
5 such they have groups organized to bring these cases,
6 pressuring for these cases. It's harder than ever to
7 draw the line between insidious offence and
8 intellectually honest and well-motivated offence, which
9 could be constructive criticism.

10 And the campus speech code issue was
11 very similar in that regard. So that's one big
12 concern.

13 Another issue related to this is, do
14 you end up creating martyrs out of these people,
15 especially if they are not convicted, that kind of
16 vindicates their claims. In my report I talk about
17 some cases in Britain along those lines.

18 There's -- recently I read a
19 newspaper article about jury refusing to convict in
20 Britain under its new laws, and how then the speech was
21 made by the person who was not convicted, look, this
22 proves that we're onto something. So that's another
23 kind of unintended consequence that can occur.

24 Interesting to note, Debra Lipstadt,
25 who is the singlemost renowned critic of Holocaust

1 denial in the world. I have her book "Holocaust
2 Denial". She had that famous lawsuit with David
3 Irving. He sued her for libeling him and he dragged
4 her to the case, and she ended up winning. The British
5 judge in case, who also has Ph.D. in history I think,
6 wrote a 600-page opinion.

7 I didn't read it all, but I read
8 excerpts in the Atlantic Monthly. Lipstadt -- so in
9 other words she is on record as a fighter against
10 Holocaust denial, which she considers an evil form of
11 knowledge, speech, expression.

12 I don't disagree with that. She is
13 dead against anti-Holocaust denial laws based on a
14 recent interview in the magazine Spiked. She, (a), I
15 believe in free speech. I believe that law is
16 punishing Holocaust denial, can be easily applied in a
17 way which harms the truth-seeking process.

18 And she mentioned cases similar to
19 the distinction that Alexander draws between invidious
20 criticism and constructive criticism. She says you're
21 pushing the envelope, or you're trying to -- get at
22 what happened, you are going to be contesting
23 established truths. That's how it works.

24 MS KULASZKA: Maybe we can just
25 produce this article at tab 13, "Iliberal Europe"?

1 DR. DOWNS: Let me mention one last
2 point about Lipstadt. She also says that by taking
3 Holocaust denial into the hands of the state for
4 punitive enforcement, you are taking it out of the
5 truth -- the marketplace of truth or the truth
6 determination process, and that weakens the argument
7 against Holocaust denial.

8 MS KULASZKA: Can I produce --

9 THE CHAIRPERSON: Yes. Tab 13.

10 MS KULASZKA: -- tab 13. I don't
11 think it had been produced.

12 Dr. Downs, we're just going to turn
13 to that argument by Debra Lipstadt. I think we have,
14 tab 1, page 5. I think that has been produced.

15 THE CHAIRPERSON: Yes.

16 MS KULASZKA: I think Dr. Mock
17 produced it?

18 DR. DOWNS: Here it is.

19 MS KULASZKA: Tab 1 of the Mock
20 binder, R-4, page 5.

21 Dr. Downs, do you see that article?

22 DR. DOWNS: Right.

23 MS KULASZKA: That's the article you
24 are talking about?

25 DR. DOWNS: Yes, it is.

1 MS KULASZKA: And if you turn to page
2 7, I think she sets out why she's opposed to these
3 laws.

4 DR. DOWNS: Yeah, right.

5 MS KULASZKA: Let's see, with the
6 fourth paragraph down she states:

7 "And thirdly and most
8 importantly such laws suggest
9 that we don't have the history,
10 the documentation, the evidence
11 to make the case for the
12 Holocaust having happened. They
13 suggest we don't trust the truth
14 but we do have the evidence and
15 we should keep on developing it
16 and deepening it and we should
17 trust it."

18 I want you to discuss what she says
19 about the truth and the role of truth in the
20 application of these laws.

21 DR. DOWNS: Well, most of them
22 don't -- we don't have truth as a defence. American
23 group libel laws didn't. I don't know of any speech
24 code where truth has been a defence. The idea is that
25 you can present truth in way which is less offensive

1 without really changing the message.

2 I suppose there are cases where
3 that's true, but there are also a lot of cases where
4 it's not. Sometimes to change a word is to change your
5 meaning, and it's also to sort of give into the
6 dictation of is someone else or someone in power we
7 don't like using this particular word. That can be a
8 problem too.

9 MS KULASZKA: So what is the role of
10 truth as you see it in society?

11 DR. DOWNS: That's a really -- the
12 definitive book on that is waiting. It's writing.

13 Now, I'm just sounding somewhat
14 artificially pedantic perhaps, or maybe artificially.
15 There's a distinction between ontological and
16 epistemological truth. Ontology is the science of what
17 is, of being. Epistemology is how do we know what we
18 know.

19 And I myself am -- I'm an ontological
20 objectivist. I believe there's a truth. I believe the
21 factual truth certainly. Did the Holocaust occur? You
22 bet.

23 What about moral truth? That gets a
24 little more difficult. Social, political truth? But I
25 would argue any time I tell someone I think that's just

1 wrong, that's a bad idea, that's an immoral idea. That
2 very sentence entails the assumption that there is a
3 moral truth.

4 Now, epistemologically, and here is
5 where the rubber hits the road when it comes to free
6 speech. To use a metaphor we are all creatures of the
7 fall, we are imperfect.

8 And James Madison, I think, had it
9 right, that there might be a truth out there but we are
10 imperfect conveyers of it. And even if we know the
11 truth -- this goes back to John Stuart Mill -- unless
12 it's changed it's not going to have vitality. It
13 becomes dead, it become an orthodoxy.

14 So in order to give vitality to truth
15 it needs to defend itself out there in the world. So
16 Rauch's book is all about the thesis of falsification,
17 that it's based on the idea the human fallibility,
18 intellectual fallibility, no one can have a corner on
19 the truth.

20 Some are more persuasive, some are
21 the people we look to as experts in their fields, et
22 cetera. We do know there's a status there, but no
23 expert should say, I have the truth because I'm an
24 expert.

25 I might be taken more seriously

1 because of that. But that doesn't mean -- again, I say
2 I in the general sense, have the potential of being
3 wrong.

4 So truth, I believe in it but we can
5 never fully capture it, it has to be constantly
6 challenged. And to say that one has the whole truth is
7 to play God.

8 MS KULASZKA: What danger do you see
9 in the government imposing a type of official truth
10 using these laws?

11 DR. DOWNS: Well, you have the down
12 sides that we've already talked about. And there's a
13 normative issue here which I haven't discussed, and I'm
14 indebted to a famous philosopher for this, Ronald
15 Dworkin, for this.

16 And Dworkin says in a democratic
17 society it's based on consent of the government. And
18 that means that every person who must -- is obliged or
19 obligated to obey the laws, has to have to it had
20 possibility of contributing to those laws, through,
21 through other kinds of influence -- freedom of
22 assembly, petition, speech, thought, conscience, et
23 cetera.

24 And if someone is told here is an
25 idea that outside the context of some sort of

1 demonstrable direct harm that you're not allowed to say
2 that, he argues that violates the very principle of
3 democratic consent because that person can then say,
4 well, I wasn't really given a chance to contribute my
5 ideas to the public sphere.

6 And this is a way in which sort of a
7 democratic theory of consent in governance links to a
8 theory of freedom of speech. That's a normative
9 argument. We've been talking about empirical aspects
10 here, which I think there as well for reasons that I've
11 stated. But I think that's another important aspect of
12 it.

13 MS KULASZKA: What --

14 DR. DOWNS: What if the government is
15 wrong?

16 MS KULASZKA: Pardon?

17 DR. DOWNS: What if government wrong?
18 1898 I think was, Supreme Court of the United States.
19 A woman wanted to be a bartender. The state of I think
20 it was Oregon said, no, you're a woman, only men can be
21 bartenders.

22 And she sued claiming economic
23 liberty. And the Supreme Court of the United States by
24 nature that women are not equipped for the public
25 sphere like men are, especially bars. And, therefore,

1 by the laws of nature Oregon's law is constitutional
2 because it's rationally based.

3 Similar arguments were made about
4 homosexuality. 1986, Hardwick versus -- the Hardwick
5 case. Bowers versus Hardwick. Supreme Court 5-4, said
6 by tradition, by the concept of order of democracy and
7 tradition, homosexual conduct is not acceptable. And,
8 therefore, it's rational for Texas to prohibit it,
9 punish it.

10 2003 Supreme Court said, wait a
11 minute. We were wrong, that homosexuals have the right
12 of liberty to do so.

13 So those are just two examples. I
14 think we have the racism in the United States back
15 until after World War II where, south especially, where
16 blacks and whites couldn't go to school together
17 because the government said this is what we enforce as
18 a matter of morality.

19 So the government could be wrong.
20 And we can -- certainly when it comes to Holocaust
21 denial, I'm not sitting here saying the government is
22 going to be proved to be wrong about that. But it's a
23 question of give them the right to do it here, why
24 wouldn't they then have the power to do it in some
25 other area where they are going to be proved to be

1 wrong some day. It's a matter principle.

2 MS KULASZKA: You've discussed an
3 article by James Weinstein, "Hate Speech, Pornography
4 and the --"

5 DR. DOWNS: It's a book.

6 MS KULASZKA: Could you talk about
7 that.

8 DR. DOWNS: Well, he went through --
9 again, links between the sort of anti-pornography
10 position as it evolved in the United States through
11 Catherine Mackinnon and others, and hate speech
12 controls, speech codes and things like that.

13 And the book is basically -- it's a
14 complex book. It's really razor sharp. He tries to
15 avoid category mistakes in the sense that, well, say
16 you want a law to prevent X and Y but what you are
17 really saying it's designed to prohibit Z. Let's be
18 careful about what we're saying because we can lump too
19 many things together, make a lot of soft assumptions.

20 And it's -- he spends some time
21 de-constructing some of the arguments about harm when
22 it comes to speech. He doesn't disavow it, but he says
23 that some of the claims haven't been demonstrated fully
24 enough.

25 He's very careful to put speech in

1 his context. Says, for example, the big question when
2 it comes to restricting hate speech in the United
3 States is, is it -- given all the other social policies
4 we have to fight discrimination -- criminal law, civil,
5 et cetera -- is it worth having a broad hate speech
6 rule to go after those who after all is said and done
7 is deterred by these other government programs.

8 And makes an argument that at least
9 we want to be very careful before we go down that road.
10 It's another analysis of the arguments for restricting
11 hate speech and pornography.

12 MS KULASZKA: What are the
13 alternative methods you've set out?

14 DR. DOWNS: Yeah. Well, I mean,
15 anti-discrimination law, enforcing it well. How is
16 fair housing laws, public accommodations, not allowing
17 discrimination when it comes to any kind of government,
18 public accommodations?

19 And I would argue enforcing hate
20 crimes. And some of the essays in that symposium that
21 we have a couple articles here from, most hate crimes
22 are not reported. We do know that. So it's probably a
23 bigger problem than we think.

24 That said, I don't think there's an
25 epidemic of it. The book by Jacobs and Potter "Hate

1 Crimes" has really, I think, debunked the idea that we
2 are now experiencing this rampage of hate crimes.
3 Thank goodness I don't think we are. There was more
4 reported because had both national level and state
5 level for reporting requirements. So of course the
6 number that's reported would go up.

7 Similar to domestic violence
8 reporting back in the late eighties, a lot of states
9 starting requiring domestic violence to be reported by
10 doctors and others. So of course there was a big jump
11 in the number of cases we knew about right after that.

12 THE CHAIRPERSON: When you refer to
13 hate crimes, I want to be clear, because hate crimes,
14 at least in Canada, can incorporate hate speech crimes.
15 So do you include that in that group?

16 DR. DOWNS: I would say if it's a
17 targeted kind of threat, or act of terrorism then I
18 would include it, sure. And speech wouldn't protect
19 that. Famous case in America, R.A.V. versus St. Paul
20 case, which I know that Tsesis talks about it in his
21 book where a burning cross is put in front of a family
22 in St. Paul. And there's also some background things
23 which made that burning cross even more threatening.

24 And the Supreme Court unanimously
25 struck down the St. Paul ordinance but only because it

1 was so poorly written. No one in the Supreme Court
2 said that a properly written ordinance with protect us
3 because this kind of speech act is a threat that
4 targeted these individuals. So I would call that a
5 hate crime as well.

6 THE CHAIRPERSON: But broader laws
7 that deal with general focus speech.

8 DR. DOWNS: Laws that deal with
9 threats, okay. That was mainly the approach that the
10 majority said should have been taken in that case.

11 THE CHAIRPERSON: But your position
12 does not encompass legislation that is broad in scope?

13 DR. DOWNS: No, no, for reasons that
14 I've stated. But when a hate crime occurs, I would
15 define a hate crime -- different states define them --
16 in different places define them differently. Selecting
17 someone because of that person's race or that person's
18 religion, et cetera.

19 Interestingly, gender is very seldom
20 included, even though crimes against women are much
21 more prevalent than crimes against people because of
22 their race. Something motivated in a clear way by
23 race.

24 Now, one can argue whether special
25 hate crime legislation is a good or bad idea as opposed

1 to simply enforcing the criminal law as strongly as
2 possible, especially with those kind of crimes without
3 making a special provision for them. But the point is
4 the same. A hate crime is a hate crime whether there's
5 a special category for it or whether or not it's part
6 of a normal assault, say. You prosecute it strongly.

7 Human Rights Watch, which I allude to
8 my report, criticized Germany because Germany had
9 broader hate speech law but it wasn't enforcing its
10 hate crimes nearly strongly enough. And what kind of
11 message does that send?

12 In the United States, just as an
13 example, most hate crimes that go unreported, et cetera
14 but most of them -- one of the essays that symposium
15 shows, I don't remember which one, they tend to be more
16 minor kinds of crimes. Quote, unquote.

17 When they reach a severe level, like
18 a major beating or something like that, we go after
19 you. And I give you two examples. The Matthew Shepard
20 in Wyoming, which was a national scandal. Let's get
21 those guys and punish them to the full extent of the
22 law.

23 The Robert Berk case, where the
24 African-American was dragged mind the car in Texas.
25 Texas didn't have a hate crime law but he got the death

1 penalty. I don't want to talk about that. But he was
2 hit with a full extent of the law. That sends a
3 message.

4 So I would say, given a choice if I'm
5 someone who could be attacked by this, I would rather
6 have a country that enforced hate crimes strongly and
7 gave me the right to engage in racist rhetoric as
8 opposed to a country that punished racist rhetoric but
9 didn't punish hate crimes severely enough.

10 MS KULASZKA: And that's the example
11 of Germany; is that right?

12 DR. DOWNS: Yes. I remember a few
13 years ago. I don't have any evidence to back this up,
14 but just from my reading. Some Germans burned down the
15 home of a Turkish family and killed them inside.
16 Felony murder/arson. And they got four years in
17 prison. So that would be -- those are examples.

18 Also public education programs.
19 There's an essay about the depriving of values based on
20 sort of social psychology research about values, how
21 they -- we filter and construe reality based on our
22 underlying value systems. And that article by Cowan, et
23 al. It's not directly on point but I think it's quite
24 clearly related.

25 That students represented with a

1 depiction of a hate kind of crime, then primed by --
2 given a strong statement about the importance of free
3 speech, one group; another group, a strong statement
4 about the importance of equality; and a third group,
5 controlled group, that wasn't given any kind of
6 priming.

7 They found that their reactions, once
8 they controlled for the types of students, their
9 reaction to this presentation of the hate crime varied
10 according to what they read before they looked at that
11 example.

12 And I would say that shows the way in
13 which our values and our approach to say hate speech
14 can be influenced by our environments, and the kind
15 messages that are being sent out there. And I think
16 it's not only the right of the government but the
17 obligation of the government to send the right
18 messages. That's got to do so in a way is not going to
19 be -- if it's a flakey kind of thing is not going to be
20 listened to. If it's done right, if it's done well,
21 that can make a difference.

22 I would argue in the democracies that
23 I know anything about, that's worked. United States
24 and Canada don't tolerate discrimination, at least not
25 in terms of our public understanding.

1 THE CHAIRPERSON: Ms Kulaszka,
2 mindful of the time?

3 MS KULASZKA: Maybe we could take a
4 break right now at 11:30, or do you want to keep going
5 till 12?

6 THE CHAIRPERSON: What I want you to
7 do is finish up before that break. It's rather quick
8 to have our break. I said 11:30 if you had finished.

9 MS KULASZKA: Okay.

10 THE CHAIRPERSON: The report does
11 speak for itself in large measure. Much of the
12 material that the witness is bringing forth is in the
13 report.

14 MS KULASZKA: What's the state of the
15 literature? And we'll exclude Professor Tsesis and any
16 response to his theory. What's the state of the
17 literature about harm caused by hate speech? Are you
18 familiar with it?

19 DR. DOWNS: Yeah. A lot of it is
20 some of the essays in that volume, but I haven't made a
21 systematic study of that. It's more just having read
22 several pieces on it.

23 We have nothing like we do, for some
24 reason, in pornography studies. At the end of
25 Weinstein's book he has a whole postscript, goes

1 through -- this is published in 1999 of all the
2 empirical research on the harms of pornography. It's
3 all laboratory-based. We haven't done any major
4 cross-cultural kind of thing so we don't know.

5 But in terms of laboratory there's
6 suggestive evidence that pornography linked to violence
7 does contribute to aggression against women. All
8 right? But it's very controversial, partly because how
9 do you extrapolate from a white coat laboratory
10 situation to the real world?

11 We haven't done as much of that with
12 racism. But some of the articles I looked at, some of
13 which are in that symposium, do show students that are
14 exposed to racist kinds of actions primed the wrong
15 way, that they are more likely to be less concerned
16 about that kind of stuff.

17 But it's really -- we haven't
18 developed it really as much as we have the pornography
19 stuff. In terms of the link between speech and actual
20 hate crimes, there's really nothing systematic that I
21 know of.

22 MS KULASZKA: Now, if your study of
23 pornography --

24 DR. DOWNS: Even the piece by
25 McAdams. That's based on assumptions that are built

1 into the formal model, not any actual empirical
2 sampling of people in society. So it's not empirical,
3 it's a formal piece.

4 MS KULASZKA: In pornography, what
5 was the effect of the development of the camera? Did
6 you study that?

7 DR. DOWNS: Yeah. I mean, one thing
8 that I think we can say with some confidence over the
9 history of censorship is that when new technology
10 develops there's also a real concern that, oh my God,
11 now it's going to be a real problem.

12 For two reasons. New technology is
13 always sort of -- we mystify it a little bit. I recall
14 a guy by the name of Richard Hofstadter, major sort of
15 theorist of computers, had a big chair of University of
16 Indiana. He used to write about whether or not
17 artificial intelligence in computers was -- had
18 consciousness. And there were people back then --
19 really crazy kind of stuff, that say only human beings
20 can have consciousness to be carbon-oriented rather
21 than silicon-oriented.

22 And a famous philosopher mind at
23 Berkeley, John Seryl, also wrote a book on campus
24 speech back in the late sixties, is an ally of mine
25 actually. He wrote a piece on Hofstadter where he

1 said, look, Hofstadter is imputing sort of mystical
2 forces in computers because it's a brand new form of
3 technology that has mushroomed with the PC. And after
4 time we're going to see they are just machines. And
5 mentioned when cars were developed people actually
6 imputed some sort of human or quasi-spiritual qualities
7 to cars. Then after they have driven them for a couple
8 of years they just realized, hey, it's just a machine.

9 We do that a little bit. So the
10 first major -- we had transportation ability to send
11 pornography around the world. America's first
12 anti-obscenity pornography law was 1842.

13 Then we had the camera, which scared
14 everybody. Then we had movies. And what happens is
15 over time we tend to calm down a bit and don't see
16 quite the same problem we did when it first happened.

17 And there's a piece by -- I don't
18 have it in the materials, by Al Hunter, who is a
19 colleague of mine at Madison in agriculture journalism,
20 about the third party effect when it comes to
21 ascertaining harms.

22 I can start this with an anecdote. A
23 few years ago, my sister and I California were sitting
24 around having a few drinks one night, and after about
25 an hour of discussion we concluded that the whole world

1 was crazy except for us. And I'm sure many of us have
2 had the same kind of experience. When we realized we
3 were doing it we just laughed. Though, we thought we
4 were right.

5 And the third party effect is that
6 people tend to have more fear of what other people will
7 do with speech or potentially dangerous things than
8 themselves. And Hunter has shown when it comes to
9 pornography there's a distinction between -- well, is
10 this okay for me to see as opposed -- well, mass
11 public, my God, they are not going to be responsible.

12 So that is sort of related to the
13 idea of technology. What technology has done in the
14 history of censorship is made materials more available
15 to everybody, and so -- pornography wasn't a major
16 problem in the world until it was democratized, until
17 we had the means of mass production. And, therefore,
18 now it's disseminated and the elites always thought
19 that they could control themselves but it's the demos
20 that can't. Maybe they're right, I don't know. I
21 doubt it.

22 So that, I think, has to be
23 considered a little bit too when you think about the
24 Internet. Not to downplay the fact is it definitely a
25 new kind of technology, important kind of technology.

1 For what its worth, the United States
2 Supreme Court has declared the Internet a classic
3 public forum, where speech/counter speech is the
4 principle. And as a matter of fact, it even has no
5 protections than other areas of free speech, for
6 example, obscenities available to Internet, whereas
7 states can prohibit it as being sold off a news rack.

8 MS KULASZKA: What was the basis of
9 that decision?

10 DR. DOWNS: It was a child
11 pornography case, Citizens Decency Act, 1997 case, that
12 had two provisions punishing knowing transmission of
13 indecent material and also communicating with a child,
14 and the court struck them both down for being too
15 vague. And that the same thing they did in 2002 with
16 virtual child pornography.

17 MS KULASZKA: What are the unintended
18 consequences of broad restrictions against hate speech?

19 DR. DOWNS: Well, I thought I sort of
20 had gotten at that. Over-application, turning, making
21 the state -- giving the state kind of a monopoly of
22 ideas of race, which the state is going to have anyway
23 in terms of its other policies. But with speech,
24 question should be the same with speech.

25 Mainly the issue of under-intended

1 consequences, overbroad application like Alexander
2 talks about, and potentially turning people into
3 martyrs. There was one example I used in my report of
4 the hate group in Britain and response to Britain's
5 law, changed its tone in a Mark Anthony kind of way,
6 and suddenly started gaining more readers.

7 There's something to be said if you
8 allow overt racist comments, however disconcerting that
9 is -- and it's disconcerting to me, very much so. You
10 expose these people for what they are and they are
11 viewed as fringe elements that are not taken seriously.

12 MS KULASZKA: I want to ask you about
13 priming again. Can there be negative priming to
14 emphasize and exaggerate potential impacts to create
15 the expectation of reward for an allegation of hate
16 speech?

17 DR. DOWNS: Yeah, I think so, sure.

18 MS KULASZKA: Have you seen that in
19 the answer of the speech codes or any other example?

20 DR. DOWNS: I think so.

21 Universities -- it's a big debate in universities right
22 now. Freshman orientation. Students come in and -- to
23 me, going to a major university is something to be
24 valued and taken advantage of. Wow, here's my chance
25 to make something out of myself. And instead we tend

1 to get students into groups and tell them how they are
2 going to victimized. We sort of socialize them at kind
3 of victimhood mentality. Alan Cors has written about
4 this in an essay.

5 But we've tried to do it at Madison.
6 This is something we haven't gotten to. We're too busy
7 with other stuff. But at least try to have the free
8 speech point of view, the kind of Brandeis idea of
9 intellectual courage. If someone says something that
10 bothers you, speak back. Create a culture of free
11 speech, which is what Rauch talks about. There's a
12 part in Rauch where he says something that seems almost
13 counter-intuitive. He says that let a million or a
14 thousand, I forget, prejudices blossom.

15 But if you have a society that is
16 structured in a way where we take free speech
17 seriously -- which also means we take people's rights
18 seriously which means we take minority rights
19 seriously, then it seems to me we create an environment
20 where people can deal with that -- prejudice speech in
21 a constructive way.

22 What we ask for at Madison is simply
23 to have our say on this where students are exposed to
24 the free speech arguments.

25 I found -- back in 1993 I started

1 teaching a course on the First Amendment at Madison,
2 because I realized -- Madison usually has about 300
3 students, and they talk to their friends. Because
4 students needed to hear why we have free speech because
5 I think the natural reaction if someone says something
6 offensive, because if someone says something offensive
7 your natural reaction is, that was rude, that wasn't
8 right, you shouldn't do that.

9 And they had to be given the
10 background reasons why a policy based on that is
11 detrimental to the democratic society. So they need
12 the information so they can make an informed choice
13 rather than an ignorant one. That would speak to your
14 priming example. And we've done that to some extent.

15 Last year the The Badger Herald,
16 student paper which I've been involved with a lot over
17 the years, they always do something, published one of
18 those cartoons of Mohammed. This is a little bit after
19 it had already broken out. And the chancellor called
20 them up the day it came out and said, "I wish you
21 hadn't published this. I don't think it was necessary,
22 but I want you to know that I know you have a right to
23 do it" and he made a public statement that the place to
24 resolve this is not through any kind of punitive
25 university action but through the marketplace of ideas.

1 And it worked out. They held a big
2 public meeting. They had Muslim students and other
3 students there and they debated it, and eventually
4 people kind of walked away understanding there was a
5 reason, they had a right to publish this, even though
6 they were criticized for doing it.

7 That's a constructive kind of
8 atmosphere. It was an atmosphere of which the concerns
9 of the Muslim students were taken seriously, though
10 they weren't given a trump card to say we have the veto
11 power.

12 MS KULASZKA: Can you talk about the
13 chill on free speech as a result of these types of
14 laws?

15 DR. DOWNS: Well, obviously the more
16 they get known as being prosecuted, some people -- and
17 this goes back to the McAdams article. Some people it
18 might be an incentive to engage in hate crime or hate
19 speech because -- this is not the predominant response
20 but it's one possible response because this is a
21 complex thing.

22 Because by going against the law they
23 gain esteem among their peer group. Making it a law
24 makes it more esteem-worthy to act that way, to go
25 against the law.

1 Others will be chilled and either not
2 engage in it or they'll find another way to engage in
3 it, which goes around the spirit of the law or letter
4 of the law. I think that what the danger, the real
5 danger -- and this goes back to the Alexander piece --
6 is that people who have a truth to be spoken, want to
7 make this a constructive criticism but are afraid to
8 either because they will be prosecuted or because they
9 will be seen as being insensitive and, therefore,
10 racist when they aren't.

11 The people who won't be deterred are
12 those who are already the racists, or if they will be
13 deterred they will find other ways of trying to deal
14 with the problem.

15 So the real problem is driving out
16 the middle. Then it's a question of, you know, what
17 percentage of the bad apples? What percentage are
18 fair-minded people that have something to say that
19 people find offensive?

20 My guess is that the numbers -- and
21 we have no -- no one has done studies on this that I've
22 know of. But those who are good apples that,
23 nonetheless, have something to say that people are
24 going to find offensive, vastly outnumbers those who
25 are just truly bad apples.

1 MS KULASZKA: So let's get back to
2 that. You say there's no study on the effects of free
3 speech by hate laws on the effects of free speech by
4 these laws on ordinary people? I'm not talking about
5 extremists or the --

6 DR. DOWNS: Not that I know of.

7 MS KULASZKA: None?

8 DR. DOWNS: No. The campus context.

9 MS KULASZKA: Any other context?

10 DR. DOWNS: Not that I know of.

11 There might be something there, I don't know.

12 But the interesting study, systematic
13 study of chilling effect. Anecdotal examples. Also be
14 honest here, as Mill said, Etokial (ph) as well.
15 Social censorship in the end of probably strong. You
16 do away with speech codes there's still the climate,
17 still the attitudinal aspect at universities. So an
18 argument against the speech code is it just adds on to
19 that, symbolically reinforces it and it's overkill
20 except in narrow contexts.

21 MS KULASZKA: Do you know of any case
22 where a professor has been started by the speech codes?

23 DR. DOWNS: Oh, absolutely. I had a
24 colleague who was investigated. He was exonerated in
25 the end but he was told in the process you could be

1 fired. He made a joke in the Lone Ranger and Tonto in
2 a class where -- it's about -- he was giving a class on
3 community versus individualism and loyalty. And the
4 Loan Ranger and Tonto are tied up at a stake and about
5 to be burned by some other native Americans. And Lone
6 Ranger said to Tonto, 'We're in trouble, aren't we?'
7 And Tonto responds, 'What do you mean, we?'

8 And we had a native American in class
9 who filed a complaint because that was insensitive.
10 And it wasn't done for any kind of invidious reason
11 whatsoever. That would be one example.

12 A professor -- again, anecdotal but I
13 can give you many examples and some are in my book. A
14 guy named Hoppy, well-known economist at University of
15 Nevada at Las Vegas. In a course talking about time
16 horizons and saving. He made a comment that
17 homosexuals, according to either his understanding or
18 research, had less time horizons so they saved less
19 than others. And he tied it to the fact that
20 homosexuals don't have families. And if you have a
21 family you are more likely to have a broader time
22 horizon.

23 Maybe an arguable point, I don't
24 know. But rather the student confronting him saying,
25 well, I think you're wrong, or maybe you weren't

1 sensitive enough to homosexuals, the student ran and
2 they filed -- the University of Nevada filed harassment
3 charges against him. And they probably would have
4 succeeded, except the American Civil Liberties Union
5 and other groups made this a big national issue. Hey,
6 he's just expressing an honest opinion. And the
7 student ran to the protection of the nanny state rather
8 than just trying to reason with the professor.

9 MS KULASZKA: Has it had effect
10 generally on professors?

11 DR. DOWNS: I think so. And I
12 remember back in the later nineties, mid-nineties at
13 Madison, professors told me they feel like they are
14 walking on eggshells. And I think you still do to some
15 extent. Part of it is just everyday decency. If I'm
16 going to say something on homosexuals, I'm going to be
17 careful. But partly just out of my own sense of
18 decency. But I don't want to have it get in the way of
19 me trying to be truthful. I don't want to hide
20 something.

21 Say, different races have different
22 crime rates. And we can talk about the reasons for
23 that. They go from the racist idea that racial
24 genetics pre-determines to crime, to the social and
25 economic arguments of the neighborhoods you live in,

1 how you are brought up, blah, blah, blah.

2 But what if I'm presenting in a
3 criminal law class, a criminal justice class,
4 comparative statistics concerning crime rates based on
5 race. There are all demonstrated, no question that
6 there is a difference based on race.

7 But I can imagine certain minority
8 students whom are offended by that because I'm talking
9 about their race. Should I be prohibited from saying
10 that? Should sensitivity trump an obvious truth?

11 The whole reason for anti-Holocaust
12 denial laws is the truth. We don't want you speaking
13 an obvious untruth, and yet here we say, well, we don't
14 want you speaking a truth because it's insensitive. In
15 a strange kind of way, laws enforcing sensitivity end
16 up almost supporting a Holocaust denial position.
17 That's the original thought I just had here. It
18 happens sometimes in class, and I love it when it
19 happens. Because the foundation of both is that truth
20 is not being tested.

21 THE CHAIRPERSON: Where are you in
22 the report?

23 MS KULASZKA: We're kind of going all
24 over the place.

25 THE CHAIRPERSON: I just want you to

1 be fair to give the opportunity to the other side to do
2 their cross-examination. Perhaps then we can show some
3 latitude if they finish early in your re-examination.

4 MS KULASZKA: In the examples you are
5 giving, it's interesting that when there is a
6 success -- the example, for example, of a professor who
7 is charged under one of these codes and you seem to
8 have an organization which comes to their help. Is
9 that true?

10 DR. DOWNS: Yes.

11 MS KULASZKA: Could you talk about
12 that?

13 DR. DOWNS: Well, it's community for
14 academic freedom of rights. We're independent, we have
15 people from across the political spectrum. We have a
16 couple of colleagues who don't even know the difference
17 between left and right in politics.

18 We have given aid, lawyering and
19 succor to individuals who have been repressed or
20 affected by these kinds of policies improperly. You
21 know, make a judgment. If someone has stepped over a
22 line they've stepped over the line. We haven't
23 encountered that yet.

24 And we also engage in political
25 advocacy on campus. We've supported the student

1 newspapers several times when they have been within
2 their rights to publish something and been attacked.

3 MS KULASZKA: Did this affect the
4 outcome of cases, number one, if they are just
5 individual on their own with no support whatsoever
6 versus an individual who is charged but has the support
7 of a group like yours?

8 DR. DOWNS: I think it makes a huge
9 difference because people alone, they don't have the
10 resources. They don't know what to do. It's just
11 something that they work on, you know.

12 MR. VIGNA: I just object whether he
13 has qualifications to make those statements.
14 Anecdotal.

15 THE CHAIRPERSON: It's more in the
16 nature of observation, I would say, than expert
17 evidence.

18 DR. DOWNS: It's my own experience,
19 plus my book talks about cases like this, especially at
20 the University of Pennsylvania where the guy that said
21 water buffalo would have been out to lunch until Alan
22 Cors got involved in the case. So anecdotal evidence
23 on it.

24 So it makes a big difference, and I
25 think for two reasons. Back in 1999 we abolished the

1 faculty speech code for the classroom. We were the
2 first university to do it without a court -- being
3 required to by a court. We still had to say something
4 germane, so say a gratuitous racist remark in class
5 would not be germane to the subject matter, and that
6 could be something you could deal with.

7 But comment, intellectually, honestly
8 held opinion or belief or truth that offended on those
9 grounds would be protected. So you make that
10 distinction.

11 And we abolished it through the
12 faculty senate vote because that policy was controlled
13 by the faculty senate, not the regents. And we are
14 very happy we did that because we had to persuade a
15 majority of our faculty members the problems with the
16 speech code that we had.

17 And they voted it down. And that
18 really helped create a different kind of climate. We
19 are now active, we were organized, we had an
20 infrastructure.

21 These arguments, at least the free
22 speech argument that could then be weighed against the
23 other arguments was something that had to be recognized
24 on campus. And on the whole it's worked out pretty
25 well. Some areas, right of free speech should be very

1 strong, it's worked.

2 There's a recent program where the
3 university was trying to enforce -- not enforce but to
4 strongly encourage people to say respectful things to
5 one another, and the original policy was very heavy
6 handed. We got involved with the students. We worked
7 out a compromise which we can both live with now.

8 So we're not necessarily absolutists.
9 But our presence made a huge difference.

10 But I go back to the issue political
11 advocacy and politics. You have to often look at the
12 politics involved in policies to determine how they are
13 going to be enforced, and in what arguments are brought
14 forth.

15 There's a lot of groups -- go back to
16 the Alexander article. Denial of the harms of
17 Communism. Untouched in Europe. Stalin killed how
18 many millions? Mao killed how many millions? You want
19 to talk about genocide or political murder? Communism,
20 fascism, Nazism, they are both in the hall of fame.
21 All right.

22 None of the laws in Europe apply to
23 Communism. Why? Because many of the people behind
24 these laws are either sympathetic to Communism or don't
25 consider it the same kind of problem. It's the

1 politics. Therefore you get an uneven playing field.

2 Why shouldn't someone who denies that
3 Stalin did what he did, be immune to a denial law when
4 the number of victims was equally large, and equally
5 unjustified?

6 MS KULASZKA: You've had a look at
7 section 13 of the Canadian Human Rights Act?

8 DR. DOWNS: Right.

9 MS KULASZKA: How does it compare to
10 the speech codes that you have dealt with?

11 DR. DOWNS: Well, it's representative
12 of the broader because it is a racist kind of rhetoric
13 that -- it's not the kind of definitive legislation
14 that deals with direct targeted harm, and there's no
15 intent requirement and there's no truth defence, but
16 similar to American group libel laws.

17 But one -- back then we had the First
18 Amendment to be balanced with. The First Amendment
19 American wasn't very strong until the sixties. Here
20 you have the Charter of Rights that is balanced with
21 section 13. So there is some sort of balancing going
22 on. But the law itself is a pretty standard group
23 libel law, seems to me.

24 MS KULASZKA: Maybe we can break for
25 lunch?

1 THE CHAIRPERSON: For what purpose,
2 though? I do want to give the opportunity to the
3 others to cross-examine. When I said I'll be flexible
4 on re-examination, what I'm thinking is this: That if
5 they enter areas you've not addressed in your report in
6 cross-examination then you can return to it.

7 MS KULASZKA: Mr. Lemire has just
8 informed me that Dr. Downs won't be able to leave
9 tonight because there's this massive snowstorm in the
10 midwest, so the only plane that he was able to get from
11 Dr. Downs is tomorrow. So I think my friends will have
12 a full opportunity to cross-examine.

13 THE CHAIRPERSON: So he won't be
14 leaving early, but we still have a time frame. We
15 can't all work beyond a certain point either. So he is
16 available tomorrow if they need to. Tomorrow?

17 MS KULASZKA: That's what I'm saying.

18 THE CHAIRPERSON: Tomorrow afternoon
19 is the flight?

20 MS KULASZKA: Yes. He can't get a
21 flight until tomorrow.

22 (DISCUSSION OFF THE RECORD)

23 --- Recess taken at 12:30 p.m.

24 --- Upon resuming at 1:20 p.m.

25 MS KULASZKA: Dr. Downs, if you could

1 go to your expert report at page 24. Right at the
2 bottom of that page there is a sentence that starts:

3 "And by restricting speech and
4 ideas codes often fostered
5 resentment, animosity and
6 incivility, moral bullying."

7 Could you talk about that?

8 DR. DOWNS: Once again, nothing
9 systematic has been done on this front. But various
10 things that I've read and my own experience in --
11 Thomas Sowell, who is sort of a leading economist, has
12 written a lot about social issues in race, has made the
13 argument very explicitly that in his opinion, speech
14 codes actually, rather than contributing to racial
15 harmony on campuses, many cases hurt that.

16 Now, I'm prepared to cite it's
17 probably both. Some people were deterred, some people
18 looked at them. The law does have a moral kind of
19 implication. Some people probably say, oh, there's
20 these codes, makes sense, and they clean their speech
21 up. Others may have felt resentment from it. So it
22 might be a mixed bag. Clearly, we had to consider the
23 negative possibility.

24 Especially -- at least in the States
25 when people are not allowed to say something, they

1 resent it. And if the codes -- the codes have tended
2 to be very much applied against people that are
3 dissenters from the social justice orthodoxy of
4 campuses, that they feel kind've singled out.

5 And a related kind of issue is the
6 argument that speech codes led to a lot of discussion
7 about free speech. Suddenly we had -- in the 1990s all
8 this literature on the status of free speech on campus,
9 and much less literature on the status of equality.

10 As Henry Louis Gates has argued --
11 and really I should have set it along here -- a new
12 republic article he wrote, essay he wrote in 1993 which
13 is a review of Richard Delgados' book, which I do cite,
14 "Words That Wound." It's an edited book, very famous
15 book. I'm sure it's been talked about here already.

16 One of his arguments, among many, "He
17 Said Let Them Speak", is the name of the article, is
18 that suddenly rather than talking about racism on
19 campus we became pre-occupied with should we protect
20 the speech of people that say racist things or say
21 things that have a racial kind of implication. So it
22 deflects from the central issue concerning equality.

23 A lot of people -- you turn people
24 into martyrs, speech policies are not applied evenly.
25 So it does, I think, exacerbate racial tensions.

1 At the same time in other ways it
2 might actually have the opposite effect. Those things
3 can co-exist.

4 MS KULASZKA: You cite a book by
5 Timothy Sheilds?

6 DR. DOWNS: Right.

7 MS KULASZKA: The example of
8 politicized enforcement. What did he find?

9 DR. DOWNS: Well, his argument is
10 that it doesn't really matter what a speech code, at
11 least on campus, is said. It's a question of how it's
12 enforced.

13 I mentioned the Richard Long case of
14 Wisconsin. I mentioned the water buffalo case at Penn.
15 There's another example of a case in University of
16 California at one of the southern schools, Pomona State
17 or something, it's in my book. And there was an
18 African-American who sort of takes the classic Booker
19 Washington kind of approach that one way to get racial
20 progress is pull yourself up by your bootstraps, a sort
21 of self-help thing, which has always been a thought of
22 African-American thought in America, along with other
23 kinds of thought.

24 And he wrote a book about how welfare
25 policy perpetuates a plantation mentality. That's the

1 title of it. And a group that brought him to campus
2 had a flyer that had a picture of him and the title of
3 book, and they put it on a bulletin board that was
4 across from the multicultural student association. And
5 the multicultural student association was offended by
6 this leaflet and the university filed harassment
7 charges against that group.

8 Now, eventually after several months
9 this was dropped because it was ludicrous. But it was
10 dropped because of public pressure which we know had
11 much more in the United States because groups like the
12 Foundation for Individual Rights and Education are the
13 groups that had publicized these things.

14 I can't imagine how a case like that
15 couldn't create competing resentments on campus. So
16 you hear -- relatively conservative group, they are
17 getting persecuted by this because some student group
18 wanted to call it harassment. That dimension of this
19 has to at least be acknowledged, at least in terms of
20 the overall package.

21 MS KULASZKA: Now, in the American
22 courts what has happened to the broad speech codes?

23 DR. DOWNS: Well, really two things.
24 Every student code that has gone to court, and really
25 three are four cases. There's not like an avalanche,

1 but these are major cases that should have a
2 precedential value. Michigan's code, Wisconsin's code.

3 Michigan's code was broader than
4 Wisconsin's. Wisconsin's was -- but it was fairly
5 broad too. Then Stanford's, which was the fighting
6 words code, which technically should be acceptable in
7 the First Amendment. All three lost in court.

8 And Wisconsin's code was considered
9 not limited to fighting words and, therefore, a
10 problem. Michigan's was very, very broad.

11 And there was another case that came
12 up with a different kind of take. Supreme Court case,
13 R.A.V. versus St. Paul, which I alluded to before about
14 the burning cross.

15 The R.A.V. code, based on the
16 Minnesota Supreme Court's interpretation of Minnesota
17 law, was limited to fighting words. But it only went
18 after fighting words involving race, religion,
19 ethnicity, and I think sexual orientation. I forget.
20 But those kinds of categories.

21 And a majority of the U.S. Supreme
22 Court said that in itself, by only picking some
23 fighting words rather than others, represented
24 viewpoint discrimination which violates a cardinal
25 First Amendment principle. And there is some dispute

1 about whether or not that's the right approach, but
2 that's what the court said. I actually think it made
3 some sense. If you are going to prohibit fighting
4 words, prohibit all of them.

5 And the R.A.V. case, based on its
6 content, should have been the death nelly for speech
7 codes, because most of the new codes were based on
8 those categories.

9 But a study done in the later
10 nineties, and it's just recently published as a book --
11 2001 was the article, then later the book -- showed
12 that campuses continued to enforce codes. Because the
13 Supreme Court -- the mere fact the Supreme Court says
14 you can't do X, doesn't mean people don't do X. I
15 think today there are schools in the south that start
16 every public school day with a prayer, which is in
17 blatant violation of the establishment clause.

18 So -- and the reason, according to
19 this writer, guy named John Gould, I mentioned him
20 earlier, is because there is such an infrastructure and
21 political situation on campus that there was no
22 immediate incentive for administrators not to continue
23 applying the code.

24 So R.A.V. has been somewhat
25 disobeyed, but certain schools have used it as

1 ammunition to try to limit the thrust of codes.

2 MS KULASZKA: Do you believe that
3 progressive censorship is better than the old type of
4 censorship?

5 DR. DOWNS: That was the original
6 idea; that if we conduct censorship for the right
7 reasons, the right kind of people, those who believe in
8 social justice, that we will avoid the problems of the
9 last which amount to moral bullying of those who are
10 part of the orthodoxy that reigns.

11 Since the campus speech code issue is
12 the only real test of this in the United States,
13 because group libel weren't very much enforced very
14 much at all, shows that nobody is immune to the
15 temptations of moral bullying that with comes -- the
16 power to re-enforce an orthodoxy.

17 I think -- I hadn't imagined I would
18 be talking about him, but Reinhold Niebuhr, leading
19 theologians of the 20th Century and his analysis of
20 human nature that nobody is perfect. Nobody can be
21 beyond criticism, nobody -- all of us have flaws and
22 can be tempted. And in some ways those who feel the
23 most morally justified in censorship can be seen as the
24 most dangerous because then they feel like they have a
25 licence to impose their will. And I think that

1 happened on college campuses to a significant extent.

2 So the social progressives often were
3 not any better in terms of handling this stuff, even
4 though their underlying motives, I would argue, were
5 better. The application wasn't necessarily.

6 MS KULASZKA: In the book that you've
7 re-produced at tab 3, "Kindly Inquisitors" by Jonathan
8 Rauch, what did he identify as the major threat to free
9 speech?

10 DR. DOWNS: Rauch spoke about history
11 as well as more recent times. He identified four major
12 threats. One is the old threat coming from the
13 traditional right. He called it the fundamentalist
14 position, that I know the truth, you don't. God makes
15 such and such the truth, thou shalt not challenge it.

16 And then he identified more recent --
17 one is the egalitarian threat which he defines in a
18 rather interesting way. To him egalitarianism is,
19 well, there is no truth, your truth is no better than
20 mine, vice versa. That doesn't get us anywhere.

21 The irony of the marketplace of
22 ideas, if you want to use that term, everyone has a
23 right to say what they think under appropriate
24 conditions. But no one has a right to be taken
25 seriously. Some ideas are better than others. That

1 goes back to my point earlier about truth and
2 objectivism, that there is such a thing as truth. And
3 the Holocaust denier should have very little standing
4 against someone who really knows the Holocaust. So
5 truth should prevail.

6 All ideas are not equal. Radical
7 egalitarianism is -- he calls it radical
8 egalitarianism, I call it progressive censorship.
9 Censorship in the name of trying to promote equality,
10 especially for those who are considered historically
11 oppressed. And Catherine Mackinnon, would be an
12 example of this with her anti-pornography approach,
13 which was very -- she even had no provision for
14 intellectual value. The play, A Streetcar Named Desire
15 clearly would have come under the umbrella of her
16 ordinance, for example. I can think many other
17 examples.

18 Many identified -- and I think this
19 is the main thing that he contributes -- what he calls
20 the humanitarian threat. And that is, thou shalt not
21 cause any harm. Thou shalt not cause offence. Thou
22 shalt not hurt anybody's feelings.

23 And he argues that this is a deadly
24 thing if you want to a society dedicated to pursuit of
25 truth and what he calls the liberal model of science.

1 Gives me examples of that. Probably
2 the example that starts the whole book is the Salman
3 Rushdie case. And he considered Salman Rushdie a
4 defining moment in western history because -- for
5 publishing satanic verses. I don't know if anyone here
6 has read it, read other of Rushdie's work. He's a
7 remarkable artist and intellectual.

8 And the clerics in Iran put out a
9 death warrant of him, \$5 million on his head. He had
10 to go into hiding for so many years. And Rauch says
11 what he found remarkable was the West was so quiet in
12 its response.

13 How can we possibly have intellectual
14 freedom? Therefore, democracy, in a meaningful sense,
15 if someone like Rushdie could get into that kind of
16 trouble.

17 Now, granted, none of these laws in
18 Europe, certainly in Canada, are putting
19 five-million-dollar bounties on people who dissent, but
20 some of them point in that direction, at least -- to
21 some extent, I guess.

22 MS KULASZKA: Now, does free speech
23 have positive effects on the individual?

24 DR. DOWNS: I think so. And one is,
25 as I mentioned earlier, the Dworkin idea that

1 consenting to government, consenting to be governed,
2 how can that consent be meaningful if your ideas are
3 out there for people to consider?

4 And that leaves one of the classic
5 functions of free speech, according to some
6 commentators, Alexander Meiklejohn and others, who is a
7 great educator -- stood up against -- one of the first
8 people in America to stand up against McCarthyism back
9 when it was hard to do.

10 It's hard to say free speech is
11 necessary to self-government. And he said that -- he
12 uses the American Constitution but if the principle
13 were applied any liberal democracy.

14 Under the U.S. Constitution the
15 speech and debate clause holds that no politician can
16 be held accountable for what he or she says on the floor
17 of congress unless it's not pursuant to the line of
18 work of being a legislature. They have absolute
19 immunity.

20 And he said, well, if the legislators
21 have absolute immunity but the people are the ultimate
22 sovereign in a government based on consent of the
23 governed, they should have something close to that too
24 for their ideas. And that if we have a double standard
25 where government is protected more in speech than the

1 people, then you've violated the basic principle of
2 consent of the governed.

3 Also, it's necessary but not
4 sufficient to get at the truth. People enjoy free
5 speech. It's a way express themselves, way they
6 develop themselves. And I think free speech -- the
7 free speech ethic is demanding. It involves mutuality
8 of rights and responsibilities.

9 The right is the right to speak
10 beyond -- up until certain limits. The responsibility
11 is abiding by -- respecting that right of others, not
12 shouting them down. Letting them listen, being
13 disciplined. And it involves -- I'm not trying to be
14 harsh here but a certain amount of self-discipline and
15 inner strength.

16 Justice Brandeis, in a famous free
17 speech case, Whitney versus California, talks about the
18 role of courage -- moral courage, intellectual
19 courage -- in the development of the free speech
20 doctrine. And it doesn't mean not to be not afraid of
21 an idea.

22 Alexander Meiklejohn in his book on
23 free speech and self-governance has a great line. He
24 says, "To be afraid of an idea, any idea, is to be
25 unfit for self-government."

1 So free speech can culcate those
2 kinds of values of active citizenship -- called the
3 *divida activa*, a principle of active citizenship where
4 we listen to ideas, respond to them. And if they are
5 wrong, say why, make them minor points of view rather
6 than trying to stifle them.

7 This is a more problematic argument,
8 I think, because it's never been demonstrated. Be a
9 safety valve, at least that's argued, that people
10 denied the right of free speech might resort to other
11 methods besides hate speech, actually committing a hate
12 crime.

13 That would be an interesting study if
14 we could do it. I'm not sure how I would do it. But
15 maybe at least arguably suppression could lead to more
16 hate crime than non-suppression. We don't really talk
17 much about that cause and affect aspect. I'm just
18 throwing that out on the table. It's never been
19 demonstrated.

20 And I think most importantly it
21 protects dissent. Because free speech is never applied
22 against those that -- shouldn't say never, but much
23 more often historically appears to be applied against
24 those who lack power.

25 And if you have a society that says,

1 we don't have a monopoly on truth, the state has no
2 monopoly on truth, nobody does. Dissent has to be
3 valued. Some commentators have argued that the
4 fundamental definition of free speech, the fundamental
5 purpose of it is to protect dissenters. And one also
6 links that to freedom of conscience and things like
7 that. Here I stand, I can do no other, kind of thing.

8 Martin Luther King in his speech
9 right before he was murdered, talked about the
10 importance of free speech to what he did, and how
11 linked it to his belief that I had had the courage of
12 my convictions to face my oppressor, take truth right
13 where it's not wanted. And in that speech he
14 foreshadowed his own death, which occurred the next
15 day.

16 MS KULASZKA: We've heard a lot
17 about -- in this case about victims: Victims of hate
18 speech, victims of offensive speech. I want you to
19 comment on that concept of victimhood.

20 DR. DOWNS: Yeah. I mean, it again
21 goes back to my earlier point that sometimes there are
22 both sides of this that can co-exist. If I'm the
23 family in St. Paul at a burning cross in front of my
24 house, I'm going to feel threatened and terrified.
25 Democracies need to have laws against that kind of

1 terrorism.

2 If I put a swastika on somebody's
3 garage door, I'm committing two acts. I notice some of
4 the literature talks about that, piece by Gansky that I
5 sent in.

6 That if you put a swastika on the
7 garage door of a Jewish resident, you are, one,
8 committing vandalism; two, you are committing an act of
9 terror. Two separate acts. But, again, it's directed
10 and targeted at that person.

11 So but other than that, in other
12 kinds of contexts, simply hearing something. Hearing
13 an argument. We have to be careful about claiming
14 victimization because then we can end up stifling free
15 expression and the process of free speech.

16 I'll give you an example, an extreme
17 example. I think I mentioned it in my book.

18 Denise DeSouza, is conservative --
19 conservative activist came to campus and gave a talk
20 about race. And after the talk a student -- I was
21 there, witness to this -- a student said to him after
22 your talk I will not be able to function -- I'm not
23 kidding -- for a week. And when I tell my parents what
24 you said they will not be able to function for a week.

25 And what he meant was, you

1 traumatized me so much with your words -- there's
2 nothing overtly racist what he said, it was that kind
3 of criticism we talked about earlier. That would be
4 sort of victimhood in extreme.

5 David Horowitz published an ad
6 criticizing the reparations for slavery. He got
7 published in several student papers around the country.
8 And some of the faculty at those colleges said this was
9 an act of hate, just publishing it was a hate crime.

10 There was nothing overtly racist at
11 all. It was hard hitting, but wasn't it a racist
12 thing. But people argued this was words that wound.
13 This shatters me. We can't have this on our campus.
14 That, to me, is really detrimental.

15 There really is no limit. Once
16 people get into that kind of victimhood game, basically
17 it gives them a card that trumps the free speech right
18 of anyone that you disagree with by making that kind of
19 claim.

20 So we have to be careful about
21 distinguishing between genuine harm, genuine terror,
22 which does exist and needs to be dealt with, from the
23 other kind which can serve a political purpose.

24 So part of this analysis is, what's
25 happened to the concept of harm? And there's a really

1 interesting essay I just read about a week ago, or part
2 of it, in which the person argues that the way we think
3 of harm now is so much more politicized and so much
4 more complex than it used to be that it's harder to
5 distinguish what we consider genuine harm from other
6 kinds of harm.

7 MS KULASZKA: There should be on your
8 desk a loose leaf sheet, it's called "Philosophy and
9 Public Policy".

10 THE CHAIRPERSON: Is it one of the
11 materials we saw yesterday?

12 MS KULASZKA: I don't know, he has a
13 copy here. This is an excerpt from a book "Philosophy
14 and Public Policy" by Sydney Hook.

15 DR. DOWNS: Right.

16 MS KULASZKA: Do you know who Sydney
17 Hook is?

18 DR. DOWNS: Of course.

19 MS KULASZKA: Who is he?

20 DR. DOWNS: Pardon?

21 MS KULASZKA: Who is he?

22 DR. DOWNS: He was a person who was
23 at one time a socialist, became somewhat more
24 conservative by the earlier wave of the
25 neo-conservative movement, who was a professor of

1 philosophy. And I read -- one of his books was on the
2 Contradictions of Freedom, I think it's entitled, where
3 he talks about these kinds of trade-offs we were
4 talking about.

5 MS KULASZKA: This is an essay he
6 wrote called "The Ethics of Controversy". If you can
7 turn to page 122. He wrote it in 1954 and he's talking
8 about the ground rules for controversy in a democracy.
9 And I just wanted to go through those with you. And if
10 you could comment on them as we go along. He said --

11 MR. FOTHERGILL: Sorry. Mr. Hadjis?
12 We've now been back from lunch for half an hour. I'm
13 concerned there is unfairness developing in the conduct
14 of the proceedings in that yesterday I took one hour in
15 total on Dr. Tsesis' qualifications and his examination
16 in-chief.

17 Mr. Christie, as you observed, used
18 time as a tool and completely denied me any right to a
19 re-examination.

20 We've now been proceeding for more
21 than half the day. I have not yet had an opportunity
22 to cross-examine. We are getting into areas that, in
23 my respectful submission, that don't really assist you
24 very much, this witness's commentary on a 1954 text
25 which we discussed yesterday.

1 And I would ask you, please, to bring
2 an end to this examination in-chief so I do have a
3 reasonable opportunity to cross-examine.

4 I would also say some concern about
5 the response that we can continue tomorrow, because we
6 have a situation where the witness called on behalf of
7 the Attorney General, for reasons of time constraint,
8 was limited to one day. And the witness called on
9 behalf of the respondent has now been in
10 examination-in-chief on over half a day and there's the
11 specter of some kind of latitude in re-examination.

12 And essentially, you're not -- if I
13 can say this with the greatest of respect -- offering
14 an equal opportunity between the parties. The
15 respondent is clearly being favored in terms of --

16 THE CHAIRPERSON: On the one-day
17 one-day issue, we can run as long as we like. I was
18 informed from the outset that your witnesses would not
19 be available beyond one day. That's -- it wasn't out
20 of fairness we did the one-day one-day thing. Dr. Mock
21 ran four days because she was available.

22 MR. FOTHERGILL: Also an
23 extraordinarily long cross-examination.

24 THE CHAIRPERSON: Whatever it may be.
25 What the Tribunal looks from parties is that they

1 reasonably look at evidence they intend to bring forth,
2 estimate their time and stick to it, rather than
3 exceeding their estimate. That's why we ask for
4 parties to seriously consider how much time they'll
5 need when we set these dates down.

6 Now, it was made clear to me at the
7 outset that each of these witnesses were only available
8 for one day, but that that would be sufficient. We
9 have a bonus here that this witness is available a
10 little longer.

11 MR. FOTHERGILL: If you are finding
12 the evidence helpful, I'll sit down.

13 THE CHAIRPERSON: I don't know if I'm
14 finding the evidence helpful, but that's not a concern
15 for me that it will continue tomorrow. What I want to
16 be sure of is that you have the opportunity to do your
17 cross-examination in full.

18 And if you feel that you are hitting
19 a point now where your time will be constrained, that's
20 one thing. If it's because they got one hour more than
21 I did or two hours more, that is not overly -- does not
22 overly concern me. I mean, whatever it takes --

23 MR. FOTHERGILL: It's the former
24 consideration. I'm concerned that time is being used
25 up and my opportunity to cross-examine the witness

1 is --

2 THE CHAIRPERSON: That is a concern
3 for me too.

4 MS KULASZKA: I just want to go
5 through those rules and have him comment on it and
6 that's basically --

7 THE CHAIRPERSON: That's it? There
8 we go. And we haven't actually hit half an hour yet.

9 MS KULASZKA: Actually, this isn't a
10 trick, that I said Dr. Downs would be here for one day.
11 He arrived here at 2:00 o'clock this morning.

12 THE CHAIRPERSON: I know the feeling.
13 That's what happened the night before. This is Toronto
14 airport, what do you want.

15 MS KULASZKA: Dr. Downs, if you can
16 look at page 122. The ground rules of controversy in a
17 democracy. He states, number one:

18 "Nothing and no one is immune
19 from criticism."

20 DR. DOWNS: Right. That's a
21 fundamental principle.

22 MS KULASZKA: This essay, are you
23 familiar with it at all?

24 DR. DOWNS: No.

25 MS KULASZKA: Did he write about

1 McCarthyism? Is that one of the main things he wrote
2 about?

3 DR. DOWNS: He has written about it.

4 MS KULASZKA: Number two:

5 "Everyone involved in a
6 controversy has an intellectual
7 responsibility to inform himself
8 of the available facts."

9 DR. DOWNS: Right.

10 MS KULASZKA: Three:

11 "Criticism should be directed
12 first to policies and against
13 persons only when they are
14 responsible for policies and
15 against their motives or
16 purposes only when there is some
17 independent evidence of their
18 character."

19 DR. DOWNS: I think that's -- if you
20 engage in characterization assassination it cripples
21 response. That would also be an argument to be made
22 against racist comments too.

23 MS KULASZKA: Or because certain
24 words are legally permissible they are not therefore
25 morally permissible?

1 DR. DOWNS: Absolutely.

2 MS KULASZKA: Five:

3 "Before impugning an opponent's
4 motive, even when they
5 legitimately may be impugned,
6 answer his arguments."

7 DR. DOWNS: I think that's correct,
8 both in terms of moral postulate and you don't do your
9 criticism credit by approaching it the other way.

10 MS KULASZKA: Six:

11 "Do not treat opponent of a
12 policy as if he were therefore a
13 personal enemy or an enemy of
14 the country or a concealed enemy
15 of democracy."

16 DR. DOWNS: Absolutely. Then you
17 would turn the person into a thing rather than a person
18 to deal with. You are not treating them as a Kantian
19 individual.

20 MS KULASZKA: Seven:

21 "Since a good cause may be
22 defended by bad arguments after
23 answering the bad arguments for
24 another position present
25 positive evidence for your own."

1 DR. DOWNS: Certainly helpful if you
2 can do it.

3 MS KULASZKA: Eight:

4 "Do not hesitate to admit lack
5 of knowledge or to suspend
6 judgment if evidence is not
7 decisive either way."

8 DR. DOWNS: That's intellectually
9 responsible.

10 MS KULASZKA: Nine:

11 "Only in pure logic and
12 mathematics, not in human
13 affairs, can one demonstrate
14 that something is strictly
15 impossible. Because something
16 is logically possible it is not,
17 therefore, probable. It is not
18 impossible is a preface to an
19 irrelevant statement about human
20 affairs. The question is always
21 one of a balance of
22 probabilities and the evidence
23 for probabilities must include
24 more than abstract
25 possibilities."

1 DR. DOWNS: Yeah, I think that makes
2 sense. I've tried to point out the pros and cons --
3 excuse me, my throat is getting dry -- of various
4 policies today.

5 MS KULASZKA: Ten:

6 "The cardinal sin when we are
7 looking for truth of fact or
8 wisdom of policy is refusal to
9 discuss or action which blocks
10 discussion."

11 DR. DOWNS: Yeah. And I think two
12 very quick points, and I'll be done on this. Mill's
13 point about how unchallenged ideas become dogmas and
14 become lazy. The need to be challenged in order to be
15 given life, and if you want to persuade people you do
16 it through arguments rather than suppression.

17 MS KULASZKA: Thank you.

18 DR. DOWNS: Unless there's discrete
19 enough harm it justifies suppression.

20 MR. KULBASHIAN: Mr. Chair, there's
21 still another party here.

22 THE CHAIRPERSON: Do you have
23 questions?

24 MR. KULBASHIAN: Yes, I just have a
25 few questions actually.

1 THE CHAIRPERSON: There's a problem
2 here. Because we have estimated time and you didn't
3 indicate how much time you would need this morning
4 and --

5 MR. KULBASHIAN: I wasn't here this
6 morning.

7 THE CHAIRPERSON: That's what
8 happened. Well, what happens is if you are not here to
9 tell me something then I can't take it into account.

10 The problem is there was an
11 undertaking made by the person leading this evidence
12 that this witness will be made available for
13 cross-examination within half an hour after we begin
14 again, which is what happened, thank you very much, Ms
15 Kulaszka, you were right on target on time.

16 But now I have told the other side
17 they would be able to cross-examine this witness at
18 this point.

19 MR. KULBASHIAN: If I can just
20 quickly talk to Ms Kulaszka before I make any further
21 submissions, just ask her a few questions about --

22 THE CHAIRPERSON: You want to confer
23 with Ms Kulaszka? I'll let you confer with her for one
24 minute. Go ahead.

25 MR. KULBASHIAN: I guess just a quick

1 question since I wasn't here this morning, was there
2 kind of time line provided by the other parties about
3 how long the cross-examination would be?

4 THE CHAIRPERSON: My understanding
5 is -- well, initially was thought it would just be the
6 rest of the day, right?

7 MR. FOTHERGILL: Yes, that's correct.

8 THE CHAIRPERSON: So there may be
9 time tomorrow for re-examination.

10 MR. FOTHERGILL: If Mr. Kulbashian
11 wants to give us an estimate of the time required and
12 if it's in the nature of five, 10 minutes, that's
13 acceptable.

14 THE CHAIRPERSON: Is it five or
15 10 minutes?

16 MR. KULBASHIAN: I'll quickly look at
17 my notes. Actually I can save most of these issues for
18 re-examination.

19 THE CHAIRPERSON: Only if they arise
20 in cross-examination.

21 MR. KULBASHIAN: I speculated they
22 will ultimately arise. In that case, I will address
23 them in re-examination.

24 THE CHAIRPERSON: Any opposition to
25 that? That's fair.

1 MR. FOTHERGILL: That's personally
2 fair, as long as he understands the restrictions.

3 THE CHAIRPERSON: It means if a topic
4 is not discussed in cross-examination you can't raise
5 it. I'm working on the principle that this report is
6 in evidence with everything that it says, and the
7 additional questions that were posed this morning, and
8 then cross-examination.

9 MR. KULBASHIAN: I understand. I
10 guess better to bring it up in re-examination.

11 THE CHAIRPERSON: Only if it comes up
12 here.

13 CROSS-EXAMINATION BY MR. FOTHERGILL

14 MR. FOTHERGILL: Good afternoon Dr.
15 Downs.

16 DR. DOWNS: Good afternoon.

17 MR. FOTHERGILL: Let me start with
18 some basic housekeeping. There should be a blue binder
19 of materials somewhere in your vicinity. Can you just
20 confirm that's marked AGC-2 and has your name, Donald
21 A. Downs on the cover?

22 DR. DOWNS: Yes.

23 MR. FOTHERGILL: I'm going to ask you
24 if you help me identify some of the documents that are
25 in there.

1 I'm sorry, this will be slightly
2 repetitive because some of the documents you've seen in
3 Ms Kulaszka's materials. I would like you to identify
4 them in this one so they don't have to be torn out.

5 So at tab 1, can you confirm it's a
6 copy of your curriculum vitae?

7 DR. DOWNS: Yes, as at the time I
8 sent it in.

9 MR. FOTHERGILL: May I produce that?

10 THE CHAIRPERSON: Yes.

11 MR. FOTHERGILL: Tab 2, is a copy of
12 your first expert report that came in the form of an
13 e-mail message.

14 DR. DOWNS: Right.

15 MR. FOTHERGILL: If may I produce
16 that?

17 THE CHAIRPERSON: Yes.

18 MR. FOTHERGILL: Tab 3 is the expert
19 report we've been discussing this morning. May I
20 produce that?

21 THE CHAIRPERSON: Yes. Trees that
22 have been chopped down for nothing.

23 MR. FOTHERGILL: I'm sorry. Tab 4,
24 Dr. Downs, will be something we haven't yet discussed
25 in these proceedings. These are excerpts from your

1 book "Nazis in Skokie" which was published in 1985.
2 Can you confirm these appear to be pages from that
3 text?

4 DR. DOWNS: Yes, they are.

5 MR. FOTHERGILL: Thank you.

6 THE CHAIRPERSON: Were any pages of
7 this text also in the other --

8 MR. FOTHERGILL: No, not this one.

9 Tab 5, Dr. Downs, there are some
10 excerpts from "Restoring Free Speech and Liberty on
11 Campus". Ms Kulaszka included the first two chapters.
12 I've included excerpts up to and including some of your
13 final observations.

14 And could I produce that, please?

15 THE CHAIRPERSON: Yes.

16 DR. DOWNS: Okay.

17 MR. FOTHERGILL: I think that's as
18 far as we need to go for now. The other ones I will
19 address in the course of my questions. Thank you for
20 that, Dr. Downs.

21 I would like to begin by suggesting
22 to you that in many respects a university campus is a
23 unique environment for fostering free speech. Do you
24 agree with that?

25 DR. DOWNS: I think so. But it's

1 interesting in one sense you would think that there
2 should be more free speech in university campus,
3 depending on context there than elsewhere. In other
4 ways, it's a more close environment, so sometimes it's
5 attention.

6 MR. FOTHERGILL: I think I read
7 somewhere that some people have likened the
8 contemporary university to an island of repression in
9 the sea of freedom. Have you heard that?

10 DR. DOWNS: Was that me?

11 MR. FOTHERGILL: It might have been
12 you.

13 DR. DOWNS: I've read it. I don't
14 remember who said it. I've said that there is more
15 free speech outside many universities today than there
16 is on them.

17 MR. FOTHERGILL: Let me refer you to
18 a statement you made in your book "Restoring Free
19 Speech and Liberty on Campus", on page 61. This will
20 be tab 4 of AGC-2. Beg your pardon, tab 5.

21 Two-thirds of the way down:

22 "Some, including me, argue that
23 universities differ from typical
24 work places because universities
25 have the distinctive obligation

1 to pursue the truth."

2 DR. DOWNS: Right.

3 MR. FOTHERGILL: "Free speech values
4 then should be as strong at institutions of higher
5 education as elsewhere."

6 And, in fact, I'll suggest to you
7 that that is an understatement. If anything, free
8 speech should be stronger on universities than
9 elsewhere. Do you agree?

10 DR. DOWNS: I'm sorry?

11 MR. FOTHERGILL: And you say of
12 course the context is important?

13 DR. DOWNS: Uh-huh.

14 MR. FOTHERGILL: "Departmental
15 offices and other domains differ from student
16 newspapers, public forums and classrooms."

17 DR. DOWNS: Uh-huh.

18 MR. FOTHERGILL: Am I right in
19 interpreting there to say in departmental offices
20 people should be absolutely free to say what they think
21 because that's a degree of privacy there as well?

22 DR. DOWNS: Not necessarily. I mean
23 department -- the function of a departmental office is
24 to do the academic work, the administrative work of the
25 department.

1 MR. FOTHERGILL: I may have
2 misunderstood then.

3 DR. DOWNS: I'm saying the
4 departmental office should have presumptively less free
5 speech.

6 MR. FOTHERGILL: Oh, less in fact.

7 DR. DOWNS: Than say a student
8 newspaper, public forum, possibly the classroom.

9 MR. FOTHERGILL: So you would suggest
10 that the strongest free speech to be found in student
11 newspapers, public forums and the classroom, and it
12 would be somewhat attenuated in a departmental office.
13 Is that because of purpose, because it's administrative
14 in nature and --

15 DR. DOWNS: Correct.

16 MR. FOTHERGILL: Did you have an
17 opportunity to look at any of these materials before
18 you began your testimony?

19 DR. DOWNS: No.

20 MS KULASZKA: All right. Can I ask
21 you to turn to the final tab in that book. This is tab
22 8. It's an excerpt from a case from our own Supreme
23 Court of Canada, and essentially this case tells us
24 that in the Canadian context the Canadian Constitution
25 or the Charter of Rights and Freedoms doesn't actually

1 apply to universities.

2 Is the situation in the United States
3 different? Are you U.S. universities actually subject
4 to the U.S. Constitution?

5 DR. DOWNS: If they are public
6 institutions they are.

7 MR. FOTHERGILL: Very interesting.

8 DR. DOWNS: In California in the
9 Stanford case it's a private university, but under
10 California statutory law they are subject to First
11 Amendment obligations. But that's very usual. So we
12 make a distinction between state action and not state
13 action.

14 Could I mention many private schools
15 because of the contracts with the students, or their
16 pronouncements about their own mission, do provide
17 strong free speech rights so if they violate that you
18 might get a contractual problem, but not a First
19 Amendment problem.

20 MR. FOTHERGILL: Can I ask you to
21 look then at page -- it's the last two pages of that
22 tab, tab 8. This case, in fact, deals with mandatory
23 retirement so it's not specifically on point but
24 there's some comments about the university and I would
25 like to solicit your views on it.

1 DR. DOWNS: Okay.

2 MR. FOTHERGILL: The first point I
3 won't ask you to comment on. It's in the second
4 paragraph:

5 "The government has no legal
6 power to control the
7 universities even if it wished
8 to do so," except perhaps to
9 note, as you told us, the
10 situation in the United States
11 might depend on the nature of
12 the institution be somewhat
13 different.

14 The Court then proves -- with
15 approval from the Court of Appeals decision in the same
16 case as follows -- that's the quotation in the middle
17 of the page:

18 "The fact is universities are
19 autonomous, they have boards of
20 governors or governing council,
21 the majority of whose members
22 are elected or appointed
23 independent of government. They
24 pursue their own goals within
25 the legislative limitations of

1 their incorporation," then goes
2 on about an issue of employment.

3 DR. DOWNS: Right.

4 MR. FOTHERGILL: The point I really
5 want to discuss with you is found in the next paragraph
6 which reads as follows:

7 "The legal autonomy of the
8 university if fully buttressed
9 by their tradition position in
10 society. Any attempt by
11 government to influence
12 university decisions, especially
13 decisions regarding appointment,
14 tenure and dismissal of academic
15 staff, would be strenuously
16 resisted by the universities on
17 the basis that this could lead
18 to breaches of academic freedom.
19 In a word, these are not
20 government decisions, though the
21 legislature may determine much
22 of the environment in which
23 universities operate, the
24 reality is they function as
25 autonomous bodies within that

1 environment. There may be
2 situations in respect of
3 specific activities where it can
4 fairly be said that the decision
5 is that of the government, or
6 that the government sufficiently
7 partakes in the decision as to
8 make an act of government, but
9 there's nothing here to indicate
10 any participation in the
11 decision by government."

12 Will you agree with me that quite
13 apart from the technical legal question of application
14 of constitutional law to universities in our two
15 countries, that statement of principle is essentially
16 the same in the United States as well.

17 DR. DOWNS: I think so. There's one
18 distinction, though, that's missing here. And that's
19 the distinction between institutional autonomy as an
20 academic freedom right, and the individual rights of
21 students or professors. And sometimes those can be in
22 conflict.

23 Actually in the United States, based
24 on recent Federal Court decisions -- not U.S. Supreme
25 Court -- it's institutional academic freedom that is

1 protected more than individual.

2 Meaning that in the university -- who
3 hire, decisions over curriculum. Those are properly
4 institutional decisions. Departments can make them.
5 Individually, professors don't necessarily have a right
6 to say, well, I won't teach that course, I won't teach
7 it that particular way.

8 Institutional academic freedom
9 represents the rights of the institution vis-a-vis
10 outside authority, typically the state. But what
11 happens -- and this is what happened with the speech
12 code movement --

13 MR. FOTHERGILL: Can I stop you there
14 for a moment? We do have a little bit of time
15 constraints, and I would be grateful for your
16 cooperation if you can try and essentially answer the
17 question I put to you. If you feel a need to
18 elaborate, you are welcome to do so, but please try not
19 to enter into a new area of discussion in response to
20 one of my questions.

21 DR. DOWNS: I'll do my best. I
22 thought this was the point, what I was saying.

23 MR. FOTHERGILL: In which case, feel
24 free to make it.

25 DR. DOWNS: Just that the speech code

1 problem became one of internal governance. What the
2 university was doing to its own, which is not addressed
3 by this statement.

4 MR. FOTHERGILL: Thank you. Can I
5 produce this case? I know it's a piece of
6 jurisprudence. I again I want to produce all the tabs
7 in the book.

8 THE CHAIRPERSON: Right. Saves us
9 from the need to rip it out.

10 MR. FOTHERGILL: Exactly.

11 I suggest another distinctive aspect
12 about the university context is that you can reasonably
13 assume that the people who are participating in speech
14 in a university setting actually are interested in the
15 truth. And it's reasonable to assume also that you can
16 demand a certain civil level of discourse in the normal
17 course. Do you agree with that?

18 DR. DOWNS: Depends on the context.
19 Certainly in class, and it would depend how you define
20 civil.

21 MR. FOTHERGILL: We'll talk about
22 this further, as in your book. You would agree with me
23 that a civil standard of discourse is a reasonable
24 expectation in a university?

25 DR. DOWNS: As a moral posture, but

1 yes.

2 MR. FOTHERGILL: Indeed, it's
3 absolutely critical if the university is to perform its
4 function?

5 DR. DOWNS: Their problem is the
6 civility code, if we're talking about some sort of
7 sanction, can be applied in such a broad way that it
8 goes back to the problem I raised earlier about the
9 distinction between gratuitous offence and an offence
10 that's caused by an honest presentation of ideas.

11 MR. FOTHERGILL: Absolutely. But the
12 idea of civility works both ways. In fact, you are a
13 proponent of civility in the sense that you don't want
14 professors' lectures disrupted by banging of pots and
15 pans --

16 DR. DOWNS: Of course.

17 MR. FOTHERGILL: -- or heckling or
18 shouting down. None of which of course -- and we'll
19 discuss this in greater detail, but none of these
20 incite anybody to violence.

21 DR. DOWNS: Correct.

22 MR. FOTHERGILL: It's just completely
23 improper given the environment of the university.

24 DR. DOWNS: In that case you are
25 actually obstructing the professor from making his or

1 her point.

2 MR. FOTHERGILL: That's right.
3 You're using your expressive rights in a way that
4 actually denies the right of the professor to express
5 his or her views.

6 DR. DOWNS: Right.

7 MR. FOTHERGILL: And we'll talk about
8 that a little bit more later on in questioning. But I
9 did want you to agree with me, as I understand you do,
10 that there is a reasonable expectation of civil
11 discourse in universities and you also reasonably
12 expect people to be interested in --

13 DR. DOWNS: And this would apply to
14 the public form as well. I mentioned about the
15 reciprocity of rights and responsibilities in the
16 process of free speech. You need to respect the rights
17 of speakers to say what they want to say without
18 disrupting them.

19 MR. FOTHERGILL: Now, a theme that
20 you have returned to time and time again, is that the
21 problem with speech codes -- and perhaps more generally
22 with hate speech legislation -- is not so much the
23 legislation itself but its application, correct?

24 DR. DOWNS: Not quite. If the
25 prohibition borders on the content of one's thought

1 alone, then I think it's a problem in principle as
2 well.

3 MR. FOTHERGILL: I appreciate this
4 isn't your only criticism, but it is one of your
5 criticisms?

6 DR. DOWNS: Absolutely.

7 MR. FOTHERGILL: And this is the one
8 I want to discuss right now.

9 If we can return to your book,
10 "Restoring Free Speech and Liberty on Campus", can I
11 ask you to turn to page 13, please.

12 THE CHAIRPERSON: That's again at tab
13 5.

14 MR. FOTHERGILL: Tab 5 of AGC-2.

15 THE CHAIRPERSON: Page 13?

16 MR. FOTHERGILL: Page 13. And this
17 is consistent with something you told us this morning.
18 I'm referring now to the text two-thirds of the way
19 down the page:

20 "My observations are sharpened
21 by the fact that I was
22 originally a supporter of speech
23 codes and related policies."

24 And you explained that you voted in
25 favor of broadly worded faculty and student speech

1 codes in University of Wisconsin 1988. And then you
2 say:

3 "But events later caused me and
4 others to change our minds about
5 the wisdom of such policies and
6 question the university's
7 course."

8 DR. DOWNS: Right.

9 MR. FOTHERGILL: And just above that
10 extract you introduced three major reasons for the
11 sorry state affairs in American universities that you
12 want to explore in the book.

13 And third one is the one I want to
14 focus on:

15 "The lack of knowledge in the
16 intellectual and public life of
17 universities concerning the
18 nature of basic constitutional
19 rights and the reasons for
20 taking constitutional liberty
21 seriously."

22 So I suggest to you that one of the
23 difficulties that you've identified in the
24 administration of speech codes in the university
25 setting is that those who administer them have no

1 particular experience in due process or constitutional
2 considerations; is that right?

3 DR. DOWNS: Yes.

4 MR. FOTHERGILL: In fact, you
5 mentioned, I think, a new administrative ethos?

6 DR. DOWNS: Right.

7 MR. FOTHERGILL: And surely that is
8 one distinction that we can make between the university
9 setting and speech codes and laws of general
10 application as applied in the broader community in that
11 you might see due process abrogated in a university
12 setting more readily than you would in a court of law,
13 correct?

14 DR. DOWNS: That's a fair statement.

15 MR. FOTHERGILL: And also before in
16 the administrative tribunal such as this one?

17 DR. DOWNS: Yes, perhaps. So in this
18 sense I'm making a special condemnation of
19 universities.

20 MR. FOTHERGILL: And you gave us a
21 couple of examples of this. The water buffalo case,
22 for example, was resolved, belatedly, because due
23 process was brought to bear, correct?

24 DR. DOWNS: Yes, but it was -- it had
25 to be to politically, in a sense, forced upon the

1 university.

2 MR. FOTHERGILL: This isn't included
3 in excerpts but I'm sure you'll recognize it. You did
4 discuss in your book "Columbia Sexual Misconduct
5 Policy".

6 DR. DOWNS: Right.

7 MR. FOTHERGILL: And you mentioned
8 that the code changed for better when the lawyer became
9 involved and had some input.

10 DR. DOWNS: Yes, from outside.

11 MR. FOTHERGILL: Right. On the
12 subject of the concern about who applies the laws. I
13 want to suggest to you that U.S. Constitutional
14 doctrine generally shows a fairly high mistrust about
15 government and the abuse of government authority. Is
16 that fair to say?

17 DR. DOWNS: Yes, it is.

18 MS KULASZKA: I don't know to what
19 extent you are familiar with Canadian Constitutional
20 doctrine or history. Have you made a comparative study
21 of the two countries in any way?

22 DR. DOWNS: Not any rigorous way,
23 no, but I have read Canadian cases and have read a bit
24 about its constitutional culture.

25 MR. FOTHERGILL: We here in Canada

1 are familiar with the mantra of U.S. freedom as the
2 pursuit of life, liberty and the pursuit of happiness.
3 And sometimes it's said that the Canadian equivalent of
4 that is peace, order and good government. Have you
5 heard of that?

6 DR. DOWNS: Yes, I have.

7 MR. FOTHERGILL: And so if I suggest
8 to you that perhaps here in Canada constitutionally we
9 tend to have less mistrust in government than the
10 United States, is that a fair characterization?

11 DR. DOWNS: I suppose it's a
12 stereotype.

13 MR. FOTHERGILL: Well, it's more than
14 just a stereotype. Let me give you another example.

15 The U.S. constitutional right to bear
16 arms derives from a fundamental mistrust of authority;
17 does it not?

18 DR. DOWNS: Correct.

19 MR. FOTHERGILL: And you'll agree
20 with me, even perhaps only anecdotally that Canada and
21 the U.S.'s approach to gun control are fundamentally
22 different?

23 DR. DOWNS: Yes, but the American
24 experience is mixed as well, depends on jurisdiction.
25 Second amendment rights are not absolutely stated or

1 settled. It's First Amendment rights.

2 MR. FOTHERGILL: Can I ask you to
3 turn to page 52 of the excerpts from your book
4 "Restoring Free Speech and Liberty on Campus"? We're
5 still on AGC-2, tab 5.

6 THE CHAIRPERSON: Just a moment. Yes.

7 MR. FOTHERGILL: Dr. Downs, you write
8 in your most recent book:

9 "Clearly some forms of offence
10 are more severe than others.
11 The worst cases involve highly
12 degrading and even threatening
13 expression which could be
14 punished under pre-existing laws
15 or rules prohibiting so-called
16 fighting records, words likely
17 to trigger a hostile reaction
18 thereby causing a breach of the
19 peace or threats."

20 And you continue:

21 "At Wisconsin, for example, an
22 African-American, a freshman
23 woman, was vilified by a group
24 of white male students at the
25 entrance to the library. They

1 told her that they did not like
2 niggers at their school."

3 So you give this example, and I take
4 it the examples we are about to review are examples of
5 speech that you think would be properly prohibited on a
6 university campus.

7 DR. DOWNS: It would depend on the
8 context and how it was said. Racial epithets directed
9 at someone, they are a tough case. Clearly they are
10 morally reprehensible, and in many cases can be
11 threatening, intimidating beyond a certain line.
12 Sometimes because something is wrong doesn't mean it's
13 a good idea to prohibit it because of the negative
14 consequences of prohibition. There's a particular
15 Herbert Packers book, "The Limits of the Criminal
16 Sanction" --

17 MR. FOTHERGILL: This is the
18 balancing of the positive --

19 DR. DOWNS: But potentially this
20 could be, depending on the context. Certainly it's
21 morally reprehensible.

22 MR. FOTHERGILL: And there's reason
23 why it has no place in a university setting, which
24 you've already told us, and it's simply not germane to
25 anything the university is doing.

1 DR. DOWNS: Well, I'm not sure this
2 would not be germane. Racial admissions and policies
3 are discussed all the time. But it does seem it's
4 gratuitous. In that sense, I would say it's not
5 germane.

6 MR. FOTHERGILL: Well, it's worse
7 than gratuitous. It contributes absolutely nothing to
8 the search of the truth. Obviously one can have a
9 reasonable discussion about race-based admission policy
10 without in any way coming close to offending the law.
11 I won't comment on speech --

12 DR. DOWNS: Right. But again, this
13 is a face-to-face kind of epithet. Writing this in the
14 student paper, morally reprehensible, but would it be
15 punishable?

16 MR. FOTHERGILL: We'll carry on. At
17 Purdue someone scratched "dear nigger" on a
18 councillor's door. That is hardly imminent of
19 incitement to violence, because presumably the
20 councillor is not even there at the time.

21 DR. DOWNS: That would be similar
22 perhaps to the burning cross in front of someone's
23 house. There could be a directed, targeted kind of
24 thing. It could be -- at the very least it's
25 vandalism. It could take the next step toward an act

1 of terrorism. It would depend on the circumstances.

2 MR. FOTHERGILL: Another example you
3 give us, at Smith a student from Africa discovered a
4 note under the door, "African nigger, do you want --"
5 oh, "African nigger, do you want some bananas? Go back
6 to the jungle." Another form of speech I would suggest
7 has no place on a university campus?

8 DR. DOWNS: It's hard to say that it
9 does.

10 MR. FOTHERGILL: Other reported
11 incidents involve less targeted indirect forms of
12 expression such as skits based on racial or sexual
13 themes and speeches by racist groups. And you are
14 giving us this examples, if I understand the context of
15 your writing correctly, of things that don't belong on
16 university campus?

17 DR. DOWNS: No. In terms of the last
18 examples, they certainly don't ideally belong. But the
19 question of whether or not one should prohibit them is
20 a separate kind of question. If a fraternity wants to
21 have a skit in its basement, that's them expressing
22 their own feelings and thoughts about race or whatever,
23 that would be protected.

24 MR. FOTHERGILL: We'll carry on over
25 the page then to page 53. We've got some other

1 examples:

2 "In January 1987 a group of
3 black female students discovered
4 leaflets in a dormitory lounge
5 announcing 'open hunting season'
6 on African-Americans, whom
7 leaflets portrayed as 'saucer
8 lips, porch monkeys and
9 jigaboos'."

10 Again, another example of speech that
11 would be --

12 DR. DOWNS: That's threatening --

13 MR. FOTHERGILL: It's the threatening
14 aspect that you --

15 THE REPORTER: Excuse me.

16 (DISCUSSION OFF THE RECORD)

17 THE CHAIRPERSON: Let's slow it down
18 just a tad.

19 MR. FOTHERGILL: A week later a
20 campus disc jockey --

21 DR. DOWNS: Are we clear, though,
22 that my argument about this would be the threatening
23 aspect?

24 MR. FOTHERGILL: It's the threatening
25 aspect.

1 DR. DOWNS: Clearly, there would be
2 grounds for some sort of sanction, and even criminal
3 sanction perhaps, because of that. What if it just --
4 what if it didn't have the open hunting season and then
5 engaged in racial mockery? Clearly, that's morally
6 reprehensible, but now I think the question of whether
7 or not you have a sanctioned policy to punish for that
8 is a much more difficult question.

9 MR. FOTHERGILL: Fair enough. We'll
10 take another example. A week later a campus disc
11 jockey asked listeners to call in racist jokes on the
12 air. Suitable for prohibition?

13 DR. DOWNS: I probably would not
14 prohibit it, no.

15 MR. FOTHERGILL: When students
16 organize --

17 DR. DOWNS: But I would like to see
18 the marketplace and counter speech fill the air. Tell
19 them they're wrong. Shame them, lose listeners, et
20 cetera.

21 MR. FOTHERGILL: "When students
22 organize to protest these acts, someone hung a Ku Klux
23 Klan sign from a dorm room above them."

24 And then you say:

25 "Some of these acts could be

1 interpreted as threats or acts
2 of intimidation that cross --"

3 DR. DOWNS: That might be like a
4 burning cross, and given the fact it's the Klan
5 situation, it was targeted right at them. It might be
6 fighting words too.

7 MR. FOTHERGILL: Very well. Indeed,
8 you go on in that passage to say:

9 "The First Amendment protects
10 offensive speech, not threats or
11 intimidation."

12 DR. DOWNS: The key issue is
13 targeting. The targeting at these particular
14 individuals, which makes it a speech at closer aligned
15 to a kind of expressive conduct.

16 MR. FOTHERGILL: But then you say
17 something very interesting at the end of this
18 paragraph:

19 "Under the circumstances, the
20 university had to act to protect
21 the sense of security of
22 affected students."

23 You summarized all of the examples
24 we've just reviewed to say that the university had to
25 act. And here if I'm reading your text correctly, you

1 are no longer drawing the distinction in all of these
2 examples, the university had to act to protect the
3 sense of security of affected students.

4 DR. DOWNS: Yeah. I think all these
5 examples, and perhaps I wasn't careful enough in saying
6 what should be sanctioned, what should not be. Clearly
7 the university had to do something, and then the
8 question is, what is the method? Do we do it through a
9 kind of prohibitive code? Do we do it through
10 education? Speaking out, telling the students we're
11 with you, this was a morally reprehensible thing to do?
12 That kind of thing.

13 So I think I'm still leaving open the
14 door to how the university reacts, which is different
15 from saying should it react at all.

16 MR. FOTHERGILL: But another thing
17 you are telling us is there's more than just preventing
18 imminent breaches of the peace you are concerned about.
19 Action should be --

20 DR. DOWNS: I --

21 MR. FOTHERGILL: May I finish?
22 Action should be taken to protect the sense of
23 security --

24 DR. DOWNS: Absolutely.

25 MR. FOTHERGILL: -- of the members of

1 that community.

2 DR. DOWNS: Absolutely. That's why
3 you have laws against threats. The question that is
4 whether or not the sense of insecurity based on what is
5 said is a reasonable reaction or not. So you have to
6 have some sort of standard of reason that's put into
7 this. Protecting the basic sense of security if
8 someone has been threatened, that's a classic function
9 of the state. I've never disagreed with that.

10 MR. FOTHERGILL: All right. I would
11 like now to review some excerpts from Nazis in Skokie,
12 which is found at tab 4 of AGC-2. And I would like to
13 begin that that discussion at page 164 which very near
14 the end of the excerpt I've given you.

15 THE CHAIRPERSON: Page 1 --

16 MR. FOTHERGILL: 164.

17 This you writing 20 years ago, so I'm
18 interested about the extent to which you now reject --

19 DR. DOWNS: I had black hair back
20 then, too.

21 MR. FOTHERGILL: You titled this
22 conclusory section "Questions and Critiques", and at
23 the end of this first book which addressed hate speech
24 in the broader context than just the university
25 setting, you said:

1 "Before we conclude, three
2 potential problems must be
3 addressed: The problem of
4 chilling effect," which you've
5 alluded to today, "the problem
6 the intent and the issue of the
7 vilification of groups or
8 individuals who do not belong to
9 a racial or ethnic minority."

10 And if I can turn the page. You
11 conclude your introduction of the first issue:

12 "The mere threat of faulty
13 enforcement of the law could
14 'chill' legitimate speech."

15 Do you see that at the top of page
16 165?

17 DR. DOWNS: Yes.

18 MR. FOTHERGILL: Then you offer the
19 following response:

20 "My answer to the criticism of
21 misapplication is
22 straightforward. Yes, there may
23 be misapplication but
24 misapplication is not a
25 sufficient argument against my

1 policy unless it could be shown
2 that misapplication would have
3 undue effect on the exercise of
4 free speech."

5 Now, that principle, I take it,
6 remains sound even 20 years after you wrote it?

7 DR. DOWNS: Right. But it's still
8 presupposes a justification for the suppression in the
9 first place.

10 MR. FOTHERGILL: Indeed, you
11 anticipated even when you wrote this, that this wasn't
12 a sufficient response unless the misapplication could
13 be shown to have undue effect. And if I understand the
14 evolution of your ideas, you are now saying at least in
15 a university setting --

16 DR. DOWNS: -- what I talked about
17 what's happening in Europe with some of the Holocaust
18 denial laws, the application to Bernard Lewis, et
19 cetera, that would certainly seem to me to be undue.

20 Another thing about Nazis in Skokie.
21 I rejected group libel laws in this book, and that's
22 one reason that the book had some of the appeal that it
23 had.

24 I think I made the mistake because
25 when I talk about targeting, I talk about targeting a

1 whole village of 70,000 people. I've changed that. I
2 want it to be more concentrated now.

3 MR. FOTHERGILL: We will get there, I
4 assure you.

5 The other thing that I think that you
6 addressed in your Critique section, or responses to
7 critiques, is the idea of slippage may occur, which is
8 to say that the prohibition might capture more than it
9 was intended to. And your response was based on the
10 case, Young against American Mini Theaters Inc. where
11 Justice Stevens -- and I'm now in the middle of the
12 page 165 said:

13 "Slippage was not a major
14 problem because the effect of
15 the expression was of only
16 marginal value to society in
17 terms of the social normally
18 value found in Chaplinsky."

19 Am I right in thinking this case
20 dealt more with sexually explicit materials?

21 DR. DOWNS: Yes.

22 MR. FOTHERGILL: But then you offer
23 us the analogy towards the end of the page:

24 "Steven's logic is appropriate
25 in the regulation of targeted

1 racial vilification as well,
2 even if my proposals were to
3 slip and chill some racialist
4 expression, this slippage would
5 affect only expression of low
6 value."

7 And that is because of course hate
8 speech is generally speech that has very low --

9 DR. DOWNS: But you are forgetting
10 the context in which I wrote that, which is targeted
11 vilification which takes the form of fighting words or
12 a threat. And that makes it especially low value. I
13 explicitly, even back then, disavowed group libel laws
14 as the way to go, because the harm is not as direct.
15 So even back then that was my position, which is
16 similar to what it is now.

17 MR. FOTHERGILL: Well, I think in
18 fairness to you, we will spend a bit more time on the
19 ideas you expressed in Nazis in Skokie, and I'm sure
20 you'll have a full opportunity to explain how your
21 thinking has matured.

22 So you've already explained to us the
23 basic context in which the book Nazis in Skokie was
24 written, the planned demonstration in the community
25 that had both actual Holocaust survivors and a very

1 large Jewish community.

2 DR. DOWNS: Yes.

3 MR. FOTHERGILL: And I wonder, then,
4 if we can turn to page 17 from the excerpts I've given
5 you at tab 4.

6 THE CHAIRPERSON: Tab 4.

7 MR. FOTHERGILL: Tab 4 of AGC-2.
8 Approximately three-quarters of the way down the page
9 you wrote the following:

10 "While in open, developing
11 community is important to
12 effectuation of republican
13 virtue, a community that does
14 not protect its citizens from
15 unjustified psychological
16 assaults (that does not honor
17 the principle of basic security)
18 is not well ordered and cannot
19 not claim legitimacy."

20 To help us understand the stand, can
21 you just let us know what republican virtue means in
22 this context?

23 DR. DOWNS: Republican virtue harkens
24 back to the point I made earlier about Brandeis and the
25 courage to stand up to discomfoting ideas and to deal

1 with them constructively.

2 MR. FOTHERGILL: Another feature of
3 republican virtue is the autonomy of an individual,
4 isn't it?

5 DR. DOWNS: I suppose it is.

6 MR. FOTHERGILL: Basically, we want
7 to promote people's individual autonomy. The
8 marketplace of ideas can be situated in this context as
9 well, can't it?

10 DR. DOWNS: It can be, though it's
11 also seen its intention with the republican notion.

12 MR. FOTHERGILL: In any event, the
13 statement that a community that does not protect its
14 citizens from unjustified psychological assaults is not
15 well ordered and cannot claim legitimacy. You have no
16 reason to reject that proposition today.

17 DR. DOWNS: I think what I have do, I
18 have changed in terms of what constitute that kind of
19 assault. And at that time I was -- my approach to what
20 would constitute unjustified psychological assault was
21 much broader, or considerably broader than it might be
22 now.

23 MR. FOTHERGILL: But psychological
24 assault, you'll agree with me, is really a matter of
25 not within your core area of expertise, what would an

1 individual feel psychologically when exposed to certain
2 forms of speech. You base yourself on the studies of
3 others when you analyze that?

4 DR. DOWNS: That's correct.

5 MR. FOTHERGILL: Page 37 of those
6 excerpts. You'll see in the second paragraph, the one
7 that begins:

8 "The problem is that Collin's
9 views are indeed quite
10 relevant."

11 You state in the third sentence the
12 following:

13 "The consideration of
14 consequences constitutes the
15 core of an ethic of
16 responsibility that Max Weber
17 elevated to the highest
18 political action. Why cannot
19 impact be a proper criterion for
20 delimiting the scope of a
21 right."

22 And I take it that that was -- at
23 that time your response to the content neutral
24 requirement in U.S. jurisprudence?

25 DR. DOWNS: Yes.

1 MR. FOTHERGILL: And you felt the
2 fact that certain views had a particularly detrimental
3 impact is something -- sorry, the expression of certain
4 views having a particular detrimental impact was
5 something that could be legitimately considered when
6 determining whether that speech ought to be prohibited
7 or not?

8 DR. DOWNS: Yes, it has to be. Even
9 with a classic threat you are looking at the content of
10 the speech.

11 So I think what's more important is
12 the viewpoint discrimination principle rather than the
13 content discrimination, because then you're talking --
14 you have any kind of valid prohibition, you're libel --
15 straightforward individual libel, obscenity -- it's
16 always going to be a kind of a content judgement.

17 THE CHAIRPERSON: The last part -- I
18 didn't hear the last part, content or context?

19 DR. DOWNS: Content. Any kind of
20 valid restriction on speech, be it a threat, be it
21 libel, be it obscenity, that's going to be a content
22 judgement. What you don't want is for that punishment
23 to be based upon the viewpoint that's included in
24 there.

25 So let's say, for example, if we

1 prohibited, say, left wing fighting words but not
2 conservative fighting words, that would be a viewpoint
3 discrimination that would be improper. Of course you
4 are going to take into consideration content in
5 deciding whether the line is gone. Content and
6 context.

7 MR. FOTHERGILL: And that's because
8 the consequences matter?

9 DR. DOWNS: Sure.

10 THE CHAIRPERSON: What matters?

11 MR. FOTHERGILL: Consequences.

12 DR. DOWNS: The question is what
13 consequences.

14 MR. FOTHERGILL: So we'll discuss
15 that for a moment. If you turn to page 84 of the
16 excerpt you have.

17 This is your account of the negative
18 consequences at Skokie. And the first subject you deal
19 with is titled, "Taking Consequences Seriously".

20 What is interesting about your
21 analysis here is that it's, to a large extent, based on
22 your own personal observations, right?

23 DR. DOWNS: Yes. Well, that's what I
24 read.

25 MR. FOTHERGILL: Yes, of course,

1 both. But you actually personally interviewed some of
2 the people --

3 DR. DOWNS: Yes.

4 MR. FOTHERGILL: -- who experienced
5 those consequences and also those who had the
6 opportunity to observe the sequences first hand?

7 DR. DOWNS: Yes.

8 MR. FOTHERGILL: So this is more than
9 just sociology, this is actually personal narrative?

10 DR. DOWNS: Yes, it is.

11 MR. FOTHERGILL: So you introduced
12 this chapter by saying:

13 "In the next chapters we will
14 look at harms and benefits which
15 resulted at Skokie."

16 And perhaps one of the things we may
17 have signal at the outset is that you found both.

18 DR. DOWNS: Yes.

19 MR. FOTHERGILL: Harms and benefits.

20 But then you continue:

21 "We will deal with harms in two
22 senses: One, harm that resulted
23 from the threat of the NSPA's
24 coming to Skokie."

25 That's the neo-Nazi group, correct?

1 DR. DOWNS: Yes.

2 MR. FOTHERGILL: And two:

3 "Likely harms that would have
4 arisen had they come."

5 If we turn the page, you have a
6 heading "Emotional Trauma".

7 DR. DOWNS: Right.

8 MR. FOTHERGILL: And you introduced
9 that discussion with the following words:

10 "My survivor interviewees did
11 indeed experience significant
12 trauma, even though it appears
13 they were among the stronger
14 survivors in the community.
15 Given my interviewees' relative
16 strength it is probable the
17 degree of trauma even greater
18 for many survivors whom I did
19 not interview"?

20 DR. DOWNS: Right.

21 MR. FOTHERGILL: Now, you do say this
22 is, as far as you can determine, partly function of
23 past experiences?

24 DR. DOWNS: Yes, very much so.

25 MR. FOTHERGILL: Then you've given us

1 some testimonials, if I can call them that, from the
2 Gans family?

3 DR. DOWNS: Yes.

4 MR. FOTHERGILL: The effect it had on
5 them. And to be clear, we're talking about here the
6 prospect of a Nazi demonstration in their community.
7 It's not even a reaction to demonstration having taken
8 place?

9 DR. DOWNS: That's right. Well, the
10 threat of it was -- they did come to town and they were
11 kept on the outskirts, so there was something immediate
12 about it early on in that year-long process. But
13 largely, it was the prospect.

14 MR. FOTHERGILL: But you would agree
15 with me that the exposure, or even the potential
16 exposure to hatred can have a very visceral effect on
17 an individual, depending on their sensitivity?

18 DR. DOWNS: Yes, yes, but for the
19 survivors it was -- given their past experience they
20 were especially sensitive to it. And the non-survivor
21 Jews in Skokie were uniformly in favor of letting the
22 Nazis come in, until they were exposed to the
23 survivors' views. And so there was a great deal of
24 moral and political persuasion that went on to get them
25 to change their minds.

1 Now, many of the non-survivor Jews
2 didn't change their minds, so you had a wide
3 distribution in the viewpoints of the Jewish community.

4 So in many ways the Skokie case --
5 it's really incredibly interesting and nerve-wracking
6 case. It's somewhat sui generis because it was a
7 survivor-driven issue. And the other Jews just said,
8 let them come in. Endorse the quarantine policy, which
9 is -- Nazis -- group like this live off the publicity,
10 like fire needs the air. So if you quarantine them,
11 they are ignored and they don't thrive.

12 MR. FOTHERGILL: But you are not
13 maintaining that the effect or the assault on the
14 community sense of security was limited only to those
15 who had personally experienced the Holocaust?

16 DR. DOWNS: Not entirely. But
17 substantially so, yes. I acknowledge that in the book.

18 MR. FOTHERGILL: Can we turn to page
19 88. You have the heading "Sociological Aspects of
20 Trauma"?

21 DR. DOWNS: Yes.

22 MR. FOTHERGILL: And in the
23 subheading, "The Protective Community", and you talk
24 about the "invasion of turf"?

25 DR. DOWNS: Right.

1 MR. FOTHERGILL: But in the last two
2 sentences of that paragraph you write:

3 "Attacks against one's turf can
4 be traumatic and emotionally
5 provocative for reasons which
6 transcend sheer individuality.
7 This result is all the more
8 likely when the attack includes
9 explicit reference to the values
10 and right to exist in that
11 community making it immoral as
12 well as a physical assault."

13 Clearly, that is applicable not just
14 to the individuals who have experienced the trauma but
15 the community as a whole because their right to exist
16 has been challenged.

17 DR. DOWNS: But given the reality of
18 Skokie, it was much more applicable to the survivors.
19 And the other Jews were much -- there's a tension
20 between historical experience versus contemporary
21 experience in America that -- non-historic,
22 non-survivor Jews, and so tension between
23 identification say with American constitutional
24 principles and identification with your ethnic group.

25 And many Jews in Skokie of course

1 were conflicted over that. So the statement I'm making
2 here is certainly applicable to the survivors. And I
3 would argue it can be applicable to others.

4 MR. FOTHERGILL: It can or cannot?

5 DR. DOWNS: It certainly is
6 applicable to survivors, survivor-driven phenomenon,
7 but under certain circumstances can also be applicable
8 to non-survivors because of historical experience. But
9 I think you have to be more definitive about what those
10 cases are because such individuals don't have the a
11 priori, psychological sensitivities that the survivors
12 have.

13 MR. FOTHERGILL: Again --

14 DR. DOWNS: So I'm not saying it
15 could never apply beyond the survivors. Of course it
16 can. But I think it applies less.

17 MR. FOTHERGILL: This really is a
18 matter for expert psychological consideration rather
19 than informed speculation. You'll agree with me?

20 DR. DOWNS: I suppose, but I would be
21 surprised if a psychologist disagreed with me. It's
22 quite clear people I interviewed, the survivors were
23 different.

24 And it was a remarkable experience
25 for me. I felt I was stepping back into history. I

1 was told what the -- I would walk in and their shades
2 would be drawn on their windows. I was told how they
3 would offer me food. And it all came to pass. And I
4 think that really influenced me a lot in this book
5 because I was just so taken with that whole experience.

6 But the non-Jews I interviewed, some
7 were very committed to the survivors, but none of them
8 was traumatized like they were.

9 MR. FOTHERGILL: Fair enough. Can
10 you turn, please, to page 90?

11 DR. DOWNS: 90?

12 MR. FOTHERGILL: Nine zero. You make
13 another very interesting observation at the bottom of
14 the page. You note that the courts eventually struck
15 down Skokie's legal obstacles in the name of the First
16 Amendment.

17 DR. DOWNS: Right.

18 MR. FOTHERGILL: So survivor
19 activists associated with the court's First Amendment
20 position at Skokie with a lack of governmental and
21 communal protection. And I put it to you that the fact
22 that a government passes an ordinance itself sends a
23 message to those who are the benefits -- enjoy the
24 benefits of the protection. The government does in
25 fact care about them and they are important.

1 DR. DOWNS: Right. But there are
2 many other ways a government can do that, as I said
3 earlier.

4 MR. FOTHERGILL: Yes. But I want
5 you, first of all, to stay with me for the first
6 proposition. You agree, yes?

7 DR. DOWNS: It depends. One would
8 think so. There's a presumption in that direction.

9 MR. FOTHERGILL: Well, in fact, you
10 told us this morning quite emphatically that the manner
11 in which the government applies law sends a message.
12 Do you remember when you said that?

13 DR. DOWNS: Yes.

14 MR. FOTHERGILL: You said that quite
15 emphatically. It sends a message when the government
16 applies a law. It sends a messages when the government
17 doesn't apply a law, correct?

18 DR. DOWNS: Uh-huh.

19 MR. FOTHERGILL: And I suggest to you
20 it sends a message when the government passes a law?

21 DR. DOWNS: Right. But when a
22 government passes a law in speech we now have another
23 available that comes into it.

24 MR. FOTHERGILL: And we will discuss
25 that. We are just taking the propositions one at a

1 time.

2 Page 91 you have a subheading which
3 is, "Breakdown of Civility", and you say:

4 "Although civility is intimately
5 related to the protective
6 function of a community it may
7 be treated separately because it
8 entails a different set of
9 values and because it's a
10 violation of Skokie constitutes
11 a cost in itself."

12 And then -- sorry, we'll continue a
13 little bit here:

14 "Civility includes the general
15 mental and emotional tone of a
16 community --"

17 THE CHAIRPERSON: "Civility
18 involves."

19 MR. FOTHERGILL: "Civility involves
20 the general mental and emotional tone of the community
21 which is conducive to the basic respect of the dignity
22 and individuality of others. On the one hand, it
23 entails treating others politely with due respect."

24 And you continue in the next
25 paragraph."

1 "There are two forms of mental
2 'invasion' when civility
3 declines. On a macro level the
4 general tone of society can
5 affect the mind. On a micro
6 level individual acts of
7 incivility can disturb targeted
8 individuals."

9 And you identified this as a cost
10 separate and apart from the other costs we discussed,
11 correct?

12 DR. DOWNS: Uh-huh.

13 MR. FOTHERGILL: And there's nothing
14 about your thinking of the last 20 years that could
15 cause you to radically revisit that proposition?

16 DR. DOWNS: No. But again, note how
17 I link it to the targeting idea.

18 MR. FOTHERGILL: Yes, all right.

19 DR. DOWNS: I think in the
20 intervening 20 years I've come to see this more as a
21 survivor issue in ways I've already articulated. So I
22 have modified on that.

23 But in principle, I had mentioned the
24 Galveston Bay case where the Ku Klux Klan circling the
25 Vietnamese fisherman. Certainly that would be an

1 example.

2 So I think what I've done is I've
3 modified the extent of the harm for a broader category
4 of individuals who were exposed. And I've also become
5 more appreciative of the sort of the downside of these
6 kinds of regulations. But the proper kind of situation
7 I would be willing to apply to this. I've never
8 completely disavowed Nazis in Skokie.

9 MR. FOTHERGILL: If we turn to the
10 next major subject in this chapter, the "Other Slippery
11 Slope", page 91, you wrote:

12 "A related, potential harmful
13 result should be discussed
14 briefly even though it is
15 speculative. Though the NSPA
16 failed to gain adherents to its
17 advocacies concerning Skokie
18 (indeed, the immediate
19 marketplace of ideas bestowed
20 victory upon the survivors), it
21 is possible that in conferring
22 the First Amendment right upon
23 the NSPCA, the courts
24 simultaneous conferred a subtle
25 hidden measure of legitimacy

1 upon the group and its ilk. If
2 so, the general long-range
3 effect of such constitutional
4 protection could be to confer
5 legitimacy upon such groups."

6 And you continue by quoting Alexander

7 Bickel:

8 "Where nothing is unspeakable,
9 nothing is undoable."

10 And you say:

11 "The law is a teacher and many
12 people may psychologically
13 associate legality with
14 morality, even if such
15 association is unsophisticated."

16 I take it you'll agree with me this
17 is another version of what we just discussed, the law
18 itself sends a message regarding the norm of --

19 DR. DOWNS: I think this proposition
20 is the one that I have moved away from most
21 dramatically compared to the other ones, especially
22 given my much deeper understanding of the free speech
23 tradition. That, by not punishing this kind of speech,
24 as long as you're pushing anti-discrimination policies
25 in other areas, I don't believe it sends that kind of

1 message any more. I might. I'm not going to
2 completely dismiss it. It's a complex world, but I
3 think I made much too big of a point about it here.

4 MR. FOTHERGILL: But nonetheless --

5 DR. DOWNS: That's where my
6 experience has changed me.

7 MR. FOTHERGILL: Fair enough.
8 Nonetheless, the principle -- the law has a role in
9 defining societal norms. You don't -- from that?

10 DR. DOWNS: Oh, of course not. But
11 it's not in the one-to-one relationship because -- you
12 know, the role that a law takes can become
13 counterproductive. It can lead to unintended
14 consequences and things like that.

15 MR. FOTHERGILL: The next major
16 heading in this chapter is the "Threat of Violence":

17 "The final important harm to
18 note is the threat of violence
19 at Skokie."

20 And you identify two elements. You
21 said, first of all -- and I hope I'm doing this in the
22 right order, but at the end of the paragraph:

23 "...groups who legitimately feel
24 assaulted usually cannot rely on
25 the law to quiet speakers who

1 verbally or symbolically assault
2 them, and will be inclined to
3 take the law into their own
4 hands. This is one of the worst
5 lessons the law can teach."

6 So you raise the possibility that if
7 law doesn't exist or if it's ineffective, it encourages
8 essentially vigilante justice, correct?

9 DR. DOWNS: I think I overstated that
10 back then. Where I stand now with much more
11 experience, I haven't really seen that happen.

12 MR. FOTHERGILL: And I suppose to be
13 consistent with the evidence you gave us this morning,
14 this is what we would put under the heading of your
15 anecdotal expertise in the sense that you haven't done
16 a systematic --

17 DR. DOWNS: I don't think anybody
18 has.

19 MR. FOTHERGILL: This is a
20 possibility that you raised without ever having done a
21 systematic study?

22 DR. DOWNS: Yes. I think both this
23 comment and the one I made in response --

24 MR. FOTHERGILL: Yes. There are two
25 sides of this coin.

1 DR. DOWNS: Absolutely.

2 MR. FOTHERGILL: Either that the
3 failure of law will promote vigilante justice or the
4 existence of the law may goad people into violence,
5 they are a rough equivalent, are they not?

6 DR. DOWNS: Say that again.

7 MR. FOTHERGILL: Yes. I'm suggesting
8 there are two sides to this violence coin. On the one
9 hand, the absence of laws may incite violence and,
10 conversely, the presence of laws may legitimize --

11 DR. DOWNS: -- presence or absence of
12 laws in the context of what other laws are there there.
13 And so I'm thinking for the American context, if
14 there's not a law restricting a certain form of hate
15 speech, there are many other messages being sent by
16 state that we are there to protect you, and we don't
17 abide by discrimination. So it's hard to isolate.

18 MR. FOTHERGILL: We will review the
19 conclusion and that might be appropriate time to take a
20 break.

21 The conclusion on page 93. You said:

22 "The major harmful consequence
23 at Skokie was the infliction of
24 mental trauma on the survivors.
25 This infliction entailed the

1 NSPA's intentional triggering of
2 painful memories in the
3 survivors as well as the threat
4 of an attack on the protected
5 community."

6 THE CHAIRPERSON: Where are you
7 reading from there?

8 MR. FOTHERGILL: Under the heading
9 "Conclusion" on page 93.

10 "The major harmful consequence
11 at Skokie."

12 THE CHAIRPERSON: What are we looking
13 for?

14 MR. FOTHERGILL: There's a heading
15 reads "Conclusion", and I'm just reading that first
16 paragraph.

17 THE CHAIRPERSON: "When the result of
18 mastery".

19 MR. FOTHERGILL: We're about to get
20 there.

21 "So the major harmful
22 consequence at Skokie was the
23 infliction of mental trauma on
24 the survivors. This infliction
25 entailed the NSPA's intentional

1 triggering of painful memories
2 in the survivors as well as the
3 threat of an attack on the
4 protected community. Survivors
5 felt exposed to hostile forces
6 from which they felt a civilized
7 society and government should
8 protect them. Accordingly,
9 their trauma appears to have
10 involved both personal and
11 communitarian dimensions. They
12 also construed their trauma as a
13 breakdown of civility."

14 THE CHAIRPERSON: I do not have that.
15 I'm sorry.

16 MR. FOTHERGILL: Do you not have page
17 93?

18 THE CHAIRPERSON: Conclusion. The
19 next page also says conclusion. If you flip two pages,
20 that also says "Conclusion".

21 MR. FOTHERGILL: I won't repeat it.
22 I was simply reading the first paragraph.

23 You end your conclusion by saying
24 that the finding in the next two chapters pull in the
25 opposite direction and that begins the discussion of

1 the positive consequences that you identified as a
2 result of the Skokie incident, and we'll talk about
3 that when we're back.

4 THE CHAIRPERSON: Fine. 15 minutes.

5 --- Recess taken at 2:45 p.m.

6 --- Upon resuming at 3:06 p.m.

7 MR. FOTHERGILL: We were at page 120
8 of the excerpts from your book "Nazis in Skokie", tab 4
9 of AGC-2.

10 This is the conclusion that the Chair
11 was reading from a moment ago. And this is summary of
12 some of the positive consequences that you observed
13 resulting from the Skokie incident.

14 And the first positive consequence
15 that you note is that the process of free speech at
16 Skokie contributed to debate about the nature of
17 Naziism and about the principles and limits of free
18 speech itself, and you thought these results were
19 praiseworthy, correct?

20 DR. DOWNS: Hm-hmm.

21 MR. FOTHERGILL: You then talk of
22 mastery, and if I understand this idea, it's that when
23 victims have the opportunity to confront and overcome
24 their fears, that is a positive development for them.

25 But nonetheless, in this book you ask

1 the question: Did the speech right extend for far at
2 Skokie despite the beneficial results we found,
3 correct?

4 DR. DOWNS: Right.

5 MR. FOTHERGILL: Because -- and I'm
6 now reading from the bottom of that paragraph:

7 "As we saw in Chapter Five, the
8 controversy also generated
9 substantial harms, such as
10 emotional trauma, breakdown of
11 civility and threat of massive
12 violence."

13 So I want to suggest to you that that
14 is complex phenomenon in a couple of important respects
15 that you've been touching upon.

16 It's complex on a psychological level
17 because the impact of hate speech is in fact quite
18 difficult to ascertain with accuracy, correct?

19 DR. DOWNS: Yes.

20 MR. FOTHERGILL: And as a result of
21 that it becomes complex in legalistic sense when one
22 determines what the appropriate response is; isn't that
23 right?

24 DR. DOWNS: Uh-huh.

25 MR. FOTHERGILL: Let me deal with the

1 first idea, which is that the psychological effect of
2 hate speech is a complicated phenomenon and, therefore,
3 worthy of study, correct?

4 DR. DOWNS: Uh-huh.

5 MR. FOTHERGILL: You are saying
6 uh-huh but you have to say yes for the record?

7 DR. DOWNS: Yes.

8 MR. FOTHERGILL: And this harkens
9 back to your idea of the consequences matter. And
10 you've made some efforts to inform yourself of the
11 psychological consequences of hate speech?

12 DR. DOWNS: Yes.

13 MR. FOTHERGILL: And you've done that
14 primarily by reviewing literature not only in the field
15 of sociology but actually in the field of psychology?

16 DR. DOWNS: Yes.

17 MR. FOTHERGILL: There was one
18 article that was produced by Ms Kulaszka, I take it at
19 your suggestion, is that right, at tab 5 of Exhibit
20 R-9? It's an article entitled:

21 "Understanding the Harm of Hate
22 Crime by Robert J. Boeckmann
23 and Carolyn Turpin Petrazino."

24 DR. DOWNS: Tab?

25 MR. FOTHERGILL: It's tab 5.

1 DR. DOWNS: Right.

2 MR. FOTHERGILL: And you've seen this
3 article before obviously?

4 DR. DOWNS: Yes.

5 MR. FOTHERGILL: And I think in
6 response to a question from Ms Kulaszka you said that
7 this was one of the articles that influenced your
8 conclusion that in fact the harm of hate crime, and
9 indeed hate speech, is a complicated phenomenon?

10 DR. DOWNS: Yes, it is.

11 MR. FOTHERGILL: And I take it if we
12 look at the abstract of this article that what is
13 impressive about the article and the articles it refers
14 to is its interdisciplinary approach. Is that fair to
15 say?

16 DR. DOWNS: Yes.

17 MR. FOTHERGILL: So we see in the
18 third sentence of the abstract:

19 "Theory and research from
20 sociopsychological, criminology
21 and legal studies are utilized
22 to describe this context. We
23 present summaries of the
24 multi-disciplinary contributions
25 to this issue."

1 And so from your perspective, this is
2 an impressive article because it actually tries to make
3 some sense of the complexity of the phenomenon,
4 correct?

5 DR. DOWNS: It's a worthwhile article
6 to look at, yes.

7 MR. FOTHERGILL: This was published
8 in 2002, so it's also comparatively recent?

9 DR. DOWNS: Yes.

10 MR. FOTHERGILL: If we look at page
11 209 of this article. The last paragraph before the
12 heading, "Defining hate speech" we see the following:

13 "There is empirical evidence
14 that suggest the impact of hate
15 crime victimization exceeds that
16 of ordinary crime
17 victimization."

18 And there's a citation there:

19 "The realization that one's
20 community may be targeted
21 because of its immutable or
22 prominent characteristics slowly
23 erodes feelings of safety and
24 security."

25 And there's another citation:

1 "Although this protracted harm
2 argument may also be made for
3 crimes such as sexual assaults,
4 hate crimes further distinguish
5 themselves into important areas.
6 One, the historical continuity
7 of hate crime victimization of
8 racial minorities, Jews and
9 homosexuals; and, two, the
10 complicity of mainstream
11 institutions and culture in
12 their victimization."

13 And there's another citation.

14 DR. DOWNS: Right.

15 MR. FOTHERGILL:

16 "Given this context, the harm
17 factor and hate crime is
18 distinctive and far reaching and
19 must be made part of the
20 definitional aspects of hate
21 crime."

22 I take it you have reason to disagree
23 with the statements --

24 DR. DOWNS: I do partially. It
25 depends again on the context. There's a book by Jacobs

1 and Potter called, "Hate Crimes: Identity Politics and
2 the Criminal Law", where they themselves -- and they
3 also go through competing literature that shows that in
4 some cases -- again, this is a complicated matter. But
5 in many cases victims of non-hate-related violent
6 crimes feel just as traumatized and stressed out. So
7 it also depends. Also, the complicity of mainstream
8 institutions and culture in their victimization, that's
9 certainly true of Nazi Germany.

10 MR. FOTHERGILL: Excuse me?

11 DR. DOWNS: But that was part of what
12 they said here.

13 MR. FOTHERGILL: I appreciate that.
14 But, essentially, you're now trying to address us first
15 as a psychologist and, secondly, as a historian who has
16 discussed Nazi Germany.

17 MS KULASZKA: I would object.

18 DR. DOWNS: I'm just answering your
19 question.

20 MS KULASZKA: He referred to this
21 article and if that is what the article deals with, Dr.
22 Downs should be allowed to talk about it.

23 MR. FOTHERGILL: Mr. Hadjis, my point
24 is Dr. Downs hasn't been qualified to give us expert
25 evidence on the subject of psychology or history as it

1 relates to Naziism, major social upheavals throughout
2 history.

3 I don't think that the answer is
4 necessitated by my question. I submit he is required
5 to answer the question within his area of expertise.
6 If he wishes to, frankly, acknowledge that the answer
7 is beyond his expertise he's certainly at liberty to
8 say so. Just because I asked the question, doesn't
9 imbue him with any pretended expertise that he may wish
10 to call upon to answer it.

11 THE CHAIRPERSON: On the first
12 component, though, which is the psychological aspect,
13 this paragraph seems to be dealing with that, the whole
14 concept of victimization.

15 MR. FOTHERGILL: It does, and the
16 proposition I put to Dr. Downs is he has no basis upon
17 which to disagree with that, and indeed the proposition
18 is he simply is not qualified to disagree with it.

19 THE CHAIRPERSON: But he did indicate
20 that he read some authority that would indicate
21 different findings from another study.

22 MR. FOTHERGILL: Yes, and we have
23 that evidence.

24 DR. DOWNS: No, you don't.

25 MR. FOTHERGILL: Sorry?

1 DR. DOWNS: You don't have that
2 evidence. That was another work that I referred to.

3 THE CHAIRPERSON: Another work. You
4 said there is another work that has differing views.

5 DR. DOWNS: I signed the book.

6 THE CHAIRPERSON: I heard the word
7 "Nazi" and I everything got interrupted.

8 MR. FOTHERGILL: We'll hear --

9 THE CHAIRPERSON: Why don't we just
10 continue with your question again and let's see.

11 MR. FOTHERGILL: So Dr. Downs, you
12 feel you are in a position to disagree with all of
13 these studies?

14 DR. DOWNS: No. I'm in a position to
15 say there are others who disagree who are reputable, or
16 disagree to an extent that's worth talking about.

17 MR. FOTHERGILL: Thank you. If we
18 turn to the heading "Define Hate Speech," you did
19 express some concern in your examination-in-chief about
20 definitional issues. Do you recall that?

21 DR. DOWNS: Yes, I do.

22 MR. FOTHERGILL: We see under the
23 heading, "Defining Hate Speech" the following statement
24 in the middle of that section at the bottom page 209:

25 "Most of the articles examining

1 hate speech refer to C.R.
2 Lawrence, Matsudi Delgado and
3 Crenshaw 1993, which defines
4 hate speech as speech that one
5 has a message of racial
6 inferiority; two, is directed
7 against a member of a
8 historically repressed group,
9 and; three, is persecutory,
10 hateful and degrading."

11 Based on your readings, is that a
12 fairly consistent definition of hate speech that's used
13 in literature?

14 DR. DOWNS: It's close enough.

15 MR. FOTHERGILL: Let us turn --

16 DR. DOWNS: Though some do not
17 emphasize point two. I'm not sure what that means,
18 "directed against". Does it mean concretely?
19 Physically directed against? Does it simply mean that
20 its message is in some broad sense directed at? So I
21 don't know that means.

22 MR. FOTHERGILL: Page 212. I think
23 this is the final argument in the section dealing with
24 societal perspectives balancing freedom and equality.
25 This is an introductory article to a series of essays?

1 DR. DOWNS: Yes.

2 MR. FOTHERGILL: So the authors of
3 this particular overview state on page 212
4 approximately half way down:

5 "In the section's final article,
6 subtle, pervasive, harmful,
7 racist and sexist remarks in
8 public is hate speech. Laura
9 Neilson further examines the
10 tension between the value of
11 freedom as embodied in the First
12 Amendment and social pressures
13 to sanction those who violate
14 the equally cherished value of
15 social equality. This analysis
16 provides a vivid and vitally
17 important detail to the context
18 that is established for the
19 issue. In particular, her
20 interview data give lucid and
21 empathic voice to the victims of
22 offensive speech that are often
23 muted in more abstract and
24 academic discourse on the legal
25 status of hate speech. Thus,

1 Neilson's article boldly
2 contrasts the more dispassionate
3 legal analysis that is typically
4 found in analyses of case law
5 with the visceral accounts of
6 those who are victimized by hate
7 speech in their daily lives."

8 The text continues:

9 "This juxtaposition highlights
10 tensions between first and
11 Fourteenth Amendment protections
12 but does so in a fashion that
13 questions the assertions made by
14 advocates of unqualified First
15 Amendment protections. In
16 particular, these accounts of
17 the victims of offensive speech
18 reveal the extent to which these
19 communications create a starkly
20 different and unequal social
21 environment for their targets.
22 Further, the characteristics of
23 this ensuing environment serves
24 to limit the opportunities and
25 freedoms of hate speech targets

1 and reifies existing social
2 hierarchies, thus impinging upon
3 victims civil rights."

4 And I just want to end this excerpt
5 with the following -- in fact it just continues:

6 "The accounts of victims
7 offensive speech presented by
8 Neilson also calls us to
9 question the valuable content of
10 hate communications. Advocates
11 restricted here as to First
12 Amendment protections argue that
13 censorship consignments,
14 important minority and divergent
15 political viewpoints that can be
16 the stimulus for debate and
17 change. It is difficult to
18 align this critique with the
19 verbatim accounts encountered on
20 the street which seem to have
21 little, if any, political
22 content."

23 And the conclusion of this overview
24 in the next paragraph is:

25 "The articles in this section

1 provide clear evidence of
2 emergent disapproval of biased
3 offences and argue for formal
4 sanction to prevent the harm
5 they create."

6 And I will ask you the same question.
7 You have no reason to disagree with those conclusions,
8 do you?"

9 DR. DOWNS: Not per se, but it
10 depends on the context. She's talking about direct
11 encounters. I have a student who has been exposed to
12 racial epithets about once a month. We just had a talk
13 last week about it. And I was talking to him, how can
14 you deal with it constructively? Should you tell the
15 police? At least have a look out to see if anything
16 bad is going to happen from it, whatever. It can be
17 harmful.

18 But that's different, say, from an
19 editorial in a newspaper, something put on a web page.
20 So the context is important in terms of this response.

21 MR. FOTHERGILL: We started to
22 discussion by acknowledging that the harmful effects of
23 hate speech are complex, therefore, require complicated
24 responses. And you praise this article in part for
25 respecting that complexity, yet at the same time we see

1 some form of consensus, at least in review of the
2 literature, that formal sanction to prevent the harm is
3 warranted.

4 DR. DOWNS: Yes. The question is,
5 under what situations are they warranted? As I already
6 stated, I do think there are certain contexts in which
7 they would be warranted.

8 MR. FOTHERGILL: All right. If we
9 can continue then on page 213 under the heading
10 "Societal Perspectives and Policy Implications". At
11 the end of that first paragraph we read the following:

12 "The public needs to develop a
13 balanced understanding of the
14 implications of unqualified
15 First Amendment protections and
16 Fourteenth Amendment assurances.
17 Developing such an understanding
18 and translated into policy has
19 three objectives."

20 I would like to turn directly to the
21 third:

22 "Legislators to strengthen hate
23 crime statutes. Levin, this
24 issue reminds us that there are
25 currently eight states with no

1 hate crime laws and that several
2 others do not include gender or
3 sexual orientation in their
4 protected categories. States
5 must undergo a periodic review
6 to determine if their hate crime
7 statutes which omitted some
8 statuses but include others,
9 continue to reflect the public's
10 interest and to assess whether
11 there are consequences to
12 omitted statuses that result in
13 public safety concerns."

14 And at the bottom of that paragraph:
15 "Thus, hate crime statutes
16 should be comprehensive and
17 uniform to ensure civil rights
18 are protected."

19 Obviously, that's a statement of
20 policy, legislative policy. And I'm not going to ask
21 you whether you agree or disagree with it. I suspect
22 you probably don't. The point I want to make here
23 is --

24 DR. DOWNS: Not necessarily. She's
25 talking about hate crimes.

1 MR. FOTHERGILL: Yes, she is.

2 DR. DOWNS: Not hate speech.

3 MR. FOTHERGILL: Fair enough. So
4 there is a valid distinction there.

5 DR. DOWNS: The point that I've
6 stressed many times today.

7 MR. FOTHERGILL: But at the same
8 time, despite the complexity there seems to be at least
9 some consensus in this literature that --

10 DR. DOWNS: Based on the book that I
11 mentioned earlier, Levitt's findings had been subject
12 to some debate.

13 MR. FOTHERGILL: All right. There is
14 a brief reference to the Internet at the bottom of the
15 page here:

16 "The Internet is used as a tool
17 of hate crimes in some
18 jurisdictions, especially
19 foreign nations. Legislators
20 and law enforcement must
21 consider reconfiguring laws to
22 better work in concert with
23 other authorities investigating
24 possible hate crimes."

25 As 11 this issue indicates:

1 "Hate organizations have used
2 the Internet to threaten,
3 intimidate and incite harm to
4 others."

5 So you agree with me that that is
6 something which is documented in the literature.

7 DR. DOWNS: Yes, it would depend on
8 what was said. Is it incitement? I'll give you an
9 example, if you like.

10 MR. FOTHERGILL: If I wish.

11 DR. DOWNS: You may have heard of the
12 Nuremberg files in United States where anti-abortion
13 groups would list the names and addresses and contact
14 numbers of abortion doctors. After the doctor had been
15 killed they would put a line through their name.

16 And it wasn't a prosecution, it was a
17 civil suit, but enough to drive them out of business
18 for the rest of their natural lives.

19 But that would certainly be an
20 example of incitement. That would be different from
21 putting an opinion on a web page. You know,
22 solicitation, enticing -- some sort of encouragement to
23 commit a crime could cross that line between speech and
24 expressive conduct that would be prohibited. It would
25 depend on what was said.

1 MR. FOTHERGILL: Thank you.

2 DR. DOWNS: So it really depends what
3 you mean by incite here.

4 MR. FOTHERGILL: Let's talk about an
5 example which I'm going to suggest to you is not an
6 actual example of incitement, and this is on page 218
7 of the article.

8 THE CHAIRPERSON: 218?

9 MR. FOTHERGILL: 218. Which is
10 headed, "Victim Perspectives Impact and Response". And
11 this section begins with the following:

12 "The primary issue in the
13 recurring debates concerning
14 hate crime legislation."

15 Let me pause again and acknowledge
16 that we're talking about hate crime legislation.

17 "...is where the bias motivated
18 assaults, for example, are
19 qualitatively different from
20 non-biased motivated assaults
21 thereby justifying different or
22 enhanced punishments."

23 Then towards the bottom of the
24 paragraph we seen excerpt from Hoffman, 1997,
25 "High-Tech Hate Extremist Use of the Internet", which I

1 think is a publication that has been referred to
2 previously in the proceedings.

3 As an example of communication that
4 may have characteristics unworthy of First Amendment
5 protection. And there's a quotation:

6 "The scenario is simple. The
7 user owns his/her e-mail box and
8 discovers the following message.
9 'Subject: Idiotic Jews who waste
10 their lives away. All you
11 pathetic Jews should go to hell
12 with your lame-ass skullcaps.
13 I've killed two Jews in my life
14 and I'll make sure to continue
15 killing you cocksuckers. Die
16 you worthless good-for-nothing
17 Christ killers'."

18 And the text continues:

19 "The lack of clear political
20 content, the offensiveness of
21 such statements, the harmful
22 psychological impacts and the
23 subsequent inhibition of the
24 victim's personal freedom assume
25 to accompany them could be used

1 as justification for hate speech
2 and hate crime legislation."

3 And you have no reason to disagree
4 with that analysis?

5 DR. DOWNS: No, I don't. This is
6 clearly a threat.

7 MR. FOTHERGILL: It's a threat but
8 it's hardly an incitement to imminent violence.

9 DR. DOWNS: No, but a threat alone
10 constitutes a harm because of the impact it has on the
11 individual.

12 MR. FOTHERGILL: Right. This is an
13 interesting --

14 DR. DOWNS: Really two questions.
15 Two issues of harm. One is, X, here's message Y and
16 commits act Z. That's encouragement, advocacy, maybe
17 bordering over to incitement depending on the facts.
18 There's where you are talking more about cause and
19 effect in a somewhat strung out manner.

20 The second issue is the threat
21 itself. As soon as that threat is made the harm is
22 there. You are not worried about whether or not it's
23 going to be acted upon. Threats are a distinct kind of
24 harm, and this statement clearly represents that.

25 MR. FOTHERGILL: And threats are a

1 distinct kind of harm because of the interference,
2 sometimes the profound interference they have with
3 somebody's sense of personal security and their ability
4 to function and flourish in society, correct?

5 DR. DOWNS: Well, in particular, I
6 argue the personal security aspect of it. Lot of
7 things in life compromise our feelings about our
8 ability to function in society. That is an add-on.
9 But what really matters here is the lack of security
10 one is going to feel by the threat. Similar to
11 self-defence law, that -- does one reasonably believe
12 that one is in imminent danger of death or serious
13 bodily harm?

14 For a threat to be a threat, it
15 necessarily -- doesn't have to be even imminent. I'm
16 going to kill you next week. That wouldn't give you
17 the right to use self-defence against that person
18 necessarily, because it would be pre-emptive attack.
19 But in terms of the harm you would feel, the threat you
20 would feel to your life, that seems to be very real.
21 There's an aspect of a psychological, emotional impact
22 that I think definitely has to be taken seriously.

23 MR. FOTHERGILL: But in this
24 example -- and perhaps we need a few more particulars
25 about it -- it seems to me this is some sort of

1 anonymous communication that has no real air of
2 reality?

3 DR. DOWNS: I don't see why that
4 would matter.

5 THE CHAIRPERSON: Why what?

6 DR. DOWNS: I don't see why that
7 would matter. Hard to figure out who did it, but the
8 impact would be the same.

9 MR. FOTHERGILL: So the violation of
10 one's sense of security could be sufficiently profound.

11 DR. DOWNS: Here you have the
12 definite target here. He sent a letter to a person who
13 said that. If he called someone up on the phone and
14 said this, I don't think any one -- very few people
15 would argue that that wasn't a threat that could be
16 criminalized. Sending it by the Internet shouldn't
17 make any difference.

18 MR. FOTHERGILL: I think in principle
19 you are right. But what isn't apparent here is just
20 how personalized this is. This could be a mass
21 e-mailing to a large group of -- that is predominantly
22 Jewish. I take it you agree with me it would still be
23 offensive and susceptible to prohibition?

24 DR. DOWNS: Yes, but my reasons are
25 not because it's offensive, because it's a threat.

1 MR. FOTHERGILL: True. But it could
2 be a generalized threat. A community could feel that
3 it had been --

4 DR. DOWNS: The difference is that it
5 was sent directly to you. Maybe -- I haven't thought.
6 Maybe if it is a massive kind of e-mail there might be
7 a different appropriate legal response. I'm not
8 inclined to say that that would be so, but I'm open to
9 talking about it. But what really matters is this was
10 sent and targeted at a particular individual. Quite
11 different from saying "Mein Comp" being available in a
12 bookstore. In other words, the harm is very direct.

13 MR. FOTHERGILL: In that particular
14 example?

15 DR. DOWNS: And demonstrable, yes.

16 MR. FOTHERGILL: And is experienced
17 that way, by suggesting to you that vilification which
18 is voiced more generally could have a similar visceral
19 effect on somebody who --

20 DR. DOWNS: It might, but I would
21 argue it's a matter of legal sanction. We should be
22 more reticent to conclude that it would fit the same
23 category as something that was sent directly a person.

24 MR. FOTHERGILL: Let's end our
25 discussion about this article --

1 DR. DOWNS: -- that's consistent with
2 Nazis in Skokie.

3 MR. FOTHERGILL: Thank you. Let's
4 end our discussion with the article at page 221,
5 please. There's a subheading that read, "Hate Crime
6 and Hate Speech As Unique Offences." And I want to
7 note on a preliminary basis that what follows relates
8 not just to hate crime but also to hate speech.

9 THE CHAIRPERSON: Let me catch up.

10 MR. FOTHERGILL: Page 221. The
11 research carried out by Harrick and Colleagues, and
12 Boechmann and Lieu provides evidence that:

13 "Offensive behaviour motivated
14 by hate towards a class of
15 people results in responses
16 unique to this type of crime and
17 speech. This evidence can be
18 used as part of a body of
19 knowledge that justifies the
20 special status of hate crime
21 legislation and may support
22 further development of
23 restrictions on hate speech.
24 Harrick and Colleagues note that
25 even minor expressions of

1 hostility towards minorities can
2 be traumatic, given that
3 minorities are well aware of the
4 extreme violence that has been
5 perpetrated on members of their
6 group."

7 The point, Dr. Downs, at least here
8 in the literature we see evidence that minor
9 expressions of hostility towards minorities can be
10 traumatic simply based on the context in which they are
11 expressed. And you have no reason to disagree with
12 that?

13 DR. DOWNS: Depending on the
14 situation, but not necessarily.

15 MR. FOTHERGILL: We've talked about
16 targeted racial vilification, and I would like to talk
17 about it a little bit more with reference to I think
18 "Nazis in Skokie" at page 131.

19 DR. DOWNS: 131?

20 MR. FOTHERGILL: Yes, AGC-2, tab 4,
21 page 131.

22 THE CHAIRPERSON: Tab 3?

23 MR. FOTHERGILL: Tab 4.

24 THE CHAIRPERSON: Page 141?

25 MR. FOTHERGILL: 131. We see the

1 heading:

2 "Application of the Free Speech
3 and Harm Principles to Skokie
4 and Similar Cases."

5 You begin with the following words:

6 "In this section we will analyze
7 actual and hypothetical cases in
8 order to demonstrate why
9 targeted racial vilification
10 inflicts a harm which is
11 substantial enough to give rise
12 to a compelling state interest
13 in the abridgement of the
14 expression. Targeted racial
15 vilification is derogatory
16 reference to race, directed at a
17 pre-determined target for the
18 purpose of intimidation."

19 And you then explain your method.

20 You say:

21 "First, I will show how targeted
22 racial vilification inflicts a
23 special kind of harm, which is
24 clearly distinguishable from the
25 harms caused by other forms of

1 unpopular disputatious speech.
2 Second, I will show how such
3 speech is inconsistent with the
4 basic liberal values and
5 justifications of the First
6 Amendment as well as with a
7 balanced principle of ultimate
8 ends."

9 Do you still agree with that
10 statement?

11 DR. DOWNS: I would qualify it
12 somewhat now. But certainly -- I do agree with it in
13 terms of racial vilification targeted at an individual
14 in a manner in which a reasonable person would construe
15 as being a threat.

16 The fact that it's a racial
17 vilification I think is evidence toward that. It may
18 not be conclusive, but it's certainly evidence toward
19 it. So I'm somewhat more qualified on that.

20 MR. FOTHERGILL: Thank you. What is
21 interesting, and I suggest potentially useful about
22 your analysis -- sorry?

23 DR. DOWNS: I wanted to add, I
24 also -- some ways I would apply this more broadly
25 rather than just singling out race. I think many other

1 ways in which target vilification can be seen as a
2 threat depending on whether or not race should just be
3 one category but stressed among others is another
4 question. I tend to be more in favor of just a broad
5 approach.

6 MR. FOTHERGILL: Would you agree with
7 me that the broad approach you are referring to is
8 essentially vilification based on immutable
9 characteristics?

10 DR. DOWNS: It could be broader than
11 that. It would have to amount to a threat.

12 MR. FOTHERGILL: All right. So --

13 DR. DOWNS: The fact that it's racial
14 because of what is said here in the piece we just
15 looked at, makes it more likely to be a threat, just in
16 the way that a hate crime motivated by race is more
17 likely to make it a hate crime than maybe something
18 else.

19 MR. FOTHERGILL: I want to --

20 DR. DOWNS: Doesn't mean the law
21 should be based on that alone.

22 MR. FOTHERGILL: Thank you. I want
23 to talk to you about the basic values of the First
24 Amendment as you discuss it here, but I think this is
25 something that might assist the Tribunal in

1 understanding the values of the speech that is being
2 prohibited by the legislation.

3 You say:

4 "The free speech values that we
5 will utilize in the following
6 analysis are a codification of
7 the free speech justifications
8 discussed in Chapter 1,
9 self-government, which includes
10 republican virtue and autonomy."

11 And you expand on that a bit in that
12 paragraph and essentially you include the:

13 "People must be allowed to
14 decide for themselves which
15 ideas are good and which ideas
16 are bad. If the government
17 senses or punishes such ideas
18 because of an undifferentiated
19 fear of their acceptance, the
20 government usurps the process of
21 intellectual and moral autonomy
22 and responsibility which
23 constitutes the heart of
24 self-government."

25 So that articulates of the purpose of

1 free speech.

2 DR. DOWNS: Those are some of them.
3 Since then I've expanded my understanding of what the
4 purposes of the First Amendment are, more complex than
5 that.

6 MR. FOTHERGILL: Seems that
7 everything is complex?

8 DR. DOWNS: Yeah. But you have the
9 individual right, the issue of consent that I talked
10 about before. Something back then I wasn't thinking
11 about.

12 MR. FOTHERGILL: On page 133 you
13 wrote for an explanation of why targeted racial
14 vilification -- and you explained that that could be
15 interpreted more broadly -- doesn't actually promote
16 any of those goals; isn't that right? I'm on page 133,
17 the last paragraph. It reads as follows:

18 "In the following analysis it
19 will be shown the First
20 Amendment principles of autonomy
21 and self-government are
22 inapplicable to targeted racial
23 vilification. First, such
24 expression is not a part of
25 self-government. Second, such

1 expression violates autonomy
2 rather than honouring it.
3 Third, these principles are
4 superceded by the harm principle
5 and the principle of ultimate
6 ends as balanced by the right to
7 free speech. Finally, targeted
8 vilification violates a
9 constitutional principle that is
10 co-evil with self-government,
11 the right to be treated as a
12 person entitled to equal
13 dignity."

14 You still hold true to that analysis,
15 do you?

16 DR. DOWNS: In a sense I do, but I'm
17 also more skeptical of what you mean by "vilification".
18 What if someone were to criticize a policy of Israel in
19 the Middle East? Could that be perceived as
20 vilification of Jews. What if someone were to
21 criticize family practices or religious practices?

22 We have a case in Madison recently
23 where a professor was using as a pedagogical device but
24 talking about how different cultural values and
25 experiences sometimes run into conflict with

1 established legal norms. And he was talking about --
2 forget whether it was self-defence or some other
3 context. But he was talking about Mong and some of
4 their matrimonial practices.

5 MR. FOTHERGILL: He was talking about
6 what?

7 DR. DOWNS: Mong from Cambodia and
8 Laos. And how some of their cultural practices
9 conflict with liberal norma of marriage and things like
10 that. And he was accused of racism by his students.
11 Maybe you can Google it, it's been talked on the
12 Internet by now.

13 MR. FOTHERGILL: So --

14 DR. DOWNS: So you have to be careful
15 what we mean by that.

16 MR. FOTHERGILL: Surely that's a case
17 of misapplication again, isn't it? Over-zealous
18 enforcement, misinterpretation of what the law was
19 intended to achieve.

20 DR. DOWNS: As in Europe as we speak.

21 MS KULASZKA: And I've heard you on
22 that and we all have. But misapplication of laws is
23 something distinct from invalidity --

24 DR. DOWNS: -- I think it comes down,
25 and I am at the point when we talk about, say, the

1 racial epithet, morally reprehensible. What should be
2 done about it in terms of legal policy.

3 I'm conflicted on that. Because when
4 you open the door to that kind of punitive action, you
5 know, do you then give the state a kind of power that
6 you don't want to give it? I'm very conflicted.

7 THE CHAIRPERSON: Can you repeat
8 those last two statements?

9 DR. DOWNS: Pardon?

10 THE CHAIRPERSON: Can you repeat
11 those last two statements?

12 DR. DOWNS: I'm very conflicted
13 about, say, racial epithets directed at someone, just
14 walking down the street calling someone a racist name.
15 Morally reprehensible. But to turn it into a punitive
16 action in the absence of some clear concern about the
17 security of the individual seems to me to be very
18 problematic and something we really have to think
19 seriously about. There are certain harms that the law
20 can't reach without creating the whole host of other
21 problems. And it's right at that point. If it's a
22 threat -- you blank, I'm going get you. That's a
23 threat. I have no problem.

24 If it's publishing a book talking
25 about how maybe Hitler had the right idea,

1 reprehensible. That would be protected speech.

2 When you target someone with an
3 epithet, to me that's an intermediate category. I'm
4 reluctant to say that should be punishable because of
5 the reasons that I've talked about. But I'm
6 uncomfortable with that. I would be uncomfortable no
7 matter what we do with it.

8 MR. FOTHERGILL: I have to be honest.
9 I can't recall whether I took you to this provision in
10 your later book earlier or not. If it's repetitive, I
11 apologize to all.

12 Can I ask you to turn to the next tab
13 briefly, page 34 of the Restoring Free Speech on Campus
14 book. Do you have that front of you?

15 DR. DOWNS: Yes.

16 MR. FOTHERGILL: The middle of that
17 page you wrote, "An extensive literature developed".
18 This is in the second sentence of that paragraph:

19 "An extensive literature
20 developed that has exhaustively
21 furnished examples of
22 transgressions of free speech,
23 due process, and other liberal
24 principles."

25 This is in the application of speech

1 codes. A little later on in the paragraph you wrote:

2 "Such cases do not disparage
3 properly drafted and applied
4 anti-harassment measures. The
5 problem arises when enforcers
6 deploy anti-harassment measures
7 to deal coercively with the
8 expression of unpopular views.
9 In their minds, speech and
10 action are not inherently
11 distinct."

12 DR. DOWNS: Right.

13 MR. FOTHERGILL: So I take it that at
14 least in theory you can have a properly drafted and
15 applied anti-harassment code, but your concern is that
16 in practice it tends to be abused?

17 DR. DOWNS: That's a major concern.
18 It also depends how they are drafted. So this goes
19 back to your point earlier about due process, that you
20 could have a code that's too broad with all the due
21 process in the world and that's still going to be a
22 problem. So it is two-fold.

23 MR. FOTHERGILL: All right.

24 DR. DOWNS: Depending on the code and
25 the situation.

1 MR. FOTHERGILL: Let's go back to
2 Nazis in Skokie at page 141 where you have an
3 interesting observation about the issue of truth in the
4 context of hate speech, which is an issue that surfaced
5 several times in our discussions here.

6 In the second full paragraph 141,
7 which begins with the words, "Moreover," you wrote the
8 following:

9 "Moreover, in these
10 hypotheticals the issue of the
11 truth and falsity of such speech
12 is again extraneous to the
13 nature of the harm. OBA --" and
14 in a moment I'll get you to tell
15 us what that means "-- OBA's
16 truthful reference to property
17 values does not change the
18 nature of the intent or the
19 concomitant harmful impact.
20 Similarly, the inherently
21 assaultive nature of Nazi speech
22 act that targeted a Holocaust
23 survivor would not be altered by
24 the astute Nazis use of a sign
25 that read 'Hitler killed six

1 million Jews'. The truth of
2 this statement does not
3 magically transform the
4 inherently assaultive nature of
5 the Speech Act."

6 Now, the later example is one I think
7 we're familiar with. The OBA one is quite interesting.
8 This is a group that circulated a truthful
9 communication about the decline of property values
10 after a black family moved into a neighborhood; is that
11 right?

12 DR. DOWNS: That's correct. Panic
13 peddling or panic selling for real estate.

14 MR. FOTHERGILL: Panic selling. So
15 the statement in the leaflet was true, correct?

16 DR. DOWNS: That part of it was.

17 MR. FOTHERGILL: But nonetheless it
18 was successfully used as a form of racist speech?

19 DR. DOWNS: Yes.

20 MR. FOTHERGILL: So this is, in fact,
21 a nice description of how a truthful statement can
22 still be used for a hateful purpose, correct?

23 DR. DOWNS, yes but I would back off
24 this position now.

25 MR. FOTHERGILL: Entirely?

1 DR. DOWNS: I would want to limit it
2 to threats, insecurity, as I have before. And the mere
3 fact that the statement was made would not in itself
4 indicate that, but it would be evidence that would be
5 used to show there was a threat perhaps. This is an
6 example where I had backed off.

7 MR. FOTHERGILL: We've had some other
8 examples presented in this hearing I would like to
9 discuss with you.

10 Are you familiar with the Air India
11 bombing here in Canada?

12 DR. DOWNS: No.

13 MR. FOTHERGILL: This is -- it's over
14 17 years ago and prior to 9/11. It was the worst
15 example of a terrorist act in an aviation context ever.
16 An Air India flight was blown up by terrorists off the
17 coast of Ireland, Killed more than 300 people. And
18 there's been a lot of inquiry in this country, indeed
19 there is a public inquiry going on right now into the
20 circumstances. And it appears --

21 THE CHAIRPERSON: The point should be
22 made the plane departed from Canada.

23 MR. FOTHERGILL: Yes, I'm sorry. It's
24 considered a Canadian tragedy, despite the fact that it
25 involved an Air India airliner.

1 It's really quite well-established
2 now that the bomb was planted by Sikh extremists who
3 were acting --

4 DR. DOWNS: By what?

5 MR. FOTHERGILL: By Sikh extremists
6 who were acting in the name of Sikhism. That's a true
7 statement, or at least you can take for the purpose of
8 discussion that that's a true statement.

9 And would you agree with me that that
10 true statement becomes a hateful statement when
11 somebody says, 'And therefore all Sikhs are
12 terrorists,' or 'All Sikhs of terrorist tendencies.'

13 DR. DOWNS: It may or may not be
14 hateful. It's a stereotype. Would depend on the basis
15 for the person making that generalization. The person
16 just might be ignorant and not hateful.

17 MR. FOTHERGILL: I see. You are
18 focusing on the intent. I want to focus on the effect.

19 DR. DOWNS: When it comes to limit on
20 speech, I think intent has to be important, because the
21 nature of the Speech Act is partly predicated on what
22 the intend it.

23 MR. FOTHERGILL: You may be right in
24 a hate crime context. In a hate speech content --
25 let's just say it's a matter for debate and I think you

1 have to agree with me that possibly the Canadian and
2 U.S. approach may legitimately differ on that point,
3 right?

4 DR. DOWNS: Yes.

5 MR. FOTHERGILL: Yes. But you agree
6 with the analysis I presented, right? We start with
7 factual statements and then we turned them into --

8 DR. DOWNS: If I called somebody up
9 on the phone -- go ahead. I interrupted.

10 All right. If I call someone up on
11 the phone and I make a truthful statement and in doing
12 so I also threaten them. Tonight I'm going to kill you
13 because Hitler killed six million Jews, I made a
14 truthful statement but that doesn't negate the threat
15 whatsoever.

16 MR. FOTHERGILL: Although with
17 respect, that's an entirely different idea.

18 DR. DOWNS: When one is offering an
19 opinion about something, a belief, an opinion or a
20 truth statement, it might have hateful implications.
21 We go back to the distinction I made earlier in the
22 Alexander article about the difference between
23 gratuitous, invidious hateful comments and comments
24 which have that kind of effect because that's how it's
25 construed. I think we need to make a fundamental

1 distinction there.

2 MR. FOTHERGILL: Let's take another
3 example which perhaps will be fairer to you because you
4 provided it yourself. You referred us to a lecturer
5 who made the statement or wished to study the
6 hypothesis that homosexuals have a decreased time
7 horizon. Do you remember that example?

8 DR. DOWNS: Yes, of course.

9 MR. FOTHERGILL: And I think you
10 thought that it was unfortunate that somebody might
11 interpret that as in any way hateful or discriminatory,
12 correct?

13 DR. DOWNS: Under the circumstances,
14 yes.

15 MR. FOTHERGILL: I want to challenge
16 you a bit on that.

17 DR. DOWNS: Go ahead.

18 MR. FOTHERGILL: Because the
19 understated assumption there is that homosexuals
20 inevitably will not have families. And the reason
21 why --

22 DR. DOWNS: I disagree with that.
23 There's a statement that as of right now they are --
24 not heads of households.

25 MR. FOTHERGILL: Indeed. You're

1 starting to explode the understated assumption by
2 yourself. What makes, I'm suggesting to you, that
3 particular example suspect as a form of legitimate
4 academic inquiry is because of that buried assumption,
5 which in fact you've already identified as almost
6 certainly false. And if the person, the speaker had --

7 DR. DOWNS: But you are assuming he
8 made the statement based on the fact that homosexuals
9 never would. You don't know that.

10 MR. FOTHERGILL: No, not really.
11 What I want to suggest is if the individual who is
12 interested in the phenomenon of time horizons among
13 people who are not raising families, then you wouldn't
14 have to study homosexuals. You'd just study people who
15 are not raising families.

16 DR. DOWNS: Well, he would have made
17 another example. But are we going to charge him with
18 harassment because he didn't?

19 MR. FOTHERGILL: That I don't know.
20 But what I want you to agree with me is one can
21 legitimately wonder about the motive given that rather
22 than do the obvious thing, such as express an interest
23 in investigating whether people without families have a
24 shortened --

25 DR. DOWNS: Perhaps, but I'm smelling

1 a little bit of -- a term I want to use here, but I
2 think you are leaping to conclusions about this man.
3 And now it becomes a little more sinister.

4 He could have picked some other group
5 that hasn't been historically oppressed. He picks
6 homosexuals. He's under an affirmative obligation to
7 make sure he doesn't pick them for that reason. That
8 starts bordering on kind of thought enforcement to me.

9 MR. FOTHERGILL: To be honest, I
10 don't want to resolve the issue in this hearing room,
11 but I wanted to have the discussion to essentially
12 illustrate that there is something potentially suspect
13 about the truthful statement.

14 DR. DOWNS: Well, take many womens'
15 studies courses at major universities. Study of
16 Catherine Mackinnon, her sidekick Andrea Dworkin. Men
17 are, by their very nature, violent. It's built into
18 the wiring of men -- sexual violence is not a deviant
19 thing to do. It is the essence of being a male.

20 Well, are we now going to accuse
21 somebody who's teaching Andrea Dworkin and agrees with
22 that of hate speech? Well maybe. But it's not going
23 to get enforced in university. It was in Canada for a
24 while.

25 So I ask you -- your questioning I

1 think re-enforces the point, that once we start making
2 those kinds of judgments we end up playing with fire.
3 Intellectual freedom.

4 Now, granted what would I do as
5 professor? I'm sensitive to those things because of
6 the kind of person I am and my pedagogical philosophy.
7 But that doesn't mean I'm not going to cut someone else
8 slack who ventures down that way, in the absence of
9 more demonstrable evidence that this was an invidious
10 act.

11 MR. FOTHERGILL: Let's conclude, if
12 we can, the point on page 141 about the issue of truth
13 and falsity.

14 And you state at the bottom of that
15 page:

16 "Psychological assault
17 constitutes a harm that cannot
18 be answered. It is inherently
19 not remediable by more speech."

20 And you still agree with that
21 statement?

22 DR. DOWNS: Yes, assuming that we
23 define it correctly and have a situation in which it
24 exists. But we have to be careful. Causing offence is
25 part of the truth process. So what do we mean by

1 psychological harm? I just -- we are going to have to
2 be very careful in how we define it and we have to look
3 at really pretty clear extreme examples of it. Because
4 we all get psychologically harmed all the time by
5 things we don't like and disagree with.

6 MR. FOTHERGILL: I would like to
7 review your conclusion on the subject of target racial
8 vilification, substantive justice that begins at page
9 150. And let's take as read your statement that in
10 fact racial vilification is too narrow and could be
11 broadened to include other immutable characteristics
12 and possibly even beyond that. You say:

13 "The major aim of this chapter
14 has been to demonstrate that
15 certain forms of racial
16 vilification pose harms that are
17 distinguishable in terms of
18 severity from other forms of
19 vilification and speech
20 pertaining to either race or
21 other matters of social
22 importance. It has been shown
23 the targeted racial vilification
24 is qualitatively different from
25 non-targeted racial vilification

1 and racist speech, as well as
2 from targeted and coercive
3 speech pertaining to a person's
4 alleged political or economic
5 actions. Whereas the later
6 forms of speech are congruent
7 with the values of
8 self-government and autonomy,
9 the former type of expression is
10 not."

11 Do you still agree with that?

12 DR. DOWNS: From a moral perspective,
13 yes.

14 MR. FOTHERGILL:

15 "In demonstrating validity of
16 this conclusion the following
17 factors were highlighted
18 concerning the special harms
19 caused by targeted racial
20 vilification. One. Such
21 expression is inherently
22 assaultive. Two. Intent and
23 motive are significant factors.
24 Three. Intimidation can occur
25 in context that fall outside the

1 narrow definition of capture
2 audience. Four. Any valuable
3 or worthy speech which
4 accompanies targeted racial
5 vilification does not justify
6 protecting such speech by the
7 First Amendment because such
8 speech does not compensate for
9 the harm committed. Five.
10 Targeted racial vilification is
11 particularly virulent and
12 intimidating form of fighting
13 words."

14 And an that's accurate summary of
15 your analysis of targeted racial vilification?

16 DR. DOWNS: At that time, yes.

17 MR. FOTHERGILL: And it hasn't
18 substantially changed?

19 DR. DOWNS: No, it's just become more
20 circumspect. I mentioned punishing racial epithets
21 said to somebody, that troubles me on both sides of the
22 line.

23 MR. FOTHERGILL: How are we doing for
24 time?

25 THE CHAIRPERSON: It's 3:53.

1 MR. FOTHERGILL: I'm about to start a
2 new area. Is this an appropriate time for a break. It
3 may be too soon. I've lost track of time.

4 THE CHAIRPERSON: There's no problem
5 on this end from proceeding all the way to the end.

6 MR. FOTHERGILL: I think we should do
7 that actually. I meant genuinely when I said I've lost
8 track of time.

9 (DISCUSSION OFF THE RECORD)

10 MR. FOTHERGILL: Let us turn, Dr.
11 Downs, to "Restoring Free Speech and Liberty on the
12 Campus", tab 5 on the book you've been referring to. I
13 want to go to the conclusion of that book. Page 272.
14 You state the time bottom of that page the following:

15 "Punitive codes must not be
16 speech codes at all. They
17 should be limited to forms of
18 expression, closely linked to a
19 legal action which have
20 traditionally been subject to
21 prohibition. Threats of
22 violence, badgering, harassment
23 as traditionally understood;
24 i.e., to tire with repeated
25 exhausting efforts to weary by

1 importunity, to cause to endure
2 excessive burdens or anxieties
3 and evasions of privacy are
4 examples."

5 And I take you agree that these are
6 all forms of speech that can be legitimately
7 prohibited?

8 DR. DOWNS: Yes, or else when it
9 comes to the harassment, it would depend on the nature
10 of the harassment, either civil approach or criminal
11 approach.

12 MR. FOTHERGILL: And what struck me
13 about this is that we're now moving clearly beyond
14 imminent threats of violence. And you've, in
15 particular, included to cause to endure excessive
16 burdens or anxieties and invasion of privacy, correct?

17 DR. DOWNS: Yeah.

18 MR. FOTHERGILL: You continue:

19 "It is especially important to
20 distinguish threats or
21 intimidation from
22 offensiveness."

23 DR. DOWNS: By that I'm talking about
24 back to the excessive anxieties and excessive burdens,
25 repeated conduct -- I should be a little more explicit

1 there.

2 The tort against violation of right
3 to privacy. You have a right to have a certain
4 superior of autonomy, so no one has a right to follow
5 me up and down the street everywhere I walk saying to
6 me things I don't want to hear. I can tell that person
7 get lost. And that would be a form of harassment, or
8 badgering as I use the term.

9 And excessive burden would come
10 along -- would be along those lines, because you are
11 always exposed every day we walk out on the street, to
12 unpleasantries. We certainly don't want to criminalize
13 that.

14 MR. FOTHERGILL: You continue on page
15 273:

16 "Offensiveness is often linked
17 to ideas that one finds
18 objectionable and it is
19 notoriously difficult to define.
20 Intimidations and threats are
21 different in both respects."

22 But then you say:

23 "Furthermore, it is the duty of
24 government and institutions to
25 protect their constituency's

1 basic sense of security."

2 DR. DOWNS: Yes. That sentence
3 follows from the previous sentence.

4 MR. FOTHERGILL: It does. Just so
5 we're here, we're not limiting ourselves to
6 intimidations and threats. If it can be shown -- and I
7 appreciate different people may have different views
8 about this -- but if it can be shown that certain forms
9 of speech violate a citizen's basic sense of security,
10 I take it you would agree with me it is legitimate to
11 control or prohibit that speech?

12 DR. DOWNS: No, because all sorts of
13 things can violate "basic" sense of security.

14 And you look at the next sentence:

15 "Furthermore --" well,

16 "...speech or singles targeted
17 individuals that would cause a
18 reasonable person in the target
19 situation to feel physically
20 endangered on that occasion fall
21 outside the realm of tolerable
22 discourse."

23 So I would say this sentence is
24 controlled by the one that precedes it and the one that
25 follows it.

1 MR. FOTHERGILL: Fair enough. But
2 you'll agree that is a subject that's really ripe for
3 psychological inquiry, isn't it? The effects?

4 DR. DOWNS: Yeah, but if you look at
5 established criminal law, laws against threats and
6 direct incitements and things like that. That
7 assumption is already built into your established
8 criminal law.

9 MR. FOTHERGILL: The final area I
10 want to speak to you about in your text before we move
11 onto something else all together, is this notion of
12 civility, which figures quite prominently in your most
13 recent book.

14 Obviously you're working in the
15 context of a university setting, but I want to ask you
16 a few questions about whether this concept might have a
17 broader application.

18 So at page 273 you wrote:

19 "It is also very important --"
20 I'm now in the middle of page
21 "-- for university
22 administrators, faculty and
23 students to affirm their belief
24 in the rights of all individuals
25 and to make clear their moral

1 intolerance of speak acts which
2 make individuals feel excluded
3 on improper grounds.
4 Universities have an obligation
5 to make all members of the
6 community feel welcome and
7 respected."

8 You then complain about coercive
9 codes as not really achieving that result. But you do
10 say if speech acts cross the line that separates
11 offensiveness and rudeness from threats, intimidation,
12 then actual legal intolerance is in fact called for.

13 DR. DOWNS: Right.

14 MR. FOTHERGILL: What I found
15 interesting about your book is you detail several
16 examples where, if I can put it this way, the shoe is
17 on the other foot where university professors found
18 themselves unable to express themselves without
19 obstruction.

20 DR. DOWNS: Right.

21 MR. FOTHERGILL: And I wonder --
22 there's probably a place where we can very generally
23 describe it. If we go to your excerpts from your book
24 at tab 5, and in particular page -- let me check
25 this -- yes, page 23.

1 THE CHAIRPERSON: Same tab?

2 MR. FOTHERGILL: This is tab 5 of
3 AGC-2. These are the excerpt from Dr. Downs' book,
4 "Restoring Free Speech and Liberty on Campus".

5 THE CHAIRPERSON: So we were reading
6 the conclusion, and now we're going back to page 23.

7 MR. FOTHERGILL: Now, back to page
8 23. And you cite somebody called Koran in a book
9 "Private Truths Public Lies: The Social Consequence of
10 Preference Falsification", as follows:

11 "In environments hostile to
12 dissent large numbers of people
13 keep their true beliefs to
14 themselves and do not speak out
15 because of fear of ostracism of
16 punishment or because they doubt
17 their views will be supported by
18 others."

19 I really don't want to review all of
20 the concrete examples that you gave us. But you do
21 give us a number of examples where professors were
22 quite simply prevented from giving their lectures
23 because students would bang pots and pans or because
24 they would stand up in the class and turn their backs,
25 incivility to the point they really felt unable to

1 speak freely.

2 And the question I have for you
3 arising from that is, don't you think a similar
4 analysis might be applied towards members of minority
5 groups who feel themselves silenced by the threat or
6 possibility of vilification?

7 DR. DOWNS: Yeah, but there's a
8 difference between, however regrettable, vilification,
9 racist rhetoric is per se. It doesn't stifle counter
10 speech in the same way that they need pots and pans
11 make it impossible to speak. Stand up and turning your
12 back to a speaker, that's protected counter speech.
13 You are not directly interfering with that speech at
14 all.

15 This goes back to the points we
16 talked earlier about, sort of standing up for yourself.
17 We need to be teaching people that if this is kind of
18 speech makes you feel bad, you feel it inhibits you,
19 talk about it, organize, mobilize. That's what
20 happened in Skokie, for example. That's an unusually
21 propitious kind of situation, rather than moving
22 towards some sort of punitive approach.

23 This is somewhat oxymoronic and
24 Jonathan Rauch mentioned this in his book. We're going
25 to promote more speech by having less speech, by

1 punishing people for saying things.

2 And the danger with that is it that
3 it encourages people to feel -- this student I talked
4 about earlier, who said just listening to Denise
5 DeSouza was going to immobilize him for a week. That
6 was -- it was a caricature and I was amazed he said it.
7 It was a true story, right there.

8 We don't want to discourage that. We
9 want to encourage people to speak up for themselves,
10 define fellow travellers. Erna Godse (ph) recorded
11 earlier in my Skokie book, told me that one lesson she
12 learned from the Holocaust was, be thy neighbor's
13 keeper.

14 And that's a responsibility on the
15 part not just those who feel victimized by general
16 racist rhetoric to try to find allies and speak out.
17 It's also responsibility of those of us who hear that
18 or exposed to it so speak out and go to that person and
19 say, that's not how I feel, that's not how a majority
20 of people here feel. That's the sociological response
21 that made Skokie so positive.

22 But that's a different kind of thing
23 from saying, simply because you feel muted by this kind
24 of speech therefore we can censor that speech too. I
25 think that is -- two wrongs don't necessarily make a

1 right. Whether it's a wrong or not depends on the
2 situation.

3 MR. FOTHERGILL: But the two examples
4 I gave you are in some ways interesting counter
5 examples, because we have one where somebody is banging
6 on pots and pans so we can acknowledge it is in fact
7 impossible for the voice to be heard.

8 We have the other example where
9 students take their seats, but then they stand and they
10 turn their backs to the professors which of course is
11 offensive and distracting, but it doesn't actually stop
12 the professor from delivering the lecture. And yet you
13 would, I take it, agree that that kind of behavior is
14 unacceptable and could, in fact, be prohibited.

15 DR. DOWNS: No.

16 MR. FOTHERGILL: You don't?

17 DR. DOWNS: No, not at all. And he
18 should be discouraged. The trouble the civility,
19 speaker comes in and says, I don't think there should
20 be reparations for slavery, like David Horowitz argued
21 in the United States. And someone says, you're full of
22 shit. All right.

23 Clearly uncivil, disrespectful, are
24 we going to punish that? Civility is such a broad
25 thing. That's one of the reasons I gravitated away

1 from "Nazis in Skokie". I'm not a lawyer but trying to
2 get the best case I could, tried to bring in
3 everything, I think I over-used it. That's the reason
4 I backed off.

5 Give you example. Wisconsin, when
6 The Badger Herald published that David Horowitz
7 article, that following fall the Dean of Students used
8 the publication of Horowitz's ad about reparations as
9 an example of terrorism in the post 9/11 era. And I
10 mean, that's just vastly over-stated. So we had to --
11 uncivil she called it.

12 Civility as a norm for restricting
13 speech is a recipe for unprincipled application.
14 That's why we need more definitive terms.

15 MR. FOTHERGILL: And yet again, you
16 returned to the idea of unprincipled application in
17 your example, that this is an absurd application.

18 DR. DOWNS: But I would argue in
19 itself, civility code punishing incivility except in
20 certain context. Disrespect to the head of the
21 Tribunal, disrespect to a judge, or something like that
22 that has a very limited important public function.

23 Sure, we're going to require decorum,
24 but in the public forum? And the marketplace of ideas?
25 It's going to be rough and tumble out there. And the

1 line between being forceful and being uncivil I think
2 is, in principle, gray.

3 MR. FOTHERGILL: That makes a great
4 deal of sense, and I think the implication of what
5 you're saying is that if you are going to prohibit
6 certain forms of speech, it really has to be extreme
7 speech. It can't be offensive. It's got to be, as you
8 say, threatening, intimidating or something that in a
9 genuine way violates --

10 DR. DOWNS: What makes it extreme is
11 a combination of the content and application, or the
12 context.

13 So Mein Das Capital, that's a hateful
14 book. He's abdicating revolution and violence against
15 capitalists. One can think of so many other works.
16 Just to say that something is hateful in itself doesn't
17 tell us a lot because hate is part of vigorous kinds of
18 debates, certain kinds of hate and certain kinds of
19 uses that have to be their concern.

20 MR. FOTHERGILL: And the content of
21 the context issue is fundamentally important, I would
22 suggest to you, particularly in the context of
23 historical works.

24 So I think you mentioned in passing,
25 for example, Shakespeare as somebody who might, on some

1 creative interpretation of legislation, be considered
2 to be anti-Semitic -- you didn't give this example
3 but -- Merchant of Venice, the character of Shylock
4 appeared to be anti-Semitic. And would you agree with
5 me there's a distinction between somebody going to see
6 Merchant of Venice when it's presented by the Royal
7 Shakespeare Company or reading it in the library. And
8 very different when somebody holds up a copy of play
9 and says, we all know that Jews are greedy, even
10 Shakespeare recognized that. Do you see the
11 difference?

12 DR. DOWNS: Of course there's a
13 difference. From a normative perspective it's staring
14 you in the face.

15 MR. FOTHERGILL: It's all to do with
16 the use that one makes of the speech?

17 DR. DOWNS: Yeah. But to say there's
18 a normative difference is still a separate question
19 from what does one do about it. Clearly, it's rude and
20 inconsiderate. We're not going to punish rudeness and
21 inconsideration unless we want a police state. Is it
22 something that's harassing a threat? Does it move in
23 that direction? What makes it move in that direction?
24 So it would depend on its use. And with Shakespeare
25 it's harder to think how one might cross that line, but

1 it's possible.

2 MR. FOTHERGILL: I agree, but one
3 would also want to consider the effects: Whether
4 people were, in fact, traumatized and reasonably
5 traumatized by the use the text in that way.

6 DR. DOWNS: Say you have a lone
7 person on a street corner saying that, as opposed to an
8 organized hate party that has social power. We don't
9 have the situation. Lonely person on the corner, maybe
10 it's traumatic, but, hey, that's not grounds to put
11 that person in prison. Because the danger there is so
12 remote and I would argue the psychological harm should
13 be lessor because of the nature of the source.

14 MR. FOTHERGILL: Can I ask you to
15 have a look am tab 6 of AGC-2. There's a piece you
16 wrote for the JournalTimes.com.

17 DR. DOWNS: That was published on the
18 university's website.

19 MR. FOTHERGILL: On the university's
20 website, titled "Defending Academic Freedom" by
21 yourself?

22 DR. DOWNS: Yes. Ten other
23 colleagues signed, but their names -- yeah, they are at
24 the end.

25 MR. FOTHERGILL: Indeed they are,

1 you're quite right.

2 This deals with controversy that
3 revolved around somebody called Kevin Barrett who is
4 contracted to teach a course in the form of Islam
5 religion.

6 DR. DOWNS: Thank you for bringing
7 that up. It was not fun.

8 MR. FOTHERGILL: Apparently Farrell's
9 decision caused an uproar because Barrett is a
10 proponent of a bizarre and outlandish conspiracy
11 theory. I'm quoting now from your work. The attacks
12 on Americans on September 11, 2001 were perpetrated not
13 by Jihad terrorists, but rather by the government of
14 the United States.

15 So there's clearly a point of view
16 for which you have very little sympathy. Is it true at
17 one point you even went so far as to suggest that
18 denying the official version of 9/11 possibly should be
19 outlawed in the way that some states had considered --

20 DR. DOWNS: No, no never.

21 MR. FOTHERGILL: May I finish?
22 Should be outlawed in the same way that some states
23 have outlawed Holocaust denial? That's not the case?

24 DR. DOWNS: That I said that?

25 MR. FOTHERGILL: I'm asking you.

1 DR. DOWNS: No, not at all. I did
2 make a comment when I came home late one night from a
3 party and there was the first information I had about
4 Barrett from a reporter. And I said, he can't be fired
5 for it but it could be a grounds for not re-hiring him.
6 Because it's an intelligently responsible position.

7 I would say the same thing about a
8 Holocaust denier, per say. If an academic department
9 wants to give someone tenure who to hire in the first
10 place, you are going to take into consideration
11 intellectual standards. That's a different question
12 from the intellectual freedom situation out there in
13 the marketplace.

14 And the fact that -- I was once
15 called by the American Historical Review, which was
16 centred in Bloomington, Indiana at the time, and
17 Holocaust denying organization, I think it's that
18 journal that's mentioned in one of the articles here.
19 And they asked me my advice. Should they publish an ad
20 from that group.

21 And my advice to them was that if
22 your reason for not publishing it is because you think
23 this group lacks the intellectual standards that are
24 befitting a university, then don't do it. Our
25 astronomy departments don't have astrologists.

1 And there's a reason for that. I
2 said, but if your reason for not publishing the ad is
3 because you don't like what they stand for, then you
4 should publish it.

5 So that was an intellectual standards
6 issue, and that issue is what was applied to the Kevin
7 Barrett case.

8 It ends up -- so I was on a sort
9 horns of a dilemma because the question is not whether
10 he should be fired from a one-semester position for
11 which he was already contracted because of the public
12 outcry. And I came down and said no, you can't do
13 that. So I ended up getting myself on firm ground, but
14 it took a day.

15 MR. FOTHERGILL: But eventually you
16 did come out in favor of Barrett's academic freedom,
17 correct?

18 DR. DOWNS: Yes, in that context.

19 MR. FOTHERGILL: Can I ask you to
20 have a look at tab 7, which is the material from the
21 Muslim Jewish Christian Alliance for 9/11 truth
22 website, which posts a letter you wrote to the
23 Wisconsin State Journal which you can find in the
24 middle of that page. Can I ask you just to take a
25 moment to yourself?

1 DR. DOWNS: I know what I said.

2 MR. FOTHERGILL: All right. Very
3 well. What I specifically want to draw to your
4 attention to is the second sentence. You write first:

5 "Barrett's views are protected
6 under the canons of academic
7 freedom if they are relevant to
8 the subject matter of class and
9 are presented in a way that does
10 not discriminate against
11 students or prevent them from
12 disagreeing."

13 DR. DOWNS: Yes.

14 MR. FOTHERGILL: So it was your
15 position, and take it it is your position, that the
16 views to be expressed must nonetheless be expressed in
17 a way that does not discriminate against people?

18 DR. DOWNS: Right. Then we get down
19 to the question of what does it mean to discriminate.
20 Grading people differently because of their race,
21 making gratuitous racist comments like, okay, the Jew
22 over here, I'll call on you, that kind of thing. That
23 would be inappropriate in that professional kind of
24 context.

25 But if the professor wrote something

1 in essay or something that took a more extreme view or
2 said something like that, then that would be protected
3 unless it reflected in some way on academic standards.
4 The academic freedom thing is a complicated matter.
5 You have to be careful about what the category is, what
6 the context is.

7 MR. FOTHERGILL: Could I ask for tab
8 6 and 7 to be produced?

9 THE CHAIRPERSON: Yes.

10 MR. FOTHERGILL: I wonder if I might
11 just have a moment to confer with Mr. Vigna. I just
12 wanted to confirm I produced each of the tabs in this
13 volume. I think the answer is yes.

14 THE CHAIRPERSON: Yes. I'm informed
15 yes, you have produced each of the tabs.

16 MR. FOTHERGILL: In that case that
17 concludes my questions of Dr. Downs.

18 Dr. Downs, thank you very much.

19 THE CHAIRPERSON: Mr. Vigna, will you
20 be asking questions?

21 MR. VIGNA: No.

22 THE CHAIRPERSON: So we'll go to
23 re-examination.

24 MS KULASZKA: Maybe we can have a
25 short break?

1 THE CHAIRPERSON: Yes, and then we
2 can proceed.

3 --- Recess taken at 4:15 p.m.

4 --- Upon resuming at 4:32 p.m.

5 THE CHAIRPERSON: Ms Kulaszka?

6 MS KULASZKA: Mr. Kulbashian spoke to
7 me in the break and asked if he can ask some questions
8 first, some re-examination.

9 THE CHAIRPERSON: I saw him with his
10 coat, he's on the way out.

11 MS KULASZKA: So he doesn't seem to
12 be here now.

13 THE CHAIRPERSON: I'm a little
14 concerned because he wanted to make his questions
15 earlier, and I'll allow re-exam in accordance with the
16 rules we're all familiar with.

17 MS KULASZKA: It's up to him. I
18 wanted to go after him, so I don't know where he is.

19 THE CHAIRPERSON: He's gone.

20 (DISCUSSION OFF THE RECORD)

21 THE CHAIRPERSON: I'm going to ask
22 you, it has to be in the form re-examination, which
23 means dealing with matters that were raised for the
24 first time only by Mr. Fothergill, since Mr. Vigna did
25 not ask any questions.

1 CROSS-EXAMINATION BY MR. KULBASHIAN

2 MR. KULBASHIAN: I'll just get my
3 notes in order.

4 You were asked about issues about the
5 chilling effects of certain hate laws. In your
6 experience, have you ever seen speech laws or hate laws
7 be I guess used against what people refer to as the
8 majority of the population or white individuals?

9 DR. DOWNS: Well, sure.

10 MR. VIGNA: I don't know if that
11 comes from the cross-examination.

12 THE CHAIRPERSON: Well, there was
13 discussion about the chilling effects.

14 MR. KULBASHIAN: There was also
15 discussion about the scope in which they are used and
16 how certain people might being excluded from the
17 application. I'll just make this point quick.

18 Have you ever seen in your research
19 or in your experience have you ever seen in
20 universities any, I guess, white individuals complain
21 about racism or how the issue has been addressed?

22 DR. DOWNS: Yes, sure. White
23 students, I don't think there is white students maybe
24 the same percentage breakdown in terms of support and
25 not support as there are with not white students. I'm

1 not sure.

2 MR. KULBASHIAN: I'll make my
3 question a bit more clear. Have you, I guess, had any
4 examples where white students have complained about
5 certain, I guess, messages?

6 DR. DOWNS: Oh, yeah.

7 MR. KULBASHIAN: Do you know how the
8 universities have dealt with them or whether or not
9 they dealt with them in the same manner they would deal
10 with say if --

11 DR. DOWNS: Oh, I see, like if a
12 white group has been persecuted or something?

13 MR. KULBASHIAN: More essential is a
14 white individual who may be the direct victim of --

15 DR. DOWNS: I think it's more a
16 question of, say, conservative groups getting their
17 speech repressed. Universities have, in my knowledge
18 and experience, been more concerned about minority
19 students being affected by them. Suddenly there might
20 be a differential application thought. It's really
21 more political than racial per se.

22 MR. KULBASHIAN: So would you say in
23 your experience that the application of any laws that
24 would prohibit I guess racial statements -- sorry.

25 MR. FOTHERGILL: Another objection in

1 re-examination. He shouldn't lead.

2 THE CHAIRPERSON: Yes. We must be
3 mindful Mr. Kulbashian is not a lawyer. But he has
4 experience in this rather. I personally am aware of
5 that. So no leading questions, Mr. Kulbashian.

6 MR. KULBASHIAN: I understand. Is
7 discrimination, on behalf of an individual, the same,
8 say, administrative discrimination? For example,
9 individual like myself, discriminated against
10 individual rather than --

11 DR. DOWNS: No, individuals have a
12 right to discriminate except when they are hiring for
13 job, they have some sort of public accomodation or
14 function that is covered by state law. But in terms of
15 just purely private acts, that's their right.

16 MR. KULBASHIAN: Would you say in
17 that sense there would be a difference between how hate
18 speech on behalf of this individual would -- hate
19 speech on behalf of an individual would be I guess
20 interpreted by somebody reading it as opposed to on
21 behalf of an administrative body or individual involved
22 in administrative body?

23 DR. DOWNS: I see. In other words,
24 if the state were to engage in hate speech or
25 administrative body I suppose to an individual, I think

1 that would again depend on the context. In some ways
2 if the state did it that would make it worse -- Jews in
3 Germany seeing the state perpetrated what the state was
4 perpetrating. I talk about that in "Nazis in Skokie".

5 And -- also maybe the person would
6 feel more threatened by a private individual if that
7 person gave him a threat or engaged in hate speech. So
8 I guess it would depend. I can see how there might be
9 a difference.

10 MR. KULBASHIAN: Thank you. We
11 heard -- there was I believe an excerpt that
12 Mr. Fothergill read about hate organizations having
13 used Internet to threaten and encourage crime.

14 DR. DOWNS: Right.

15 MR. KULBASHIAN: I guess from your
16 personal experience, would you say that the majority of
17 hate messages have been encouraging crime or would you
18 say that it was more -- something that would apply to
19 anything. For example, a regular individual like
20 people involved in computer group would also be
21 encouraging crime by encouraging piracy?

22 DR. DOWNS: I can't really answer. I
23 haven't scoured the Internet to make that
24 determination.

25 MR. KULBASHIAN: As far as -- a lot

1 of the examples we heard today were I can say more --
2 is that a leading question? I'll just say it.

3 THE CHAIRPERSON: Avoid saying your
4 own normative comments.

5 MR. KULBASHIAN: In that case,
6 according to your testimony in cross-examination lot of
7 comments that were brought seem to be more of a
8 personal and direct nature. Would you say that
9 comments that are more indirect or broadcasts would
10 have the same affect as personal?

11 DR. DOWNS: My general presumption is
12 there is a distinction there. I stressed that over and
13 over. It's not absolute, but I think there's a good
14 reason to say that it's the difference between general
15 racist rhetoric and targeted racial vilification, and
16 then beyond that sort of racial threats. So, yeah.
17 But certain individuals could react the same way to all
18 of them. I think there is a definite difference.

19 MR. KULBASHIAN: So from certain
20 examples that we had seen, example where somebody had
21 stated things along the lines of Jews should be killed,
22 et cetera, and I killed two Jews -- I don't remember
23 the exact quotes, but it was something along those
24 lines. Would you say that I guess in the U.S. from
25 your knowledge that there are already laws that address

1 death threats?

2 DR. DOWNS: Absolutely.

3 MR. KULBASHIAN: Do you believe that
4 specific acts, let's say violence against an individual
5 because he's black, or violence against individual
6 because he's gay, that's hate crime laws should also
7 come into affect?

8 DR. DOWNS: My general approach, I
9 think there can't be, as I mentioned when we we
10 talking about the swastika on the garage door. Two
11 distinct acts: Vandalism, terror. I don't think like
12 having special add-on racial aspects. If there's no
13 distinct crimes, that's fine. That's kind of an
14 intermediate approach.

15 But my view would be enforce the
16 criminal law to the fullest extent, and I think the
17 fact that it's a racial crime -- there's more
18 motivation for a prosecutor to make sure that crime is
19 punished. That's an appropriate thing, because
20 prosecutors use discretion. I don't think the fact the
21 fact hate crime laws specify certain types of crimes --
22 who is in, who is out -- it sort of brings identity
23 politics into the criminal law, which I think
24 undermines the criminal laws universalism.

25 And there's one area where everyone

1 is in agreement. It would go around the whole word.
2 Every society has what was we call U.S. category one
3 crimes - theft, rape, assault, murder, et cetera,
4 arson.

5 And people who commit those things
6 should be punished. And I have some troubles with
7 singling out the motivations on it. I would make the
8 motivations relevant to how aggressive the prosecution
9 might be, that's fine. But that's just my own opinion.
10 My main concern is about speech as opposed to conduct.

11 MR. KULBASHIAN: Then you would say
12 hate in that case would be more aggravating factor.

13 DR. DOWNS: It could be. There was a
14 case in the U.S. where a guy in named Dawson, Ku Klux
15 Klan member and he committed an assault, a murder, an
16 African-American man, and at his sentencing his
17 membership in the Klan came up, and that partially was
18 responsible for him getting the death penalty.

19 And the Supreme Court reversed that
20 decision because it said the crime wasn't motivated by
21 hate. The person happened to be black and therefore it
22 was irrelevant to the punishment and actually
23 prejudicial.

24 Now, had he selected the victim
25 because of the victim's race, I think that's an

1 appropriate aggravating circumstance. The U.S. -- with
2 death penalty he to do find aggravating circumstances
3 for death penalty as opposed to life in prison. I
4 don't think it an appropriate one. I don't think it's
5 an inappropriate one. But that's more similar -- that
6 more to traditional established sentencing policy.

7 MR. KULBASHIAN: In that case, do you
8 believe that in other examples that were given issues
9 where there were direct threats or issues where there
10 were direct I guess -- were the messages were anyway
11 directly threatening or harassing to the individuals,
12 do you believe there are laws at this point that
13 actually cover those actions?

14 DR. DOWNS: Yes.

15 MR. KULBASHIAN: So do you believe
16 that there should be further laws that would restrict
17 even I guess more minor infractions, so there isn't
18 this area of threat but yes it's also racist?

19 DR. DOWNS: I would be very careful
20 about that. I'm critical of that. Unless it's
21 absolutely necessary. Hopefully, existing laws will
22 cover that. Always going to have these gray areas
23 where, you know, since I'm not a speech absolutist.
24 I've delineated the context in which I think it's
25 appropriate for lines to be drawn. There's always

1 going to be right beyond that line a difficult case.
2 And should it be punitive, should it not? But the
3 point is to make certain fundamental distinctions, at
4 least we have them in mind when we make those
5 decisions.

6 MR. KULBASHIAN: I'm going to give
7 you a hypothetical situation about issues of fairness
8 implementation and how laws -- let's say hypothetically
9 there is a process by that individuals could file
10 complaints, as there is in universities as you stated,
11 where they file complaints stating that the hate laws
12 are broken, for example, or somebody was personally
13 confronted with threatening racist material.

14 In that situation, let's say
15 hypothetically also that the individual that is being
16 complained about is part of that administration. Would
17 you state, would you say that there is an unfairness in
18 the way that the law is being implemented or any kind
19 of act is being implemented if there is preferential
20 treatment as to who is actually dealt with?

21 DR. DOWNS: Absolutely. Fairness
22 requires that everyone who commits a similar crime be
23 treated the same way.

24 MR. KULBASHIAN: So would you state
25 that there be some constitutional issue where -- say,

1 constitutional --

2 DR. DOWNS: I'm sorry?

3 MR. KULBASHIAN: -- say where a
4 specific law is being used against a group of people,
5 however if the law is used back against individuals
6 that I guess are more -- I should rephrase my question,
7 it's kind of leading.

8 Would you say that if a law is being
9 used to prosecute only specific individuals and
10 protecting others, because let's say the administrative
11 organization in charge of it has autonomy over how it
12 conducts investigations, would you state that that law
13 is being implemented in an unconstitutional fashion?

14 DR. DOWNS: As you presented it, it
15 seems to be the case.

16 MR. KULBASHIAN: You also talked
17 about situations where I guess the law takes the side
18 of one extreme against the other. Do you know of any
19 situations where that has happened?

20 DR. DOWNS: I'm not sure what you
21 mean by that.

22 MR. KULBASHIAN: For example, a
23 situation where you are discussing with Mr. Fothergill
24 about how certain laws are being applied in such a
25 manner where you would take the side of one extreme

1 against another extreme. For example, as you stated in
2 your case if a law was taking the side of republicans
3 and damning --

4 DR. DOWNS: Viewpoint discrimination.

5 MR. KULBASHIAN: In that case, have
6 you ever seen -- a little bit disorganized right now
7 because I kind of rushed in.

8 Have you ever seen any instances
9 either I guess locally in the U.S. or internationally,
10 where governments have taken one extreme against the
11 other?

12 DR. DOWNS: I don't know if you were
13 here for the first part of the day. When it comes to
14 like denial of mass murder, a Communist groups,
15 Communism gets -- those who deny the murderous effects
16 of Stalinism, Maoism, other forms of extreme Communism
17 get a free pass, and those who deny the Armenian
18 genocide, the Holocaust, don't. That would be an
19 example.

20 On campus, I have seen cases where
21 authorities are less inclined to investigate cases in
22 which minority students have violated the rights of
23 speakers, et cetera. I've seen that a little bit. But
24 I think the example I gave about Communism is probably
25 more on point. But that would speak to the politics of

1 it.

2 MR. KULBASHIAN: In that case, have
3 you ever I guess -- this was recently used -- situation
4 in Turkey where a journalist was assassinated. Would
5 you state that the position that the Turkish government
6 took in that situation was pitting one extreme against
7 the other?

8 DR. DOWNS: I just know about the
9 case, but I don't know that much about it.

10 THE CHAIRPERSON: We've had evidence
11 on that in your absence. That was yesterday's witness,
12 I'm sorry.

13 MR. FOTHERGILL: And certainly I
14 didn't deal with any of this in cross-examination.

15 MR. KULBASHIAN: This is down to the
16 topic of one extreme to the other. Just -- because he
17 said he doesn't know very much about it I'm not going
18 to really go into it.

19 Would you say a government or
20 administration position is to take one extreme against
21 another, that would cause certain level of unfairness,
22 or I guess I want to go more to a perception that it's
23 okay to target individuals of the government's stands
24 again. Let's say, the U.S. government took a strong
25 position against the Ku Klux Klan and they were joined

1 with the Anti-Defamation League in that position.

2 Would you state that --

3 MR. FOTHERGILL: Again, Mr. Chair,
4 this is not in any way reasonably raised by me in
5 cross-examination.

6 THE CHAIRPERSON: I don't think so.

7 MR. KULBASHIAN: Until any of the
8 situations that happened at the university, have you
9 ever noticed or I guess studied any situations where
10 the speech was made in a general fashion and not
11 necessarily written on a wall or scribbled on a wall,
12 but in more a fashion where you have access it to read?
13 For example, in a situation where as opposed to
14 somebody's student web page.

15 DR. DOWNS: Yeah, sure.

16 MR. VIGNA: I don't recall that being
17 a part of the cross-examination.

18 MR. KULBASHIAN: Actually, the issue
19 this gets into is -- a lot of the examples
20 Mr. Fothergill brought were examples of direct
21 confrontation and direct racism, and there was also
22 evidence that he brought also --

23 THE CHAIRPERSON: So you indicated
24 that you witnessed in a school environment these
25 indirect forms of messages?

1 DR. DOWNS: Yeah, to some extent.

2 MR. KULBASHIAN: For example, a
3 situation where people would have to go and manually
4 access information as opposed to being confronted with
5 it.

6 DR. DOWNS: Yeah, you would have to
7 pull into it.

8 MR. KULBASHIAN: Would you say the
9 effect on individuals from let's say racism that was
10 posted in that kind of manner was different than the
11 effect of racism that was posted directly?

12 MR. FOTHERGILL: I object. He's not
13 qualified to answer that question.

14 THE CHAIRPERSON: On the effect.

15 MR. FOTHERGILL: Yes.

16 THE CHAIRPERSON: Okay.

17 MR. KULBASHIAN: I guessing I'm going
18 to get objections. I'm guessing I'm going to get
19 objections.

20 As far as jokes, you stated there was
21 an incident that there was a radio show where were
22 people are told to call in.

23 DR. DOWNS: Right, it was at the
24 University of Michigan, not my school.

25 MR. KULBASHIAN: They were told to

1 call in and provide their racist jokes. What kind of
2 outcry was there from the -- I guess population.

3 DR. DOWNS: At Michigan?

4 MR. KULBASHIAN: Yes.

5 DR. DOWNS: There was an outcry,
6 significant outcry. If it happened at my school it
7 would be huge.

8 MR. KULBASHIAN: Would you say in
9 that case that -- actually, if you could elaborate on
10 what kind of comments you all made about that
11 situation?

12 DR. DOWNS: Basically people said
13 that was racist and inappropriate, wrong, an example of
14 how social censorship operated -- could operate.

15 If I recall, at Michigan -- I have to
16 go back and check out the facts, I don't remember all
17 the facts -- the school told them not to do it, but I'm
18 not sure.

19 MR. KULBASHIAN: So if individuals
20 were put in a position where, say, I guess ultimately
21 talking about administrative tribunals at the
22 schools -- you said that certain schools have their
23 private administrative tribunals because they don't
24 fall under the constitution. So in that situation, do
25 students usually have access to some kind of legal

1 representation or legal help?

2 DR. DOWNS: It's going to vary case
3 by case. Generally speaking, no.

4 MR. VIGNA: That doesn't come up from
5 cross.

6 THE CHAIRPERSON: The information
7 about the public and private universities, that was
8 Mr. Fothergill's question, and that's where it's
9 arising.

10 MR. VIGNA: It's not really the same
11 question.

12 MR. FOTHERGILL: I certainly asked
13 nothing about representation.

14 THE CHAIRPERSON: No, but the context
15 of how things function at a private and public
16 institution in terms of -- that was not explored by Ms
17 Kulaszka.

18 MR. FOTHERGILL: Nor by me. There
19 was a question of the extent to which universities were
20 subject to the constitutional -- how this in any way --

21 THE CHAIRPERSON: -- and the response
22 came out about how one of the problems is that the
23 universities -- there is a lack of due process in the
24 university. That came out in the cross. So he's now
25 replying to that saying to what extent, what is there

1 due process, at least in the representation of counsel.

2 MR. FOTHERGILL: I admire your
3 interpretation.

4 DR. DOWNS: My university allows
5 counsel, it varies all over the map. Definitive
6 article on this was written by woman in Columbia 1999
7 and she found that there was a stunning lack of due
8 process in higher education, especially on private
9 schools.

10 MR. KULBASHIAN: Just to get a bit
11 more detail. If -- let's say there was a situation
12 where there was a complaint made. Who would be
13 opposing the student who was getting -- who was being
14 alleged to have --

15 DR. DOWNS: Depend on what office,
16 civil rights, affirmative action, equal opportunity.
17 My campus would be equity and diversity. Or the Dean
18 of Students. They would have different organizations
19 set out for this, varies.

20 MR. KULBASHIAN: Would that
21 organization be, I guess, official school organizations
22 or would it be private organizations?

23 DR. DOWNS: Be official school
24 organizations. But some of them tend to be very much
25 influenced by student groups.

1 MR. KULBASHIAN: Would you say it
2 would be unbalanced that in schools where they continue
3 have the right to legal representation so they would
4 have to retain their own lawyer? Would you say that
5 would cause an unbalance in the way the hearing would
6 proceed?

7 DR. DOWNS: It could. I've read
8 cases of that, yes.

9 MR. KULBASHIAN: In that case, do
10 students usually fair well in a situation where they
11 have allegations made against them? Do they usually --

12 DR. DOWNS: I can't answer that
13 systematically. No one has looked at the number of
14 complaints and how they were processed. I know a
15 number of cases where it's been a problem, but I have
16 no idea what the percentage is.

17 MR. KULBASHIAN: Do you know of any
18 universities that I guess deal where there had been
19 issues where -- what message was actually placed
20 on-line as opposed to being carved on somebody's door
21 or spray painted on somebody's door?

22 MR. VIGNA: Again, I don't think that
23 came up in the cross-examination.

24 THE CHAIRPERSON: The whole issue of
25 the Internet came up. There was one question related

1 to the Internet. I don't think it was that broad.

2 DR. DOWNS: There has been some
3 cases.

4 THE CHAIRPERSON: You're not supposed
5 to ask the question. If I'm going Mr. Vigna what's
6 way --

7 DR. DOWNS: The whole issue --

8 THE CHAIRPERSON: There's no question
9 here.

10 MR. KULBASHIAN: In a university
11 environment you stated that it's kind of an environment
12 where universities have the obligation to seek the
13 truth. In a university environment, say Holocaust
14 denial or I don't know if -- you stated that talking
15 about Holocaust denial at one point. Were you talking
16 about just denial as a whole or more questioning
17 specific --

18 DR. DOWNS: That's an interesting
19 point. That's one argument about the problem with
20 punishing Holocaust denial is that, well, what about
21 those who just say, it wasn't as extensive in one death
22 camp as has been reported. There's variations. That
23 is one Lipstadt is against prosecuting it.

24 But when it comes to the
25 universities -- mentioned earlier about the distinction

1 between institutional academic freedom, and an
2 individual academic freedom. If an institution or
3 department says that certain kind of Holocaust denial
4 represents a lack of intellectual international
5 standards, they have an academic freedom right to make
6 that determination.

7 Now, if a professor -- case of
8 Northwestern, a guy named Buttz, who is an accomplished
9 engineer also wrote Holocaust denial stuff on other --
10 in other forms but never talked about it in class,
11 wasn't part of his university research on engineering.
12 And he did it outside of class and also had a web page.
13 First web page cases which has just recently started to
14 become important.

15 And he's protected because his views
16 about Holocaust denial -- he already had tenure, and
17 something outside of his field. So he's protected the
18 full canon of academic freedom.

19 But if they were, say, in the history
20 department and he's up for tenure and he's gone down
21 that line, case could be made that he lacks the
22 intellectual standards to do so. That's the considered
23 judgement of the field of history. So, again, depends
24 on the situation.

25 MR. KULBASHIAN: So --

1 DR. DOWNS: One thing to say we
2 shouldn't punish Holocaust deniers. Nothing to say
3 they are automatically entitled to tenure. Two total
4 different questions.

5 MR. KULBASHIAN: Obviously that would
6 be a private decision more than a public decision.

7 DR. DOWNS: Could be a public
8 university, but it's academic that goes back to the
9 Barrett situation. I got hit from both sides on that
10 issue about hate speech. I got hate e-mail from both
11 sides of that issue. That is an academic premium and
12 an academic standards question. The question is how
13 they get apportioned, and there was disagreement over
14 that.

15 MR. KULBASHIAN: There was some talk
16 about a U.S. constitution showing distrust of the
17 governments. To your knowledge, who drafts the
18 Constitution?

19 DR. DOWNS: Pardon?

20 MR. KULBASHIAN: To your knowledge,
21 who drafted the Constitution?

22 DR. DOWNS: The founding fathers:
23 James Madison, Alexander Hamilton, Washington was
24 involved in the Philadelphia Convention.

25 MR. KULBASHIAN: Would you say they

1 were government individuals that found the
2 Constitution?

3 DR. DOWNS: Yeah, sure. They active
4 politicians at the time.

5 MR. KULBASHIAN: Do you believe that
6 that's the same situation here, Canadian government
7 would have drafted the Constitution not the people per
8 se?

9 DR. DOWNS: I can't really answer
10 that.

11 MR. KULBASHIAN: If, hypothetically,
12 then the Canadian government --

13 DR. DOWNS: I read you recently had a
14 constitution, and it was voted on.

15 MR. KULBASHIAN: If it's the Canadian
16 government that ultimately hypothetically established
17 the Constitution, would there be any significance
18 whether or not the Constitution actually expressed --
19 did not express mistrust of the government? Would that
20 mean the government is to be trusted, or would that
21 have no significance at all?

22 DR. DOWNS: I think it would indicate
23 that basis of consent would be different rather than we
24 the people --

25 THE CHAIRPERSON: I don't know where

1 this falls in his expertise.

2 MR. KULBASHIAN: That's true.

3 DR. DOWNS: I teach Constitutional
4 law.

5 THE CHAIRPERSON: I know, but it's
6 Canadian Constitutional law. We're all jurists here
7 and we know exactly how the Constitution was formed.

8 MR. KULBASHIAN: In that case we can
9 put an example of U.S -- the U.S. Constitution did not
10 have I guess articles and amendments that would show
11 mistrust of the government. Would that --

12 DR. DOWNS: The whole Bill of Rights
13 shows it. That's why it was put there. More at that
14 time distrust of the national government, not state
15 governments. State governments wanted it too. Both
16 the state governments and individuals distrusted the
17 national government.

18 MR. KULBASHIAN: So if hypothetically
19 there wasn't anything, any article or any amendment
20 that did I guess somewhat indicate a distrust for the
21 government, would that mean in any way that U.S.
22 government should be trusted on that basis?

23 DR. DOWNS: No, no, and it's part of
24 American culture.

25 MR. KULBASHIAN: Would that go to the

1 credibility of the government's decisions? Would that
2 go to the credibility of how the government operates at
3 all?

4 DR. DOWNS: In my view, it would, but
5 that's just an opinion.

6 MR. KULBASHIAN: How would it go to
7 the credibility, in your view?

8 DR. DOWNS: That I think it would --
9 the less power the citizens really have to check the
10 government the less legitimate it is. Trust is a
11 question of degree. Too much distrust is a problem
12 too. Because then you don't have the kind of
13 collective action which governments are also there for.
14 Majority rule is part of constitutional governance as
15 well as individuals' rights, so a question of balance.

16 MR. KULBASHIAN: In that case, do you
17 believe that dissent is a -- I guess the right of every
18 individual to express --

19 DR. DOWNS: Absolutely. Even if you
20 have a government that's based on trust and consent you
21 can't really say that it's legitimate if people's
22 viewpoints -- if some viewpoints are not allowed at
23 least to be aired, because they're frozen out of any
24 possibility to influence the government. I said that
25 earlier.

1 MR. KULBASHIAN: Actually, I don't
2 have any more questions. I'm just going go over my
3 list. It was just kind of scribbled.

4 Pretty much one more question. If
5 laws already exist to address harassment, violence,
6 rape and other laws, do you believe that laws that
7 exist in a forum to also address the speech and the
8 effect of that speech are necessary?

9 DR. DOWNS: Not per se. And I've
10 stressed that here. I think in some respects some of
11 this legislation ends up -- and I heard certain people
12 say that today; that it's symbolic politics. And
13 symbolic politics is okay, but when you are dealing
14 with freedom of speech don't you need something more.

15 So I'm much less open to claims about
16 politics with free speech policy than I am with maybe
17 other kinds of things, because free speech is so
18 important to democracy.

19 MR. KULBASHIAN: Thank you very much.

20 MS KULASZKA: I just have a couple of
21 questions.

22 RE-EXAMINATION BY MS KULASZKA

23 MS KULASZKA: You were referred in
24 articles were you used the term targeted vilification.
25 Can you just define that?

1 DR. DOWNS: Well, criticizing someone
2 for being a particular race, for talking about race.

3 MS KULASZKA: Is it direct,
4 confrontational?

5 DR. DOWNS: Yeah, yeah. But even
6 then since that "Nazis in Skokie", I now look at
7 targeted -- like an epithet or something, it's that
8 gray area I'm troubled with. So I have backed off that
9 position somewhat.

10 MS KULASZKA: Does it include writing
11 or does it always have to be confrontational?

12 DR. DOWNS: To be targeted it has to
13 be physically sort of pointed at someone or sent to
14 someone.

15 Now, I suppose you can have a third
16 situation where it's just on-line but you name someone.
17 Say I have a web page and I mention someone by name and
18 talk about what I want to do to that person. I think
19 that would be -- since you named the person that could
20 maybe make it a targeting kind of thing too. So you
21 have to think about what we mean by targeting.

22 But the whole idea here is to try to,
23 at least in analytic sense, make a distinction between
24 direct and less direct harms. And when it comes to
25 liberties -- fundamental liberties, direct harm that

1 clearly calls more for state action than something
2 that's less direct. And we can then argue about, well,
3 what's right on the border of what?

4 MS KULASZKA: Now, my friends raised
5 the issue of due process in the application of speech
6 codes. My question to you would be -- is that the only
7 problem with speech codes, due process?

8 DR. DOWNS: No, it also be the scope,
9 if they're written poorly. So it's a combination of
10 content and application. But the application ends up
11 being very, very important in that context. But
12 it's -- if a code is too broad it doesn't matter how
13 much due process you attach to it.

14 MS KULASZKA: So it would also
15 include definitional problems?

16 DR. DOWNS: Yeah. And I found
17 something we haven't talked about that's related.
18 Under the radar cases where administrator, Dean of
19 Students said, you've agreed you did something wrong or
20 you go to sensitivity training or we're going to apply
21 the code against you. And this goes back to the point
22 about lawyers. Kids don't have lawyers or they don't
23 know their rights, so they agree to something because
24 of the threat. Awful lot of enforcement under the
25 radar screen. I suspect there has been. I know of

1 some cases, but I can't be definitive. It makes utter
2 intuitive sense, because that's how the law gets
3 enforced.

4 MS KULASZKA: Those are my questions.
5 Thank you.

6 THE CHAIRPERSON: Thank you. That
7 means although your flight is tomorrow you won't have
8 to testify.

9 (DISCUSSION OFF THE RECORD)

10 THE CHAIRPERSON: Ms Kulaszka, where
11 does that put us in your -- or everyone. We've been
12 going back and forth on the evidence but -- are we done
13 with the experts?

14 MR. FOTHERGILL: We are.

15 THE CHAIRPERSON: So that just leaves
16 the ordinary witnesses that you were calling?

17 MS KULASZKA: We are going to try and
18 bring Jurgen Newmann in tomorrow because Paul Fromm
19 won't be available apparently until at least Thursday.

20 THE CHAIRPERSON: Right. We want him
21 for Thursday because Mr. Kurz wanted cross-examination.
22 There was another person, Mr. Livingston?

23 MS KULASZKA: Yes. We'll try at
24 least tomorrow to wrap that up and --

25 THE CHAIRPERSON: Both of them?

1 MS KULASZKA: Yes, I think so.

2 THE CHAIRPERSON: Gentlemen,
3 Mr. Newmann, would be tomorrow morning?

4 MS KULASZKA: Yes. That uses up the
5 time.

6 THE CHAIRPERSON: Yes, I want to use
7 up the time productively.

8 MR. VIGNA: I just wanted to refresh
9 my memory. Newmann was on the issue of -- similar to
10 Mr. Fromm?

11 MS KULASZKA: It's just what's
12 written out in the statement of particulars. He's
13 going to prove some documents.

14 THE CHAIRPERSON: I think I have it
15 here.

16 "Jerry Newmann will prove
17 documents relating to the case
18 and video evidence. He'll give
19 testimony and violence against
20 those accused of hatred from his
21 personal experience. He will
22 testify to the effect and his
23 user experience of the
24 freedomsite.org.

25 MR. VIGNA: I didn't get any

1 disclosure.

2 THE CHAIRPERSON: What's the video?

3 MS KULASZKA: Pardon?

4 THE CHAIRPERSON: The reference to
5 video, and Mr. Vigna said he did not receive a video.

6 MS KULASZKA: Yes, we disclosed it
7 last year, some videos.

8 THE CHAIRPERSON: So they will have
9 to be shown tomorrow?

10 MS KULASZKA: Not all of them maybe,
11 but I hope at least one.

12 THE CHAIRPERSON: Has anyone arranged
13 for that?

14 MS KULASZKA: We've asked Mr. Vigna
15 is he can bring his projector.

16 MR. VIGNA: I have the projector but
17 what's the video about? Is it VHS video or DVD?

18 MS KULASZKA: It's a DVD.

19 MR. VIGNA: On what topics?

20 MS KULASZKA: ARA demonstrations.

21 THE CHAIRPERSON: So the subject
22 matter is similar to what Mr. Fromm testified to?

23 MS KULASZKA: Yes, similar to that.
24 There were disclosed last year.

25 MR. VIGNA: We'll be objecting to the

1 relevance but --

2 THE CHAIRPERSON: If it's the same
3 objection we did with Mr. Fromm, the evidence came in
4 and forever it's worth I'm not going to be inconsistent
5 on that.

6 MR. VIGNA: For the record --

7 THE CHAIRPERSON: Yes, okay, you can
8 object for the record.

9 MR. VIGNA: I know you're ruling on
10 Fromm, so I guess you have to be consistent but I'm
11 just saying for the record I'll be objecting at
12 least --

13 MR. FOTHERGILL: I disagree with
14 Mr. Vigna --

15 THE CHAIRPERSON: Disagree on what?

16 MR. FOTHERGILL: -- on the issue of
17 consistency. I mean in principle I do, but -- agree on
18 that, but there have been developments since the issue
19 was first canvassed and we've actually had a couple of
20 witnesses who have been able to address whether there
21 is any sort of nexus between ARA activities and section
22 13 of the Canadian Human Rights Act.

23 Two people who have some kind of
24 familiarity with the organization. Specifically,
25 Richard Warman and Karen Mock have, in my submission,

1 effectively disposed of the idea there is any sort of
2 nexus between the ARA violent activities and the
3 existence of this legislation. So we know longer have
4 any sort of factual foundation.

5 THE CHAIRPERSON: Just because one
6 witness said so --

7 MR. FOTHERGILL: But there's no
8 competing evidence and nobody who is coming who has any
9 experience in the ARA.

10 THE CHAIRPERSON: I will not allow as
11 to anticipate how the evidence will come in. That will
12 be presumptuous on my part.

13 MR. KULBASHIAN: Just for the record,
14 the major thing is Mr. Warman and Dr. Mock who
15 testified about the ARA, both testified from I guess
16 the complainant, the Commission side, from their
17 perspective, and both have -- in their admission
18 both -- in this hearing or otherwise admitted to being
19 involved with the group and therefore I don't believe
20 that they would have the same kind of --

21 THE CHAIRPERSON: You are saying may
22 be issues of credibility?

23 MR. KULBASHIAN: Yeah, that's where
24 it comes up.

25 THE CHAIRPERSON: I understand. So

1 it's Jerry Newmann tomorrow. Where are going to show
2 the thing? On the wall?

3 MS KULASZKA: I was wondering, you
4 offered this morning to allow some documents in. I was
5 wondering if we could file those documents.

6 THE CHAIRPERSON: Let's see them.

7 MS KULASZKA: One was called "Unless
8 We Abolish Article 301 in Our Thoughts."

9 THE CHAIRPERSON: I assume these have
10 been disclosed.

11 MS KULASZKA: "Unless We Abolish
12 Article 301 in Our Thoughts".

13 MR. FOTHERGILL: These were e-mailed
14 to us on Sunday afternoon. We printed them. I must
15 confess, I haven't read these.

16 THE CHAIRPERSON: Thinking they were
17 now produced.

18 MR. FOTHERGILL: Exactly. If perhaps
19 Ms Kulaszka could explain the purpose of them. I'm
20 sure the authenticity isn't an issue. I just wonder
21 what utility they have without having input --

22 THE CHAIRPERSON: Let me see if I can
23 find it. I have -- from the batch you handed up
24 yesterday I have something called "Censorship Still A
25 Burning Issue".

1 MS KULASZKA: Right.

2 THE CHAIRPERSON: And "Signed Never
3 Again Petition".

4 MS KULASZKA: Right. "Turkey and
5 Hrank Dink", is filed, and "Philosophy and Public
6 Policy". Those were put to Professor Tsesis and he --
7 they have been filed. And these are the other three
8 documents.

9 THE CHAIRPERSON: I don't have them.
10 What you described, I don't have. I have two copies of
11 the same thing. From my understanding, the documents
12 you put forth yesterday were an article from The
13 Independent?

14 MS KULASZKA: Essentially I would
15 like to use them in argument, so maybe I could just put
16 them into my authorities.

17 THE CHAIRPERSON: I'm a little
18 cautious about using newspaper articles as authorities.
19 It might be better that they are in evidence rather
20 than authorities.

21 MS KULASZKA: Okay. The first one
22 would be "Unless We Abolish Article 301".

23 THE CHAIRPERSON: I can't find it.

24 MR. VIGNA: Perhaps we can free the
25 witness.

1 THE CHAIRPERSON: Here it is. I
2 found it. They are not stapled.

3 MS KULASZKA: "Unless We Abolish
4 Article 301". This is the legislation in Turkey.

5 THE CHAIRPERSON: Any objection to
6 that?

7 MR. FOTHERGILL: Not based on
8 authenticity without prejudice --

9 THE CHAIRPERSON: It's an article.
10 Whatever it's worth. Newspaper article. So that would
11 go in as -- this is an article from --

12 MS KULASZKA: Today's Zaman.

13 THE CHAIRPERSON: What's that?

14 MS KULASZKA: Turkish newspaper.

15 THE CHAIRPERSON: Okay. Two-page
16 article. That will go in as --

17 THE REGISTRAR: Entered as respondent
18 Exhibit R-10.

19 EXHIBIT NO. R-10: Two-page
20 newspaper article titled "Unless
21 We Abolish Article 301"

22 MS KULASZKA: The second article is
23 "Censorship Still a Burning Issue". This is also about
24 the assassination of the journalist.

25 THE CHAIRPERSON: The second one

1 is --

2 MS KULASZKA: From The Independent in
3 Britain.

4 THE CHAIRPERSON: Let me back you up.
5 I have something here that says "Independent on-line".

6 MS KULASZKA: Four pages.

7 THE CHAIRPERSON: From The
8 Independent. "Censorship Still a Burning Issue". Okay.
9 I have that, yes. Article from The Independent. Any
10 objection?

11 MR. VIGNA: The petition was not --

12 THE CHAIRPERSON: Talking about The
13 Independent.

14 MR. FOTHERGILL: It will be the same
15 position at the previous.

16 THE CHAIRPERSON: Four-page article
17 dated February 25th, 2007.

18 THE REGISTRAR: Document will be
19 produced as respondent R-11.

20 EXHIBIT NO. R-11: Four-page
21 article dated February 25, 2007

22 MR. VIGNA: Just for the record, I'll
23 be arguing on the relevance on argument, although I
24 don't object at this point.

25 MS KULASZKA: The next document is a

1 petition which Professor Tsesis did sign, but I don't
2 think it was ever put to him. Parts of it were read to
3 him and he agreed with it, but he was never actually
4 shown the document.

5 MR. FOTHERGILL: It wasn't shown to
6 him and I do object to this being entered in evidence.
7 The proposition was put to him he had signed a petition
8 so you have that evidence. The petition itself may
9 contain additional information which might be used to
10 his prejudice and I object to it being filed. There
11 was the opportunity to have him identify and produce it
12 and it wasn't done.

13 THE CHAIRPERSON: Is there anything
14 in here of that nature? On that point, I even got
15 evidence today from Dr. Downs about this incident as
16 well.

17 MR. FOTHERGILL: But the only
18 proposition that was put to Dr. Tsesis and the only
19 ones he spoke to was whether he had signed a petition
20 in support of Professor Buttz's termination from his
21 position.

22 MS KULASZKA: I think parts of it
23 were actually read to him. He was never shown the
24 document but I think Mr. Christie read parts to him.

25 THE CHAIRPERSON: If parts were read

1 I would rather have the document.

2 MR. FOTHERGILL: I don't think anyone
3 from this side of the room recalls that. But if you
4 do, I'm still concerned this might be used in a
5 prejudicial way.

6 THE CHAIRPERSON: Could I look at it
7 and see what might be prejudicial about it?

8 MR. FOTHERGILL: The text of the
9 petition.

10 THE CHAIRPERSON: Seems --

11 MR. FOTHERGILL: My colleague has
12 checked where -- notes and all that was said about the
13 petition is that it was titled "Never Again" and it
14 called for the termination of Professor Buttz and that
15 Professor Tsisis signed it. In my respectful
16 submission, it is not appropriate to take the document
17 now as an exhibit.

18 THE CHAIRPERSON: Ms Kulaszka, is it
19 essential you have this exhibit? I have all the
20 evidence.

21 MS KULASZKA: It's hard to say
22 without the transcript. I recall him reading I think
23 the last line, "We look forward to the resignation of
24 Arthur Buttz."

25 THE CHAIRPERSON: Here's what I'll

1 do, since we have a little debate. I'll reserve on
2 this until you get the transcripts. We're going to
3 have final argument. On that day if somebody can
4 demonstrate to me it was read to him, then we'll enter
5 it into evidence at that point. And this is on the
6 transcript, too. Hold on to these copies then.

7 MR. KULBASHIAN: I don't know if this
8 is relevant because there's issues that came up
9 regarding denial. This is just about the decision
10 yesterday -- Court of Justice, came to a decision that
11 Serbia did not in fact commit a genocide against the
12 Bosnians.

13 THE CHAIRPERSON: Sorry?

14 MR. KULBASHIAN: I don't know if you
15 read the newspaper, but yesterday there was decision by
16 the International Court of Justice and they came to
17 decision that Serbia did not in fact commit a genocide
18 against the Bosnians.

19 THE CHAIRPERSON: What about that?

20 MR. KULBASHIAN: Just -- this might
21 be an issue of relevance. There have been a lot of
22 issues about genocide denial, Holocaust denial in case,
23 and it might be an issue to either side whether or
24 not --

25 THE CHAIRPERSON: Look. If that was

1 the decision -- was it from the International Court of
2 Justice. If it was, it sounds like it's a legal
3 authority. Somebody could print it off and submit it
4 for argument or whatever.

5 MR. KULBASHIAN: Thank you very much.

6 THE CHAIRPERSON: I, myself
7 referenced that decision this week on -- with regard to
8 security certificates. I don't know if that has any
9 relevance to this case but anyone can produce anything
10 that's fresh from the courts. Okay.

11 Do we need to start early tomorrow?

12 MS KULASZKA: 9:30.

13 THE CHAIRPERSON: Okay, 9:30.

14 --- Whereupon the hearing adjourned at 5:20 p.m.,
15 to resume on Wednesday, February 28, 2007
16 at 9:30 a.m.

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I hereby certify the foregoing
to be the Canadian Human Rights
Tribunal hearing taken before me
to the best of my skill and
ability on the 27th day of
February, 2007.

Sandra Brereton
Certified Shorthand Reporter
Registered Professional Reporter

StenoTran