

LUNCHEON ADDRESS

Judge Alex Kozinski: "Don't Drop the Torah!"*

STANLEY INGBER: Those of you who know me know that when planning programs such as today's, I try to retain control of the event by preparing for all contingencies. For our symposium, I am most concerned about the importance of including individuals with varying backgrounds and perspectives. Since I knew our keynote speaker, Cass Sunstein, as an eloquent academic with a leaning toward communitarianism, I wanted our luncheon speaker to be, although equally eloquent, of a differing background and viewpoint. I desired a scholarly individual, but one whose position demanded a greater focus on practicalities, a jurist possibly. One with more libertarian tendencies. The name of Alex Kozinski quickly came to mind. I was greatly pleased when Judge Kozinski agreed to participate as our luncheon speaker.

But, uncharacteristically, I had not done all of my homework. I had not read *all* of his scholarly writings or I would have noted Judge Kozinski's penchant for unusual, if not startling, titles. I would have noticed articles like, "Lawsuit, Schmawsuit" or "Bob Bork Meets the Bald Soprano," or "Confessions of a Bad Apple." If I had seen these titles, I might not have been so confounded when his secretary left a message on my phone mail that his title for today's address was "Manhole Covers for the Handicapped." I called the Judge back to confirm that he knew the subject of our program, to ask for a more revealing title, for, at least, the addition of a colon followed by some explanatory clause. He refused. I explained my need to be able to tell our sponsors and others of the outstanding speakers we were drawing and the important topics we would confront. He said, "Fine, so tell them." When I pressed my discomfort, he laughed and said, "Trust me." So much for my compulsion for control.

So, although with some residual apprehension, let me introduce our luncheon speaker: Alex Kozinski is a judge of the United States Courts of Appeals for the Ninth Circuit. After graduating from UCLA, from which he received both his A.B. and his J.D., and prior to his appointment to the Appellate Bench by President Reagan, he clerked for Chief Justice Warren Burger of the United States Supreme Court, practiced law in the District of Columbia, worked as assistant counsel to the Office of Counsel to the President, and served as Chief Judge of the United States Claims Court. All of this by age 35. In addition to filling his judicial responsibilities, Judge Kozinski has developed a reputation as a prolific scholar and an accomplished and provocative academic lecturer. Consequently, although my toes remain crossed, I am most pleased to introduce Judge Alex Kozinski to deliver remarks titled, "Manhole Covers for the Handicapped." Judge Kozinski. [As the reader will note, the judge has changed the title of his talk. The new title, however, is as cryptic as the original one.]

* Judge Kozinski wishes to acknowledge and thank his law clerk, Paul Watford, for his help in preparing these remarks.

ALEX KOZINSKI: Thank you, Professor Ingber. Good afternoon, ladies and gentlemen. Well, I must say I have been shamed into it. Professor Ingber tried to explain to me his need for a title by saying, "Think about the audience -- they'll want to know where you're going." And so I have reconsidered. Now I realize telling you what my talk is about right before I'm about to give it is a little late, but I hope you're not going to be one of those audiences that rejects enlightenment just because it comes late. So I will now withdraw my earlier title, or put a colon after it, and tell you what my talk is really about and give you a chance to know where I'm going. The new title is, "Don't Drop the Torah!" Now that we all understand each other, I can go on with the subject of my talk.

A few months ago in a case called *In re Perez* (1994), I wrote an opinion dealing with bankruptcy law. In what was probably a futile effort to liven up an otherwise dull subject, I started out with the following grabber: "In this appeal from an order approving a Chapter 11 reorganization plan, we confront the iron maiden of bankruptcy reorganization -- the dreaded cramdown." One of my colleagues joined promptly, but the other circulated a short dissent. This in itself was not unusual -- disagreements about difficult areas of the law are common. What I did find somewhat surprising was the last paragraph of the dissent, which read as follows:

I write also to disapprove of the sexist reference in the first sentence of Judge Kozinski's opinion. The term "iron maiden" refers to "a medieval instrument of torture fashioned as a box in the shape of a woman, large enough to hold a human being, and studded with sharp spikes on the inside." The use of the term unnecessarily perpetuates the misogynistic nomenclature of medieval torturers.

"Sexist? Misogynistic?," I thought. Surely, nothing was farther from my mind. I had selected the term because it conveyed in a colorful and somewhat humorous way the attitude of many bankruptcy practitioners toward a legal device that, figuratively speaking, places all creditors into a tight box and squeezes the lifeblood out of them. I had considered using various other expressions -- the thumbscrew, the rack, drawing and quartering -- but none conveyed exactly the right image. Nor does the English language have a ready synonym for the term. I suppose I could have said something like, "We now confront a legal device that in its ferocity resembles a certain medieval torture device with long iron spikes used to macerate human bodies," but that would have taken some of the grab out of my grabber.

When I learned of my colleague's objection, my first impulse was to remove the offending term and get on with the case. But, alas, I am vain about my writing, so I decided to do some research to see if he really had a point. I started with my law clerks, two of whom were women, and they assured me they found nothing offensive about the term "iron maiden," nor did my two female secretaries. Nor did my wife, my mother, my mother-in-law or any of the other dozen or so women to whom I posed the question.

Who knows, I thought, maybe I live in a sheltered universe, so I decided to do some research into the history and etymology of the term "iron maiden."

Externs were dispatched to UCLA and other large libraries around town in search of any volume that contained a discussion of medieval torture. While we found a great deal that explained how and when the iron maiden was used, there was no hint about its name. The closest we came was a reference to the fact that the device was also known as the "iron virgin" and a conjecture that it might have something to do with the Virgin Mary holding the pierced body of Christ.

At that point I realized I had gone about it all wrong. Why read stodgy books when I could cruise the information super highway? Eagerly, I logged onto my server and formulated my query. Veronica churned for many long minutes as it rummaged through hundreds of data bases worldwide and, to my great satisfaction, came up with a list of several dozen entries all concerning Iron Maiden. "Jackpot!" I thought to myself, until I figured out they were all devotionals to some rock group I had never heard of.

Surfing the net means never having to say you're sorry, so I devised another strategy: Ask the experts. Luckily, I managed to track down two discussion groups that seemed promising. One was frequented by historians specializing in the late middle ages, the other by etymologists. With eager fingers, I formulated my query: "How did the iron maiden get its name? Is there some truth to the notion that, apart from being otherwise model citizens, medieval torturers were misogynists?" I promptly received several responses. "The Iron Maiden," they told me, "was a medieval torture device large enough to hold a human being, and studded with spikes inside. It was called 'iron maiden'" -- I held my breath as I read the explanation -- "because it was shaped like a woman." Who would have guessed?

In the end, I decided to stick with the term, but not without some trepidation. After the opinion was issued I attended our judicial conference (an intimate gathering of 1200 judges and practitioners) -- and several people -- including some noted feminists -- assured me that they took no umbrage at my use of the term. To my knowledge, no one has yet come up with support for the view that iron maiden is sexist or reflects badly on women.

But what if someone had? What if I had overlooked some body of scholarly research that showed pretty clearly that "iron maiden" does have misogynistic historical roots? It seems to me that two things would follow: First, that body of research would say nothing at all about my attitude toward women. It might say something about my research skills, or those of my staff, but not about my decision to use the term "iron maiden" before learning of its shadowy past.

Which would not detract at all from the second thing that would have been true, which is that I would have found myself deep in trouble for using the term. I can just imagine the op-ed piece in the New York Times or the American Lawyer bemoaning sexist attitudes in the federal courts and citing my use of iron maiden as Exhibit A. Who knows? It might still happen.

I've gone on at some length about the iron maiden incident, not because it is so unusual, but because it is so common. I recently ran into someone who took umbrage at use of the term "handicapped." "Why?", I asked. "Because," came the smug explanation, "handicapped comes from cap-in-hand, which refers to disabled beggars who had to beg for money by holding their upturned caps in their hands."

I felt chastened until I looked it up in The Barnhart Dictionary of Etymology, which explains that “handicap” is derived from “hand in cap,” an old wagering game in which money was put in a cap. This evolved into a burden put on competitors in any game, such as in horse racing and golf. And from there it came to refer to a burden under which a disabled person must labor. Other dictionaries agree.

And then there is the verb “to welsh,” as in not to pay up on a debt, which has been banned, not in Boston, but in my home town of Los Angeles -- at least in the Los Angeles Times. “Some dictionaries,” the Barnhart says, “associate this word with [the Welsh Nationality], suggesting a disparaging derivation.” “But,” the Barnhart continues, “there is no evidence to support this” theory. Words that appear to share a common derivation don’t always; scot-free, for example, has nothing to do with Scotland. It had never occurred to me that the good people of Wales might have a reputation for renegeing on their debts until I heard that a Welsh-American group sued to stop news organizations from using the term. I won’t even mention the salacious and sinister derivations I have heard attributed to such words as “manhole” and “titillate.”

I, for one, am troubled by this trend of dissecting bits and pieces of our language and roping them off whenever someone can imagine a slight. To begin with, it makes the language poorer by removing a large number of useful and colorful terms. More troubling still is the very impulse that animates people to go looking for insult in every nook and cranny of the English language, and call those who unwittingly use the terms sexist or racist or at least insensitive.

The fact is, there are very few words in the English language that cannot, with the right twist or inflection, be given a pejorative meaning; conversely, very few -- if any -- have an unequivocally derogatory meaning. I was reminded of this when I recently read the blue brief in a case called *Meehan v. United States Postal Service*. Meehan had been removed from his job as a postal worker for saying: “I only want to work here until December and then I’m going to go to Florida anyway. And I’m going to take one of the motherfuckers out before I go.” In arguing that the expression was not nearly as bad as it sounded, the appellant’s lawyer dropped the following footnote:

It may be noted . . . that obscene as it is, [the term “mother fucker”] is now street talk for a (not necessarily disliked) male person. The term is defined variously as an “exclamation of anger,” “insult; derogatory name; bastard” and a “positive, complimentary name for a friend” (E.E. Landy, *The Underground Dictionary*, 135, Simon & Shuster, N.Y. 1971); as “any despicable person or thing,” “a superb person or thing,” and “a male buddy or chum” and as “a term used between males” (R.A. Spears, *Slang and Euphemism*, 260, Jonathan David Publishers, 1981).

Alas, Meehan lost, but it was a nice try.

The hunt for fossils of insult in ordinary language is but one example of a broader trend to demonize those who say and do things that -- under some view of the matter -- are deemed offensive. And this is itself part of an even broader consensus that clings firmly to the notion that instances of racial or ethnic or gender insensitivity -- ranging from the simple slip of the tongue to the burning of a

cross on somebody's lawn -- are to be treated according to a simple rule: assess individual blame, mete out crushing punishment and impose whatever prohibition you can get away with to make sure it doesn't happen again. Which gives rise to symposiums such as this one, where we debate the tension between free speech and equality.

I'm here to suggest that we've been looking for the right paradigm in all the wrong places. It is only in trained legal minds -- with the concomitant confrontational ethic -- that equality and free speech seem polar opposites in a zero-sum game. In fact, they can coexist just fine; it's only our own narrow focus on prohibition and punishment that creates a false tension between the two.

I'd like to offer a perspective that focuses not on the areas where the First and Fourteenth Amendments clash, but where they can be reconciled. In particular, I'd like to discuss how we might go about resolving apparent conflicts between free speech and equality in a manner that does not sacrifice one in the name of the other.

I'll start by drawing a conceptual line between two types of offensive speech. On one side of the line, I put hard-core hate speech -- burning crosses, swastikas painted on synagogue walls, and other such unadulterated expressions of bigotry. On the other side of the line, I put everything else, including all offensive or potentially offensive speech, such as tasteless jokes or ambiguous language capable of an invidious construction. While few conceptual lines are entirely hermetic, and I am sure many of you are already formulating the hard cases that straddle the imaginary line I have drawn, I ask that you indulge me and accept the distinction for the time being. As you will see, it won't make much difference to the conclusion, only to the way we get there.

The line I have drawn does not divide the universe of offensive speech into two equal parts. Instead, the intentionally derogatory and demeaning stuff is only a small percentage of the whole. Most of what is labelled offensive speech is of the more ambiguous or unintentional kind. Some of it may be pretty offensive, to be sure, but we can tell it apart from anti-Semitic slogans.

In our zeal to combat hate speech, we often treat the two as if they were one and the same. Ambiguous remarks capable of both an innocent and a malevolent interpretation are carefully scrutinized for hidden slights or insults against particular groups. And, having discovered the hidden slight or insult, we then make broad judgments about the speaker's character: Because Professor Jones said something that could plausibly be interpreted as offensive to Jews or blacks or women, he must be anti-Semitic, racist or sexist.

Being branded with such a label has far from trivial consequences in today's climate, where universities and employers feel enormous pressure to stamp out anything that could remotely be viewed as harassment. At the very least, an accusation of racism or sexism can result in an embarrassing investigation, in which the speaker's past acts and words are dissected for potentially discriminatory content. Should one be found guilty of having uttered words construed as racially or sexually harassing, career-wrecking sanctions like suspension or dismissal are not uncommon.

In my view, this is a decidedly wrong-headed approach to tackling what we all recognize as a significant and disturbing problem on campuses and in work-

places. We should begin with the assumption that most of us are well-intentioned people who don't harbor pervasive bias toward other groups. The openly bigoted -- those who would burn a cross on the lawn of a black family or deface a synagogue, for example -- are the exceptions, not the rule. If we begin with this assumption, rather than presuming every ambiguous remark to be evidence of a malevolent character, we are far less likely to wrongly stigmatize individuals with charges of racism or sexism for remarks that carried no intent to injure or degrade.

None of us, of course, is totally pure of heart; nearly all of us have occasionally said something that carries racist or sexist connotations, perhaps told a joke at the expense of someone of a different sexual orientation, or perhaps said things that members of another group interpret as a slight, even though we didn't realize such remarks would insult or offend. On other occasions, we may have said things in anger that we know are likely to be offensive to others, then upon calmer reflection regretted having said them. Does this mean that we're bad people? Does this mean we should be labelled "racist" or "sexist"?

I don't think so. I don't think it's being too forgiving to recognize that people sometimes say things that don't reflect who they are as human beings. That is not to say we can never conclude that someone who says offensive things about minority groups or women is indeed hopelessly bigoted. But far more common is the person who unwittingly says something that's interpreted as offensive, only to have that stray remark viewed as conclusive proof of the type of person he is, or the person who makes a remark in anger and deeply regrets it once he cools down. If we start out on the assumption that most of us are of good will, we will find in many instances that an isolated offensive remark is not the product of a bad character, as is so often assumed.

To illustrate the point, let me cite the case of Daniel F. Calabro, then a commissioner of the Glendale, California Municipal Court. In California, commissioners are hired by the court itself and serve sort of as assistant judges, but only with the consent of both parties.

Back in August of 1987, the Los Angeles Times reported that then District Attorney Ira Reiner held a news conference to announce that, henceforth, all his deputies appearing in the Glendale Municipal Court would automatically object to Calabro, which meant that the commissioner would be precluded from hearing criminal cases. The reason for this drastic action, Reiner explained, was that during a recent hearing involving an assault by three white men on a black man, Calabro was quoted as saying the following: "Another nigger case? Another one where this nigger business came up? We're not [past] that yet? I thought we were [past] all that."

Reached by reporters for comment, Calabro denied he had used the word in a derogatory sense. Rather, he explained, this was his second case in five days involving a racially motivated crime where the perpetrators had used that particular epithet; his statement was an expression of distress and disappointment that such crimes continued to appear on his docket, and that the epithet was still in such common use. Calabro offered an apology: "The use of the word was totally unfortunate," he said. "I'm sorry that I used it. I should not have used it. I will never use it again . . . I can assure you I have no prejudice against any group of persons or a specific individual."

Having extracted a public apology from Calabro, one might have thought that the district attorney would be satisfied. But having demonized Calabro publicly, Reiner found it hard to back down. It was unclear what else the D.A. expected Calabro to do, but there was a strong hint he hoped the Municipal Court would fire Calabro.

The Municipal Court and several bar groups commenced investigations to determine whether Calabro's remarks disclosed some hidden bigotry. Among the items they discovered were the following:

* The Public Defender of Los Angeles County stated that Calabro "Had never shown any prejudice at all against black people or other minorities. If he had, we'd have certainly said something about it."

* An assistant Municipal Court administrator, a black woman, credited Calabro with helping her career. She said, he "encouraged me; he helped me obtain a lot of my goals. He was just really supportive."

* Another court employee recounted an incident when a black defendant walked into Calabro's courtroom barefoot. During a recess, the employee reported, Calabro "went home and brought back shoes for him -- and they were new, too."

* A court administrator recounted an incident where Calabro had been present when someone had made a racist joke and heard Calabro say, "Please don't say those things in front of me, it offends me." The administrator noted that because of Calabro's example, she had learned how to object to such comments.

The Glendale Municipal Court, the Los Angeles County Bar Association, and the Langston Bar Association all cleared Calabro of the charges of racism; the NAACP accepted Calabro's public apology. Yet the district attorney held fast. Finally, some nine weeks later, Ira Reiner found himself standing alone and had to back down. Calabro, in the meantime, had lost 40 pounds because of chronic nausea and sleeplessness caused by the ordeal.

What is troubling about this story is how the district attorney was so ready to infer that Calabro was a bigot, incapable of redemption. It was not enough for Calabro to offer a public apology and promise not to do it again. Instead, in order to show a sufficient degree of outrage, District Attorney Ira Reiner had to demand nothing less than the destruction of Calabro's judicial career. What's going on here is that we have adopted the litigator's ethic for dealing with a difficult social problem: scorch the earth, take no prisoners and under no circumstances turn the other cheek.

Is that really the best approach? If we allow for the possibility of misunderstanding, for human frailty, for mistakes of judgment, for the hope of improvement, we may come up with solutions that reconcile both the interests of the persons offended and those of the speaker. If you tell me I said something that hurt your feelings, I may well apologize and explain that I did not mean it that way. If you assume I am a person of good will who may have misspoken, you may be willing to accept the apology and the explanation as complete redress. But if you accuse me of being a flawed human being and demand that I crawl away and die, you are likely to get a vehement denial and a nasty fight.

The litigation ethic leaves little room for the possibility of resolving differences productively. Thus, the fact that Calabro didn't mean any harm by using a word we find deeply offensive doesn't mean that those who heard his statement were wrong in taking umbrage. Regardless of his intent, his easy use of the word reflected insensitivity and he needed to be told that racial, ethnic and religious epithets are to be used only when absolutely unavoidable, and even then with the greatest of care. Ira Riener thus had a point, but the point was lost in the battle over whether Calabro is a good man or bad man.

Contrast the way another incident was resolved, involving Disney's animated film "Aladdin." As originally released, the movie opens with a scene in which a Muslim character sings a song with the following verse:

Oh, I come from a land, from a faraway place, where the caravan camels
roam. / Where they cut off your ears if they don't like your face. / It's
barbaric, but, hey, it's home!

A number of Arab-American organizations complained to Disney that this scene perpetuated negative stereotypes of Arabs, and asked that the studio modify that portion of the film. These organizations weren't shrill in their demands; they didn't threaten large scale boycotts or multimillion dollar lawsuits. Instead, they informed the studio that it had included a portrayal of Arabs that was deeply offensive to them, and asked Disney to respect their sensibilities by changing the insulting scene. Disney obliged by amending the words for the home video version of the film, so that the revised version went like this:

Oh, I come from a land, from a faraway place, where the caravan camels
roam./ Where it's flat and immense and the heat is intense./ It's barbaric,
but, hey, it's home!

As this incident illustrates, it's very often possible to work out a solution that accommodates the interests of both sides, in a manner that fosters mutual respect rather than divisiveness. Aside from the fact that the scorched earth litigation ethic really does very little to resolve legitimate disputes among well-meaning individuals, it also has a profound chilling effect on public discourse. Perhaps two examples will suffice. Not surprisingly, the "iron maiden" incident became the subject of discussion on Lexis Counsel Connect, and I was relieved to learn that no one had taken offense at my use of the term, although several questioned my decision to keep it in over another judge's objection. Professor Steven Gillers, of NYU Law School, responded in a way that encapsulated the issue for me:

I am not offended at the use of the term. I didn't even know what it meant, historically, but I would have removed it if another judge was offended, even in dissent. That's because I'm a coward, a quality nurtured by years of teaching . . . In my 16 years of teaching I have become way too careful about what I say in class. I never tell jokes anymore. References that one thinks are innocuous will turn out to offend someone. A letter, possibly anonymous, appears in the school paper. . . . This is unfortunate because

spontaneity is crucial to exciting classes. If you monitor your language too closely, you can't easily be spontaneous.

Perhaps having professors lose spontaneity in class is a reasonable price to pay for avoiding offensive speech. But the dangers involved here are far more serious, because once you wield the axe of censorship you may find it's actually a boomerang. Let me illustrate this with a story reported in the *Syracuse Daily Orange* in May of 1991, involving an incident that occurred at Syracuse University. What was gingerly described as a "public sexual experience" took place during a rush party at an on-campus fraternity. The incident came to the attention of school authorities who, in secret proceedings, imposed a relatively mild sanction on the fraternity. A student group called the Gay, Lesbian, Bisexual Student Association got wind of the incident and distributed a flyer protesting the school's handling of the incident. The flyer consisted of the fraternity's rush advertisements with the words, "Phi Delta Theta Gang Rapes" scribbled across the top in graffiti fashion. The precise nature of the incident has never been made public, but the university, after an investigation, concluded that no rape had occurred. The university then commenced disciplinary proceedings against Pat Chang, co-President of the Gay, Lesbian, Bisexual Student Association and the organizer of the leafleting effort. A judicial board found Chang guilty of two counts of having harassed the fraternity; she was placed on probation for the remainder of the semester. The Dean of Students eventually lifted the sanction but noted that the judicial board "had made the right decision in finding Chang guilty of harassment."

I, for one, find it strange that the University would even think of disciplining a student for a misstatement about a matter where the facts were never made public. In fact, one of the protestors' main concerns was that the incident was being hushed up by university authorities, hiding the problem of sexual violence on campus. Moreover, hyperbole is an accepted form of protest, and the students may have felt that any type of "public sexual experience" would adversely affect the dignity and personal security of women on campus. The phrase "Phi Delta gang rapes" on a protest flier could have meant to point out that the fraternity's cavalier attitude toward such conduct was dangerous to women. What I think is remarkable about the incident is that a speech code intended to promote equality for minority groups on campus was used to punish efforts to protest what some perceived as the very lack of equal treatment at the university.

* * *

Let me now turn to the more difficult, mercifully rare, cases where truly bigoted speakers intend to send an unmistakably hateful message -- the cross on the lawn, for example. We consider these cases difficult because it's here that our desire to protect the equality interests embodied in the Fourteenth Amendment is strongest. These are the cases where it's most tempting to sacrifice free speech interests to achieve a greater good.

The reason these cases have become unnecessarily hard is our legal system's obsession with a single remedy: punishment of the speaker. Prohibition and punishment -- even if they could be achieved without offending the First Amendment -- do very little to solve the problem, and in fact may divert resources and attention away from more effective remedies within our grasp.

Unlike the unwitting blunderer, the truly bigoted in our society will seldom be sensitized to the feelings and interests of minority groups by being threatened with punishment. Their extreme views prevent them from even recognizing that minority groups have legitimate interests in avoiding insult and degradation. Thus, while I certainly see the importance of sending a cross-burner or synagogue-defiler to jail for criminal trespass, I have more difficulty seeing the wisdom and utility of imposing punishment solely because we abhor the message they seek to convey.

Perhaps more important, our focus on punishing the bearer of the despised message blinds us to some important realities about hate speech. The reason hate speech is so offensive to us -- and so painful to the victims -- is that it resonates a dark reality for which many more than just the speaker bear responsibility. Consider, for example, the situation where someone puts up a poster saying "Blue-eyed people are stupid." Anyone reading that sign -- including those of us with blue eyes -- will view it more with bemusement than anger; we will assume the sign says far more about the intelligence of the speaker than about those with blue eyes. The reason for this is that such a sign does not reflect attitudes held at large now or in the past.

Not so with a sign that sends a racist, sexist, homophobic or anti-Semitic message. Messages like these are so very devastating because they reflect attitudes held by some now and, unfortunately, many more in the not-so-distant past. A gay or a lesbian who confronts a homophobic message thus is not simply confronting an oddball whose views can be shrugged off. By raising the fear that the message reflects widely-held attitudes, the bearer of the sign erects a daunting psychological barrier between the victims and the community in which they live.

Our focus on punishing the speaker diverts attention from the responsibility each of us bears for the pain the message causes, and the things we can do to repair the damage. What I have always found most distressing, for example, about the vandalizing of synagogues with anti-Semitic messages is not the physical damage, nor even the knowledge that there are some among us who would do such things. The most distressing thing is that most members of the community are content to denounce the perpetrators and then leave to the congregation the task of cleaning up the mess. This response glosses over a reality far more important than the guilt of a few individuals, namely that the incident has torn the fabric of the community, leaving the victims badly in need of reassurance that they belong, that they are not outcasts. Our single-minded focus on the guilt of the perpetrators often keeps us from realizing that the difficult job of repairing the social fabric and restoring the victims' sense of belonging is one that must be undertaken by all of us.

A community response to instances of egregious hate speech might involve public shaming of the perpetrators or compensation to the injured citizens, perhaps by helping to repair or replace damaged property, or by offering some other symbolic gesture (whether monetary or otherwise) to demonstrate that the community accepts responsibility for undoing the harm that has been inflicted. Or, a community-wide response might involve a public apology by the mayor, a formal denunciation of the hateful message espoused. Gestures like these can have enormous symbolic and psychologic value for the individuals injured by incidents of hate speech. The message sent is that the injured individuals are

welcome members of the larger community, and that it is the purveyors of hate who are the outcasts.

In mentioning this, I'm reminded of the war reparations my mother receives each year from Germany on account of the persecution she suffered at the hands of the Nazis. It's not a lot of money, but it's not the amount that's important to her; it's what the gesture represents, the message it sends. The message conveyed is that the citizens of Germany -- even those who didn't support the Nazi regime -- recognize their responsibility.

Think of the bright spots in the otherwise horrific experience of the Holocaust. Was it the Nuremberg trials and executions? Was it the trial and execution of Adolph Eichman? Was it the long hunt for Nazi war criminals? My parents were both Holocaust survivors and I grew up with concentration camp stories, yet I found the hunting down and punishment of the perpetrators -- Adolph Eichman's cry to the end that he was just carrying out orders -- only a bitter satisfaction.

What I find as the bright spots of the Holocaust are the brave members of the community who risked their lives to save Jews, people like Oscar Schindler and Raoul Wallenberg; like the courageous people of Denmark who, led by their King, camouflaged the Jews by donning the yellow star themselves, and later snuck every single member of their small Jewish community out of the country to safety.

What I find uplifting about these stories is knowing that there are among us saintly people who, at the risk of their lives, nevertheless saw it as their responsibility to keep the fabric of the community intact even against the menace of the final solution. They did not say, "This is not my problem because the perpetrators are those other people who have their own free will and therefore carry all the responsibility." They recognized, rather, that every decent member of the community has the power and the responsibility to stand up to the forces that would tear it asunder.

There is a tradition in Jewish law which says that if the sacred document -- the Torah -- ever touches the ground, everyone who is present in the synagogue, indeed everyone in the congregation, must fast for forty days, from sunrise to sunset; no special punishment is imposed on those responsible for the transgression. I asked a friend of mine who is a rabbi about the reason for this and his explanation was simple: The underlying assumption is that something like this could not happen unless the entire assembled community was at fault, for otherwise their collective merit would have prevented it. So too it is with racial bigotry, anti-Semitism, homophobia, and similar conduct: such things could not take root unless each of us had failed to uproot them.

Viewing free speech and equality as pulling in opposite directions is an illusion. Prohibiting speech will not promote equality and may indeed hinder it, while impoverishing our public discourse. And it is not at all true that we must turn our back on the ideal of a just and equal society because we allow some among us to carry offensive and divisive messages. The hard-core bigots in our society will always be with us and will surely find ways of carrying their hateful message despite any prohibitions. The responsibility of the rest of us is to embrace the targets of hatred, to stand against the views of the few and our sad history of bigotry. Doing so without the expedience of prohibiting or punishing

speech is, perhaps, more difficult; it no doubt requires more time, effort and imagination on our part, and asks for the type of personal commitment to the concept of equality that goes far beyond just passing a law and then expecting it to solve our problems for us. But it has one big advantage: It works.

Thank you.

Audience Discussion

STANLEY INGBER: As the Judge said, I can turn to our sponsors and our audience and say, "It was wonderful."

Again I would like to solicit your questions and comments.

WILLIAM KRUSE (Audience): I'm Bill Kruse, the mayor of Melbourne, Iowa, and a victim of a hate crime. I just want to echo your last comment, that it works. The hate crime I suffered was universally condemned and it has not reoccurred. Here in Des Moines, when the synagogue was defaced, the whole community got together and helped clean up the synagogue and had a public rally, and I think that worked. So I think your comment was well taken. We can pass all the laws that we want but it takes each and every one of us to say "no" to that kind of conduct. So thank you very much.

ALEX KOZINSKI: Thank you.

ROBERT MANNHEIMER (Audience): I'm Bob Mannheimer, I'm a lawyer. The sequel to the last speaker's story is that the rabbi at the synagogue called in these people who had committed the crime, and, as far as we can tell, succeeded in convincing them that they had made a serious mistake. They then claimed to be properly repentant. We, of course, can't be sure of that, but I just thought you'd be interested to know the rest of the story.

ALEX KOZINSKI: I am. Perhaps Des Moines wasn't the best place to deliver this particular message because I live in Los Angeles and the reality I described is very much the reality in Los Angeles. I'm immensely heartened to hear this episode. I hope this is more characteristic than my own experience.

BERNICE SANDLER (Audience): I'm Bernice Sandler. I'm not a lawyer; I'm with the National Association for Women in Education. First I want to say that I disagree wholeheartedly with your position that we should assume that most people are of good will, try to allow them the opportunity to apologize and go on from there. I also thought I would tell you why "iron maiden" is offensive to some people. It's because it has become a term for women in power, or women who assert power, or women who act in an assertive manner -- Margaret Thatcher; Elizabeth Dole when she was Secretary of Labor. Women in Washington who have power very often are called "the dragon lady" or "the iron maiden." And I think that was the origin there.

ALEX KOZINSKI: I had heard "the dragon lady"; I had never heard "iron maiden." We ran this on LEXIS as well, thinking that we might pick up something in the press that would give a hint. But I must tell you this is the first

time I have heard his explanation and it makes sense. Now I can go back and take it out.

BERNICE SANDLER (Audience): As long as you don't call me an "iron maiden" for saying so. The point I wish to make is that language changes over time. Our view of language has changed over time so that comments that were once acceptable to large numbers of people, or jokes that were once acceptable, are no longer acceptable. Sometimes there's a gap between those who feel that it's acceptable and those who feel it's not. We live in a time of change, and our sense of what is fair and just is rapidly changing around language.

Language shapes our thoughts, and I'll leave you with a story. I once did a paper based on the University of Wisconsin's little handbook on non-sexist language -- it was hardly radical, the most radical thing in it was instead of saying "fireman" say "firefighter". The paper was picked up by the press, and the project I then directed got more comments on that than on anything else we had ever done, including comments such as "God will get you for this." What did the writer mean by that? I don't know, but certainly it is indicative of the degree to which people deep down recognize how powerful language is. Yet when groups raise these issues they are seen as focusing on something trivial. If they are trivial, it is easy to apologize and say, "That is not what I meant, I am misunderstood, I had no idea it's offensive and I will not do that." So many times people say, "You're taking it too seriously." But words are not trivial; language shapes our thinking.

ALEX KOZINSKI: I think that's a very good point. Language is changing, and I would just put a plea in that we ought not to take those people that get caught in the change and make devils of them. Again, it's very hard to say "I'm sorry" and admit guilt if the stakes are I'm an evil human being. A little bit of forgiveness might help a great deal in avoiding these conflicts.

IRMA McCLAURIN (Audience): Irma McClaurin, anthropology at Grinnell College. I'm glad where you ended up in your speech. I guess I want to stress that not only does language shape how we think, but all of our behavior is shaped by our culture. I think in your earlier example about our quest to categorize people and label them, and the zeal with which we do that, in some ways minimizes the power of culture. So much of our behavior is shaped at an unconscious level that even the best people with the best intentions may not be aware of how much they've internalized beliefs and values that have to do with inferiority or things of that nature. Although I understand and appreciate the caution that you give us about rushing to convict someone or somehow categorize someone, I think there's also a real danger in minimizing the implication of their words. If that person is in a position to exercise power over people's lives or over allocations of resources, we must be sure to investigate enough so that we feel comfortable with the conclusion that the intentionality is really at a very superficial level.

I just want to emphasize the power of culture, and culture at the unconscious level. At that level, racism is something that is so insidious that most of us participate unknowingly. And coming back to your final comment,

the reason that people don't feel the need to help contribute to the victims' somehow feeling supported is because they don't see that there is a real problem. In the realm of their lives or their point of reference, particularly if they are part of the dominant group, these are minor issues. In other words, it has not affected them at the level at which it's affected those of us who have been marginalized by virtue of sexual preference, race, or religion. Therefore, there is this minimizing. That is in many ways the key of racist behavior in the 1990s, that it minimizes critical issues by saying that somehow we've moved past this racism point, and perhaps you're overreacting, or perhaps you're reading too much into it. And it's a very dangerous kind of racism because it's not Jim Crow segregation, you can't easily pinpoint it. So I want to reemphasize the point made earlier, that culture is very powerful. And when talking about law, we have to be sure we don't minimize it.

ALEX KOZINSKI: That's a very important point, if I can just edge a little bit beyond the four corners of my talk into a deeper area. I've had this paper in the works for a while. I circulated it to a number of people in my staff. One of those people, who is a member of a minority group -- not racial -- who has felt the effects of bigotry, made very much the point you made. The fact is there is bigotry in our society; we grow up with it, we live with it. It's so pervasive that it's difficult to know where it stops. And self-examination is so difficult -- it's never objective. The question he posed to me is, "Well, what do you do about it? We have people in society that to some measure are bigoted. They're not going to leave, they're not going to go away, they're not going to die, most are not going to get into trouble at all because they're going to be careful. How do you deal with this reality?"

His view was that we have to be more accepting of the fact that some people have this as part of their culture and as part of their lives, and educate them. Even when you find bigots, trying to hit them over the head will do more damage than good. It will make it less likely that other people will give themselves away, and so they will never move from their bigoted position. If they get called on it and have to defend it at the stake of their own lives or careers, they'll never give in. In their own minds they'll become even more pushed in that direction, then you really have a problem. What is your thought on that?

IRMA McCLAURIN (Audience): That is the same logic that people used to try to impede the enactment of civil rights. They argued that if you forced or coerced -- white southerners in particular -- to change their behavior through legislation or regulation, that what you would get is this tremendous reaction and that in fact it would make people more entrenched. Now I don't think we're arguing that now. We in fact did go ahead, and of course there was response.

Of course, I don't think there's any empirical evidence that attitudes of whites who strongly held the beliefs that upheld Jim Crow and segregation have fundamentally changed. What has changed is the ability of such people to translate those beliefs and prejudices into specific kinds of institutional responses, into behaviors that have implications beyond their living room, their house, their set of friends, by extending them into the public arena. When

examining things like hate speech and this whole issue of harmful communication, my concern is not whether I can convert someone to believe in libertarian or progressive ideas, but that I can have some means to impede the ability of that person in a systematic way to limit my equality, my freedom. I am not particularly concerned about individual cases, but when the effect of these prejudices becomes systematic, that's when I see the need for action existing.

So the point you were making earlier you could also have made 25 years ago around civil rights. Then too people argued that the civil rights movement was overkill, that it was too public and confrontational, even though it was non-violent. Now we've moved to a position of "they could have even gone farther."

So again, I think one of the points that's made is that history shifts; our perspective on what that history consists of shifts. So I think that ten years from now, the thought that we overkilled by trying to regulate certain kinds of hateful speech because of the systematic impact they had on particular vulnerable groups of people will probably be looked at as wrong and that our efforts were a very mild response to these concerns.

STANLEY INGBER: Prior to our second panel which will focus on the equality paradigm, we'll take a short break.