

1990

## Free Speech & Religious, Racial & Sexual Harassment (Program)

Institute of Bill of Rights Law at the William & Mary Law School

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*The Seventh Annual Bill of Rights Symposium*

# FREE SPEECH & Religious, Racial and Sexual Harassment April 5-6, 1990



# FREE SPEECH

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**Thursday, April 5**

Marshall-Wythe 119  
7:00 p.m.

Welcome  
Rodney A. Smolla

Dean Timothy J. Sullivan  
Presentation of First Annual  
Institute of Bill of Rights Law  
Distinguished Public Service Award  
Recipient: Mary V. Bicouvaris

First Case

**The Hate Speech and Sexual  
Subjugation Statute**

Intermission

Second Case

**The University Hate Speech  
Regulation**

Student Lounge  
9:30 p.m.

Reception

In all of modern constitutional law, there are few conflicts as wrenching as the inherent tension between the free speech values of the First Amendment and the values of human dignity, tolerance, and equality embodied in many other provisions of the Constitution. Americans of good will are committed to racial and sexual equality, and to tolerance and respect for members of other religious, ethnic, and racial groups. Yet one of the central edicts of the First Amendment--that government should not censor speech on the basis of its message, even if it is repugnant to prevailing sensibilities--often collides with ideals of tolerance and equality.

The Institute of Bill of Rights Law is privileged to have Anthony D'Amato, Leighton Professor of Law at Northwestern University, Randall L. Kennedy, Professor of Law at Harvard University, Toni M. Massaro, Professor of Law at University of Arizona and Robert C. Post, Professor of Law at University of California at Berkeley with us for the evening.

These scholars are writing articles on themes explored during this program for the Annual Bill of Rights Symposium issue of the *William and Mary Law Review*. Those articles will outline their ideas in far greater depth and detail than this presentation will permit. The symposium issue is widely distributed, and we strongly commend those articles to you. The session will be moderated by Rodney A. Smolla, James G. Cutler Professor of Constitutional Law and Director of the Institute of Bill of Rights Law.

**Friday, April 6**

Marshall-Wythe 127

10:30 a.m.-noon **Workshop on Diversity and Tolerance**

In contrast to focusing on the conflicts posed by the rights of free expression and the social commitment to equality and tolerance, this workshop is devoted to an analysis of the sources and causes of racial, sexual, and religious friction in contemporary life, and to strategies for raising tolerance and improving harmony. The workshop will be conducted by Rodney A. Smolla and will engage members of the academic and general communities in an exchange of ideas and opinions.

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**& Religious, Racial  
& Sexual Harassment**



## CASE ONE: THE HATE SPEECH AND SEXUAL SUBJUGATION STATUTE

The Legislature of the State of Freedonia is considering the enactment of a Bill dealing with "hate speech," i.e., speech impugning others on the basis of race, ethnicity, gender, sexual orientation or religion, and speech involving "sexual subjugation," speech depicting rape or other crimes of sexual violence.

Freedonia already has a "fighting words" statute, making it a crime to utter "fighting words" in face-to-face confrontations when the language used, under the circumstances, creates a clear and present danger of physical violence. Several federal courts have upheld this statute, holding that it complies with the requirements of the First Amendment. The hate speech provision of the proposed Bill would add the following additional section to the current fighting words law:

**Section 101: Attacks Based on Race, Ethnicity, Gender, Sexual Orientation, or Religion.** No person shall publish or utter any communication attacking, impugning, or insulting the dignity of another person, or group of persons, on the basis of race, ethnicity, gender, sexual orientation, or religion, if such communication would create a clear and present danger of inflicting severe emotional distress on a reasonable person, and is patently offensive to the ordinary reasonable person in the community.

Freedonia also has an anti-obscenity statute, that is written in language that tracks, verbatim, the applicable doctrines from prevailing United States Supreme Court opinions on obscenity. The statute thus bans speech appealing to the "prurient interest in sex," in a "patently offensive manner" applying "the standards of the community," depicting specifically defined graphic sexual acts, and lacking in redeeming "serious literary, scientific, artistic, religious, or political value." This statute has also been upheld in federal court challenges. The sexual subjugation provision of the proposed Bill would add the following amendment to the existing obscenity law:

**Section 202: Sexual Subjugation.** In any prosecution under this Act, the jury shall be instructed that presence of depictions of rape, sexual assault, or other acts of sexual domination or violence, in a manner condoning or advocating such acts, shall be taken into account in determining whether the material is patently offensive to the standards of the community.

The sponsors of the Bill have publicly stated that the purpose of the hate speech provision is to go beyond the existing fighting words law, by criminalizing group attacks containing slurs, insults, and other forms of hate, speech that the sponsors claim is "beneath the dignity of the First Amendment," and no part of the "free trade in ideas." The sponsors claim that the sexual subjugation provision "merely directs the jury to consider whether depictions of sexual violence and exploitation contribute to the offensiveness of the material, which must still meet all other requirements of the existing obscenity law." The sponsors argue that the section merely requires that the jury be told that such depictions be "taken into account" in determining offensiveness, but it does not direct the jury as to how it must judge the material.

The audience will sit as the Freedonia Legislature. It will hear the testimony and discussion of four distinguished experts: Professors Anthony D'Amato, Randall Kennedy, Toni Massaro, and Robert Post. The Legislature will also hear brief testimony and debate from members of the public and members the Legislature. At 8:15 p.m., the Legislature will vote on the two provisions of the Bill.

## CASE TWO: THE UNIVERSITY HATE SPEECH REGULATION

In this case the audience will sit as the Faculty Senate of Freedonia State University. The Faculty has before it the following proposed regulation, which has been recommended by the Faculty Committee on Racial and Sexual Harassment:

**Part I: Statement of Purpose.** Freedonia State University is a place of robust intellectual discourse. A university is also, however, a unique *community*, which may require of its members reasonable levels of rationality and civility in certain defined settings. As a condition upon entry into this special community, the University requires its faculty and students to refrain from speech attacking others *at certain places and times*.

**Part II: Open Forums.** Many parts of the University must be open forums for discourse, with no prohibitions other than a ban on speech presenting a clear and present danger of injury to people or property. These open forum areas include the open areas of the campus, such as malls, greens, squares, plazas, streets, and sidewalks, meeting rooms, auditoriums, classrooms outside of class times, and other spaces traditionally open to all comers (including bulletin boards in such spaces), publications, such as the campus newspaper, or professional journals published by the University, and displays for all forms of creative and artistic expression, such as art galleries or stage productions.

**Part III: Restricted Zones.** Other parts of the University, rather than being open free speech forums, are directly dedicated to the University's academic function. These "restricted zones" include classrooms during class times, libraries, laboratories, or recreation and research centers. In these "restricted zones," members of the University community should be assured that they will not be subjected to hate speech attacks.

**Part IV: Attacks Prohibited in Restricted Zones.** No faculty member, administrator, University employee, or student shall utter or publish any speech in a restricted zone attacking, impugning, or insulting the dignity of another person, or group of persons, on the basis of race, ethnicity, gender, sexual orientation, or religion.

Violation of the regulation can subject the offender to a range of disciplinary sanctions, including dismissal or expulsion from the University.

The audience, sitting as the Faculty, will hear the testimony and discussion of four distinguished experts: Professors D'Amato, Kennedy, Massaro, and Post. The Faculty will also hear brief testimony and debate from several students, professors, and members of the community. At 9:25 p.m., the Faculty will vote on the proposed regulation.



## MARY V. BICOUVARIS

Thirty years ago, having just completed a teacher training program, Mary Bicouvaris left her war-torn homeland of Greece and came to America with a love of democracy and a dream of becoming a public school teacher. After earning her bachelor's degree in secondary education from Ohio State University in 1963, she began her career as a history teacher at Jefferson Davis Middle School in Hampton, Virginia.

Today, Mrs. Bicouvaris, who became a naturalized citizen in 1968, teaches citizenship and democratic principles as a government and international relations teacher at Bethel High School in Hampton, a position she has held since 1976. Last April, Mary Bicouvaris was named the 1989 National Teacher of the Year.

Mrs. Bicouvaris was selected for the award from 2.5 million elementary and secondary school teachers in all 50 states, the District of Columbia, Puerto Rico, and American Samoa. She is the first person from Virginia to win the honor in the 38-year history of the prestigious award. She was chosen on the basis of her dedication to democracy in her teaching and her innovative teaching methods. Among her many accomplishments, she founded and directs the Model United Nations program at Bethel High School and organized a school-wide celebration of the 200th anniversary of the Constitution. Her teaching ideas on the Constitution were published as a booklet circulated among educators nationwide.

## ANTHONY D'AMATO

Anthony D'Amato is the Judd and Mary Morris Leighton Professor of Law at Northwestern University. Professor D'Amato, a member of Phi Beta Kappa, received an A.B. degree, with distinction, from Cornell University, and a J.D. degree, magna cum laude, from Harvard Law School, where he served on the *Harvard Law Review*. He also holds a Ph.D. from Columbia University. Professor D'Amato joined the law faculty at Northwestern in 1968. He has been a visiting professor at the University of Oregon and at Cardozo Law School (Yeshiva University).

Professor D'Amato is one of the leading American scholars in the area of international law and human rights. He is a prolific writer and has published a number of books including, *International Law and World Order* (co-authored with Weston and Falk), widely considered the premiere text on the subject, for which he received a certificate of merit from the American Society of International Law. The focus of this year's symposium—the conflict between free speech values and the values of human dignity, tolerance and equality—is a prominent issue in international discussions on freedom of speech. Professor D'Amato is actively involved in the deliberations on this issue from both an international and a domestic perspective. His publications in this area include, among others, "The Concept of Human Rights in International Law", 82 *Columbia Law Review* 1110 (1982), "International Human Rights at the Close of the Twentieth Century", 22 *International Lawyer* 167 (1988), "The Relation of the Individual to the State in the Era of Human Rights", 24 *Texas Journal of International Law* 1 (1989), and "Free Speech and the Culture of Indeterminacy", *William and Mary Law Review* (forthcoming, 1990).

## RANDALL L. KENNEDY

Randall L. Kennedy, a frequent guest of the Institute of Bill of Rights Law, is a Professor of Law at Harvard University. He graduated from Princeton University in 1977, was a Rhodes Scholar at Balliol College at Oxford University from 1977-1979, and received a J.D. from the Yale Law School in 1982, where he served as Note and Topics Editor of the *Yale Law Journal*. Prior to joining the Harvard law faculty, Professor Kennedy served as a Law Clerk for Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia, and as a Law Clerk for United States Supreme Court Justice Thurgood Marshall.



Professor Kennedy has published extensively in both legal and general interest publications, including the *Yale*, *Harvard*, and *Columbia* law reviews, *The New York Times*, *The Nation*, *The New Republic*, and *The Columbia Journalism Review*. He is a noted constitutional scholar and has written a number of articles in the area of race relations law, including, among others, "Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott", 98 *Yale Law Journal* 999 (1989), "Developments in the Law: Race and the Criminal Process; Race and Capital Sentencing", 101 *Harvard Law Review* 1603 (1988), "Racial Critiques and Legal Academia", 102 *Harvard Law Review* 1388 (1988), and "Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt", 86 *Columbia Law Review* 1622 (1986).

## TONI M. MASSARO

Toni M. Massaro is a Professor of Law at the University of Arizona where she teaches Constitutional Law, Civil Procedure and Education Law. Prior to joining the Arizona faculty this Spring, Professor Massaro was a member of the law faculty of the University of Florida, and a Visiting Professor at Stanford University in 1989 and at the University of North Carolina at Chapel Hill in 1988. Her participation in this year's symposium marks a homecoming for Professor Massaro, who received her J.D. degree from the Marshall-Wythe School of Law in 1980, where she served as Editor-in-Chief of the *William and Mary Law Review* and was a member of the Order of the Coif.

Her publications include articles in the *University of Florida Law Review*, the *Southern California Law Review*, the *North Carolina Law Review*, and the *William and Mary Law Review*. Of particular note with respect to this symposium is her recent article, entitled "Empathy, Legal Storytelling and the Rule of Law: New Words, Old Wounds?", 87 *Michigan Law Review* 2099 (1989), which examines the current trend in legal scholarship encouraging increased consideration by decisionmakers of individual experiences and concrete situations.

## ROBERT C. POST

Robert C. Post is a Professor of Law at the University of California at Berkeley. Professor Post, a member of Phi Beta Kappa, received his A.B. degree, *summa cum laude*, from Harvard College and his J.D. degree from Yale, where he served as Note Editor of the *Yale Law Journal*. He also holds a Ph.D in the History of American Civilization from Harvard University. Prior to joining the faculty of UC-Berkeley, Professor Post served as a Law Clerk to Chief Judge David L. Bazelon, United States Court of Appeals for the District of Columbia, and as a Law Clerk to United States Supreme Court Justice William J. Brennan, Jr. He also practiced law in Washington, D.C. representing such clients as *The Washington Post*.

Professor Post has written extensively on constitutional issues, particularly in the area of First Amendment rights. He has been particularly influential in exploring the relationship of free speech and tort doctrines to conceptions of community values. Among his publications in this area are: "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell*," 103 *Harvard Law Review* 601 (1990); "Blasphemy, the First Amendment and the Concept of Intrinsic Harm," 8 *Tel Aviv University Studies of Law* 293 (1988); "Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment," 76 *California Law Review* 297 (1988); "Defaming Public Officials: On Doctrine and Legal History," 1987 *American Bar Foundation Research Journal* 539; and, "The Social Foundations of Defamation Law: Reputation and the Constitution," 74 *California Law Review* 691 (1986). His article, "Theories of Constitutional Interpretation," is scheduled for publication this year in *Representations*. Professor Post has also been commissioned to write a forthcoming volume of *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*.



**Sponsored by  
The Institute of Bill of Rights Law  
at the Marshall-Wythe School of Law  
College of William and Mary**

The Institute of Bill of Rights Law was established at the College of William and Mary in 1982 by a private bequest to support scholarly research on the Bill of Rights. The Institute functions as a public forum for airing and debating matters of legal and public policy, as a vehicle for education by providing information on constitutional topics, and as a source of creative thought on constitutional and public policy issues. It is an academic foundation with a mission of quality research and public education.

This symposium is supported by the Virginia Foundation for the Humanities and Public Policy and is presented as a public service. The principal aim of the symposium is to discuss in an objective and nonpartisan context issues of concern and interest to citizens of the Commonwealth of Virginia. The views and opinions expressed do not necessarily represent those of the Institute of Bill of Rights Law or the Virginia Foundation for the Humanities. The Virginia Foundation receives funding from the National Endowment for the Humanities, the Commonwealth of Virginia, and individual and corporate sources.

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# WITNESSES

**Jayne Barnard** -- Professor, College of William and Mary, Marshall-Wythe School of Law

**Sabrina Johnson** -- 2nd year student, College of William and Mary, Marshall-Wythe School of Law

**Ruth Micklem** -- Staff Member, Avalon Center for Women and Children, Williamsburg, Virginia

**Stephen B. Pershing** -- Legal Director, American Civil Liberties Union, Richmond, Virginia

**Roy Reynolds** -- Minister, Unitarian Universalists Fellowship, Williamsburg, Virginia

**Dale B. Robinson** -- Director of Affirmative Action, College of William and Mary

**Roberta Rosenberg** -- Professor, Department of English, Christopher Newport College

**Martin Zelder** -- Professor, Department of Economics, College of William and Mary