

Vincent Munoz:

I think what we need to do is explain how our principles of free speech, free inquiry will help serve the cause of justice.

Betty Friendan:

The First Amendment, the constitutional freedom of speech and freedom of conscience that is the bulwark of our democracy.

Bettina Apthekar:

There was a passion in what was being said, affirming this, what people considered a sacred constitutional right, freedom of speech and freedom of association.

Michelle Deutchman:

From the UC National Center for Free Speech and Civic Engagement, this is Speech Matters, podcast about expression, engagement, and democratic learning in higher education. I'm Michelle Deutchman, the Center's Executive Director and your host. This month I have the privilege of welcoming Dr. Mary Anne Franks, the Eugene L. And Barbara A. Bernard Professor in Intellectual Property, Technology and Civil Rights Law at the George Washington University Law School.

Mary Anne recently published her second book, *Fearless Speech: Breaking Free from the First Amendment*, which raises serious and critical questions about the First Amendment's speech paradigm. Rather than facilitate expression which protects democratic values and the voices of the vulnerable and defiant, Mary Anne argues that the First Amendment does the opposite, safeguarding extremist, racist and misogynistic speech that has long held sway over American society. *Fearless Speech's* publication could not be more aptly timed, given the type of ugly, hateful and targeted rhetoric that was not only a prominent part of this recent election cycle, but will surely be a tactic utilized in the incoming administration.

There's much to discuss with Mary Anne, but first Class Notes, a look at what's making headlines. The Western Association of Schools and Colleges, formed in 1962 to promote the development and accreditation of higher education in the western region of the US, garnered attention last week with its proposal to drop the commitment to diversity, equity, and inclusion language from the standards its college members must meet. The group has proposed changing the standards to emphasize success for all students instead. Groups including PEN America and the Modern Language Association released statements raising concern about WASC's decision to comply with ideological restrictions before the government actually imposes them.

They fear that WASC is motivated by political pressure, especially in light of the fact that President-elect Trump has threatened to fire the radical left accreditors. Association leaders defended the move explaining that proposed changes are not a sign the association is backing away from its commitments to DEI, but a way to clarify accreditation standards.

Similar allegations of over-compliance were also lobbed against administrators at the University of North Texas for their decision to edit course titles and descriptions in the College of Education's graduate and undergraduate programs, following a directive from the lieutenant governor which builds on SB 17. This occurred despite the exemption of academic course instruction and scholarly research or creative work by students, faculty, or other research personnel which exists in the law.

Professors learned of the changes to course titles and descriptions via email after the fact and were instructed to adjust their course materials to align with the new titles and descriptions. University spokesperson denied that the changes were related to SB 17, and said this was part of an effort to ensure that the Department of Education's curriculum is in line with state standards.

Universities around the country are urging their international students who might be traveling home for the holidays to return to the country in advance of the inauguration of President-elect Donald Trump on January 20th. Many remember that in 2017, after the first inauguration of President Trump, his administration issued the so-called Muslim ban and many international students at US institutions found themselves unable to return to United States for the spring session. Universities say that these warnings are out of an abundance of caution and not because they anticipate a particular policy change on January 20th.

Now back to today's guest, Dr. Mary Anne Franks is the Eugene L. and Barbara A. Bernard professor in intellectual property technology and civil rights law at the George Washington University Law School. She's an internationally recognized expert on the intersection of civil rights, free speech and technology. Her other areas of expertise include family law, criminal law, criminal procedure, First Amendment law, and Second Amendment law. Dr. Franks is also the president and legislative and tech policy director of the Cyber Civil Rights Initiative, a nonprofit organization dedicated to combating online abuse and discrimination.

In 2013, she drafted the first model criminal statute on non-consensual pornography, sometimes referred to as revenge porn, which has served as the template for multiple state laws and for pending federal legislation on the issue. She served as the reporter for the Uniform Law Commission's 2018 Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act, and frequently advises state and federal legislators on various forms of technology facilitated abuse.

Dr. Franks also advises several major technology platforms on privacy, free expression and safety issues. She's been an affiliate fellow of the Yale Law School Information Society Project since 2019. Dr. Franks is the author of the award-winning book, *The Cult of the Constitution, Our Deadly Devotion to Guns and Free Speech*. She was awarded a Knight Foundation grant to support research for her second book, *Fearless Speech*, which was just published in October and is the subject of today's conversation.

Her scholarship has also appeared in the *Harvard Law Review*, the *California Law Review* and *UCLA Law Review* among others. Mary Anne, I'm so glad you were able to join us at *Speech Matters*.

Mary Anne Franks:

I'm so happy to be joining you. Thank you.

Michelle Deutchman:

I want to add that I'm a longtime fan of your work and I don't say this to every guest, and I also want to acknowledge that you've been an integral part of our programming at the Center with appearances at two of our *Speech Matters* conferences. In 2022, you were there to discuss social media, freedom of speech and the future of democracy, obviously still topical. And again this year to participate in a conversation about harassment of university employees.

I anticipate that today we'll touch on these topics and others. There's a lot I want to discuss with you, but before I leap ahead, let's start with some table setting. The title of the book is *Fearless Speech: Breaking Free from the First Amendment*. I think we should just start with what your conception of fearless speech is. What does that look like? And maybe you can share an illustration.

Mary Anne Franks:

Yeah, I'd be happy to. And I have to start by saying that it's not something that I came up with. This is a really, really old concept, and it's one so old that it came from the ancient Greeks. I can't remember exactly when it was that I came across the word, but I was a classics minor when I was in college and I'm always attracted to these concepts that you can go back and look at the original language and try to figure

out the context, and there's this concept called parrhesia that is oftentimes translated as free speech, but is better translated as fearless speech.

And Michel Foucault, the French philosopher, in the 1980s I think it was, did this whole series of lectures at Berkeley where he talks about this concept and says that he wants to revitalize it and talk about the characteristics that he has traced about the concept through his studies of Greek mythology and philosophy.

And in general, the characteristics are that it's a kind of speech that is not just about saying whatever you want to say with no consequences, but saying something brave. And you have to, according to Foucault, in order to be someone who truly speaks in this way, you have to be someone who is taking ownership of the speech. You can't pretend to be a devil's advocate, or playing a role, or trying to use some kind of rhetorical device. You have to speak from your own truth, and you have to be someone speaking to someone who's more powerful, or to an entity that is more powerful, and you have to be criticizing that power. So, you have to be candid and you have to be critical and you have to be courageous, because by virtue of criticizing someone or something that's more powerful than you, you're taking the risk that they're going to hurt you for it.

And that is a concept that is so different from what I think of as our pedestrian view of free speech, is just say whatever you want to say and who cares about the consequences. This is one where there is risk involved about the consequences, but it's a risk to the speaker, and it's in service of truth, it's in service of equality, it's in service of justice.

So, for examples, the real genesis of this book was actually reading about the White Rose student resistance movement in the 1940s in Germany. The White Rose was this very small group of college students who were writing pamphlets about Nazi atrocities and trying to raise awareness to the public about what their country was actually doing. And this of course was highly dangerous work, they weren't allowed to say these things, and so they acted anonymously mostly at the cover of night, printing up these pamphlets and leaving them in various places.

And the instance that really made me think about this concept of fearless speech and just how remarkable it is, is focusing on one of the few female members of the White Rose, a woman named Sophie Scholl who was very young at the time, 21 years old. She and her brother were at the University of Munich and they were distributing some of these pamphlets and they were running out of time, they didn't want to get caught, and so they were over this kind of almost like a bridge area that looked down over this courtyard, and they had a bunch of these pamphlets left and they just kind of flung all of them over the side of the balcony so they kind of fluttered down, and they got caught by the janitor at the university who was a member of the Nazi party. And he turned them in and they were immediately... Well, they were interrogated for several days, and then they were tried in this completely a pretext of a court that was clearly going to find them guilty no matter what they said, and they weren't even allowed to speak in their own defense.

But Sophie Scholl decided that she was going to speak anyway, and she interrupts the judge and talks about how she had to say something, they had to say something because otherwise no one else would, and if other people could see what was happening there would be a movement. And inevitably, she and the other members of the White Rose are sentenced to death to die by guillotine. And there is a record of what she said to her cell mate before she's executed, and she talks about how it's a beautiful day and she has to go, but her death doesn't matter because if her words, if their words, were important enough to stir other people to action everything was worth it.

And when I read about this story, I just thought that is what brave speech looks like. That is what truly risk taking, risk to the ultimate point of the ultimate sacrifice really looks like, and I was just really inspired to think there are lots of examples like this. Some of them are maybe not quite as dramatic, but there are so many examples of people really risking everything for their ability to speak the truth to power. And those are the kinds of things we should be focusing on if we really cared about the value and

the radical nature of speech. And that's why I wanted to write this book, was to write about those kinds of examples.

Michelle Deutchman:

Well, that among many of the other profiles that you shared in the book about fearless speech were incredibly moving, and it really is a very stark contrast to what you describe as reckless speech, which unfortunately is what we are more accustomed to. And so, why don't you share what that looks like and then we can talk about the interplay between the two.

Mary Anne Franks:

That's exactly right, that I was thinking about the contrast between the story of Sophie Scholl and what is often thought of as a high watermark for American free speech. And for a lot of people that is the Skokie march in the 1970s. And these were individuals, this kind of a neo-Nazi party that wanted to dress up like SS officers and wear swastika armbands, and they specifically wanted to march through a town in Illinois that had a considerable number of Holocaust survivors in it and members of their families, and just have this parade in front of them and carry signs that said things like, "Free speech for White men." And a lot of Nazi slogans, and the ACLU quite famously defended their right to do so. Skokie didn't want them there, and so the town tried to impose ordinances that would make it so that they couldn't have this parade there, and the ACLU fought for the Nazi's right to march through this town.

And I thought, what starker contrast can there be between that kind of example as a high watermark of what Americans think of as free speech, versus what I think of when I think about the Sophie Scholl case? They seem so much in contrast with each other. And so, the term that I've given the speech that we tend to think of more often in the American context is reckless speech, as opposed to fearless speech.

And I use that in both the colloquial, but also the legalistic sense, which is recklessness is about not necessarily trying to be harmful to someone else, but not caring if you're harmful to someone else. That primarily it's about self-interest. It's when you care more about a benefit to yourself than you care about the potential for harm to other people.

My sense of the divergence here is that Americans, and American law specifically, the First Amendment doctrine, really focuses on the reckless speakers, people who are creating harm or the possibility of harm to other people. And that is such a contrast to this concept of fearless speech and people like Sophie Scholl who are risking something certainly, but they're risking something for their own welfare as opposed to those of others. And that to me seemed like the key distinction that I really wanted to emphasize.

Michelle Deutchman:

It's interesting because I've thought a lot about the rights versus responsibilities paradigm, in terms of talking about just because you can say something doesn't mean you should, but one thing I really hadn't thought about was the canon of First Amendment cases and really whose speech is being protected. When I started going through Skokie, Brandenburg Snyder versus Phelps, I started to see that pattern and I was a little bit astonished and then I was a little bit ashamed that I was astonished. It's just a different perspective, and throughout the book you really take... At first I said it was a chisel, but then I decided no, it's kind of a wrecking ball, to some of the really relied on arguments for why reckless speech should be protected. And there are arguments that I have utilized myself when I do workshops, and I want to talk about a couple of those and maybe have you walk our listeners through why you think these rationales either no longer work, or perhaps they never worked.

And let's start with what you call the Bad Precedent Theory of Censorship. And from the book you say, "This is the idea that if you censor Nazis today, it will lead to the censorship of Jews tomorrow." And you

could fill in any number of groups in that, fill in the blank. I'd love for you to share why you find this line of reasoning to be unpersuasive, if that's the right word.

Mary Anne Franks:

Yeah. I think it is the right word, and there's multiple reasons for why I dislike the way that Bad Precedent Theory Censorship operates. And the first reason why I'm skeptical or critical of it is because it's wrong descriptively. That is, the first part is when you say something is setting a bad precedent, you necessarily are saying, "Well, this bad thing hasn't happened yet." So, if you do X today, then Y happens tomorrow. You're assuming Y hasn't happened yet, but it has.

So, the idea that power, or people in power, are waiting to censor vulnerable groups or waiting to harm them, they've never waited for those things, right? Throughout history we've seen that the government mobs, or whoever it is, they're always willing to censor vulnerable people. So there's a falsity originally to erase that history and to say, "Oh, well if you today start doing this kind of practice, tomorrow it's going to come around and hurt those vulnerable people." That really is this revisionist take on history that says that those bad things aren't happening.

And yes, you can pick any group you want, but pick non-White men, pick women, pick whoever it is, they've always been censored by the government and by others. So, it's a false statement to say, "Well, this new thing will happen if you do this other thing."

The other reason why it's a problem is because the kind of equivalences that are being made don't make any sense. Because the problem is not an identity problem. It's not Nazis today, Jews tomorrow. That's not what any of this really is about. It's should you be able to engage in the kind of behavior that causes for objective reasons people to be terrified that they're going to be hurt or injured, regardless of who you are, whether it's Nazis or anybody else? To say that you want to say people shouldn't be able to do that, they shouldn't be able to terrorize people, what is the flip side of that, right?

Who is arguing to say, "Well, no, you ought to be able to terrorize." People misunderstand, I think, that it's not a Nazis versus Jews thing, it's should you be able to call for the extermination of people, or shouldn't you? Right? That's another way that the Bad Precedent Theory tends to distort what's actually at stake.

And then the other aspect, and the best possible version of the Bad Precedent Theory is to say, okay, look at situations where protecting negative, harmful speech has in fact helped a vulnerable group. And the answer to that I think is that really doesn't happen very often. So, if you think about people today who speak out against, let's say, police brutality, or they speak out against sexual assault, what has actually happened to them in the end is they usually do get harassed, or they do get shot at by police, or they do get sued for defamation, and the First Amendment doesn't save them.

So on every level, everything, all the premises and the conclusions of the Bad Precedent Theory, they all are basically flawed. Which isn't to say it never works out that way, but by and large there are many places in which at least one of those things is operating within that Bad Precedent Theory, which makes it just not a very compelling or persuasive explanation for why it is you have to protect individuals who are calling for harm. Again, not focusing on their identity or whether they're likable or not, but what they're actually trying to do and whether they're causing harm.

Michelle Deutchman:

And when you talk about calling for harm, are we talking about still within the realm, and I know this is using the jurisprudential kind of framework, of it being protected under the First Amendment, as opposed to it being calling for harm in terms of the not protected threat harassment?

Mary Anne Franks:

Yeah, that's part of the issue that gets swept up in these rhetorical myths, or these kinds of cliches about what we have to protect. So, if what we mean, and one of the best examples I can think of is actually the case that the courts relied on when they... At least the Illinois courts relied on when they found in favor of the neo-Nazis who wanted to march in Skokie. They leaned on a case, a Supreme Court case called Cohen versus California, which is the famous or infamous Fuck the Draft case, right? And they basically said an offensive jacket that has those words on it is the same thing as a swastika.

And I think that's a real mistake, because you've actually classified those things wrong. One of those things is maybe offensive, the jacket that says this about the draft, but it's political, it has a crude word in it, but it's not aimed at anybody. It's not trying to threaten someone. And then you have the swastika, which especially when we're talking about the context of a place like Skokie and in the 1970s, we all know what that swastika is supposed to indicate, and as many experts who testified in those various trials were saying, it's an attempt to try to say to those who survived the Holocaust, "You may have survived then, but we'll get you now." Right? It's an ongoing threat.

So, to try to make an equivalence between those two I think completely misses the point [inaudible 00:19:57] that there is a real justification for the Cohen decision, which I think was the right decision. There are things that offend people, there are things that people don't like, there's vulgarity, there's whatever, all those things. There are things, matters of taste. The line really should be drawn though at there's a question of whether you want to offend someone and whether you want to hurt someone, or whether you want to create a credible situation in which they feel like they're going to be hurt by you.

And I think it would have made much more sense for the courts to say, "We're going to distinguish between those two things and take them separately, because we may in fact need to tolerate a lot of offensive speech, but why do we have to tolerate a lot of harmful speech, when in other situations we would punish recklessness and we would punish, or hold at least libel on some level the deliberate engagement of actions that creates that kind of fear or terror in another person?"

Michelle Deutchman:

I think that's such an interesting point. And you also... We don't have to go through all of them. You dispense with the speech-we-hate defense, and you also detail weaknesses with the more speech is better speech argument, right? The court's inconsistent application of harm versus benefits. All this parade of reasons we need to support what some would call offensive or hateful, and you're using the word reckless speech. And so, I guess my question is, and I can't help it because I'm a lawyer myself, is a doctrinal one, which is would you make some doctrinal changes to the way that we interpret the First Amendment? And then I'll get to my next question, let's start there.

Mary Anne Franks:

Yeah. Sometimes I guess I would say I would, although the caveat for would I make doctrinal changes is for which version of the First Amendment? Because it's not as though we've been consistent. So, the courts have changed their minds about what the First Amendment means all the time, so when I suggest there's a change, I'm suggesting another change or at least a reorientation, or I guess I would actually say I'm suggesting a more consistent and intelligible version of what I think the court is trying to get at. Because what we've often seen, if we switch gears for a moment we think about things that most people agree on.

So, most people agree with the Supreme Court in the 1980s when they said child pornography is not protected by the First Amendment. Now what's the reason for that? The reason that the court gives is that it's harmful. Some people like to say, "Well, it's because it's an actual record of a child being harmed." But that isn't always true. We know that if children take pictures of themselves in compromising positions and someone else happens to distribute it, the child hasn't been abused, it's something about the image that

we think is harmful. And that's an agreed upon situation where the courts have said, "Because it's so harmful, we don't think it gets protection by the First Amendment."

That's a very sensible way to think about harm and speech. But then the court has this tendency to then say, "Oh, that's not what we meant at all." So, in situations where it doesn't want to say the speech can be regulated, it pretends like it's never done that it says, "Ph, we don't ever talk about harm. We've already made a kind of assessment of cost benefit analysis with the First Amendment itself." Or whatever the court tries to say.

And that's just not true. I think we want a court that would say, "In every situation we have to calculate the costs and the benefits." Because that's the only way to be sensible about a law. So, does that mean that sometimes we should tolerate offensive, even troubling speech? Of course, yes. Because sometimes, on balance, that's better to do than the opposite. Especially when it's something that is genuinely ambiguous. And if we're focusing on the question of speech we hate, I actually support that principle, so long as we understand that the word we is doing a lot of work here, and that the we here should be the government, should mean the people in power. Any attempt to try to criticize the government, or to make a political stand, or to do something that's unpopular politically, yes, should be protected. But the question is we should not then become the speech that the most vulnerable people hate and fear, because those are people who we should be protecting ourselves.

That is the we needs to be those in power, and I think that actually is consonant with the best versions of the First Amendment doctrine we have. I do think some early cases really made that clear that the we, of the speech we hate is you should allow and you should protect even disruptive, unpleasant, aggressive speech, when it is attacking people in power, or contesting the government, or criticizing government officials. Yes, we absolutely should be giving a really wide berth for that kind of speech, because that's really essential to democracy. So, I think that part is right.

It's the slippage from that to, "Well, and that means we also need to side with Nazis who say that Jewish people should be exterminated." Those two things do not follow from each other.

Michelle Deutchman:

That's really helpful. Because I think I was trying to imagine in my head everything being turned over, and that doesn't sound like what you're really saying. What you're talking about is a more consistent application and then doing away with some of the disingenuousness of just like let's be... And I think you used the courageous, critical, candid, but I feel like another word I was thinking of is accountability. And it sounds like you're asking the court be accountable to what it's done in the past, and then be applying that across the board and not picking and choosing.

One of the things that you said toward the end of your book, which I've been thinking a lot about, is you said that the First Amendment, quote, "Had little to no relevance for the most courageous speech acts in America's history." And I've really been struggling with that a lot, because I do think that there is a line of thought that says that even though people who were utilizing their speech in these very courageous and fearless ways may have been abused or attacked by government officials, this idea that if not for the First Amendment perhaps achievements of social movements may not have been able to come to fruition, whether it's suffrage or gay rights or civil rights or Me Too or Black Lives Matter, and I'm wondering if you can speak to whether or not you agree with this concept that the First Amendment... Did it really play no role?

Mary Anne Franks:

Yeah. And I would definitely not want to say that the First Amendment plays no role. I do think there's a tendency for those who are skeptical of some of the claims that I'm making to over read my claims here, as if I were saying the First Amendment has never been used in the service of expanding equality or on the side of democracy. I certainly think it has. I mentioned before that the Cohen versus California case I

think is a good example of this. And there are others, there are some of the civil rights cases that I think also point in that direction.

What I am emphasizing, though, is first I think of my book as an intervention against the classic narrative about the First Amendment, and I think we are already swimming in the sea of being told that the First Amendment does all these wonderful things. And so, I take it as a given that the average reader has already gotten that version of events of how the First Amendment is the savior, is the hero of the story. And so I'm providing a narrative that says, "Well, is it though?"

But I don't want to go completely in the other direction and say it has nothing to do with those achievements, but one way that I would express what I'm doing that's different from other histories of the First Amendment, or accounts of what's happening with free speech is, the heroes of my story are the free speakers, not the law and not lawyers. Which is not to say that the law has never been used again in good ways, or that the ACLU or other groups have not done bold and courageous things that have also forwarded the project of democracy. It's just that that overwhelming narrative that says that that is the story I think is a false one, and it's quite literally false when we think about essentially everything before, I would even... The early 1930s, right?

So, First Amendment scholars have to contend with the fact that for the first almost 150 years people read the First Amendment as meaning what it said, which is, "Congress shall make no law." Which meant that anything a state did didn't matter. So, that's a really long period of time to think that the First Amendment has nothing to say about government censorship, as long as it comes from the States, as opposed to the federal government. That's a lot of missed opportunities.

And we also know that for that first 100 years, it didn't even take, what was it? A couple of years before Congress literally passes a law about alien sedition and various things you can't say about the government, and immediately violates its own principle. So, that I think is a problem that we have to confront. But then even when you get to the 1920s and 30s when you've got incorporation and you've got the interpretation that now says the First Amendment does apply to state as opposed to federal government action, then you get dissenters and draft people who want to resist the draft, and you get communists and you get labor workers, and they all lose, every one of them loses.

So, once you get that update to the First Amendment, then it's used in these ways that's counterproductive to all the things that we like to think of the First Amendment doing. And it's really not until you get to the 1960s where that starts to change. So, when I say it wasn't really relevant, or it is not the hero of the story when it comes to suffrage certainly, or when it comes to the abolition of slavery, I mean that literally, the First Amendment had nothing to do with those things, because it wasn't even thought of in those terms. So, that's a big miss.

And then to the extent that you get the modern First Amendment starting in, let's say, 1969 with Brandenburg, that's when I would say once you started to use the First Amendment in this modern sense, it's also not a great story there either, because it isn't a mistake of history that the court finally says, "Hey, we actually think the First Amendment should be more protective of bad speech when it's a KKK leader."

Whereas 40 years before, we looked at a feminist labor organizer who was speaking out against racism and lynching, and we said to her, "No, it's perfectly fine to lock you up." I think there's a convenient retelling to say, "Oh, well, we just matured, and it's irrelevant that it was a KKK leader in 1969, and it wasn't for the feminist labor leader before." I don't think it's a coincidence. I think it's because the court, like all powerful institutions in the United States, tends to be more sympathetic overall, with a few exceptions, to reinforcement of racial patriarchy. So, things that on the whole are going to benefit White people over Black people or White people over non-Whites and men over women, rich over poor. Generally speaking the court has always been more sympathetic to those kinds of claims, and that's part of the story I really want to emphasize.

Michelle Deutchman:



It completely resonates with me. I'll be honest, I don't ever really think about prior to incorporation. Of course it was the huge period of time, but when I think of the First Amendment it's always about post-incorporation and, yeah, it probably starts like you said, in the sixties, and I'm sure there's a lot of reasons why I do that, beginning with how it's taught in law schools and also, again, the narrative that is, it's retold enough. And so that's, again, one of the reasons I was so interested in this lens, which is like, okay, it's not that we want to change it all, it's that we want to reflect differently on it.

And I do think one of the things, there's so many ways to go, that we have to reflect on, is social media and technology, and how reckless speech has really, I don't want to say flourished, that seems positive, I want to say run amuck. And that I want to go back and pull on the thread that you were talking about, which is you were talking about Congress and then states and then the fact that a lot of people don't even understand that the First Amendment is meant to be about government restraint and prohibition, not about private speech promotion.

And you actually cite to a survey that I cite to regularly, which is by the Freedom Forum Institute. They have a survey called Where America Stands on the First Amendment, and a few years ago it showed that 65% of respondents erroneously believe that social media companies violate the First Amendment rights of users when they ban users based on the content of their posts. And one of the things that you do is rather than just accept that finding as ignorance about the First Amendment, you detail actually how technology has been playing off this misunderstanding to their own benefit. And I really want you to talk a little bit about this conflation between social media engagement, which is really speech that is private speech, on a private platform, and constitutional rights, and why maybe that conflation is not just not serving us well, but can actually be harmful and dangerous to our democracy.

Mary Anne Franks:

Yeah. As you say, I'm really struck by that statistic and one reaction we could have is say, "Oh, well, we just do a really bad job of educating people about the First Amendment in this country." Which is true we do, but that's only part of the reason. And part of the reason is that we've had more than 20 years of a tech industry that has really seized on that, whatever we call it, that lack of understanding or that lack of clarity about what free speech means, or has emphasized that free speech in this loose way really is about how you can speak online, that all the cyber libertarian rhetoric from the 1990s was about how this coming revolution of the internet is a free speech revolution. Everything's going to be speech online. And there are ways to criticize that even in the nineties before things got super corporatized, but certainly now we can see that the reason why people today are so invested in this idea of free speech not being too clear about what we mean by that exactly, and whether censorship really means getting blocked from a platform, is because the industry really benefits from that, right?

It's telling you, "Hey, if you really want to exercise your constitutional rights, you should do it on this platform. And we are the new public square, and this is where all the conversations are happening." It shouldn't actually surprise us when people say, "Well, I think if I get blocked or I'm restricted somehow on a social media platform, I'm being censored." It feels like censorship, because these companies and these products and services have not only become really embedded in our lives in ways that we can't really extricate ourselves from, but they also have been telling us for 20 years that this is where speech happens.

So, I think that's why this is happening now, but it's really dangerous. I do think it's really dangerous. Because there's a version of this where you might say, "Well, they're not wrong in an intuitive sense. That is free speech really should be about our ability to speak where we want to speak, and not just about whether the government can stop us."

And that might be true, except that if we're going to go down that path, we need to have a whole different conversation about how we would like to shape those dynamics about what kinds of speech we want, and what is our purpose in this community, and what are the norms of this community. But we really

shouldn't be mixing it up between the First Amendment and free speech. Because, yes, it really does matter that it's the government in the First Amendment context because the government has all the power. So, is it right that the government has to tolerate ideas that it doesn't like, even if it really, really wants to suppress them? Yes, because the government's in power and it's right for it to be restrained.

Is it right for a person online to have to listen to things that they don't like? No, because they don't have any power. A woman who's being harassed online by people who want to call her every misogynist slur in the book, when she blocks that person she's not censoring them. She's saying, "I don't really want to listen to you." And she shouldn't have to, not only because she's not the government and doesn't have more power, but also because as a private citizen she has the power and the right to not listen to other people. You don't have to talk to strangers. Right? If somebody wants to shove a pamphlet in your face as you're walking down the street, you can walk away from them and that's not censorship. In fact, it's our own right to not have to listen to people if we don't want to.

So, it's of absolutely vital importance for us to understand the difference between when the government wants to force you to do something or not, or take away some of your speech, versus someone just saying to you, "I don't want to listen to you, or I don't want to amplify you, or I don't want to include you in my platform." They're very different things. And then maybe we can have an intelligent conversation about what does a good social media platform do if it wants to create, I don't know, a space that is maximized for democracy, or maximized for community, or for democratic engagement, or anything else? But it shouldn't follow the First Amendment pattern because it's not the government. So, it's really dangerous when people separate those two things out, because you get confused about which one is, first of all, legally a question for you. And secondly, we get confused culturally about what matters.

Because the same people who want to tell you that it's censorship when social media takes down a neo-Nazi post, are the people who want to tell you that it's not censorship when the government bans a book, and those two things almost always go together. They're trying to tell you censorship's happening here on this platform where everybody actually is allowed to make their own choices, it's not happening over there, when there's literally a governor who's saying, "You can't read that." That's a really bad state of confusion to be in.

Michelle Deutchman:

Well, and I think there's a lot of people who benefit from confusion across the board. And I see that confusion, it's not the same, but when I talk to stakeholders on campus where people don't understand that if you're on a public campus, that that campus's administration, that power structure is actually the government, it is akin to the government, and that's the reason why things happen the way that they do, and why it's not the case that you have to necessarily listen in your dorm, or when you're out on the quad.

Individual to individual is different than the leadership of a public institution, and the people that are employed live and work there. So, I see that all the time. So, we've talked a lot about the dynamics of power and of narratives and maybe false narratives, and I'm wondering if we can turn our focus to some, not just counter narratives, but also to the way that you would like people to start thinking about and envisioning a First Amendment that perhaps we don't have to break quite as free from.

One of the things that you talk about in the final chapter is this Last Girl First concept that came from the writings of Mahatma Gandhi, and I'm wondering if you can talk a little bit about that. And then, at some point, because most of our listeners are from higher education, perhaps you can apply this concept of the Last Girl First to some of your ideas about redesigning education, which is one of the areas of focus in your Fostering Fearless Speech chapter.

Mary Anne Franks:

Yeah, thank you for the invitation to do that. And I think one of the things I want to say at the outset is there's always two tracks that I'm speaking of when I'm talking about this kind of reimagination, and one

is maybe to the law itself. So, to your previous question about doctrinal reorientations or updating. And then there's a separate question about, well, once we're out of that government space, when we're not just talking about what the government's obligated to do or not do, what about all the spaces that are not governed by that question? So, a big part of what I'm trying to emphasize in the book is when I say speech is bigger than the first amendment, I mean that in a literal sense, that there's so little of our lives that's actually determined by the law of free speech, because again, it's only about what the government can and can't do to you, so that's already a very small piece.

And there's all these other, again, distinctions you were making between dorms and classrooms and the public spaces, there are all these other values and all these other considerations that we just naturally have about how it is that we want to have conversations, and how it is we want to promote safety. And just as normal human beings, we don't just think, "Well, is everybody's speech being protected here?" Because that's a weird question to ask in a conversation with another person, or at a bar, or... The question really is what are the situations or the conditions we need to actually maximize for something that we value? Whether that's democracy, or whether that's innovation, or whether that's artistic expression, but we have to have some vision that's more than just, is this legal? Because that's a weird way to approach anything.

So, when I talk about the reorientation around the Last Girl, I mean it in both of those senses. And to separate too the idea between what the law has to protect because of our concerns about restraints on the government, and what we should be promoting as individuals in every other space that's not controlled by the government. Right? The big piece of this that I try to emphasize is even when we think that it's right that the court or the law should express some deference to the worst speech, the situations where neo-Nazis should be able to say what they want to say, that's a protection issue. That is the government shouldn't jail you, or you can't get sued for that.

Should you raise them up as heroes? Should you spend a lot of time thinking about them? Should you promote them on your private businesses? And I think the answer to that question should be not unless you actually endorse those ideas, right? It's a big difference between saying, "Don't jail those people for what they're saying, or don't sue them for what they're saying." Versus, "Do I have to amplify you, or listen to you, or promote you?" As a private individual, as someone who's not part of the government.

So, I just want to remind people that those two things aren't the same. That we might say in some circumstances, "Okay, that speech has to be protected." But at the same time say, "But the speech I want to promote in my own life, in my own work, in my own classroom, is very different." And so, when I talk about the last girl, it's a kind of a gloss on Gandhi, because Gandhi not great on gender relations, but he did have this concept where he thought that one of the most powerful reflection points we can have for ourselves about a system, or about designs, or about a product, or an innovation is how will it affect the most vulnerable person we know?

And there are advocates, experts, who work in the anti-trafficking space and the human rights space who have revised that Last Man concept as the Last Girl, because from their context, they know that usually the most vulnerable person in society will be the girl who will be chosen last for basically every right or benefit. And so, the framework the human rights advocates use here is think about legal and cultural changes and how they're going to affect girls and the most vulnerable person generally.

And so, when I'm trying to use this for the purposes of free speech, I think both in terms of the First Amendment, as in let's reverse this idea of you need to protect the Nazi to protect the Jew. Why don't we flip this, right? So if you are actually protecting the Jew, you're protecting the non-white person, the woman, the harassment victim, whoever it is, you will also protect in every way that is meaningful, you will also protect the rights of everybody else. All the ones that should matter.

That is to say, if the last girl can speak, everybody can speak. And that's much more true than if the Nazi can speak, every person that the Nazi is going to attack can speak. So why don't we flip this? And I try to borrow from the universal design architecture theory of design here to say very often, when you build something, whether that's a building or a cockpit or whatever it is, with diversity in mind, that it could be

for short people, or tall people, or able people, less able people, if you actually put all those things into consideration, you'll get a better and more usable product. So, my version of this is to say start with the person who's going to be multiply burdened or discriminated against or erased or excluded, and try to think about what would be required to let them have access to speech.

You do that and you will protect everybody else in a meaningful sense. I don't want to suggest that that's going to be easy in every circumstance, because there's going to inevitably be some kind of conflicts between, okay, what if you protect the vulnerable person and it means the non-vulnerable person is going to have to lose a little bit? And I would say in those situations, I would say err on the side of the vulnerable, because that's a match up that we have to confront. And I would say we should err on the side of the person with less power.

But I do think in a lot of these situations for speech, if you protect the most vulnerable, you actually will get a better speech system for everyone. I believe that that's true in the law, and I definitely think it's going to be true in the non-law settings. I think, again, if you are maximizing your space for educational purposes, as you were mentioning, you want to be as accessible as possible to the people with most diverse range of experiences, because that makes for a better pedagogical environment. So, that's the adaptation of that that I would see, or would hope I would see as being useful, or at least a point at which we could expand and change our orientations as opposed to thinking about free speech versus whatever else is out there.

Michelle Deutchman:

No, I think it's so essential to have pulled apart what you did in the government areas and then the not government related areas. And just a reminder, I have a wonderful mentor from my former job who would always say that the law's a really blunt instrument, and it reminds me here that that's the case. And it's a lot of what I do talk about. Now I'm feeling a little better about the way I frame the First Amendment, which is that most of the things people are going to encounter are not going to be unprotected speech, they're going to be protected, and then we're going to have to use all of these other resources and tools in our toolbox about how as communities, right, and individuals, we choose to respond, not respond, amplify or elevate.

And so, you're really focusing on that idea of the law, like you said, isn't necessarily the leader in how we want to run our conversations and discourse in society.

One of the things I was really struck by both in reading the book and also in looking at the book, is this imagery of burning, and it's embedded in the book, it's on the cover, it's in the title of many chapters, which hopefully everyone will read, Burning Crosses, Burning Women, Burning Books, burning Down the Public Square, and then the book's conclusion, which is titled, I Choose My Own Way to Burn. I have my own thoughts about this motif, but I was hoping that you could speak to what it meant to you and why you threaded it through the manuscript.

Mary Anne Franks:

The image that I began with was really Ida Wells and her newspaper. Her newspaper is called the Memphis Free Speech, and the image I am thinking of is when she is out of town, and she's published this really, at least in the eyes of the White public, that this really controversial op-ed where she says, "Not only is lynching this terrible form of torture, but that the excuses that are being given for it are lies." And it really sets off this incredibly violent backlash by the White mob, and they burn her newspaper to the ground.

So, it begins in this idea of how we have... The idea that Americans historically over time have welcomed controversial ideas, that we have welcomed radical thought, as opposed to wanting to move as quickly and violently as possible to suppress it, I just really thought it was important for us to reorient ourselves

about our own history to say, "No, by and large Americans have responded to radical revolutionary ideas with violence, and with destruction, and with silencing and with suppression."

We are big on the mob violence in America. So that's a motif throughout the book, because I really think people lose sight of this, because we like to tell ourselves that we're a tolerant society, and that's why the First Amendment becomes this kind of identity for us, because we want to believe we've always been tolerant. So, we really have to confront all the ways in which we're not tolerant. So, that's why I focus on the burning the crosses question is the focus of racism, Burning Women is focusing on our misogyny. The Burning Books thing is our very contemporary attempts to engage in educational censorship. And Burning Down the Public Square is very much saying we're taking that concept and lighting it on fire in the worst possible way, and misleading and distorting what it means to engage in free speech along the way, while these corporations just pocket just unimaginable profits while they're doing so.

And what I wanted to contrast that to, and it was returning back to Sophia Scholl, it's not something that she actually said, but a play that she inspired and the words in the play and this representation of Sophie Scholl, that's one of her lines, is that, "I choose my own way to burn." And so, in this playwright's re-imagining of Sophie Scholl and her resisting the interrogators who were trying to get her to essentially betray her brother and say, "It was all his idea, let me go." Which apparently is part of the historical account of what happened during her interrogation. She is musing about how many people in their own lives will just roll up and become nothings, because they're scared of life and they're scared of the danger, and that she defiantly says that, "I'm going to burn out. That's true that I'm going to be destroyed, but I'm going to choose how I'm going to be destroyed. I'm going to make it mean something."

And so I wanted to end on that note, because it was such a difference. Everything else that I'm describing is attempts to suppress other people. It's an attempt to silence them. It's an attempt to do violence against them. It's out of anger, and it's out of exclusion, and it's out of this attempt to hold onto power. And then by contrast, you have a figure like Sophie Scholl saying, "I am going to take real risks for something entirely different, for other people's sake, for fighting for the illumination of justice. I will set myself on fire for this cause." And it's such a stark contrast visually to me, but also, of course, in this deep and substantive way as well. And that's why I wanted to return to that motif, that power, that force of language being harnessed in this way, as an attempt to do real radical work in the world and not have it be something that will be destructive to others, but something that will hopefully save others, even if it costs you your own life.

Michelle Deutchman:

Extremely powerful, the way that you said it and also the way that it is, it moves throughout the book, so I appreciate your speaking to that. It certainly raises the question of would one, would I, be willing to be someone like that? And that's a larger existential question to ponder, but I don't want to end on that note. I do want to end... I don't want to end, but since we have to, I will end by asking you, we ask all of our guests, which is, what are ways that individuals who maybe don't have the courage or candor of a Scholl, what can they do to integrate the themes and ideas of this conversation into their daily lives? Whether that's as students or teachers or student affairs professionals or policy makers. Or even in their personal lives, because I think I'm a big believer that we need to give people small steps they can take, otherwise it feels overwhelming. So, that's why I didn't want to end on who would burn for justice? So, what are your thoughts on maybe smaller steps people can take?

Mary Anne Franks:

Yeah, I think there's two. One is to the extent that people are working within the law, to think about how the law is always made, at the end of the day, by people, which means that you can always remake it. There's nothing about the First Amendment or any other law that is set in stone. It can be remade, it can be better. So, that is something we can all own. And ultimately, the power of the Constitution, the power

of our rights comes from the way that people interpret it. And so, that's a very powerful... I would hope that that's a powerful thing to contemplate.

And apart from that though, the subtitle of the book being Breaking Free from the First Amendment, what I mean by this is to say you don't have to be governed by the law. Whether it's good or bad or indifferent, so much of our lives have nothing really to do with the law. I open every one of my First Amendment seminars with asking my students the question, "When's the last time you had a good conversation? And can you describe what that conversation was like?" And not a single person ever talks about how, "Well, I knew that this was protected by the First Amendment and therefore this was a good conversation." It's never that. It's, "I had a conversation with a family member, or a friend, or a random encounter in the street, or I met somebody as I was grocery shopping." And the details and the characteristics of the conversation are things like, "I learned something I didn't know before. I heard someone say something I'd never heard before. Someone listened to me with respect. Someone actually heard something that I had been trying to say for years and no one had recognized what it was."

I want to emphasize this because speech is so important, language is so important to us, and I am so worried that we get trapped in this legalistic notion of what speech is that we miss out on all of these opportunities to think about when have we really had powerful encounters [inaudible 00:51:54] involved in communication, and let's focus on what made those things powerful and meaningful, and not think so much and not spend so much of our time thinking about whether it's a First Amendment issue.

Whether for good or for ill, most of our conversations and most of our meaningful connections have nothing to do with that at all, and I really do think if we allow ourselves the freedom to think about what is good art? What is good politics? What does it mean to be humane to another person? What does it mean to understand someone? What does it mean to express something? That's a beautiful new landscape that we should be able to just fully embrace without getting weighed down on these legalistic questions that are so contested in many ways. So much misunderstand and underestimate the power of our human interactions.

Michelle Deutchman:

Well, I think that's a hopeful note to end on, which is the power of human interactions, and we will certainly need all of that power as we move ahead. And I think I just want to end by thanking you for taking time to spend it with us and with center listeners.

Mary Anne Franks:

Thank you so much for having me.

Michelle Deutchman:

It's been a pleasure. That's a wrap. Thanks so much again to Professor Franks for joining us for this conversation and for sharing her insights from her book Fearless Speech. If you haven't done so yet, pick up a copy. As the holidays and the end of 2024 approach all of us here at the UC National Center for Free Speech and Civic Engagement send our best wishes to you for a healthy and happy new year.

No doubt 2025 will bring new conversations and perspectives about the First Amendment, open expression and democratic engagement, and we look forward to exploring and tackling all of them with you. Talk to you next year.