QUESTIONS AND ANSWERS*

Judge Napolitano:** *Professor Taub, What are stereotypes?*

Professor Taub: A stereotype is a characteristic that generalizes about a particular group. The problem with a stereotype is not whether it is true or false. Stereotypes exist regardless of their truth. We hear a lot about stereotypes not being true and therefore they are not stereotypes. Well, it's all about how stereotypes are applied, not whether they are true or false. Equal protection law is very clear, as recently articulated in the *J.E.B* case, that the Equal Protection Clause protects individual rights and treats the individual as an individual and not as a member of a group. Sex discrimination law has been equally clear since *Frontiero*, through *Hogan*, and as most recently in *J.E.B*, providing that sex-based generalizations whether they be that most women are nurturing or that most women are whatever it may be, can't be used to preclude the individual rights, or to trump individual rights. I hope that answers the question. It has to do with individual rights.

Judge Napolitano: *Mr. McCarter says the* Frank *case was an exercise of raw judicial power based on the political and philosophical predilections of the temporary members of the New Jersey Supreme Court. Do you go along with that?*

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*The following is an edited transcript of the question-answer portion of the January 24 Symposium. Following a fifteen minute presentation by each panelist, questions were submitted by audience members. Each question was written down and handed to Judge Napolitano for submission to the panelists. The Symposium was held on January 24, 1996 at Seton Hall University School of Law, Newark, New Jersey.

**The youngest state judge in New Jersey ever granted lifetime tenure, Judge Napolitano left the New Jersey Superior Court in April 1995 and is currently a partner at Robinson, St. John & Wayne in Newark, New Jersey. Judge Napolitano, a graduate of Princeton University and Notre Dame School of Law, is also an adjunct professor of Constitutional Law at Seton Hall, where, in 1994, he received the Student Bar Association's Most Outstanding Adjunct Faulty Award. Judge Napolitano's current professional associations also include the New Jersey Institute of Continuing Legal Education for whom he has lectured since 1990 and the Justice Morris Pashman American Inn of Court, of which Mr. Napolitano is a founding president.

Professor Taub: Well, first of all, I want to be very open. I am the attorney he alluded to, I've spent more than ten years of my life on this so I'm very happy to talk to you about it. One thing I want to make a little clearer than he did is that the case was not won under either the federal or the state constitution. The case had to do with whether New Jersey's law against discrimination, which has to do with employment, which has to do with public accommodations and that's what was at issue here. So we are talking about a law that was passed by citizens of New Jersey that ruled out discrimination on the basis of sex, race, and other things in public accommodations, and the law is very explicit—it's not just against private accommodations. Distinctly private accommodations are the only ones exempted so that the issue before the Division on Civil Rights, the issue before the State Supreme Court, was whether the Princeton eating clubs at issue, Ivy and Tiger, were distinctly private and, thus, whether they were within the meaning of the statute. Justice Garibaldi upheld the much more detailed opinion of the Division on Civil Rights which did mention how there was not a First Amendment violation. Thus, we argued implicitly that there was no First Amendment violation and the court implicitly accepted that argument when it affirmed the lower court. In any event, the question was once the people of New Jersey had decided that distinctly private clubs could not discriminate, could these eating clubs continue to discriminate. He's contending that there is a constitutional violation because there is some sort of right of freedom of association.

Judge Napolitano: *Isn't there a right of freedom of association, which is the right to exclude?*

Professor Taub: Well, let me say that there are two answers to that. First of all, this is not a tiny little club. The Ivy Club has existed for a hundred years and has many members. There was a story about some guys who went on a cruise, four of them. They put in an announcement while on the cruise that there will be a meeting of the Ivy Club at 7 o'clock before dinner.

People showed up but they didn't know, they were alumni and members of the Club from different years. That was their joke that the four of them were going to get together. So these are not tiny little clubs. I would not say that they're distinctly private; they were basically Princeton University's way of feeding juniors and seniors. This is not exactly like someone you play bridge with, and so my first censure is factually these were not distinctly private, there was not a First Amendment violation that way. But my second answer is that when you have competing constitutional considerations, association and equality, they have to be weighed and what is the most prominent one. Well, I think that it's important for women to be able to belong to a club where they have access to James Baker who was at one point, you may recall, Secretary of the State. So I would say that it was not wrong to say that New Jersey, when the citizens passed a law, not constitutionally decided, but when they passed a law that you had to really be private, you had to be talking about a small group of people, playing bridge or whatever, that First Amendment violations were not at stake, that equality was more important. Thank you.

Judge Napolitano: *Suppose these clubs truly were private and that they had large numbers of people, say fifty, sixty, or even two or three hundred. Can they still exclude on the basis of gender? Let's say the Union Lee Club in New York City, truly private, you can't get past the front door without some exacting, excruciating membership and financial qualifications. And presumably all the members of this club have something in common.*

Professor Taub: They had large numbers of people? I think you've really got to have all the details. I think that the club you just hypothesized somehow assumes that they're not doing business, which I think is unlikely, so I really would want to know a lot of the facts to establish that they are really private, given your assumption of the large numbers.

Judge Napolitano: *Dr. Fox Genovese, Please clarify your logic in concluding that ending public single sex education*

will end protection for victims of domestic violence. A person may choose single sex education while they of course would not choose to be a domestic violence victim.

Dr. Fox-Genovese: Clearly so. I didn't mean to suggest what the question implies, but I think if we apply strict scrutiny in the case of education we will establish it as the general standard and thereby make suspect all institutions that are devoted specifically to one's sex. Some of the institutions that are most valuable, it seems to me, are those that serve women directly and do not admit men.

Judge Napolitano: *While we have you on this, If the courts should not be in the sphere of gender scrutiny and discrimination, what is the procedure and what is the means you say we should use to rectify sex discrimination. If not the courts, who?*

Dr. Fox-Genovese: First of all, we have had legal action in the area of sex discrimination from which we're all benefitting. So I am not in fact criticizing all previous efforts and affirmative action. What I'm trying to suggest is that they have had a tremendous powerful effect in a short span of time and if you study the numbers closely as I have, it increasingly looks that women's disadvantage in, say, employment and level of income relative to men, is more correctly attributed to women having children or giving time to families than to discrimination on the part of men or employers. Where thirty years ago women did indeed earn .59 cents on the male dollar; today an entry level woman earns .98 cents on what her male peer earns. If she starts to lag behind him, more often than not, it has to do with aspects of her life that relate to her being a woman and choices she made. I was just thinking, in listening to Professor Taub's Ivy club argument and the access to Jim Baker, for example, even if we legislate entry for women, which in many instances we have done in the last couple of decades, we cannot overnight guarantee all the results we want.

Judge Napolitano: *But let's get back to the question's point, which I think is integral to your assertion that there are differences between men and women that cannot be*

changed by willing, wishing, or legislating them away. Don't women need more protection than men from domestic violence, and ought not the courts be the roots of that protection?

Dr. Fox-Genovese: That is, I think, a very difficult question. Yes, in some instances the court should recognize those differences and be the roots of that protection. But if you ask the court simultaneously to treat women as equal to level the playing field and to attend to their differences and protect their differences, you risk facing a series of contradictions.

Judge Napolitano: *To Ms. Mandelbaum, How would strict scrutiny, or any alternative scrutiny, eradicate stereotypes in education? Maybe that needs to be refined a little more so whether we are talking about public education or private, but I'll throw the ball at you and let you hit it out.*

Ms. Mandelbaum: My answer to that question is by saying that we absolutely need strict scrutiny in order to deal with the problems of stereotypes in education. The current standard, and I believe that we do need strict scrutiny, and I definitely would like to see that happen, but the current standard of intermediate scrutiny requires an exceedingly persuasive justification for a sex-based classification, as Debbie Brake said earlier, demonstrating that the classification was substantially related. I think that a searching inquiry of class and sex-based generalizations will almost always require a result that rejects the stereotype in favor of the individual rights because, well, I think that we've already seen that in *Hogan* and other cases, so I guess that answers your question.

Judge Napolitano: *To Ms. Blair, Do you have any sense of why VMI seems to be insisting on the method of education which it uses? Would it have to change if women were admitted? Why not keep the system as it is, admit women, and see if they can make it?*

Ms. Blair: The VMI system depends on a rigorous egalitarian ethic throughout the corps. When the cadets first come in, their heads are shaved, they are made to wear the same clothes. Basically it's driven home to them that they are all the same at the same

low level. What they learn over the next four years is that whatever they achieve they achieve based on their own efforts and their own intelligence and hard work. If you introduce into a system like that another class of people who have different standards applicable to them, it makes the lesson less valuable. Instead of "it doesn't matter how much money your father has," it teaches the boys "it does matter whether you are going to be able to get some kind of special dispensation for yourself." This is something that has actually happened in the service academies. The service academies, upon admitting women, needed to have different physical standards for the women. They needed to have different quarters for them, and so forth. And they had to struggle for a long time to figure out a way that they could balance the military needs of putting together teams and having everybody look after everybody else versus the fact that they had very different classes of people that they had to pay special attention to.

Judge Napolitano: *Okay, here's a follow up. Don't you think that your arguments about prohibiting women from participating at VMI for the reasons you've articulated are similar to the arguments that would be made about race and weren't African-Americans denied admission in the past into educational institutions and military and government organizations because it was said that the institutions or the government or the entities would have to accommodate them in orders inconsistent with the mission of those entities?*

Ms. Blair: Well, arguments justifying racial discrimination are spurious arguments. Those were arguments that simply didn't have any basis in fact because the only thing that was different between this man and that man was his skin color. There are real substantial differences between a man and a woman and particularly between an adolescent boy and an adolescent girl. This week, Washington Post Book World reports that the number one hardcover nonfiction best-seller, which has been on the list for 122 weeks, is "Men Are From Mars, Women Are

From Venus." This is something that we all know intuitively, that women and men are different. Science is telling us more and more about it everyday. It is simply of a different character altogether than the differences between races which are completely superficial..

Judge Napolitano: *To Debbie Brake, What is the practical effect of strict scrutiny in terms of sex discrimination in the workplace, and wouldn't strict scrutiny in the workplace deny the employer the type of discretion the employer would have to have to make decisions in the best interest of the entity?*

Ms. Brake: I think actually strict scrutiny would have very little impact in the workplace primarily because sex discrimination is covered by federal law, which prohibits employment decisions made on the basis of sex. You also have a state action issue, only public employers would be covered under the Constitution so that the change to strict scrutiny would only affect public employers anyway and public employers are also already covered by this other federal law that prohibits sex discrimination. As far as the underlying theme in the question that this would interfere with employer's prerogative somehow, I think that is a matter of public policy which has been addressed by Congress in passing this federal sex discrimination law, that sex is not something that is legitimately within an employer's discretion.

Judge Napolitano: *To Deborah Ellis, The third criterion for strict scrutiny is that the definition of it applies to those who are a discrete and insular minority. Since women are 53% of the population, how can you contend that they are a discrete and insular minority and thus should benefit from the strict scrutiny analysis?*

Ms. Ellis: Well, obviously women are not a discrete and insular minority. They are a numerical majority but that isn't one of the arguments we make in support of strict scrutiny. Instead we depend on arguments such as the fact that even though women are a numerical majority, they do not have equal political power in this society, as exemplified by their

underrepresentation at all levels of electoral office, which is much more important than just numbers.

Can I just add a point to that. Now that we have *Adarand*, which extended strict scrutiny to white people challenging race discrimination, who are also a majority of this country, it's very clear that you don't have to compromise a numerical minority to get strict scrutiny.

Judge Napolitano: *Would* Adarand *permit affirmative action for women if sex discrimination were subject to strict scrutiny?*

Ms. Ellis: Yes, I think it definitely would. If you look at Justice O'Connor's opinion in *Adarand*, she makes a very clear point of saying that even though the Court is now applying strict scrutiny to race-based affirmative action programs, strict in this context does not necessarily mean fatal-in-fact. And if strict scrutiny were applied to gender, Justice O'Connor's statement also would hold true for gender-based affirmative action programs.

Professor Taub: I would like to add to that. The practical reality is that most affirmative action programs, if they are challenged in a lawsuit that applies to both racial minorities and women, will be judged in the same standard, and it will be struck down anyway. So women who benefit from affirmative action programs will already be subject to a strict scrutiny standard in effect on affirmative action.

Judge Napolitano: *Ms. Blair, you argue that the equal protection doctrine should not be used to make all people the same. But, isn't VMI's role as part of the state using the law to make men and women more different than they already are. Men are soldiers, women are nurses.*

Ms. Blair: In the *VMI* case, you have to go back to the origin of the case. The lawsuit is actually against Virginia. Virginia is the state that the Justice Department alleges is denying its citizens equal protection. Virginia, being the defendant, has justified its conduct in maintaining VMI as all-male by saying: we want to provide a lot of opportunities for our citizens in higher education. We don't want to have just one big state university that's co-ed and

is exactly the same for everybody. We have a history, beginning in 1819 when the University of Virginia was founded, of having many different schools—we have big schools, small schools, we have schools that are more known for science, schools that are more known for liberal arts. VMI is one part of our educational system which we think is valuable to maintain because it performs a function in the context of the whole. Up until 1980 Virginia had a number of all-female schools, colleges that were publicly supported and each of those schools, at least four, by their own autonomous board of visitors' decision, decided to go co-ed as the market changed. VMI never made that decision. Just before the Justice Department brought suit, as a matter of fact, VMI had just completed a two-year review to determine whether it should go co-ed, and decided to remain all-male.

Judge Napolitano: *Does the State of Virginia provide the equivalent type of military training for women? Equality in facilities, and money and prestige, certainly not history?*

Ms. Blair: The military training that's provided at VMI is the same military training that you can receive at any ROTC program in America. As a matter of fact, the ROTC is there and for those who are worried about the cadets not getting any exposure to women, half of the officers who run the ROTC program in Lexington are female. Just to add on to that, in fact, VMI has a couple of female instructors. And that military program is the same as you would get in any ROTC program. In addition, Virginia has, at Virginia Tech, a co-ed ROTC barracks-type program in which cadets live the life and wear their uniforms a lot more often than the typical ROTC student.

Judge Napolitano: *But is there anything quite like the VMI experience for women and, if no, is there not some obligation on the part of the government to spend its money roughly equally in the manner in which it educates women and educates men?*

Ms. Blair: No, there is no demand for the VMI experience for women. And as a Virginia taxpayer, I would be shocked and appalled and outraged if my state was

going to spend money setting up a school that nobody wanted to go to. The array of educational opportunities in Virginia serve first, the large bunch of people who like the co-ed education and who do fine with it, and second, mostly women at one end, mostly men at another end who need something a little different. The women need something generally to build up confidence; the men need something to tear down confidence. And it's those kind of generalizations that are economically-based that the state is addressing when it has a VMI and a VWIL [Virginia Women's Institute for Leadership] and lots of other things in between.

Judge Napolitano: *Okay, Ms. Mandelbaum, I want you to respond to that and I also want you in your response to address this: Would you argue in favor of VMI if it were purely, purely private? But first hit back this curve ball Ms. Blair is throwing at you, that there's no demand for this in Virginia.*

Ms. Mandelbaum: Okay, first, in response to Ms. Blair's suggestion that VMI is one of an "array of opportunities in Virginia," I wish to stress that VMI is not just any school. It has the highest per capita endowment of any school in the country, after Harvard. It is an extremely prestigious school in Virginia in that a VMI degree virtually guarantees you entry into this exclusive male club, networks, alumni, opening up career and other opportunities for these male graduates. Women deserve access to these valuable benefits too. And, the value of the VMI degree is in no way replicated by going to any other institution.

Judge Napolitano: *Do women really want a VMI for themselves in Virginia?*

Ms. Mandelbaum: Yes, they want *the* VMI though — not a poor substitute. Before the government brought suit in 1990 there were over 400 inquiries to VMI from women. And we often don't hear about this because the Justice Department is the plaintiff in that case so, unlike the Shannon Faulkner case, *VMI* seems faceless. The Citadel, which is a very similar program, has also received similar inquiries. In any event, the Equal Protection Clause does not depend

on demand so I don't even think that that's a relevant issue, but if you want to talk about demand, yes there is demand. There's demand here even though women have been excluded as a matter of official state policy. Can you imagine how much demand there might be if the program was actually opened to women.

Judge Napolitano: *Okay, Ms. Mandelbaum, Would you argue in favor of VMI if it were purely private? Like Grove City, they didn't take a nickel from the government.*

Ms. Mandelbaum: If VMI had started out in 1839 as a purely private institution and had remained such throughout, the answer is no, we would not be bringing this lawsuit. If VMI were to suddenly go private in response to the litigation challenging its all-male policy, that would be a very different story because then you'd have a very similar situation to what was happening during the massive resistance era when schools were adopting subterfuges to evade court-ordered desegregation. So we would continue to challenge VMI if it were to go private after this lawsuit was brought.

Judge Napolitano: *Would you bring an action on behalf of a male challenging his denial of admission to exclusive women's schools, or do you not object to the exclusivity of women's schools, private women's schools? The question is unclear as to private women's schools, but let's say yes.*

Ms. Mandelbaum: A private women's school. The answer, no, I don't think I'd take that lawsuit. Women's programs can be justified under the compensatory purpose doctrine. A private women's college would have an opportunity to prove in court that it serves an important or compelling state interest, and I think they might well sustain such a burden. They are serving a remedial function for historical and continuing discrimination against women, not only in education but in vocational and professional areas in which women have been excluded; so that is an argument that potentially could be used in favor of those colleges.

Judge Napolitano: *Dr. Fox-Genovese, you are an expert witness in a case in which Ms. Mandelbaum was representing*

a young man who wants to be admitted to Wellesley or Smith. You were engaged by the university to defend its female exclusivity. Tell us why the court should not order this male into the school.

Dr. Fox-Genovese: Because as I said in my remarks, the single most important characteristic of single sex education is its single sexness. You can argue on the basis of demand that men tend to prefer and benefit from certain kinds of programs and women tend to prefer and benefit from other kinds of programs, but you do not need that argument to defend the benefit of single sex education which separates the business of education from the mating-dating games that preoccupy adolescents, as they will tell you, and as all observers will confirm. There's big literature on this so that the argument is to preserve the "option" of single sex education. Otherwise, what we end up with is a mass of co-educational institutions in which young women and young men just happen to behave differently, so then we need a vast scheme of experts and, of course, lawyers to make sure that they behave themselves as they should.

Judge Napolitano: *Well, we all want lawyers to be employed, fully employed.*

Dr. Fox-Genovese: I understand, and in this group this is a high priority. But you'd save yourself some of the problems of how many times you have to ask please and what kind of consent you have to get when you unbutton the top button of a young women's blouse if you didn't have them at the same school and going to the same class.

Judge Napolitano: *Let's change the facts a little bit. Smith and Wellesley are now public institutions and this young man represented so ably by Ms. Mandelbaum seeks admission. And the state in which they are located does not provide similar all-male atmospheres with a Smith or Wellesley experience. Would your answer be the same?*

Dr. Fox-Genovese: My answer would be the same although I'd be open to arguments such as we've had in Virginia and South Carolina. There must be a parallel program. I do not think that means identical, I think that with education we need to be talking about outcomes,

how we prepare young people to be the best they can be, not giving them an identical experience.

Judge Napolitano: *Mr. McCarter, Can the government spend its money to educate only one sex and not spend as much money to educate the other? For example, the State of Virginia running VMI or the state of Massachusetts running Wellesley and not providing a similar facility for all members of the other sex.*

Mr. McCarter: Okay, well I think I touched on that very briefly in my remarks when I said that if I were on the Supreme Court I might very well vote against VMI. I don't think that the government, no matter what it does, can really be fair. It's not fair on the one hand to use taxpayer money to fund one program that's not open to the majority of the citizens of the state and not provide them with a comparable experience elsewhere. On the other hand, it's not fair to abolish overnight the tradition that has lasted for, I don't know, 150 years and has created the most distinguished citizens that have ever come from Virginia. There is no way this lawsuit can come out in a fair way. The only thing we can do is to approach rough justice. And I would go back to Ms. Mandelbaum, I think VMI should privatize, and I don't think it's comparable to massive resistance in the segregation era. At that point what was being privatized was local schools and the black children in the neighborhood were faced with no alternative but the same segregated schools they always had. For VMI to privatize is not to deny the women in Virginia the possibility of getting a comparable education. They can go anywhere else in the country in a private institution to get the same thing. The State of Virginia has gotten out of the business and I think that's a good thing.

Judge Napolitano: *Let's segway into your and Professor Taub's favorite case. When does a private entity become a public accommodation and thus subject itself to Fourteenth Amendment analysis which is subject to the government? How open would Ivy or Cottage have to be in the McCarter view of the world before*

they could be subjected to the type of analysis that Justice Garibaldi chose?

Mr. McCarter: Before I get to the McCarter view of the world, I think the answer to the question has been basically presented by the *Frank* case. The answer is when the judges say it does. There was no principled analysis between public or private in the *Frank* case. The justices in the *Frank* case wanted to open up the Princeton eating clubs, and so they did. I hope I made that clear and my quotes were not really taken out of context. They did base the decision on a gestalt. I don't know where the line between public and private is; that's why I say go private as far as possible.

Judge Napolitano: *Professor Taub.*

Professor Taub: I don't want to rehash the facts in the case. I do want to emphasize that a state decision that a public accommodation, which may be technically private, cannot discriminate is the same thing as applying the Fourteenth Amendment of the United States Constitution, which requires state action. So there is a distinction between the decision by the state voters, which represents the state voters desire to prohibit discrimination in New Jersey in private accommodations. There is a distinction between that and applying the United States Constitution to public entities. I would be happy to discuss with you in private the many details of the case, the basis for the gestalt, and once again the fact that this terribly private institution at Princeton was relying on the clubs as their very fancy cafeteria. But we will do that later.

Judge Napolitano: *What are the ramifications, Professor Taub, of strict scrutiny on denying classifications in the public or private sector? And wouldn't the imposition on strict scrutiny on gender open up to that Pandora's box?*

Professor Taub: Well, that's a very different question. That is the question of whether either under a statute or the United States Constitution or state constitution you should measure discrimination against the previously disadvantaged class by the same standard as you measure discrimination against the advantaged class.

That was an issue that was before the United States Supreme Court and I recall now Justice Ginsburg being pressed about this by the Supreme Court, and I would argue that you should not use the same standard but that's in my law professor capacity not in my attorney capacity. Right now the United States Supreme Court says that you should use the same standard and then the question is can you prove, as my colleagues to the right would want you to do, that there is a compelling interest, that there's enough of an interest in the need to either meet the current definitions of the differences between people or past discrimination.

Judge Napolitano: *Is there a compelling state interest in the State of New Jersey to see to it that Sally Frank gets admitted to Cottage or Ivy? The names of two of the clubs at Princeton University.*

Professor Taub: That's exactly my point. They did not have to decide that. They were deciding whether the law applied. The law does not require finding any kind of compelling state interest.