

GOVERNMENTAL AND SELF-REGULATION OF THE PRESS:
AN AMERICAN PERSPECTIVE

CAMBRIDGE CONFERENCE:
EXTREME SPEECH AND DEMOCRACY
UNIVERSITY OF CAMBRIDGE
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I. INTRODUCTION/OVERVIEW:

In brief, I shall address what I perceive to be the approach to extreme speech taken by the American legal and media communities.

Simply put, I view the American legal position as one that condemns hate speech rhetorically, but gives it the widest possible berth jurisprudentially. In the American legal system, such communications are privileged, except when provably false, defamatory and at least negligently reported, or when highly particularized and likely to cause imminent harm. I view the American media and cultural position as quite similar; that is, condemnatory but permissive. In the end, I view this dance between what we say we abhor and what we permit as one subconsciously designed to strike an appropriate balance between man's inclination toward aggression, on the one hand, and the "imposed compromise" of civilization, on the other. (If you will, a vaguely Freudian interpretation.) In the United States, regulation of extreme speech is the province of ethics panels and watchdog groups, legally toothless but highly vocal.

- A. The true founder of civilization, Freud once observed, was the man who flung an *epithet* at his enemy instead of a spear. [Peter Gay, *Freud: A Life for Our Time*, Anchor Books, p. 546 (1989)]
- B. Though indispensable, civilization gave rise to "the most drastic interference with the passionate desires of the individual, the suppression – and repression - of instinctual needs" [*Id.*]
- C. Life in society, therefore, is an "imposed compromise" and an essentially insoluble predicament. "The very institutions that work to protect mankind's survival also produce its discontents." [*Id.*, at 547]
- D. Yet it was man's inclination toward aggression that constituted "the greatest impediment to civilization." [S. Freud, *Civilization and Its Discontents*, W. W. Norton & Co., p. 81 (1989)]
- E. If civilization is a good thing, as Freud concluded, and should be encouraged to thrive, does it necessarily follow that the hurling of epithets should be consistently protected and fostered? Or does some hate speech pose the risk of lunging society backward into the very violence that undermines civilization?
- F. Striking the proper balance in the regulation of epithetic and hateful speech is essential to individual and cultural development, which Freud viewed as being in "hostile opposition" to one another. [*Id.*]
- G. Freud said the "fateful question for the human species" was whether and to what extent their cultural development will succeed in mastering "the disturbance of their communal life by the human instinct of aggression and self destruction." [*Id.*, at 111]
- H. Neither courts nor newspaper editors consciously ask themselves whether epithetic or hateful speech promotes civilization or poses the risk of a backward

lurch toward that Hobbesian state of nature known for being nasty, brutish and short.

- I. But I submit that the wink-wink, nod-nod form of censure and publication that takes in the American legal and media cultures represents the struggle to find the proper balance – one that allows individuals to let off enough steam to keep our collective engine moving forward – without riding off the rails.

II. FRAMEWORK AND PERTINENT EXAMPLES FROM AMERICAN LAW AND MEDIA

A. American Law

1. *Prior Restraints and the Heaviest Presumption of Unconstitutionality: Near v. Minnesota*, 283 U.S. 697 (1931) (prior restraints on publication are presumptively unconstitutional);
2. *Libel Actions and the “Actual Malice” Standard: New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (speech about public officials on matters of public interest should be “uninhibited, robust, and wide-open”);
3. *Incitement and its Imminence: Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (speech is protected by First Amendment unless it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”);
4. *Rhetorical Hyperbole and Lusty, Imaginative Expressions of Contempt: Greenbelt Cooperative Publ’g Ass’n, Inc. v. Bressler*, 398 U.S. 6, 13-14 (1970) (newspaper’s use of word “blackmail” to describe developer’s negotiations with city council was absolutely protected as “no more than rhetorical hyperbole, a vigorous epithet”). *Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (use of word “traitor” to define union “scab” not actionable when used “in a loose, figurative sense” and was “merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members”);
5. *Parody and its Absolute Protection: Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (First Amendment precluded recovery under state emotional distress action for ad parody that “could not reasonably have been interpreted as stating actual facts about the public figure involved”);
6. *Cross Burning with Specific Intent to Intimidate: Virginia v. Black*, 538 U.S. 343 (2003) (upholding constitutionality of statute banning cross burning with intent to intimidate; invalidating jury instruction that any cross burning would constitute requisite intent);
7. *Aggravating Circumstances and Hate Speech*: Some state statutes require the trier of fact to determine, and the court to consider, as an aggravating circumstance – for purpose of sentencing – whether a defendant

committed the crime out of malice toward a victim because of the victim's identity in a group "based on race, color, religion, national origin, sexual orientation, gender or disability." See A.R.S. §§ 13-702.C.15 and 41-1750.A.3.

8. *Aiding and Abetting When Directly and Unmistakable Urging Murder: Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 263 (4th Cir. 1997) (publisher of book "How to Be a Hit Man" could be civilly liable for aiding and abetting a criminal act, consistent with First Amendment; not mere abstract advocacy, where book "directly and unmistakably urge[d] concrete violations of the laws against murder for hire and coldly instructs on the commission of the crimes");
9. *CDL and its Protection of ISPs: Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 535 (E.D. Va. 2003) (plaintiff's civil rights claim against Internet provider dismissed under Communications Decency Act; statutory immunity from liability upheld, despite plaintiff's feeling "harassed, insulted, threatened, ridiculed and slandered" in chat rooms labeled "Beliefs Islam" and "Koran");
10. *Incitement, True Threats, Fighting Words and a Letter to the Editor: Citizen Publ'g Co. v. Miller*, 115 P.3d 107, 210 Ariz. 513 (2005) (Arizona Supreme Court ordered dismissal of intentional infliction of emotional distress claim by Islamic Americans over letter to editor about Iraq war, which said: "[w]henver there is an assassination or another atrocity we should proceed to the closes mosque and execute five of the first Muslims we encounter").

B. Media Culture

1. *Tucson Citizen*: Editor/Publisher issues prompt and prominent column apologizing for publication of letter ("Printing it was a mistake and a case of bad judgment The letter was run based on the right of free expression. But I won't offer that as a defense for our decision to print it.") (*Tucson Citizen*, Dec. 6, 2003).
2. *Don Imus* (one of American's most popular radio hosts): "Networks Condemn Remarks by Imus" (*New York Times*, April 7, 2007, p. A15); syndicated radio host called the students who play for Rutgers University women's basketball team, most of whom are Black, a bunch of "nappy-headed ho's":

"What followed was a familiar dance for Mr. Imus and the media companies that profit from his ability to shock his way into big audiences: outrage, indignation and, eventually, the expression of deep regret."

- MSNBC, which simulcasts The Imus Show on cable TV, issued an apology, noting that the program is not a production of the network;
 - NBC, its parent company, called the comments “deplorable”;
 - CBS Radio, which syndicates the radio show, expressed disappointment: “We fully agree that a sincere apology was called for and will continue to monitor the program’s content going forward”;
 - Mr. Imus: orally and in writing called his remarks “thoughtless and stupid”;
 - “Unimpressed by his on-air apology or corporate promises of a tighter leash, angry critics of nationally syndicated radio host Don Imus called Saturday [April 7, 2007] for his dismissal over his racially charged comments about the mostly Black Rutgers women’s basketball team.” (Associated Press, April 8, 2007);
 - Columnist Filip Bondy of the *Daily News*, in a column headlined “Imus spews hate, should be fired,” said the radio star “should be axed for one of the most despicable comments ever offered on air.” (*Id.*)
 - See Attachment A (*New York Times*, April 9, 2007, p. C1).
3. “Anti-Mormon DVD triggers a strong LDS Church Rebuke,” *Desert Morning News*, March 30, 2007.
- Various Christian organizations launched a campaign targeting Mormonism in the United States and Canada by distributing an estimated 500,000 copies of a DVD, “Jesus Christ/Joseph Smith”;
 - “. . . [W]e believe the doctrines of the LDS Church cause people to be deceived and go to hell,” one of the DVD’s producers said.
 - The Anti-Defamation League (Arizona Region, where a door-to-door distribution was organized) criticized the campaign: “hate directed at any of us is hate directed at all of us,” said David Bodney, Regional Board Chairman.

- See Attachment B (*Deseret Morning News*, March 30, 2007).
4. *Comedian Michael Richards*: Known best for his portrayal of “Kramer” on the *Seinfeld* show, Richards was caught on tape in November 2006 during a racially-charged rant at the Laugh Factory in Los Angeles. The outburst of racial slurs, profanities and repeated use of the “n-word” began after two audience members shouted, “you are not funny” (“Taped Tirade: Michael Richards spews racial slurs during stand-up; Seinfeld helps initiate apology,” *Chicago Tribune*, November 21, 2006).
 5. *Banning Use of N-Word*: In response to outbursts such as the one made by Richards, Westchester County (New York) legislature passed a resolution that would ban use of the “n-word.” It declared the “symbolic elimination” of this common racial slur. The legislature has urged the media to end the use of the word. [<http://www.msnbc.msn.com/id/17127693>].
 6. *Actor Mel Gibson*: In July 2006, Gibson ranted anti-Semitic slurs when he was pulled over for driving under the influence. Gibson later apologized, claiming he does not believe in the comments attributed to him. [<http://www.msnbc.msn.com>, July 31, 2006]
 7. *Press Ethics Principles*: “We will treat people with dignity, respect and compassion We will observe common standards of decency.”

III. CONCLUSION

As Oliver Wendell Holmes famously observed in the *Abrams* case: “[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.”

Holmes again: “A word is not a crystal, transparent and unchanged.” Instead, a word is “the skin of a living thought [that] may vary greatly in color and content according to the circumstances and the time in which it is used.”

“A comedy sketch dramatized by Richard Pryor and Chevy Chase on the television show *Saturday Night Live* makes this point vividly. Chase is interviewing Pryor for a job as a janitor and administers the word-association test that goes like this:

“ ‘White,’ ” says Chase.

“ ‘Black,’ ” Pryor replies.

“ ‘Bean’ ”

“ ‘Pod.’ ”

“ ‘Negro.’ ”

“ ‘Whitey,’ ” Pryor replies lightly.

“ ‘Tarbaby.’ ”

“ ‘What did you say?’ ” Pryor asks, puzzled.

“ ‘Tarbaby,’ ” Chase repeats, monotone.

“ ‘Ofay,’ ” Pryor says sharply.

“ ‘Colored.’ ”

“ ‘Redneck!’ ”

“ ‘Jungle bunny!’ ”

“ ‘Peckerwood,’ ” Pryor yells.

“ ‘Burrhead!’ ”

“ ‘Cracker.’ ”

“ ‘Spearchucker!’ ”

“ ‘White trash!’ ”

“ ‘Jungle bunny!’ ”

“ ‘Honky!’ ”

“ ‘Spade!’ ”

“ ‘Honky, honky!’ ”

“ ‘Nigger,’ ” says Chase, smugly [aware that, when pushed, he can always use that trump card].

“ ‘Dead honky!’ ” Pryor growls [resorting to the threat of violence now that he has been outgunned in the verbal game of racial insult].”

[Randall Kennedy, *Nigger, The Strange Career of a Troublesome Word*, Vintage Books, pp. 24-25 (2002)]

Query whether the same comedy sketch would air on American network television today?

The New York Times

With Imus, They Keep Coming Back

"Imus in the Morning" is scheduled to start this morning like any other, with Don Imus and his crew cracking wise about the weekend's events, riffing off the news and chatting with Evan Thomas, one of Newsweek's top guns. Later Tom Oliphant, Washington author and former op-ed columnist for The Boston Globe, will check in for some political talk.

Given that Mr. Imus spent part of last week describing the student athletes at Rutgers as "nappy-headed ho's," you might think he'd have trouble booking anyone, let alone A-list establishment names. But Mr. Imus, who has been given a pass for this sort of comment in the past, also generously provides airtime to those parts of the news media and political apparatus that would generally be expected to bring him to account.

Mr. Imus's comment about the Rutgers team last week was not just, as they say, over the line — you can't even see the line from where he landed. It was not a gaffe, a slip of the tongue, a joke in poor taste. (Nor was the on-air comment to Mr. Imus by the show's longtime producer, Bernard McGuirk, calling the women's final the "Jigaboos vs. the Wannabees," in a bad attempt to borrow a phrase from a Spike Lee movie.) Mr. Imus's slur was the kind of unalloyed racial insult that might not have passed muster on a low-watt AM station in the Jim Crow South.

On Thursday, before his employers knew they had a growing public-relations problem on their hands, Mr. Imus suggested that everyone needed to relax and should not be offended by "some idiot comment meant to be amusing." (Which part was supposed to be funny? The nappy-head or the ho's?)

That's not to say that everyone at MSNBC, which simulcasts the show, and its owner NBC (a unit of the General Electric Company), along with CBS Radio, which owns WFAN and syndicates the show, wasn't terribly,

A misanthrope displays 360-degree offensiveness.

terribly sorry. Before apologizing, network executives at MSNBC pointed out that, "Imus in the Morning" is not a production of the cable network and is produced by WFAN Radio," which is a little like saying that they did not manufacture a bomb, they only delivered it.

This isn't the first time that Mr. Imus has trolled these waters: he once called Gwen Ifill, then working at The New York Times, "a cleaning lady" and described one of the paper's sports columnists, William C. Rhoden, as a "quota hire." Both of those journalists are black, but Mr. Imus's defenders like to point out that he is an equal-opportunity misanthrope whose long-running show displays 360-degree offensiveness toward "thieving Jews," "faggots" and "lesbos."

Although the Web has been alive with calls for sanctions against Mr. Imus — the clip is available for all to see on YouTube — mainstream media have remained relatively silent. He is, after all, popular, good at his job and, perhaps more important, he generously provides oxygen — and an audience — to the kind of journalistic and political elites who would be expected to demand his head on a pike.

He is, to borrow one of the show's metaphors, a lawn jockey to the establishment. Few politicians, big or small, pass up a chance to bump knees with Mr. Imus, in part because his show is one of the few places where they can talk seriously and at length about public issues. Senator John Kerry has stopped by. Senator John McCain is on frequently. And Senators Joseph I. Lieberman and Joseph R. Biden are part of a legion eager to sit in the guest chair.

NBC News uses "Imus in the Morning" to promote the brands of Tim Russert, Andrea Mitchell and David Gregory. Tom Brokaw was a frequent guest, and his replacement, Brian Williams, has been sanctified by the I-man, as they call him. Chris

Matthews from MSNBC has appeared, as have anchors and journalists from CNN and CBS and, on the print side, by reporters and editors from Newsweek and popular opinion columnists from The New York Times.

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Whatever problem there was, I think that he took care of with his statement of Friday," said Mr. Oliphant, one of the guests scheduled for this morning. "It was classic Imus. He said he screwed up and he was sorry. Bang. Bang. It was very much to the point, and did not offer any excuses."

The other guest scheduled today said the show must go on. "He should not have said what he said, obviously," said Mr. Thomas of Newsweek. "I am going on the show, though. I think if I didn't, it would be posturing. I have been going on the show for quite some time and he occasionally goes over the line." Mr. Imus may rib his exalted guests, but he generally stays away from the racial humor and invective that is part of the connective tissue of the rest of the show. Perhaps that gives the politicians and opinion makers enough plausible deniability to sit comfortably across from Mr. Imus.

There have been temporary break-ups in the long-running affair. After Mr. Imus stepped over quite a few lines at the White House correspondents' dinner in 1996, Cokie Roberts, now an analyst for ABC News, said, "Now none of us can go on his show again." But she went back; they always do.

To borrow another trope from Mr. Imus — in a conversation last year on the show with Mr. Matthews, he reworked the title of "Brokeback Mountain" in into a bit of homophobic, gross-out humor — they just can't quit him. (MSNBC was sorry for that one, too.)

Part of the reason that his corporate owners are eager to apologize, eager for the latest gaffe to blow over, is so that they can get back to counting the lucre he generates. Mr. Imus has been a boon for MSNBC because he provides a cheap and effective way for the third-ranked cable news network to compete in the morning (it doesn't cost a lot to film a radio show). CNN recently switched morning anchors in part because of the ratings strength that Mr. Imus was generating.

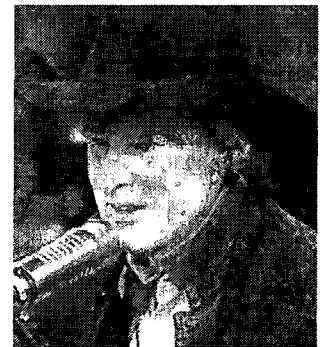
On the radio, Mr. Imus may have lost some of the heat that he used to generate — Talkers magazine, a trade publication, ranked him 14th among United States radio hosts — but he is still the go-to guy for selling books, in part because when he becomes interested in a book, he will flog it for days and sometimes weeks.

He fills a demand for serious discussion on contemporary radio so that the journalists and politicians pushing an agenda or a book don't have to get in line behind the strippers at Howard Stern's show.

So who is left to hold Mr. Imus accountable? For the time being, that would be the Rev. Al Sharpton, who told The Associated Press, "I accept his apology, just as I want his bosses to accept his resignation." (Late yesterday, Mr. Imus agreed to go on Mr. Sharpton's syndicated radio show today.)

It is hard to say how much coverage the protests will get. Had Fox's Bill O'Reilly said what Mr. Imus said, he might have been confronted with pitchforks and torches outside his studio. Last month, after Ann Coulter used a homophobic term to describe presidential candidate John Edwards, she received opprobrium from dozens of media outlets, including MSNBC, which featured a running count of the number of outlets that had dropped her column. Earlier this year, Mr. Biden got creamed for describing Senator Barack Obama as "clean" and "articulate."

Mr. Imus's friends will tell you that he is not a racist in his heart. But what is or is not in the heart of a radio talk show host is much less important than what comes out of his mouth.



Don Imus's show gives MSNBC a cheap way to compete in the morning.

Deseret Morning News, Friday, March 30, 2007

Anti-Mormon DVD triggers a strong LDS Church rebuke

Retired preacher says he's trying to save LDS members

By Amy Choate-Nielsen

Deseret Morning News

A recent mass distribution of anti-Mormon DVDs has triggered a strong rebuke from The Church of Jesus Christ of Latter-day Saints.

The DVD, "Jesus Christ/Joseph Smith," is part of a campaign targeting Mormonism that was launched by various Christian organizations on Sunday in the United States and Canada. Areas with a high concentration of LDS Church members — like Utah — are expected to receive the bulk of the DVDs, but an estimated 500,000 copies are expected to be delivered across the United States and Canada by the end of the week.

"Groups opposed to the (LDS Church) have a perfect right to distribute their materials in ways that are legal," said a statement posted Thursday on the church's Web site, www.lds.org. "The issue is not one of rights. Rather, it is that one religious group chooses to target another with a DVD full of distortions of its doctrine and history, and misrepresentations so stark that they call into question the integrity of the producers."



An estimated 500,000 copies of the DVD have been produced.

Stuart Johnson, Deseret Morning News

The video — which features an LDS temple and a picture of Joseph Smith on the cover — is designed to expose the "fatal flaws" of the LDS Church, said Floyd McElveen, who helped create the DVD.

McElveen, a retired Baptist preacher from Petal, Miss., said he helped create the video to warn Mormons and "save" them.

"We may be wrong — I'm 100 percent convinced that we're not — but we believe the doctrines of the LDS Church cause people to be deceived and go to hell," McElveen said. "Now if they believed that about me, even if they were wrong, they would be monsters if they didn't try to reach me and warn me. ... As long as I have breath, I'll try to reach Mormons for the real Christ, the biblical Christ."

McElveen said the video has been finished for several months, but efforts were made to keep the project hidden from public knowledge until March 25, the campaign's kickoff day. The campaign was planned to coincide with the semi-annual General Conference of the LDS Church, which begins Saturday.

"We knew what would happen (if the information got out)," McElveen said. "We knew when the (LDS) bishops heard about it they would say, 'Throw it in the wastebaskets,' and that's a lot of money to throw away. We wanted a fair shake."

Attachment B

McElveen says he helped plan the distribution out of love, but the campaign has come under fire from other religious organizations who disapprove of the effort.

In Arizona, where a door-to-door distribution was organized, Jewish Anti-Defamation League Regional Board Chairman David Bodney criticized the effort, saying that "hate directed at any of us is hate directed at all of us."

The LDS Church said it is not surprised at being the focus of the campaign. In denouncing the DVD campaign, the church compared the mass-distribution with the church's own missionary effort.

"When Latter-day Saint missionaries visit homes or engage others in conversation, they ... declare their own message honestly and openly and allow people the freedom to choose," says the statement. "That will continue to be the church's approach, not just because honest and open dialogue is what most people want, but because in our view it best represents the spirit of the gospel of Jesus Christ."

Since the DVD's initial distribution on Sunday, McElveen says the DVD's Web site, www.goodnewsforlds.com, has been flooded with e-mails and attention. The same can be said for another Web site, www.fairlds.org, that has published a point-by-point rebuttal of "Jesus Christ/Joseph Smith."

The Web site was created by the Foundation for Apologetic Information and Research to defend Mormonism, but is not affiliated with the LDS Church. Scott Gordon, president of FAIR, said his organization obtained a copy of the DVD about a week before it was distributed, and volunteers prepared the rebuttals.

The questions raised — and their answers — aren't anything new, Gordon says.

Gordon said the DVD misses the target because it attempts to discredit tenets that are not true representations of LDS beliefs.

"My feeling about this DVD is they took a shotgun and said, 'We're going to give you everything we've got,'" Gordon said. "Then we say, 'If that's everything you've got, then it's not enough.'"

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