

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?