

A close-up, low-angle shot of the Statue of Liberty's head and crown against a dark background. The statue's face is partially obscured by a piece of bright red tape, symbolizing censorship or the silencing of speech. The crown's spikes are visible behind the head.

human**rights**

VOL. 43 NO. 4

ABA American Bar Association Section of Civil Rights and Social Justice

THE
ONGOING
CHALLENGE
TO DEFINE
FREE
SPEECH

Editorial Board

Chair:

Jason Sengheiser

Issue Editors:

Claire Parins

Stephen J. Wermiel

Members:

Emily Bergeron

Mathew Mecoli

Claire Parins

Aram A. Schvey

Juan Thomas

Stephen J. Wermiel

Alexander Wohl

Managing Editor:

Melissa Ladwig

Design and Production:

Monica Alejo

Section of Civil Rights and Social Justice

Chair: Wilson Adam Schooley

Chair-Elect: Vacant

Vice Chair: Wendy Mariner

Secretary: Angela Jean Scott

Budget Officer: Richard Soden

Section Delegates: Estelle H. Rogers

Mark I. Schickman

Immediate Past Chair: Robert N. Weiner

Section Director: Tanya N. Terrell

Associate Section Director: Paula Shapiro

Project Director (AIDS) and Director of the ABA

Center for Human Rights: Michael L. Pates

Project Director (Death Penalty Due Process

Review): Misty Thomas

Section Administrator: Jaime T. Campbell

Section Program Assistant: Alli Kielsgard

Section Office:

1050 Connecticut Ave., N.W., Suite 400

Washington, D.C. 20036

tel: 202-662-1030, fax: 202-662-1031

email: crsj@americanbar.org

americanbar.org/groups/crsj.html

Cover:

By Werner22brigitte via Pixabay. Photo illustration by Monica Alejo.

Introduction

The Ongoing Challenge to Define Free Speech

By Stephen J. Wermiel

Freedom of speech, Supreme Court Justice Benjamin Cardozo declared more than 80 years ago, “is the matrix, the indispensable condition of nearly every other form of freedom.” Countless other justices, commentators, philosophers, and more have waxed eloquent for decades over the critically important role that freedom of speech plays in promoting and maintaining democracy.

Yet 227 years after the first 10 amendments to the U.S. Constitution were ratified in 1791 as the Bill of Rights, debate continues about the meaning of freedom of speech and its First Amendment companion, freedom of the press.

This issue of *Human Rights* explores contemporary issues, controversies, and court rulings about freedom of speech and press. This is not meant to be a comprehensive survey of First Amendment developments, but rather a smorgasbord of interesting issues.

One point of regular debate is whether there is a free speech breaking point, a line at which the hateful or harmful or controversial nature of speech should cause it to lose constitutional protection under the First Amendment. As longtime law professor, free speech advocate, author, and former American Civil Liberties Union national president Nadine Strossen notes in her article, there has long been a dichotomy in public opinion about free speech. Surveys traditionally show that the American people have strong support for free speech in general, but that number decreases when the poll focuses on particular forms of controversial speech.

The controversy over what many call “hate speech” is not new, but it is renewed as our nation experiences the Black Lives Matter movement and the Me Too movement. These movements have raised consciousness and promoted national dialogue about racism, sexual harassment, and more. With the raised awareness come increased calls for laws punishing speech that is racially harmful or that is offensive based on gender or gender identity.

At present, contrary to widely held misimpressions, there is not a category of speech known as “hate speech” that may uniformly be prohibited or punished. Hateful speech that threatens or incites lawlessness or that contributes to motive for a criminal act may, in some instances, be punished as part of a hate crime, but not simply as offensive speech. Offensive speech that creates a hostile work environment or that disrupts school classrooms may be prohibited.

But apart from those exceptions, the Supreme Court has held strongly to the view that our nation believes in the public exchange of ideas and open debate, that the response to offensive speech is to speak in response. The dichotomy—society generally favoring free speech, but individuals objecting to the protection of particular messages—and the debate over it seem likely to continue unabated.

A related contemporary free speech issue is raised in debates on college campuses about whether schools should prohibit speeches by speakers whose messages are offensive to student groups on similar grounds of race and gender hostility. On balance, there is certainly vastly more free exchange of ideas

continued on page 4



2 In the Age of Social Media, Expand the Reach of the First Amendment

By David L. Hudson Jr.

The time has come for the First Amendment to be extended to cover powerful private social media entities such as Facebook and Twitter that can limit, control, and censor speech.

6 Getting to the Truth: Fake News, Libel Laws, and “Enemies of the American People”

By Jane E. Kirtley

The public wants the press to tell the truth. When politicians call the press “the enemy of the people” and threaten to “open up” libel laws, who will decide what is “fake news”?

10 What Constitutes a Public Forum on Social Media?

By David McGee

As more politicians are using social media to communicate with citizens, the question arises: When is a politician’s social media account considered a public instead of a private forum?

11 Not a Masterpiece: The Supreme Court’s Decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*

By Erwin Chemerinsky

The recent decision in the *Masterpiece Cakeshop* case allowed a business to discriminate based on its owner’s beliefs, which goes against many established federal, state, and local civil rights laws.



16 Counterspeech in Response to Changing Notions of Free Speech

By Nadine Strossen

Many people hold inconsistent notions of free speech, cherishing the liberty to speak freely but wanting to suppress speech when it is controversial or hateful. The concept of counterspeech promotes more speech as opposed to silencing and censorship.

22 Sexual Expression and Free Speech: How Our Values Have (D)evolved

By Geoffrey R. Stone

Throughout history, courts have struggled with how to define and regulate obscenity. As thoughts regarding free speech have changed over time, so have social mores, and now an unregulated Internet provides unlimited access to sexual images.

20 Thwarting Speech on College Campuses

By Stephen J. Wermiel and Josh Blackman

Two companion pieces provide examples of student protesters on college campuses silencing speakers they disagree with—on both sides of the political spectrum. These events raise questions about how our nation deals with speech that is offensive to parts of the population.

26 Human Rights Heroes: The Challengers of Free Speech

By Stephen J. Wermiel

In this issue of *Human Rights*, we honor those who have sacrificed to protect the free exchange of ideas in our society.



Printed on recycled paper

Human Rights (ISSN 0046-8185) is published four times a year by the Section of Civil Rights and Social Justice (CRSJ) of the American Bar Association, 1050 Connecticut Ave., N.W., Ste. 400, Washington, D.C. 20036. An annual subscription (\$5 for Section members) is included in membership dues. Additional annual subscriptions for members are \$3 each. The yearly subscription rate for nonmembers is \$18 for individuals and \$25 for institutions. To order, call the ABA Service Center at 800/285-2221 or email service@americanbar.org. The material contained herein should not be construed as the position of the ABA or CRSJ unless the ABA House of Delegates or the CRSJ Council has adopted it. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means (electronic, mechanical, photocopying, recording, or otherwise) without the prior written permission of the publisher. To request permission, contact the ABA's Department of Copyrights and Contracts via www.americanbar.org/utility/reprint.html. Postmaster: Send notices by Form 3579 to *Human Rights*, 321 N. Clark St., Chicago, IL 60654-7598. Copyright © 2018, American Bar Association.

In the Age of Social Media, Expand the Reach of the First Amendment

By David L. Hudson Jr.



The First Amendment only limits governmental actors—federal, state, and local—but there are good reasons why this should be changed. Certain powerful private entities—particularly social networking sites such as Facebook, Twitter, and others—can limit, control, and censor speech as much or more than governmental entities. A society that cares for the protection of free expression needs to recognize that the time has come to extend the reach of the First Amendment to cover these powerful, private entities that have ushered in a revolution in terms of communication capabilities.

While this article focuses on social media entities, the public/private distinction and the state action doctrine are important beyond cyberspace. The National Football League’s reaction to Colin Kaepernick and other players “taking a knee” during the playing of the National Anthem is a pristine example of private conduct outside the reach of the First Amendment under current doctrine. But the nature of those protests couldn’t seem more public and cries out for a re-evaluation of the state action doctrine and the importance of protecting speech.

Speaking of speech, two key justifications for robust protection of the

First Amendment right to freedom of expression are the marketplace of ideas and individual self-fulfillment. These justifications don’t require governmental presence. Powerful private actors can infringe on free expression rights just as much as public actors.

The first justification, the marketplace of ideas, is a pervasive metaphor in First Amendment law that posits the government should not distort the market and engage in content control. It is better for people to appreciate for themselves different ideas and concepts. It is traced back to John Milton’s free speech tract *Areopagitica* (1644): “Let Truth and Falsehood

grapple; whoever knew Truth put to the worse in a free and open encounter?”

Individual self-fulfillment, often associated with the liberty theory, posits that people need and crave the ability to express themselves to become fully functioning individuals. Censorship stunts personal growth and individual expansion.

The point here is that when an entity like Facebook engages in censorship, individuals don't get to participate in the

plaintiffs contended that such exclusions violated the Equal Protection Clause of the Fourteenth Amendment. However, the U.S. Supreme Court responded somewhat cavalierly “[i]t is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.” (*Civil Rights Cases*, 109 U.S. 3, 11 (1883).) The Court said that there were no constitutional remedies available to these plaintiffs and that they would need to

Anthony Kennedy elaborated that the expansion of social media has contributed to a “revolution of historic proportions.” *Id.* at 1736. In other words, social media networking sites have become the modern-day equivalent of traditional public forums like public parks and public streets.

This societal development and change in communications capacities require that the antiquated state action doctrine be modified lest the law become ossified. The time has come to recognize that the reach of the First Amendment be expanded.

This is not a novel thesis. Many others have advocated for this approach. Many legal scholars have recognized that when a private actor has control over online communications and online forums, these private actors are analogous to a governmental actor. For example, legal commentator Benjamin F. Jackson cogently explained in a 2014 law review article that “[P]ublic communications by users of social network websites deserve First Amendment protection because they simultaneously invoke three of the interests protected by the First Amendment: freedom of speech, freedom of the press, and freedom of association.” (Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121, 134 (2014).)

Decades earlier, the brilliant legal scholar Erwin Chemerinsky argued that the state action doctrine should be revisited and abandoned. He wrote that private censorship can be as harmful as governmental censorship. As applied to freedom of speech, he posited:

Freedom of speech is defended both instrumentally—it helps people make better decisions—and intrinsically—individuals benefit from being able to express their views. The consensus is that the activity of expression is vital and must be protected. Any infringement of freedom of speech, be it by public or private entities, sacrifices these values. In other words, the consensus is not just that the government should not punish expression; rather, it is that speech is valuable and, therefore, any unjustified violation is impermissible. If employers can fire employees and landlords can evict

When a private actor has control over online communications and online forums, these private actors are analogous to a governmental actor.

marketplace of ideas and are not allowed the liberty to engage in individual self-fulfillment—just like when a governmental entity engages in censorship.

It is true that state action doctrine traditionally limits the application of the First Amendment to private actors. Earlier this year, a federal district court in Texas applied the traditional state action doctrine to dismiss a lawsuit filed by a private individual against Facebook. The court explained that “the First Amendment governs only governmental limitations on speech.” (*Nyabwa v. Facebook*, 2018 U.S. Dist. LEXIS 13981, Civil Action No. 2:17-CV-24, *2 (S.D. Tex.) (Jan. 26, 2018).)

After all, for about 140 years, the U.S. Supreme Court has explained that the Constitution and the protections it provides—aside from the Thirteenth Amendment's ban on slavery and involuntary servitude—only limit governmental actors. Thus, traditional legal doctrine provides that private actors are not constrained by the Constitution generally. This is called the “state action” doctrine. It purportedly creates a zone of privacy and protects us from excessive governmental interference.

The Court developed the state action doctrine in the *Civil Rights Cases* of 1883. This case actually consisted of five consolidated cases in which private businesses egregiously excluded African-American plaintiffs from their privately owned facilities opened to the public (such as movie theaters, inns, amusement parks, and trains) on the basis of race. The

rely on the common law state protections. Sadly, there were no such state common law protections either.

Only Justice John Marshall Harlan I, the so-called “Great Dissenter” for his solitary dissent in this case, *Plessy v. Ferguson* (1896), and other decisions, recognized that his colleagues were allowing the government a free pass to discriminate against persons of a particular race with regard to the use of public facilities. He wrote that the “discrimination practised by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude” that Congress could rectify under its powers under the Thirteenth and Fourteenth Amendments. (*Civil Rights Cases*, 109 U.S. at 43 (1883) (J. Harlan, dissenting).)

But, in 2018, speech takes place online much more so than it does in traditional public forums, such as public parks and streets. People communicate on social networking sites, such as Facebook and Twitter, more than in any offline venues. The U.S. Supreme Court recognized this reality last year in *Packingham v. North Carolina* (2017): “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.” (*Packingham v. North Carolina*, 137 S.Ct. 1730, 1735 (2017).)

In his opinion for the Court, Justice

tenants because of their speech, then speech will be chilled and expression lost. Instrumentally, the “market-place of ideas” is constricted while, intrinsically, individuals are denied the ability to express themselves. Therefore, courts should uphold the social consensus by stopping all impermissible infringements of speech, not just those resulting from state action. (Erwin Chemerinsky, *Rethinking State Action*, 80 N.W. U. L. REV. 503, 533–34 (1985).)

Already, some state high courts interpret free expression provisions in state constitutions to provide protection to individuals involving private actors. For example, a few states apply their free expression protections at privately owned shopping malls. The New Jersey Supreme Court has applied the free expression provision of its state constitution to allow individuals to challenge restrictive bylaw provisions of private homeowner associations. The state high court wrote: “In New Jersey, an individual’s affirmative right to speak freely is protected not only from abridgement by government, but also from unreasonably restrictive and oppressive conduct by private entities in certain situations.” (*Mazdabrook Commons Homeowners Association v. Khan*, 210 N.J. 482, 493 (2012).)

The U.S. Supreme Court should follow these examples from state supreme courts to relax the state action doctrine. The Court should interpret the First Amendment to limit the “unreasonably restrictive and oppressive conduct” by certain powerful, private entities—such as social media entities—that flagrantly censor freedom of expression.

David L. Hudson Jr. is a Justice Robert H. Jackson Legal Fellow for the Foundation for Individual Rights in Education (FIRE). He also is a First Amendment Fellow for the Freedom Forum Institute. He is the author, coauthor, or coeditor of more than 40 books, including *First Amendment: Freedom of Speech* (Thomson Reuters, 2012), *The Encyclopedia of the First Amendment* (Sage, 2008), and *Let the Students Speak!: A History of the Fight for Freedom of Expression in American Schools* (Beacon Press, 2011).

Introduction

continued from inside front cover

that takes place on campuses today than the relatively small number of controversies or speakers who were banned or shut down by protests. But those controversies have garnered prominent national attention, and some examples are reflected in this issue of *Human Rights*.

The campus controversies may be an example of freedom of speech in flux. Whether they are a new phenomenon or more numerous than in the past may be beside the point. Some part of the current generation of students, population size unknown, believes that they should not have to listen to offensive speech that targets oppressed elements of society for scorn and derision. This segment of the student population does not buy into the open dialogue paradigm for free speech when the speakers are targeting minority groups. Whether they feel that the closed settings of college campuses require special handling, or whether they believe more broadly that hateful speech has no place in society, remains a question for future consideration.

Few controversies are louder or more visible today than attention to the role and credibility of the news media. A steady barrage of tweets by President Donald Trump about “fake news” and the “fake news media” has put the role and credibility of the media front and center in the public eye. Media critics, fueled by Trump or otherwise, would like to dislodge societal norms that the traditional news media strives to be fair and objective. The norm has been based on the belief that the media serves two important roles: first, that the media provides the essential facts that inform public debate; and, second, that the media serves as a watchdog to hold government accountable.

The present threat is not so much that government officials in

the United States will control or even suppress the news media. The Supreme Court has probably built enough safeguards under the First Amendment to generally protect the ability of the news media to operate free of government interference. The concern is that constant attacks on the veracity of the press may hurt credibility and cause hostility toward reporters trying to do their jobs. The concern is also that if ridicule of the news media becomes acceptable in this country, it helps to legitimize cutbacks on freedom of the press in other parts of the world as well. Jane E. Kirtley, professor and director of the Silha Center for the Study of Media Ethics and Law at the University of Minnesota and past director for 14 years of the Reporters Committee for Freedom of the Press, brings her expertise to these issues in her article.

Other current issues in our society raise interesting free speech questions as well. It is well-established law that the First Amendment’s free speech guarantee only applies to government action. It is the government—whether federal, state, or local—that may not restrict freedom of speech without satisfying a variety of standards and tests that have been established by the Supreme Court over the past century. But the difference between government action and private regulation is sometimes a fine line. This thin distinction raises new questions about freedom of speech.

Consider the “Take a Knee” protests among National Football League (NFL) players expressing support for the Black Lives Matter movement by kneeling during the National Anthem. On their face, these protests involve entirely private conduct; the players are contractual employees of the private owners of the NFL teams, and the First Amendment has no part to play. But what could be more public



than these protests, watched by millions of people, taking place in stadiums that were often built with taxpayer support, debated by elected politicians and other public officials, discussed by television commentators because of the public importance of the issue. That is not enough to trigger the application of the First Amendment, but should it be? First Amendment scholar David L. Hudson Jr., a law professor in Nashville, considers this and related questions about the public-private distinction in his article.

Another newly emerging aspect of the public-private line is the use of social media communications by public officials. Facebook and Twitter are private corporations, not government actors, much like NFL team owners. But as one article exams in this issue, a federal court recently wrestled with the novel question of whether a public official's speech is covered by the First Amendment when communicating official business on a private social media platform. In a challenge by individuals who were barred from President Trump's Twitter account,

a federal judge ruled that blocking access to individuals based on their viewpoint violated the First Amendment. If the ruling is upheld on appeal, it may open up an entire new avenue of First Amendment inquiry.

One aspect of current First Amendment law is not so much in flux as in a state of befuddlement. Courts have long wrestled with how to deal with sexually explicit material under the First Amendment, what images, acts, and words are protected speech and what crosses the line into illegal obscenity. But today that struggle that has spanned decades seems largely relegated to history because of technology. The advent of the relatively unregulated Internet has made access to sexually explicit material virtually instantaneous in the home without resort to mailed books and magazines or trips to adult bookstores or theaters.

In his article, law professor and First Amendment scholar Geoffrey R. Stone elaborates on much of the legal and social history and current challenges in handling sexually explicit material,

drawing on his own 2017 book, *Sex and the Constitution: Sex, Religion, and Law from America's Origins to the Twenty-First Century*.

If there is a unifying theme in the articles in this issue of *Human Rights*, it may be that while as a nation, we love our freedoms, including freedom of speech and freedom of the press, we are never far removed—even after more than two centuries—from debates and disputes over the scope and meaning of those rights.

Stephen J. Wermiel is a professor of practice of constitutional law at American University Washington College of Law. He is past chair of the American Bar Association (ABA) Section of Civil Rights and Social Justice and a current member of the ABA Board of Governors.

The views expressed here are the author's and do not reflect those of the ABA Board of Governors.

Getting to the Truth: Fake News, Libel Laws, and “Enemies of the American People”

By Jane E. Kirtley



After the fall of the Berlin Wall and the collapse of the Soviet Union, emerging democracies in Eastern and Central Europe began revising their constitutions and statutory laws to guarantee the rights of a free press. As part of that effort, in 1993, I traveled to Bucharest, Romania, to speak at a conference for nongovernmental organizations and other civil society groups. During one of the presentations, a trade union representative stood up and asked, “How do we make the press tell the truth?”

It struck me then that the question was naïve, if understandable. If you had lived in a society where all media were controlled by the Ceaușescu dictatorship

and published only authorized propaganda, much of it false, it made sense to think that the opposite should prevail in the newly independent Romania. A free press *should* tell the truth. But as Pontius Pilate asked, “What is truth?” Who decides what is true? And who should compel the press to “tell the truth?”

“Fake News”: Trump Didn’t Invent the Term

There were no easy answers to these questions then, and 25 years later, we confront them again, not only in Europe, but in the United States and around the world. Politicians and their supporters accuse those in the mainstream media of peddling “fake news,” a term President

Donald Trump claimed, in an October 2017 interview with Trinity Broadcasting Network, he invented.

In fact, he didn’t. Perhaps the most notorious use of the equivalent term, “Lügenpresse” or “lying press,” was invoked by the Nazis in the 1930s and revived by far-right anti-immigration activists in Germany in 2014 and by Trump supporters during the 2016 campaign to undermine public confidence in the mainstream media. But other groups across the political spectrum have used the term as well. As one example, the left-leaning Center for Democracy & Technology’s PR Watch has been “reporting on spin and disinformation since 1993” with its “Stop Fake News!” campaign.

So, no, Trump didn't invent what he called "one of the greatest of all terms I've come up with." But he has been one of the prolific users of it. During his candidacy and since his election, he has applied the label of fake news to virtually any media—the "failing" *New York Times*, NBC, ABC, CBS, CNN, among others—he disagrees with or doesn't like. But he isn't alone. A poll conducted by Monmouth University reported that three out of four Americans believe that the media routinely report fake news, while a Gallup/Knight Foundation study found that 42 percent of Republicans consider any news stories that cast a political group or politician in a negative light

her mother by federal agents. Defenders of the magazine claimed the cover was meant not as literal fact, but rather as a metaphor for the national debate. But for those looking for more evidence of fake news, *Time's* cover provided it.

Weaponizing the "Fake News" Label

Despite Trump's incendiary tweets calling "the FAKE NEWS media" "the enemy of the American People," his actual power to take action to curtail their activities has, to date, been limited to largely unsuccessful attempts to exclude credentialed reporters from press briefings. But as Joel Simon of the Committee to Protect Journalists (CPJ)

to "tackle" disinformation, and further research to monitor and assess the sources and impact of fake news. On the other hand, also in March, the Dutch Parliament voted to repudiate EUvsDisinfo.eu, a European Union website created by the East Stratcom Task Force in 2015 to report disinformation and fake news allegedly spread by Russian actors. Its Dutch opponents characterize it as a state publication that "passes judgments whether a publication in the free media contains the correct views or not. If your publication ends up in its database, you're officially labeled by the EU as a publisher or disinformation and fake news."

These examples illustrate how problematic it can be when governmental entities become arbiters of what is true and what is fake. As the Dutch critics argued, governments should be loath to interfere in freedom of the press because "it makes it impossible for the truth to emerge in the public debate." This thinking was at the core of the seminal 1964 U.S. Supreme Court decision, *New York Times v. Sullivan*.

Constitutionalizing the Right to Be Wrong

The *Sullivan* case arose during the civil rights movement, involving a Montgomery, Alabama, public safety commissioner named L.B. Sullivan, who sued the *New York Times* after it published a fundraising advertorial that described law enforcement actions designed to discourage protests by activists such as Martin Luther King Jr. and his followers. Sullivan claimed that the ad, which made several factually inaccurate allegations about the Montgomery police, had defamed him personally, even though he was not identified by name or title.

In other words, Sullivan claimed the publication was fake news. He sought and won \$500,000 in damages, without being required under Alabama law to prove that his reputation was actually harmed. But in a decision by Justice William Brennan, the high court reversed, concluding that under the First and Fourteenth Amendments, public officials like Sullivan could prevail in a libel suit only if they were also able to show not only falsity, but actual malice on the part of the publisher. This term of art is defined as knowledge that the statement was false, or proof that the publisher acted with reckless disregard for

The marketplace of ideas is imperfect but essential to facilitate the search for truth.

to be fake news. The phrase has become so ubiquitous that *Washington Post* columnist Margaret Sullivan has argued that it should be discarded because its original meaning—"fabricated stories intended to fool you"—has been distorted beyond recognition.

Yet, the fake news label persists. Trump's inaugural "Fake News Awards," published on the Republican National Committee's website in January 2018, included several cases where news outlets had corrected themselves and apologized, actions that would not fit the traditional definition of fake news. In April 2018, more than 170 television stations owned by conservative-leaning Sinclair Broadcast Group were ordered to use local anchors to produce a scripted "must-run" commentary decrying fake news. Responding to criticism from others in the industry that the segment was itself fake news intended to deceive viewers, Trump tweeted that "The Fake News Networks, those that knowingly have a sick and biased AGENDA, are worried about the competition and quality of Sinclair Broadcast."

In June 2018, at the height of the controversy over the separation of undocumented immigrant families at the southern border, *Time* magazine's "Welcome to America" cover, juxtaposing a photograph of a crying Honduran toddler with one of a menacing Donald Trump on a red backdrop, was promptly labeled fake news because the child had not, in fact, been taken from

observed, in countries with less robust protections than the First Amendment, Trump's words provide authoritarian leaders in countries such as Kenya, Venezuela, and the Philippines the ammunition to suppress opposition media, even as they spread fake video clips and stories through paid commentators and bots. CPJ also reported that out of 262 journalists jailed around the world in 2017, 21 were arrested on "false news" charges. In April 2018, Malaysia, citing national security concerns, enacted the Anti-Fake News Act, which provides that anyone convicted of creating or circulating fake news online or in social media could face imprisonment for up to six years or fines in excess of \$120,000.

Even mature democracies struggle with the issue of fake news. On January 1, 2018, Germany announced that it would begin to enforce a law, known as NetzDG, requiring social media sites to remove hate speech and fake news within 24 hours or face fines of up to 50 million Euros. In March 2018, the European Commission's High Level Group on fake news and online disinformation issued a report concluding that although disinformation may not necessarily be illegal, it nevertheless is harmful to democratic values. Although ostensibly eschewing "any form of censorship, either public or private," it advocates greater self-regulation in the short term, with a long-range goal of developing a Code of Practices to encourage transparency, media literacy, diversity, the development of tools

the truth. A showing of hatred or ill will, known as common law malice, is not sufficient to meet that test.

According to Justice Brennan, because some factual errors are inevitable even in the most careful news reporting, this protection is essential to avoid media self-censorship, to promote vigorous reporting on government and public officials, and to preserve our “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.”

In subsequent years, the First Amendment protection expanded to include lawsuits by public figures as well as government officials. Alleging falsity was not enough. No doubt this situation is what prompted Donald Trump, first as a candidate and then as president, to float the idea that the law should be changed.

“Open Up the Libel Laws”

At a rally in Fort Worth, Texas, in February 2016, Trump vowed, “I’m going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We’re going to open up libel laws, and we’re going to have people sue you like you’ve never got[ten] sued before.” In March 2017, he claimed in a tweet that “The failing @nytimes has disgraced the media world. Gotten me wrong for two solid years. Change libel laws?” And in October, he complained that it is “frankly disgusting the press is able to write whatever it wants to write.” He raised the issue again in January 2018, contending that “Our current libel laws are a sham and a disgrace and do not represent American values.”

Many would argue that existing libel laws are quintessentially American. Their sweeping protection of good faith errors, even when they harm a reputation, exceeds that of every other common law country, including Canada and the United Kingdom. This is why, in 2010, Congress passed the SPEECH Act, making foreign libel judgments unenforceable in the United States unless the legal standards in the other country offer at least as much protection to the defendant as the First Amendment. The statute was enacted to curtail libel tourism, where foreign nationals sue U.S. defendants in other nations’ courts where the standards of proof are less demanding.

Perhaps these less demanding standards might be precisely what Trump seeks to establish. In a meeting with the *Washington Post*’s editorial board in March 2016, Trump, after complaining about the “enormous” and “incredible hatred” demonstrated by the media, was asked what new standard he would propose, and he replied, “I want to make it more fair from the side where I am, because things are said about me that are so egregious and so wrong, and right now according to the libel laws I can do almost nothing about it.”

As frustrating as that might be for Trump, it is exactly Justice Brennan’s point. As a commentator in *The Federalist* observed, freedom of the press is “too important to allow public figures . . . to use the courts to silence the publications of things they didn’t like or that made them look bad.” This brings us to the heart of the matter: Is Trump really bothered by falsehoods or by truthful reports that make him “look bad”? Libel law in the United States is, as then-10th Circuit Judge Neil Gorsuch wrote in *Bustos v. A&E Television Networks*, “not about compensating for damage done to a false reputation by the publication of hidden facts. It’s about protecting a good reputation honestly earned.” Libel suits are intended to provide compensation to those whose reputations have been harmed as a result of false statements made with actual malice. By design, that is a very difficult standard to meet.

Focus on Truth, Not Fault

Trump’s musings remind me of proposals to reform libel law considered in the late 1980s and early 1990s. Driven by concerns about escalating punitive damages awards, and inspired by a 1987 study by University of Iowa professors concluding that most libel plaintiffs sue to vindicate their reputations, not for the money—a sentiment Trump echoed at his 2016 Texas rally, where he claimed “I’m not taking their [the media defendants’] money”—several prominent scholars, judges, and free press advocates argued for new approaches to libel law that would focus on truth or falsity, not fault.

In 1988, in a *Harvard Law Review* article, Judge Pierre N. Leval, then of the Southern District of New York, advocated creation of what he called the “no-money,

no-fault” libel suit. Under Leval’s system, plaintiffs could sue to obtain a declaratory judgment of falsity. The fault requirements of *Sullivan* and its progeny would not apply, because, Leval claimed, “the sole purpose” of the *Sullivan* standard was to protect the press from crippling monetary awards. He also argued that these “no-money, no-fault” trials would be simpler, more efficient, less expensive, and would protect the media from inquiries into their news-gathering practices. They would provide plaintiffs with a far greater chance of vindicating their reputations, which is really what most of them want, he wrote.

Also in 1988, the Libel Reform Project at Northwestern University issued “the Annenberg Proposal.” Under the Annenberg model, a libel “victim” would have to request a retraction or opportunity to reply within 30 days of publication. If the defendant complied, any further legal action would be barred. If not, either the plaintiff or the defendant could compel any libel suit to be converted into a “no-fault, no-damages” declaratory judgment proceeding, where the only issue would be truth or falsity. A traditional suit for actual damages would remain an option, but only if the defendant agreed to it.

Neither of these proposals was adopted at the state level. However, in 1993, the Uniform Law Commission promulgated the Uniform Correction or Clarification of Defamation Act (UCCDA) making a correction/clarification request a prerequisite to a libel suit. Under the Uniform Act, if, after a correction or clarification was published, the case still went to trial, a prevailing plaintiff could recover only economic losses, not punitive damages. As of 2018, only North Dakota, Texas, and Washington had adopted the UCCDA.

Libel Reform Redux

Of course, President Trump cannot unilaterally “open up the libel laws” by executive fiat. Libel law consists of state, not federal, statutes, or judge-made constitutional or common law. But assuming Trump could persuade some state legislatures to adopt a version of the Annenberg or Leval proposals, would he be satisfied with a retraction or a declaratory judgment of falsity? Would he fit the Iowa study profile of the libel plaintiff who is seeking only vindication, not money?

I'm skeptical. Most media organizations have, of their own volition, corrected their mistakes in their coverage of Trump and his administration, such as when *Time's* White House correspondent erroneously reported in January 2017 that the bust of Martin Luther King Jr. had been removed from the Oval Office. Yet, despite rapid and repeated digital corrections, Trump nevertheless condemned the story as "deliberately false reporting," including it in the "Fake News Awards" list published in 2018. He didn't seem appeased by corrections or apologies.

Perhaps Trump would prefer some version of the "no-money, no-fault" trial. Although proof of actual malice would be off the table in a "truth trial," the reality is that even then, "[i]t is the reporter's accuracy, integrity, professional reputation and standing that are ultimately at stake," as litigator Don Reuben argued in the *ABA Journal* in April 1989. He contended that the Annenberg proposal would "chill the hell out of the working press, the reporter and editor" by making it easier for plaintiffs to prevail in court. He feared that corporate media would be tempted to embrace the "no-fault, no damages" option, abandoning First Amendment defenses and sacrificing the reporter in the name of expediency. If that was true in 1989, it is even truer in 2018, when economic constraints encourage news organizations to reduce their financial exposure as much as possible. With its potential humiliation of the news organization and journalists as a bonus, the "no-money, no-fault" trial might be an option that Trump would relish.

All this begs the question of whether courts are the best entities to determine the official version of "the truth." Supporters of the Leval or Annenberg proposals asserted that the government has a legitimate interest in the accuracy, or inaccuracy, of media reports. This view is shared by many government officials and institutions around the world. Numerous studies posit that fake news affected voter choices in the 2016 election, in the Brexit referendum, and other political campaigns, posing a fundamental threat to democratic institutions. Logically, governments would have a duty to protect audiences from fake news. Yet, both the executive and legislative branches might be perceived as self-interested if they tried to evaluate truth or falsity. The courts may be the best alternative.

But they would be the best of a bad lot. However independent they may be, courts are still instrumentalities of the government. As First Amendment scholar Zechariah Chafee wrote, "We must always be careful not to assume that the findings of a tribunal on a controversial issue are THE TRUTH." The marketplace of ideas is imperfect but essential to facilitate the search for truth. Government can control and manipulate the flow of information about itself and its actors, so any determination of truth or falsity that fails to recognize the fundamental and coextensive right of the citizen to criticize without fear of sanctions or retribution—what Justice Brennan called "the central meaning of the First Amendment"—is flawed. A free and independent press, not a single leader or a government-run "Truth Tribunal," is the best means to ensure an informed citizenry, and to hold institutions and individuals to account. And that's not fake news.

Jane E. Kirtley is the Silha Professor of Media Ethics and Law at the Hubbard School of Journalism and Mass Communication at the University of Minnesota, where she directs the Silha Center for the Study of Media Ethics and Law and is an affiliated faculty member at the Law School. She was a Fulbright Scholar at the University of Latvia in 2016 and the executive director of the Reporters Committee for Freedom of the Press from 1985 to 1999.

Selected links and citations:

New York Times v. Sullivan, 376 U.S. 254 (1964)

Bustos v. A & E Television Networks, 646 F.3d 762 (10th Cir. 2011)

M. Sullivan, *The term 'fake news' has lost all meaning. That's just how Trump wants it*, WASH. POST (April 4, 2018), available at https://www.washingtonpost.com/lifestyle/style/the-term-fake-news-has-lost-all-meaning-thats-just-how-trump-wants-it/2018/04/03/ce102ed4-375c-11e8-8fd2-49fe3c675a89_story.html?utm_term=.942cf626e181

P. Leval, *The No-Money, No-Fault Libel Suit: Keeping "Sullivan" in Its Proper Place*, 101 HARV. L. REV. 1287 (1988)

R. Smolla & M. Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25 (1989)

D. Reuben, *Reform Libel Law? No*, ABA J. (April 1989)

J. Nesbit, *Donald Trump Supporters Are Using a Nazi Word to Attack Journalists*, TIME (Oct. 25, 2016) available at <http://time.com/4544562/donald-trump-supporters-lugenpresse>

European Commission, A multi-dimensional approach to disinformation: Report of the independent High level Group on fake news and online disinformation (2018), available at <https://publications.europa.eu/en/publication-detail/-/publication/6ef4df8b-4cea-11e8-be1d-01aa75ed71a1/language-en>

R. Bezanson, G. Cranberg & J. Soloski, *Libel Law and the Press* (1987)

J. D. Davidson, *Donald Trump Doesn't Understand Libel Laws*, FEDERALIST (March 22, 2016), available at <http://thefederalist.com/2016/03/22/donald-trump-doesnt-understand-libel-laws>

EU vs Disinfo website: <https://euvsdisinfo.eu>

A. Nijeboer, *Why the EU must close EUvsDisinfo*, EU Observer (March 28, 2018), available at <https://euobserver.com/opinion/141458>

Malaysia's anti-fake news legislation becomes law, is now enforceable, STRAITS TIMES (April 11, 2018) available at <https://www.straitstimes.com/asia/se-asia/malaysias-anti-fake-news-legislation-becomes-law-is-now-enforceable>

Germany starts enforcing hate speech law, BBC (Jan. 1, 2018), available at <https://www.bbc.com/news/technology-42510868>

PR Watch website: <https://www.prwatch.org/nofakenews>

CPJ Report, Dec. 13, 2017, available at <https://cpj.org/reports/2017/12/journalists-prison-jail-record-number-turkey-china-egypt.php>

The Highly-Anticipated 2017 Fake News Awards, available at <https://gop.com/the-highly-anticipated-2017-fake-news-awards>

UNIFORM CORRECTION OR CLARIFICATION OF DEFAMATION ACT, available at http://www.uniformlaws.org/shared/docs/Correction%20or%20Clarification%20of%20Defamation/UCCDA_final_93.pdf

States that have adopted the UCCDA, per the Uniform Law Commission, <http://www.uniformlaws.org/Act.aspx?title=Correction%20or%20Clarification%20of%20Defamation>

SPEECH Act, codified as 28 U.S. Code § 4102, available at <https://www.law.cornell.edu/uscode/text/28/4102>

What Constitutes a Public Forum on Social Media?

By David McGee

With the advent of social media, many politicians chose to set up official Facebook, Twitter, and Instagram accounts to communicate with their constituents. These accounts are used for official purposes, and many politicians have kept their own, separate personal accounts, which they use for their lives outside of public life.

President Donald Trump's use of his previously private Twitter account as president brings a major new wrinkle into whether a politician's private Twitter account may be a public forum. President Trump, unlike many politicians, maintains only one Twitter account that he uses for both private and official interactions with the American people. Like other private citizens, when President Trump sees tweets directed at him that he finds offensive or inaccurate, he sometimes takes steps to block those users. Because President Trump is a public official, the act of blocking an individual user on his private account may have constitutional implications that are not a consideration with a private citizen.

In *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. May 23, 2018), a group of seven citizens, represented by the Knight First Amendment Institute, sued President Trump. Their complaint alleged that when President Trump blocked them on Twitter, he engaged in viewpoint discrimination in a public forum, action that would violate the freedom of speech guarantee of the First Amendment. President Trump argued that because this was his private account, created in 2009, it was not subject to First Amendment claims at all.

The District Court, in a case of first impression, found Trump's argument unpersuasive, as both parties stipulated to the fact that President Trump regularly conducts official business through his private Twitter account. The court ruled that President Trump's Twitter feed constitutes a designated public forum. Judge Naomi Buchwald likened his Twitter feed to a public park in which many voices could congregate to express their views and ideas. President Trump's Twitter feed (where a user can interact with the president's tweets by responding, retweeting, and more) was differentiated from President Trump's original tweets, which would be considered government speech and not subject to a First Amendment claim. In blocking individual users, President Trump engaged in unconstitutional viewpoint discrimination, and the court ordered the president to unblock the users who filed suit.

The ruling is essentially saying President Trump may not decide who may interact with his tweets based on the viewpoint of the Twitter follower. Currently, President Trump is appealing the decision to the U.S. Court of Appeals for the Second Circuit. If *Knight* is upheld on appeal, it will provide important guidance for politicians to determine when Twitter is a public or private



forum. For politicians who use their personal account as their Twitter for their office, they must take note of how they can interact with constituents without engaging in viewpoint discrimination. *Knight* takes care to differentiate between the different options a politician can use to interact with citizens they find offensive or who “troll” the official. Judge Buchwald made it clear that an official may mute an individual account. She likened this to a public official merely ignoring the voice of a

constituent. A citizen has a right to petition the government, or a government official, but the official also has the right not to engage with that individual. If President Trump had merely muted the plaintiffs in *Knight*, there would have been no First Amendment violation. The plaintiffs would've been able to interact with President Trump's interactive space on Twitter, but President Trump just would not have seen those messages. Any public official may face the same issue, but their solution can be to just mute the offensive account rather than block it.

Politicians who have separate Twitter accounts for their personal and their official roles should also heed the ruling in *Knight*. Analogous to a business owner who owns multiple businesses and does not want to risk a plaintiff piercing the corporate veil, politicians need to keep their private and official Twitter accounts separate. There can be no crossover between the two because one of the chief reasons why the court found that President Trump's Twitter is a public forum is his use of his private account for official business. If a politician starts to use a personal account for official purposes, that could open the politician to legal action for blocking anyone from the time the private account was put to official use. *Knight* indicates that people who were blocked before President Trump used his account for official use would not have standing to sue because at that point it was still a private citizen's account.

The debate over what constitutes a public forum on social media websites will not end with this case. There will almost certainly be more cases involving Twitter and Facebook and Instagram that could also constitute a designated public forum under circumstances similar to the reasoning of *Knight*. The continued expansion of the Internet as a means of communication will continue to force the courts into examining traditional doctrines considering how the American people communicate over the Internet.

David McGee is a third-year law student at the Washington College of Law, where he serves as editor-in-chief of the *Journal of Gender, Social Policy and the Law*.

Not a Masterpiece: The Supreme Court's Decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*

By Erwin Chemerinsky



No case before the U.S. Supreme Court in October Term 2017 received more attention or raised more important issues than *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*. The underlying issue is profoundly significant: Does a business have a constitutional right to discriminate based on its owner's beliefs?

All antidiscrimination statutes pose a tension between equality and liberty. Any law that prohibits discrimination—whether based on race or sex or religion or sexual orientation or any other grounds—denies the freedom to choose who to serve or to hire. Indeed, this was a key objection

to the Civil Rights Act of 1964, which prohibits places of public accommodation from discriminating based on race and forbids employers from discriminating based on race, sex, or religion: The law interferes with the freedom to choose one's customers or employees. Congress and the courts both deemed ending discrimination to be more important than protecting the right to discriminate.

But that was exactly the issue in *Masterpiece Cakeshop*: Is a business's freedom to choose its customers more important than the government interest in stopping sexual orientation discrimination?

The Supreme Court did not answer this question, but instead decided the case

on narrower grounds by concluding that members of the Colorado Civil Rights Commission expressed impermissible hostility to religion. But with Justice Anthony Kennedy's retirement, it is likely that there are five votes in the future to allow businesses to discriminate. This would open a potentially broad exception to federal, state, and local civil rights laws.

The Facts

Charlie Craig and David Mullins got married in Massachusetts and wanted to celebrate their wedding where they lived in Colorado. In July 2012, they went to a local bakery, Masterpiece Cakeshop, a limited liability company in Colorado,



The U.S. Supreme Court rules (narrowly) for baker in same-sex wedding cake case. Rally in Washington, D.C., on June 4, 2018.

and sought to purchase a wedding cake. The owner, Jack Phillips, refused to design and bake the cake, saying that gay marriage violated his religious beliefs. He said that he would be implicitly complicit in violation of his religion if he were to design and bake the cake. He was willing for his bakery to sell an already prepared cake for the couple, but not to make one for them.

The Colorado Anti-Discrimination Act prohibits businesses from discriminating, including based on sexual orientation. The law provides: "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin,

or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation."

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in September 2012, shortly after the couple's visit to the shop. The Colorado Civil Rights Division found probable cause that Phillips violated the Act and referred the case to the state's Civil Rights Commission.

The Commission found it proper to conduct a formal hearing, and it sent the case to a state administrative law judge (ALJ). Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the

couple's favor. The Colorado Civil Rights Commission agreed and found that Phillips violated Colorado's public accommodations law that prohibits business establishments from discriminating, including on the basis of sexual orientation. Phillips would design and bake a cake for opposite-sex couples, but not for same-sex couples, a form of discrimination that violated state law. The Colorado Court of Appeals affirmed the Commission's ruling against Masterpiece Cakeshop. The Colorado Supreme Court denied review.

The question presented states: "Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment."

The Decision

On Monday, June 4, 2018, the U.S. Supreme Court reversed in a 7–2 decision.

Justice Kennedy wrote for the Court; only Justices Ruth Bader Ginsburg and Sonia Sotomayor dissented. The Court did not reach the central issues of the case: Would it violate free exercise of religion or freedom of speech under the First Amendment to force Masterpiece Cakeshop to design and bake a cake for a same-sex wedding?

Instead, the Court found that the Colorado Civil Rights Commission had expressed impermissible hostility to religion and thus violated the free exercise clause of the First Amendment. Justice Kennedy wrote: "The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."

It is important to look carefully at what the Court found to be sufficient evidence of hostility to religion. One commissioner at the meeting said, “Phillips can believe ‘what he wants to believe,’ but cannot act on his religious beliefs ‘if he decides to do business in the state.’”

The Court especially focused on a statement made by a commissioner at a subsequent meeting: “Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use—to use their religion to hurt others.”

Justice Kennedy said that this was “disparaging” to religion and thus showed hostility. He wrote: “To describe a man’s faith as ‘one of the most despicable pieces of rhetoric that people can use’ is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips’ invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.”

The Court also found hostility to religion because the Commission in other cases had rejected challenges to bakers who had refused to bake cakes with messages they found offensive. There is a great deal of discussion in the various opinions about these other instances and their significance.

The Court thus declared: “[T]he Commission’s treatment of Phillips’ case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. In view of these factors, the record here demonstrates that the Commission’s consideration of Phillips’ case was neither tolerant nor respectful of Phillips’ religious beliefs.” The Court concluded: “The

Commission’s hostility was inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion.” Because the Court found that members of the Colorado Civil Rights Commission had expressed hostility to religion, it concluded that there was a violation of the Establishment Clause without the need to reach the questions that had been briefed and argued concerning whether it would violate the First Amendment’s speech or religion clauses to hold Phillips liable for his refusal to design and bake a cake for a same-sex wedding.

Was There Hostility to Religion?

In appraising the Court’s decision, the critical question is whether there was impermissible hostility to religion. As described above, the Court points to three pieces of evidence as demonstrating impermissible hostility to religion by the Colorado Civil Rights Commission. The first was the statement “Phillips can believe ‘what he wants to believe,’ but cannot act on his religious beliefs ‘if he decides to do business in the state.’”

That, though, is not expressing animus to religion: It simply says that a business has to comply with the laws of the state and not discriminate. In fact, the Supreme Court in *Employment Division v. Smith* (1990) was explicit that free exercise of religion does not provide a basis for an exemption from a general law of a state, here an antidiscrimination law. To express the view that someone should not be able to inflict injury on others, here by discrimination, is not animus against religion.

The second piece of evidence of hostility to religion was the statement by a commissioner, “Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use—to use their religion to hurt others.”

But the first sentence is factually sadly true: Religion has been used to justify discrimination, including slavery and the Holocaust. The second sentence is expressing an opinion that it is wrong to use religion as a basis for hurting others.

That is not hostility to religion, but expressing the view that people should not be able to exercise their rights in a way that harms others.

Finally, the Court pointed to other cases where the Colorado Civil Rights Commission ruled in favor of bakers who refused to make cakes with specific messages. But those cases were clearly distinguishable because those bakers had not discriminated in a way that violates the Colorado law. The Colorado Anti-Discrimination Act makes it unlawful for a place of public accommodation to deny “the full and equal enjoyment” of goods and services to individuals based on certain characteristics, including sexual orientation. No one in the litigation disputed that Jack Phillips refused to bake a cake for Craig and Mullins because of their sexual orientation. By contrast, in the other cases, the bakers had refused to bake cakes with particular messages, but doing that did not violate the Colorado law because it did not involve discrimination based on race or sex or religion or sexual orientation.

The evidence of discriminatory animus against religion thus seems very weak. It is ironic that this evidence was deemed sufficient to find a violation of the First Amendment, when in the travel ban case—*Trump v. Hawaii*—the Court found no constitutional violation notwithstanding Donald Trump’s repeated statements that he wanted a Muslim ban in immigration. During his presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement “calling for a total and complete shutdown of Muslims entering the United States.” That statement remained on his campaign website until May 2017 (several months into his presidency). Trump repeatedly expressed his belief that “Islam hates us. . . . [W]e can’t allow people coming into this country who have this hatred of the United States . . . [a]nd of people that are not Muslim.” It is telling that the Court found religious animus in *Masterpiece Cakeshop*, but not the travel ban case.

The Underlying Unresolved Issues

The Court’s decision is narrow and leaves unresolved the key question of whether

forcing businesses to provide services for gays and lesbians, or others, violates free exercise of religion or free speech rights of owners who wish to refuse to provide such services. The issue is sure to come up again, perhaps in cases involving florists who won't make flower arrangements or photographers who won't take pictures at same-sex weddings. Interestingly, the Court had the chance to take such a case after its decision in *Masterpiece Cakeshop* that involved a florist who refused to make flower arrangements for a same-sex wedding, but the Court remanded the case in light of *Masterpiece Cakeshop*. In *Arlene's Flowers v. Washington*, the Washington State Supreme Court came to the same conclusion as the Colorado Civil Rights Commission and the Colorado Court of Appeals.

There were two questions presented in *Masterpiece Cakeshop* that were not resolved by the Court: Would requiring services violate the free exercise clause of the First Amendment? Would requiring services be impermissible compelled speech in violation of the First Amendment?

As to the former, the Supreme Court's decision in *Employment Division v. Smith* (1990) seemingly answers the question. That case involved Native Americans in Oregon who argued that a state law prohibiting consumption of peyote infringed their free exercise of religion. They said that their religion required use of peyote in religious rituals.

The Supreme Court, in an opinion by Justice Antonin Scalia, ruled against the Native Americans and concluded that there was no violation of free exercise of religion because the Oregon law was neutral in that it was not motivated by a desire to interfere with religion and because it applied to everyone in the state. The Court held that the free exercise clause cannot be used to challenge such a neutral law of general applicability. Justice Scalia, writing for the majority, rejected the claim that free exercise of religion required an exemption from an otherwise valid law. Scalia said that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that

proposition." Scalia thus declared "that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."

Likewise, Colorado's law that prohibits business establishments from discriminating is a neutral law of general applicability. Colorado's antidiscrimination law was not motivated by a desire to interfere with religion, and it applies to all business establishments. Businesses that want to discriminate based on the owners' religious beliefs thus cannot prevail on their religious freedom claim unless the Supreme Court overrules *Employment Division v. Smith* or significantly changes the law of the free exercise clause.

If the Court overrules or limits *Employment Division v. Smith*, the implications will be great. Then any person could claim that his or her religion requires discrimination. The Court long has held that the focus in religious freedom cases is whether a particular person has a sincerely held religious belief, not what the religion teaches. There would be no way to keep a business owner from saying that his or her religion requires not serving women or Jews or Muslims or any group.

Although the Court in *Masterpiece Cakeshop* did not resolve this issue, it did indicate that claims like that of Jack Phillips and Masterpiece Cakeshop were unlikely to prevail under the free exercise clause and *Employment Division v. Smith*. Justice Kennedy's opinion suggested that the free exercise clause will not provide a basis for such refusals of service when there is not the expression of hostility to religion. The Court declared: "while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."

The other issue—whether requiring service violates the free speech clause of the First Amendment—has potentially even broader implications. Phillips argued that baking a cake is inherently expressive activity. He described himself as a "cake artist." He says that to force

him to design and bake a cake is to compel him to engage in speech. Compelled speech violates the First Amendment.

Justice Clarence Thomas, in an opinion joined by Justice Neil M. Gorsuch, accepted this argument and said that forcing the baker to make a cake would be impermissible compelled speech. He wrote: "Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated—the precise message he believes his faith forbids. The First Amendment prohibits Colorado from requiring Phillips to 'bear witness to [these] fact[s],' or to 'affir[m] . . . a belief with which [he] disagrees.'"

I question whether baking a cake should be regarded as expressive activity and whether a company can make such a speech claim. But, if so, then almost any kind of work can be seen as being a form of expression. If baking a cake is speech, then so is cooking food or, as in other cases that have arisen, taking pictures or making floral arrangements. Any business could refuse to serve gay weddings—or for that matter anyone—by claiming that the antidiscrimination law constitutes impermissible compelled speech.

For example, Title II of the 1964 Civil Rights Act prohibits restaurants and other public accommodations from discriminating based on race. A restaurant owner could claim that forcing it to cook food for African-Americans is impermissible compelled speech in violation of the First Amendment. Any business that wants to discriminate would be able to say that forcing it to provide services is compelling its expression. In fact, why couldn't an employer say that it can hire only men to express a view about the type of work that should be done by the sexes or that women's role should be in the home? Enforcing antidiscrimination law and forcing the employer to hire women would thus be impermissible compelled speech.

At the oral argument in *Masterpiece Cakeshop*, Justice Stephen Breyer said that accepting the speech argument would create a basis for an exception to every civil rights law adopted since "day two." I don't know why Justice Breyer chose "day two" in his comment, but the underlying

point is surely right: An inherent tension exists between liberty and equality. The application of all antidiscrimination laws infringes the freedom to discriminate. But for decades, the law has made the choice that ensuring equality is worth sacrificing the liberty to discriminate. Put in constitutional terms, ending discrimination is a compelling government interest. Enforcing antidiscrimination laws thus should not be seen as a violation of free exercise of religion or freedom of speech.

The Future

Justice Kennedy's retirement at the end of October Term 2017 changes so much on the Supreme Court, including what is likely to happen when the issues presented in *Masterpiece Cakeshop* return to the Supreme Court. Chief Justice John Roberts Jr. and Justices Thomas and Alito vehemently dissented in *Obergefell v. Hodges*. They also expressed concern about what recognizing a right to same-sex marriage would mean for those who oppose it on religious grounds.

In *Pavan v. Smith* (2017), Justice Gorsuch wrote a dissent, joined by Justices Thomas and Alito, indicating strong disagreement with the decision in *Obergefell*. In *Pavan*, the Court declared unconstitutional an Arkansas law that did not allow both members of a married same-sex couple to be listed on a child's birth certificate.

At the oral argument in *Masterpiece Cakeshop*, Chief Justice Roberts and Justices Alito and Gorsuch asked questions and made comments that left no doubt as to how they would vote. Indeed, Justices Thomas and Gorsuch wrote a separate opinion in *Masterpiece Cakeshop* saying that the bakery should have won on free speech grounds.

At the same time, Justices Ginsburg, Breyer, Sotomayor, and Elena Kagan were part of the majority in *Obergefell* and *Pavan*. Their comments at oral argument left no doubt that they were on the side of the gay couple.

This means that the ultimate resolution of the issues will depend on the newest member of the Court. But it seems far more likely that the new justice will side with Roberts, Thomas, Samuel A. Alito Jr., and Gorsuch than with Ginsburg, Breyer, Sotomayor, and Kagan.

Justice Kennedy has written every Supreme Court decision in American history advancing rights for gays and lesbians. In *Romer v. Evans* (1996), he wrote the opinion for the Court striking down a Colorado initiative that repealed all laws in the state protecting gays and lesbians from discrimination and precluding the enactment of any new such laws. The Court concluded that the initiative was motivated by impermissible animus against gays and lesbians.

In *Lawrence v. Texas* (2003), Justice Kennedy wrote the opinion for the Court declaring unconstitutional a Texas law that made it a crime to engage in private, consensual, adult homosexual activity. Kennedy eloquently said that if the right to privacy means anything, it is what consenting adults do in their own bedroom.

In *United States v. Windsor* (2013), Justice Kennedy wrote the opinion for the Court striking down a key provision of the federal Defense of Marriage Act, which said that for purposes of federal law and federal benefits, marriage had to be between a man and a woman. Two years later, in *Obergefell v. Hodges* (2015), Justice Kennedy wrote the majority opinion holding that state laws prohibiting same-sex marriage deny equal protection and violate the right to marry.

Justice Kennedy could have written the opinion in *Masterpiece Cakeshop* making it clear that businesses have no First Amendment right to discriminate against gays and lesbians. Unfortunately, he didn't, and it may be a long time before there is a majority of the Court willing to do so.

Erwin Chemerinsky is dean and Jesse H. Choper Distinguished Professor of Law at the University of California, Berkeley School of Law.

Human Rights Heroes

continued from back cover

for the right to criticize public officials and to debate public issues (*New York Times v. Sullivan*, 376 U.S. 254 (1964)).

Some of those who have sacrificed have compelling stories that remind us of their heroic actions. Mary Beth Tinker, now a nurse and activist for free speech, was a 13-year-old eighth-grade student in Des Moines, Iowa, when she and her brother and friends decided in December 1965 to wear a black armband to school to support a Christmas truce in the war in Vietnam. Her suspension for wearing the armband led to a major Supreme Court ruling recognizing the First Amendment rights of students (*Tinker v. Des*

Moines Independent School District, 393 U.S. 503 (1969)).

Tinker has become a symbol to many students and free speech advocates throughout the United States of how one can stand up for one's beliefs. Not every central figure in a major free speech case has achieved that status. No medals have been pinned on Gregory Lee Johnson, who burned the American flag during the 1984 Republican Convention in Dallas. The Supreme Court ruled in 1989 that the First Amendment protects flag burning as a form of expression (*Texas v. Johnson*, 491 U.S. 397 (1989)). Within days, a near-unanimous Congress condemned the ruling, and many continue to argue that the American flag should enjoy protected status.

Even less likely to receive any medals

is one of the most recent free speech winners in the Supreme Court. Lester Packingham lost access to the Internet under North Carolina law after he was forced to register as a sex offender for having sex with a 13-year-old girl when he was 21. Last year, the Supreme Court ruled that the ban on Internet access violated his First Amendment rights because it foreclosed too much speech and communication that had no relation to potential sex crimes (*Packingham v. North Carolina* (2017)).

For their courage and personal sacrifice, *Human Rights* magazine recognizes the many litigants who have fought for free speech and free press rights as Human Rights Heroes.

Counterspeech in Response to Changing Notions of Free Speech

By Nadine Strossen



In addressing this issue's theme—"the changing notions of free speech in our society"—I will explore whether and how notions of free speech actually have been changing. To start, a couple of important such notions have not notably changed for many decades.

Unchanging Support for Two Important, Inconsistent Notions of Free Speech

Notwithstanding recent alarmist headlines on the subject, public opinion surveys and other data, going back to the mid-twentieth century, consistently

demonstrate that most people simultaneously hold two inconsistent notions of free speech. On the one hand, when asked about freedom of speech in the abstract, most people are supportive. After all, freedom of speech is a cherished national value "as American as apple pie." On the other hand, when asked about freedom of speech for particular controversial views, many of the very same people favor censorship.

Many members of the public, as well as officials, from across the political spectrum have supported suppressing a

range of controversial expression at particular points in the recent past—from flag burning to media violence. Furthermore, as far back as the data extends, there has been one particular unpopular message that solid majorities have steadfastly supported stifling: "hate speech," or speech conveying hateful, discriminatory views on bases such as race, religion, gender, and sexual orientation. Hence, we should not be shocked by the recent Gallup/Knight Foundation poll reporting that 64 percent of college students oppose constitutional protection for such

speech. Their responses mirror those of all adults throughout recent history.

There is abounding evidence of the unchanging notions of free speech in our society as excluding controversial messages, in particular, hateful speech. One piece of evidence is a trend analysis of the First Amendment Center's annual surveys about free speech attitudes, between 1997 and 2004, by Princeton University's Center for Arts and Cultural Policy Studies. It found that in each of these years, while respondents overwhelmingly expressed support for free speech, "a substantial number of respondents (sometimes even a majority) did not support the right to express *specific* types of potentially offensive opinions."

Surveys further show that majorities of respondents consistently oppose free speech rights for hateful speech in particular. For example, let me cite a historic survey conducted by the very organization that publishes this magazine: the American Bar Association (ABA). In 1991, to mark the 200th anniversary of the Bill of Rights, the ABA released a survey revealing that 51 percent of adult Americans believed that government should ban hate speech. Also pertinent are the First Amendment Center's annual free speech surveys, noted above. In every such survey from 1997 to 2008, majorities of respondents either strongly disagreed or mildly disagreed with the proposition that "people should be allowed to use words in public that might be offensive to racial groups." Throughout that period, the lowest percentage of respondents who either strongly or mildly disagreed with this core free speech principle was 53 percent (in 2005), while the highest such percentage was 78 percent (in 1999).

These polling results are bolstered by other evidence. One potent example involves the iconic "Skokie case": the 1977–1978 litigation arising from the attempts to bar a proposed demonstration by neo-Nazis in Skokie, Illinois, a Chicago suburb that had a large Jewish population, including many Holocaust survivors. When the American Civil Liberties Union (ACLU) defended the fundamental free speech principles at stake, it resoundingly won in the courts of law. In contrast, though, the ACLU did not fare so well in the court of public

opinion. In fact, even many ACLU members—who were generally diehard free speech champions—supported censoring the Nazis; remarkably, a full 15 percent of the ACLU's members resigned from the organization in protest.

Likewise, when the ACLU (successfully) defended free speech rights for alt-right demonstrators in Charlottesville, Virginia, in 2017, about 200 ACLU staff members (out of 1,300) objected. In sum, even many ACLU insiders, who are surely among the staunchest supporters of free speech in general, nonetheless object to freedom for racist views. This underscores the prevalent, longstanding disconnect between our society's support for free speech in general, while *not* supporting freedom for hateful speech in particular.

The Supreme Court's Changing Notions of Free Speech

Although the public's notions of free speech have not been changing, insofar as many people have consistently sought to suppress hateful speech, fortunately, the Supreme Court's pertinent notions *have* been changing—in a speech-protective direction. From the mid-twentieth century onward, with support from justices across a broad ideological spectrum, the Court has been evolving toward more and more protection of more and more speech purveying controversial views, including hate speech.

The Viewpoint Neutrality Principle

The Court has increasingly strongly enforced the "viewpoint neutrality" principle, which it has hailed as "the bedrock principle" securing our free speech rights: that government may not punish speech solely because its viewpoint or content is deemed hateful by the majority of the community—even if it is deeply loathed by the vast majority of the community. Ideologically diverse justices long have been united in supporting that fundamental notion of free speech, including when the hated viewpoint is a racist or other hateful one. For example, just last year, the Court unanimously reaffirmed this principle when it upheld freedom of speech for a term ("slants") that traditionally has been used as an ethnic slur against Asian Americans. As the majority opinion declared, quoting a famous

phrase that Justice Oliver Wendell Holmes had penned in a 1929 dissent:

Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'

Similarly, in a 1964 case, the Court explained that even when people "speak out of hatred," their "utterances . . . contribute to the free interchange of ideas and the ascertainment of truth."

The Emergency Principle

To be sure, if a hateful message (or any other message) is conveyed in a specific context that poses "a clear and present danger" of directly causing certain specific, imminent, serious harm—such as violence—which cannot be averted through any other means, then government may suppress the speech. Short of such an emergency situation, though, the Court has insisted that the answer to hateful, hated ideas is "more speech," not suppression.

The Court has acknowledged that even hateful speech that does not satisfy the emergency test may potentially have other adverse impacts. For example, it might indirectly contribute to a more speculative potential harm—including violence—at some indefinite future time. Or it might contribute to emotional or psychic harm, which the Court has held cannot justify punishing any speech about matters of public concern—including hateful speech—because that would silence too much speech that is crucial in our democracy.

Before the Court's changing notions of free speech embraced the viewpoint neutrality and emergency principles, it had permitted government to silence speech based on the speech's potential emotional harm, and also based on a more speculative feared connection between the speech and potential violence. Predictably, this broad power was used disproportionately to silence views that were critical of government officials or policies, or that advocated reforms, including racial justice and other human rights causes. For this reason, many human rights activists, including leaders of the

twentieth century civil rights movement, have opposed hate speech laws.

Let me quote a 2011 Supreme Court decision on point. Upholding the right of individuals to picket outside the funerals of military veterans with signs conveying hateful views about military personnel, Catholics, the pope, and gay men and lesbians, the Court explained (over only one dissenting vote):

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Extending Protection to New Media

The Court not only has enforced the speech-protective viewpoint neutrality principle to protect a growing array of hateful and hated messages; it also has enforced that principle to protect expression in an expanded array of media. This constitutes another noteworthy respect in which free speech notions have been changing.

For example, in the 1978 case of *FCC v. Pacifica*, the Court stated: “We have long recognized that each medium of expression presents special First Amendment problems.” Accordingly, the *Pacific* decision permitted the federal government to bar certain words from radio and television broadcasts solely because the government deemed the words to be “indecent” or “patently offensive.” Under this dramatic departure from the viewpoint neutrality principle, the Court upheld a ban on comedian George Carlin’s famous, satirical “Seven Dirty Words” monologue.

In contrast, in subsequent cases that reviewed the “special First Amendment problems” presented by other, newer media, the Court’s free speech notions evolved toward strict enforcement of the viewpoint neutrality principle. Accordingly, it struck down restrictions on “indecent” and “patently offensive” expression in those new media. This was true, for instance, of the Court’s opinions concerning such expression conveyed by telephones (in 1989), cable TV (in 1996), and the Internet (in 1997). Most recently, in its 2017 opinion

that focused on yet another new “medium of expression”—online social media—the Roberts Court unanimously extended strong First Amendment protection to such expression.

Changing Notions of Counterspeech in Our Society

In short, the Court’s foregoing decisions reflect its changing notions of free speech, which have expanded protection for both the messages that speech conveys and the media by which the speech is transmitted. In these lines of cases, the Court has consistently held that the constitutionally permissible response to speech conveying controversial, disfavored views is “counterspeech,” not censorship—more speech, not silence. And here is where some “changing notions of free speech in our society” *can* clearly be discerned: in the increasingly vigorous and widespread counterspeech that is being undertaken by so many members of our society. In recent years, we have witnessed a remarkable and bipartisan outpouring of speech and peaceful demonstrations that have denounced hateful ideologies while celebrating our nation’s renewed commitments to equality, inclusivity, and intergroup harmony.

Recent dramatic examples of such potent counterspeech have prompted the cancelling of comedian Roseanne Barr’s rebooted television show following her racist tweet about Obama aide Valerie Jarrett, and Samantha Bee’s apology for using a vulgar, disparaging, sexist term to describe Ivanka Trump. Consider also the concerted social media and on-the-ground public shaming of New York City lawyer Aaron Schlossberg, who was caught on video making anti-immigrant and discriminatory remarks to and about Spanish-speaking restaurant workers. Such condemnation increasingly has been leveled not only against intentional, explicitly hateful expression, but also against unwittingly insensitive expression.

As one commentator has observed: “For a politician or a journalist . . . to be labeled racist is usually equivalent to the end of their public career.” Indeed, in 2017, a (white) Florida state senator was forced to resign after he used a racist slur in a private conversation with several other state legislators, for which he abjectly apologized. In another 2017 example, after HBO

host Bill Maher’s use of the N-word for attempted comic purposes, for which he also promptly apologized, HBO was pressured to fire him.

Vigorous counterspeech also has been flourishing in the especially important campus context, which has been the site of so many free speech debates and so many attempts by right-wing and even alt-right speakers to gain platforms and recruits. This was the conclusion of a report by *Buzzfeed News* in September 2017, which it described as “the first comprehensive survey of hate speech at higher education institutions since the 2016 election.” To be sure, that survey confirmed 154 hate speech incidents at more than 120 campuses across the country. But *Buzzfeed* concluded that “colleges typically responded to [these] bias incidents quickly and to the satisfaction of their students. . . . In nearly every case, university presidents sent off mass emails condemning the hate speech.”

All of this is hardly to say “mission accomplished” when it comes to endemic societal and individual biases. But it is proof positive that human rights activism has been flourishing despite—or even because of—well-publicized incidents of hateful, discriminatory speech and conduct. Just think of Charlottesville and its aftermath last year, with the overwhelming outpouring of opposition to the hatemongers and support for minority groups they disparaged, including from top officials in both major parties, military leaders, and business leaders. Or think of this year’s anniversary gatherings, in which tiny bands of white supremacists were vastly outnumbered by counter-demonstrators.

As the daughter of a Holocaust survivor, with many relatives who were slaughtered by the Nazis, I will never forget the horror of hearing the torch- and gun-bearing demonstrators in Charlottesville last year, chanting: “You will not replace us. Jews will not replace us.” But the net result of that horrific incident was to underscore that such views will never replace Americans’ core commitments to liberty and justice for all. For all of the partisan and tribal divisions we face, we remain united in our repudiation of those views.

Among other things, even CEOs of major business corporations who had been serving on two advisory councils to President Donald Trump were so critical

of the president's failure to forcefully condemn the neo-Nazis in Charlottesville that they resigned and both councils were disbanded. Let me quote just one such CEO: Jamie Dimon of JP Morgan Chase. He had been a member of the president's Strategy & Policy Forum. Although he and other members of that forum supported the president's economic and regulatory policies, they nonetheless chose to disband in light of the larger issues at stake. As Dimon explained: "Constructive economic and regulatory policies . . . will not matter if we do not address the divisions in our country. It is a leader's role in business or government, to bring people together, not tear them apart." In a nutshell, this was strong counterspeech against Trump's tepid (at best) counterspeech against the Charlottesville Nazis.

countering hateful speech in many ways, including by persuading even leaders of hate-mongering groups, as well as members of such groups, to abandon the groups and repudiate their ideas. Online media have facilitated not only counterspeech (as well as hateful speech), but also studies as to which counterspeech strategies are most effective, thus promising that future counterspeech campaigns can be ever more successful.

Amid all the positive changing notions of counterspeech in our society, the one I find most encouraging has been burgeoning in the much-discussed campus context: Marginalized students have increasingly been raising their voices and taken seriously. Shaun Harper, director of the University of Southern California's Race and Equity Center, describes this

development as "an unmuting of black collegians," who are now "speaking more loudly" than ever "about the . . . racism they experience in classrooms and elsewhere." (Likewise, we recently have been witnessing the extraordinary "unmuting" of even much younger students

to protest the gun violence that terrorizes their classrooms and lives.)

Harper's center has conducted dozens of investigations of the racial climates on campuses across the country, and he reports that, when minority students are asked what corrective actions they're calling for, they say nothing about "speech codes":

They tell us they want to be heard, understood and taken seriously. They want white people to recognize the harmful effects of their words and actions. . . . They want educators on their campuses to be more highly skilled at teaching diverse student populations and fostering inclusive learning environments where every student feels respected. They want

names of slave owners removed from buildings and statues of white supremacists taken down.

Hoped-for Future Changing Notions of Counterspeech and Censorship

Throughout U.S. history, human rights champions have hailed counterspeech as more effective than censorship for advancing their goals. One important example is Barack Obama. He speaks with special expertise and experience concerning these issues; not only has he taught constitutional law, but he also has been subjected to virulently hateful speech. While he was president, Obama declared that "the strongest weapon against hateful speech is not repression; it is more speech—the voices of tolerance that rally against bigotry . . . and lift up . . . mutual respect." In the same vein, then-First Lady Michelle Obama famously recounted how she and her husband taught their daughters to respond to "hateful language," including "when someone is cruel or acts like a bully": "[Y]ou don't stoop to their level. No, our motto is, when they go low, we go high."

Based on the changing notions of free speech that have produced increasingly vigorous and sophisticated counterspeech, I am hopeful that we can look forward to yet another changing notion of free speech in our society. Specifically, I hope that, as diverse members of our society continue to experience power and agency by engaging in counterspeech, their support for censorship will diminish. When it comes to changing notions of free speech in our society, that is one that I would heartily welcome.

Nadine Strossen is a John Marshall Harlan II Professor of Law, New York Law School; immediate past national president, American Civil Liberties Union (1991–2008); and author of *HATE: Why We Should Resist It with Free Speech, Not Censorship* (Oxford University Press, May 2018).



Former President Barack Obama

In a speech at the University of Illinois on September 7, 2018, former President Barack Obama underscored the same point:

It shouldn't be Democratic or Republican to say we don't target certain groups of people based on what they look like or how they pray. We are Americans. We are supposed to stand up to bullies, not follow them. We are supposed to stand up to discrimination. And we sure as heck are supposed to stand up clearly and unequivocally to Nazi sympathizers. How hard can that be, saying that Nazis are bad?

We also have seen increasingly sophisticated social media campaigns for

Thwarting Speech on College Campuses

By Stephen J. Wermiel



We present here companion articles on the subject of protesters interrupting or otherwise thwarting speakers with whom they disagree, an issue that has gained national attention primarily on college campuses.

These articles are intended to offer context for a discussion that is taking place at different levels in our society and that is reflected in articles in this issue of *Human Rights*. At a specific level, there is debate about the extent to which college campuses should be places for the exchange of ideas, even those that are offensive to some students, or should be safe havens where some hateful, provocative ideas are off-limits. At a broader level, this is a question about how our nation wants to deal with speech that may be deeply offensive to entire segments of the population.

In one article, Professor Josh Blackman of South Texas College of Law in Houston describes his experience when invited by the Federalist Society to give a talk at City University of New York Law School. His speech was disrupted by students who would not let him begin the talk for several minutes. He even-

tually scrapped his prepared remarks and talked informally with those who had invited him and wanted to hear him.

Blackman generally falls on the conservative side of the spectrum, and his experience is similar to those that other conservatives have encountered on college campuses. Forms of protest by liberal students have ranged from interrupting speeches to physically blocking the access of speakers to lecture halls to demanding that administrators disinvite controversial figures.

Some of these protests have been aimed at a handful of conservative speakers who advance provocative and controversial views connected to white supremacy and disparaging others, including feminists, Jews, LGBTQ persons and groups, and more.

In the other article, we describe similar experiences encountered by liberal speakers, although unlike Professor Blackman, we were unable to get the speakers, themselves, to contribute directly. Protests against liberal speakers have drawn less media attention and appear to be less frequent.

Silencing Liberal Speakers

When Claire Guthrie Gastañaga visited the College of William and Mary in October 2017, she intended to discuss freedom of speech, the topic she was invited to address. Instead, the executive director of the American Civil Liberties Union (ACLU) of Virginia found her talk in Williamsburg, Virginia, disrupted by a campus Black Lives Matter student group (<https://www.insidehighered.com/quicktakes/2017/10/05/aclu-speaker-shouted-down-william-mary>). The students were upset that the ACLU supported the right of white nationalists to demonstrate in August 2017 in Charlottesville, Virginia, a rally that turned violent and led to the death of a counter-demonstrator who was run down by a car.

A week after Gastañaga's experience at William and Mary, California Attorney General Xavier Becerra, a progressive Democrat, was heckled and largely prevented from conducting a planned public question-and-answer session at Whittier College in Whittier, California, near Los Angeles. According to a published account, the event was organized by Ian Calderon, the majority leader of the California Assembly, and was intended to be a 60-minute session with Becerra addressing questions submitted by the audience (<https://www.thefire.org/hecklers-shout-down-california-attorney-general-assembly-majority-leader-at-whittier-college>). But hecklers wearing hats with the slogan of President Trump, "Make America Great Again," shouted insults and largely prevented Becerra from being able to answer audience queries. The protest was apparently aimed at Becerra's lawsuit against Trump's decision to rescind the DACA (Deferred Action for Childhood Arrivals) immigration program. At least one of those leading the disruption reportedly has a track record of heckling Democratic speakers.

Most of the publicity about campus free speech incidents has involved disruption of conservative speakers by liberal students who do not want to hear views they deem offensive. But the incidents at William and Mary and Whittier involved the less common disruption of liberal speakers.

In the William and Mary incident, the Black Lives Matter student group expressed frustration with the ACLU's defense of what they described as speech defending white supremacy and racism. The students chanted, "ACLU, you protect Hitler, too," and "ACLU, free speech for who?" William and Mary's president at the time, W. Taylor Reveley III, said in a statement, "Silencing certain voices in order to advance the cause of others is not acceptable in our community. . . . William & Mary must be a campus that welcomes difficult conversations, honest debate and civil dialogue."

Silencing of a Conservative Speaker

By Josh Blackman

In the spring of 2017, the Federalist Society Chapter at the City University of New York (CUNY) School of Law invited me to deliver a lecture titled "The Importance of Free Speech on Campus." It was a talk that I had given many times before without controversy. Three days before the event, the president of the Chapter wrote, "We passed out the flyers today (first day back from spring break) and a large number of students are already up in arms about the event." The Office of Student Affairs explained that "some enraged students . . . apparently, are planning to protest." I had never been protested before and strongly doubted that there would actually be a demonstration. I was wrong.

When I arrived on campus, CUNY's chief of public safety explained that a few dozen students were already assembled in the hallway outside the room. Then, he asked me what my "exit plan" was. He explained that there were certain safe ways to exit the building. As I walked to the classroom, students shouted at me and held up signs calling me a white supremacist, a fascist, and other slanders. For the first eight minutes of the hour-long lecture, a dozen students surrounded me—standing inches away—and shouted at me every time I opened my mouth. The obstruction only ended after I began to engage the protesters. When I explained that—contrary to their false charges—I support the DREAM (Development, Relief, and Education for Alien Minors) Act, one law student could only respond by screaming "F*ck the law!" With nothing of substance to say, one student actually mumbled, "I don't want to hear this." The protesters exited the room.

After the protesters left, I took questions from the students for over an hour. I did not present any of my prepared remarks, but it didn't matter. I spoke on originalism, textualism, the separation of powers, about DACA (Deferred Action for Childhood Arrivals), affirmative action, criminal procedure, and a wide range of other topics. The conversation was civil and professional. I was very proud of the students who stayed till the end.

To my knowledge, CUNY never disciplined any of the students who disrupted the talk. Mary Lu Bilek, the dean of the Law School, defended her students. Because of the interruption's short duration, she insisted that "limited protest was a reasonable exercise of protected free speech." Students now have a blank check to shut down speech they dislike, so long as they do so briefly. Following the event, no one from the CUNY administration or faculty contacted me to explain what happened, let alone to apologize. I am relieved by the handful of students who wanted to hear me speak—even if they disagreed with me. Yet, if the CUNY protest is the canary in the coal mine, the future of free expression in America looks bleak.

Josh Blackman is a constitutional law professor at South Texas College of Law, Houston.

Sexual Expression and Free Speech: How Our Values Have (D)evolved

By Geoffrey R. Stone



In the eighteenth century, bookstores in the American colonies carried an extraordinary array of erotica, ranging from Boccaccio's *Decameron* to such explicitly sexual works as *Venus in the Cloister*, *The Politick Whore*, and *Letters of an Italian Nun and an English Gentleman*. Indeed, there were no statutes forbidding obscenity during the entire colonial era. Throughout this period, the distribution, exhibition, and possession of pornographic material were simply not thought to be any of the state's business.

Historical Prosecution of Obscenity

The first obscenity prosecution in the United States did not occur until 1815, at the height of the evangelical explosion of the Second Great Awakening. Philadelphia tavern owner Jesse Sharpless was charged with exhibiting for a fee an image of "a man in an obscene, impudent, and indecent posture with a woman." The Pennsylvania Supreme Court held because exposure to such "lascivious" images could corrupt the morals of young people by "inflaming their passions," it was a fit subject for criminal prosecution.

Such prosecutions, however, were rare,

and by the 1840s, as the Second Great Awakening waned, there was once again an upsurge in the availability of pornography. As industrialization and urbanization transformed the nature of cities, New York came to be known as the "carnal showcase of the Western world." Daguerreotypes (an early form of photographs first introduced in the 1830s) of women in various stages of undress could be purchased from pushcart vendors who plied the city's streets and weekly newspapers like the *Flash*, the *Rake*, and the *Libertine* celebrated sexual freedom. By the end of the Civil War, a new breed of "concert saloons" began presenting live entertainment that combined the services of the bar, the theater, and the brothel. These new entertainments placed sex into the forefront of American society as never before.

Not everyone was cheering. In the years after the war, the Young Men's Christian Association (YMCA) launched a comprehensive study to document the state of vice in New York City. The study detailed the existence of sexual materials so lurid that some members of the YMCA executive board could not believe they existed. Because New York still had no statute forbidding the distribution of

obscenity, the YMCA board drew up proposed legislation to address the issue. In 1868, after an aggressive lobbying campaign, the YMCA got its bill through the New York legislature. The new law made it a crime for any person to sell or give away any "obscene and indecent" book, pamphlet, drawing, painting, or photograph, or any article for "indecent or immoral use," or any article or medicine "for the prevention of conception" or the "procuring of an abortion." Over time, the New York law became a model for other states and the federal government.

Having secured the enactment of this legislation, though, the YMCA board feared that law enforcement officials, who had more pressing priorities, would not devote sufficient resources to suppress the burgeoning market for indecent materials. The board therefore decided that extralegal methods were necessary to achieve the organization's goals. The board established its own private task force to ensure the vigorous implementation of its hard-won statute. The YMCA's chief inspector in this campaign, Anthony Comstock, would dominate the national debate over obscenity for the next four decades.

Based on an unwavering conviction that the devil's temptations were omnipresent, Comstock believed to his very core that abstinence from all impure thoughts and behaviors was the only faithful path to righteousness. The leaders of the YMCA were so impressed with Comstock's energy, enthusiasm, and effectiveness that they offered him a full-time job. He stepped easily into his new role. After organizing his squad, which he named the "Committee for the Suppression of Vice," Comstock led several successful raids on local publishers, but soon realized that to make a truly major impact he needed national legislation. With the backing of the YMCA, Comstock journeyed to Washington, D.C., to lobby for a federal law. Comstock warned Congress that obscenity was a "hydra-headed monster" that required a potent legislative weapon.

On March 3, 1873, President Ulysses Grant signed into law the Act for the Suppression of Trade in, and Circulation of, Obscene Literatures and Articles of Immoral Use. The new legislation established a broad ban on all items that could be deemed “obscene, lewd, lascivious, or filthy,” but it did not define those terms. The act established six categories of obscenity: print and pictorial erotica, contraceptives, abortifacients, information about contraception or abortion, sexual



Methodist revival in USA 1839, watercolor from 1839 Second Great Awakening. The print was made in the United States in the 1840s.

implements and toys, and advertisements for any of the above. The law authorized severe penalties, including hard labor, and it empowered the post office to censor and to confiscate any objectionable material. Comstock was appointed a special postal agent and, fittingly, the law came to be known as the Comstock Act.

In his writings and public lectures, Comstock passionately affirmed the sacredness of his mission. In his 1880 book *Frauds Exposed*, Comstock asserted that “lust defiles the body, debauches the imagination, corrupts the mind, . . . and damns the soul.” Comstock aggressively led the national campaign to suppress obscenity from 1873 until just before his death in 1915. During this era, even a single phrase, passage, or image involving sex was sufficient to warrant a criminal conviction. Moreover, material was deemed obscene if it had the capacity to corrupt an impressionable adolescent. This standard effectively limited adults to only those materials that were deemed appropriate for children. For all practical purposes, virtually any reference to sex in this era was unlawful.

Changing Social Mores

After Comstock’s death in 1915, the power of the nineteenth-century anti-obscenity

societies began to wane, and with changing social mores courts began to embrace more speech-protective interpretations of the nineteenth-century obscenity laws. Over the next several decades, courts struggled to give some clear, consistent and coherent meaning to the legal concept of “obscenity.” A Massachusetts decision in this era held that Theodore Dreiser’s acclaimed masterpiece *An American Tragedy* was obscene because it included a scene in which the main character visits a house of prostitution and another in which the main character and his pregnant girlfriend attempt to secure an abortion.

Throughout this era, it was universally assumed that, whatever obscenity was, it was not protected by the First Amendment. Indeed, the U.S. Supreme Court in these years simply took it for granted that “obscenity” was not within the “freedom of speech, or of the press” guaranteed by the Constitution. But the issue remained unresolved until 1957, when the Supreme Court finally addressed the question. In an opinion by Justice William J. Brennan Jr., the Court accepted the conventional wisdom that something called “obscenity” is not protected by the First Amendment, but noting that sex “has indisputably been a subject of absorbing interest to mankind through the ages,” the Court held that the First Amendment permits the government to censor sexual expression only if the material, judged as a whole, appeals primarily to the prurient interest in sex, is patently offensive to contemporary community standards, and lacks any redeeming social value. In so doing, the Court sharply narrowed the constitutionally permissible scope of what could be deemed “obscene.” This led to a significant upsurge in the availability of sexual expression, including a growing proliferation of sexually oriented magazines, books, and movies.

Moreover, in the years after *Roth*, attitudes in the United States toward sexual expression began to change dramatically. The Victorian prudery that previously carried the day was pushed aside by the dawning of the sexual revolution in the 1960s. With the advent of the pill, women’s liberation, and the publication of such works as Helen Gurley Brown’s *Sex and the Single Girl* and Dr. David Reuben’s *Everything You Always Wanted to Know About Sex** (*But Were Afraid to

Ask), sexual freedom and sexual explicitness began to reshape American culture. By the late 1960s, full-frontal male and female nudity appeared in the movie *Medium Cool*; the X-rated *Midnight Cowboy*, which featured both nudity and strong sexual content and won the Oscar for Best Picture; and the much more explicit Swedish import *I Am Curious (Yellow)* played to packed houses in cities across the nation.

Defining Obscenity

In the meantime, the Court struggled with the precise definition of obscenity. In *Redrup v. New York*, for example, the Court overturned obscenity convictions in three cases arising out of the sale of sexually explicit paperback books and magazines carrying such names as *Lust Pool*, *Shame Agent*, and *Swank*. In a brief, unsigned opinion, the Court announced that, with each justice applying his own definition of obscenity, a majority of the justices had concluded, after toting up the votes, that the materials were not obscene. The Court’s inability to articulate a clear definition of obscenity led to an era of chaos and confusion.

In the meantime, Congress, concerned about the growing proliferation of sexually explicit material, authorized President Lyndon Johnson to appoint a special blue-ribbon Commission on Obscenity and Pornography to determine whether exposure to sexually explicit material caused “antisocial behavior.” After two years of comprehensive research and study, the Commission’s report, issued in 1970, found that 85 percent of adult men and 70 percent of adult women had seen explicit sexual material in recent years and that more than 70 percent of minors had been exposed to such images by the time they had reached age 18. The Commission reported that most people said that their exposure to such material affected them more positively than negatively, and that most experts found that exposure to sexually explicit material did not have harmful effects on either adults or adolescents. In light of these findings, the Commission concluded that there was not sufficient justification to forbid “the consensual distribution of sexual materials to adults.”

The Commission’s report triggered a firestorm of criticism. Charles H. Keating Jr., for example, the head of Citizens for

Decent Literature, characterized the Commission's recommendations as "shocking and anarchistic." Keating declared that, "For those who believe in God, . . . no argument against pornography should be necessary." By the time the Commission completed its report, Richard Nixon had succeeded Lyndon Johnson in the White House. A great many Americans, especially those in the so-called "Silent Majority," were appalled by what they saw as the rampant immorality of the "sexual revolution" of the 1960s. Nixon repudiated what he described as the report's "morally bankrupt conclusions" and proclaimed that "so long as I am in the White House, there will be no relaxation of the national effort to . . . eliminate smut from our national life."

Government's Influence on Pornography

Soon after he assumed the presidency, Nixon had the opportunity to appoint four justices to the Supreme Court, dramatically changing the overall makeup of the Court. The new Chief Justice, Warren Burger, loathed pornography. At one point, he observed that obscenity is "like filth in the streets that should be cleaned up and deposited in dumps." Nixon could hardly wait for the newly-constituted Burger Court to get its hands on the obscenity issue.

On June 21, 1973, the Supreme Court handed down its decisions in two landmark obscenity cases: *Miller v. California* (413 U.S. 15 (1973)) and *Paris Adult Theatre v. Slaton* (413 U.S. 49 (1973)). With evident relish, Burger delivered the opinion of the Court in both cases, with Justices William Douglas, Brennan, Potter Stewart, and Thurgood Marshall dissenting. Burger offered a new definition of obscenity: To find that any particular work is "obscene," a court must conclude that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; that the work depicts or describes sexual conduct in a patently offensive manner; and that the work, taken as a whole, lacks "serious literary, artistic, political, or scientific value." The third prong of Burger's test was critical because his new definition of obscenity expressly jettisoned the *utterly without redeeming* social value test and held that a work now could be deemed obscene unless it had *serious*

social value. With this profound change in the law, it seemed that America was headed into a new Victorian era with respect to sexual expression.

It was Warren Burger's hope that his opinions in *Miller* and *Paris Adult Theater* would reverse the tide of sexually explicit material in the United States. But this was not to be. The social changes unleashed in the 1960s and 1970s, shifting cultural values, and the advent of new technologies—including VHS, DVD, cable television, and the Internet—simply overwhelmed the capacity of the law to constrain sexual expression. As the flood of sexual material outpaced the capacity of prosecutors to respond, community standards soon became more tolerant of what would once have been regarded as "patently offensive" depictions of sex, and the real-world definition of obscenity shrank down to a small fraction of what had once been thought to be obscene. And as the category of sexual expression that could satisfy even the new *Miller* standard narrowed, so that only the very hardest of what had once been thought to be hard-core pornography could warrant conviction, it became less sensible for government officials to expend scarce prosecutorial resources on what increasingly came to be seen as an essentially futile effort to suppress the market for such expression.

When George W. Bush assumed the presidency in 2001, many people hoped for a resurgence of adult obscenity prosecutions. Bush stood, after all, for a return to traditional American values. Living up to that promise, Attorney General John Ashcroft proudly declared in 2002 that "The Department of Justice is committed unequivocally to the task of prosecuting obscenity." But despite the assurances of President Bush and Attorney General Ashcroft, the Department of Justice filed fewer than 10 adult obscenity prosecutions between 2001 and 2005.

Conservative religious organizations were outraged. But if the government was going to bring cases it could actually win, it had no choice but to go after the most extreme fare, such as videos in which men urinate in a woman's mouth, women have sex with horses, and women and men engage in violent sado-masochistic behavior. In a world of limited prosecutorial resources and changing social mores, as much as some people wanted

to turn back the clock to the "good old days" when *Lady Chatterly's Lover*, *Playboy*, and *Deep Throat* were thought to be obscene, those days were long gone. Technology had changed, society had changed, cultural values had changed, and, as a result, the law had changed. By the early years of twenty-first century, given the pervasiveness of sexually explicit pornography on the Internet and elsewhere in society, we had for all practical purposes reached the end of obscenity. As Robert Peters, the president of Morality in Media, an organization established to combat pornography, reluctantly conceded, "The war is over and we have lost."

Where We Are Today

The practical reality is that today, with the mere click of a button, search engines will instantaneously find virtually limitless websites that offer access to graphically explicit videos of masturbation, anal sex, oral sex, bondage, sadomasochism, and literally anything else the mind can imagine. Whether this is good, bad, or indifferent is at this point largely irrelevant. The law has simply been overwhelmed by technology and by changing social mores. The challenge for the future is no longer how to *ban* such adult obscenity, but how to deal with its existence.

So, where does this leave us? Compared to the 1950s, when any depiction of sex in books, movies, or magazines was tightly constrained, we are now inundated with all sorts of sexually explicit material. We have gone from a world in which an airbrushed photograph of a partially naked woman was forbidden even to consenting adults, to one in which consenting adults can see pretty much anything and everything they can possibly imagine on the Internet.

The restrictions that now exist are quite specific and limited. First, there remains a strong presumption in favor of protecting unconsenting adults and children when they are in public. Second, the government can constitutionally prohibit the sale or exhibition to children of material that is obscene for minors, but only if it can do so without significantly interfering with the rights of adults. Third, the government can constitutionally prohibit the production, distribution, and possession of child pornography (that is, sexual images and videos made with real

children). Beyond that, though, there are effectively no limits on what consenting adults can see.

Has this triumph of free speech—and the consequent rejection of Comstockery—been good for the nation? A fundamental precept of American constitutional law is that, all things considered, the freedom of speech is a positive good. As a matter of first principles, the Constitution denies government the authority to decide for the American people what speech—what ideas, what values, what facts, what opinions, what images—they will be allowed to express or consider or hear or view.

But what of the consequences of greater freedom of sexual expression? Are they good or bad? On one side of this question there is, of course, the principle of freedom of speech. In some sense, in terms of individual liberty, the more freedom of expression, the better. But freedom of expression is not merely a principle. It has consequences. The greater availability of sexual expression, for example, enhances the ability of individuals to understand and to satisfy their own sexual needs and desires; gives them a much richer exposure to unconventional forms of artistic excellence; entertains, amuses, enlightens, and excites; and enables individuals to learn more about sex and its many varied possibilities. All of this, in varying degrees, captures at least some of the potential individual and social benefits of a much broader freedom of sexual expression.

What, though, of the other side of the question? What are the negative consequences of greater freedom of sexual expression? Those who are appalled by the current freedom of sexual expression insist that this state of affairs harms adults, children, families, and society in general. These harms, they insist, go well beyond the bare proposition that sexual explicitness is immoral.

Some researchers suggest, for example, that the increasing availability of sexual expression has negative as well as positive consequences. Although the findings are tentative, and although exposure to such expression does not affect all individuals in the same way, several significant harms are said to be associated with the current availability of sexual expression. There is evidence, for example, that continued exposure to sexual imagery can cause in

some users compulsive and obsessive behaviors that resemble behavioral addiction. Other researchers assert that the proliferation of certain kinds of sexual messages and imagery can cause particular harm to women by shaping cultural expectations about female sexual behavior in ways that enshrine relationships based on disrespect and often abuse. And, of course, there is the alleged harm to children. There is no doubt that minors are far more likely to encounter sexually explicit images today than ever before in American history. One study found that 23 percent of minors who came across such material on the Internet were “extremely” or “very upset” by the incident. Research also suggests that both adolescent boys and girls who regularly view such material online are more inclined to view women as sexual objects. This might have triggered some of the apparent increase in recent years in sexual harassment and sexual assault on college campuses.

What are we to make of these concerns? The first and perhaps most important point is that free speech *always* comes at a cost. Speech that questions the wisdom of fighting a war may cause soldiers to desert. Speech that defends the morality of abortion may encourage women to engage in what others regard as immoral “baby killing.” Religious condemnation of homosexuality can incite prejudice, discrimination, and violence against gays and lesbians, and can inflict serious emotional harm on minors who have discovered themselves to be homosexual. The central insight of the First Amendment, though, is that speech cannot constitutionally be censored merely because it might have harmful consequences.

This does not mean that we cannot mitigate what we perceive to be the negative consequences of sexually explicit expression. To the extent that critics see sexually explicit speech as akin to cigarettes, alcohol, and gambling in its capacity to overwhelm the individual’s will, the proper response is to warn people about the dangers of abuse and to help those who succumb to temptation. To the extent that they fear that such expression can warp people’s values, the proper response is to educate them about the “right” values and expectations. Of course, there is no guarantee that such efforts will carry the day. In the end, some of us will simply

disagree with what others believe to be the “right” values to live by. In a free society, that is our right.

The issue is more complicated with respect to children because they do not have the same capacity to make responsible judgments for themselves about right and wrong. In part for that reason, the Court has continued to adhere to the doctrine that some sexually explicit material is obscene for children, even though it is constitutionally protected for adults. In practical effect, though, it is difficult, if not impossible, to shield children in today’s world from exposure to sexually explicit expression. The primary remedy therefore rests largely in the hands of parents. By using filters on home computers, by speaking with their children about the possibility that they might encounter sexually explicit expression, by talking with them after they do encounter such material, by guiding them in what they believe to be “best” ways to think about intimacy and sex, and by educating themselves about the best ways to manage their parental responsibilities, parents can create a reasonably safe environment for their children. In truth, this is no different from the trust we place in parents more generally. In everything from crossing streets to playing near the water to choosing friends to walking alone at night to eating right to smoking and drinking and drugs, we rely on parents to protect their children from harm. The same is true today in terms of protecting children from the harm caused by exposure to sexually explicit expression.

Perhaps ironically, we are where we are today not because citizens intentionally voted to make the most extreme forms of sexual material legal, not because judges intentionally held that the Constitution should protect the most extreme forms of such material, but because technology overwhelmed the capacity of the law to constrain the availability of such material. The challenge for the future is to make the best of it.

Geoffrey R. Stone is the Edward H. Levi Distinguished Professor of Law at the University of Chicago. He is the author of many books on constitutional law, including most recently *Sex and the Constitution: Sex, Religion, and Law from America's Origins to the Twenty-First Century* (2017).



Section of
**Civil Rights and
Social Justice**
AMERICAN BAR ASSOCIATION

NONPROFIT
ORGANIZATION
U.S. POSTAGE
PAID
AMERICAN BAR
ASSOCIATION

Human Rights Heroes: The Challengers of Free Speech

By Stephen J. Wermiel

The U.S. Supreme Court's jurisprudence on freedom of speech and press spans little more than 100 years, during which justices from Oliver Wendell Holmes to John Roberts have weighed in on the development of the law. But perhaps more than in some other areas of constitutional law, the evolution and growth of free speech have required the courage, sacrifice, determination, and commitment of hundreds, maybe thousands, of litigants over the years who have waged heroic struggles for their rights.

Many have sacrificed much to protect the free exchange of ideas and criticism in our society, even predating the Constitution and the Supreme Court's grappling with the meaning of free speech and free press.

In 1733, well before the writing of the Constitution, a New York jury sending a message about the importance of liberty

CONGRESS SHALL MAKE NO LAW respecting
an establishment of religion, or prohibiting the free
exercise thereof; or abridging the freedom of speech,
or of the press; or the right of the people peaceably
to assemble, and to petition the Government for a
redress of grievances.

THE FIRST AMENDMENT
TO THE U.S. CONSTITUTION
15 DECEMBER 1791

This stone plaque guards the "First
Amendment Area" in Independence
National Historic Park.

found printer and newspaper publisher John Peter Zenger not guilty of libeling the local governor, although the fact of publication was enough to render him guilty under the law at the time.

In 1798, Matthew Lyon, a Republican congressman from Vermont, became the first of more than two dozen individuals convicted of seditious libel under the Sedition Act of 1798. His sentence of four months in prison and a \$1,000 fine were based largely on his sharp criticism of the administration of President John Adams.

In the period 1835–1837, anti-slavery abolitionist speech became a target not only of state laws barring it in some southern states but of angry mobs suppressing it in the North and South. A mob seized and burned abolitionist literature in the Charleston, South Carolina, post office in 1835. That same year, a mob in Boston seized abolitionist publisher William Lloyd Garrison and dragged him by rope toward the Boston Common before he was arrested for his own protection.

When the Supreme Court turned its attention to the First Amendment in 1919, just after the end of World War I, the justices began to develop a vision of free speech in a series of cases; but in each of the cases, the criminal conviction of the speaker or pamphleteer was upheld. This included socialist and labor leader and frequent presidential candidate Eugene Debs (*Debs v. U.S.* 249 U.S. 211 (1919)). In the last of five runs for the White House, Debs was in prison serving a sentence for opposition to U.S. involvement in World War I.

As the twentieth and twenty-first centuries progressed, free speech cases became numerous in the Supreme Court, and the sacrifice of individuals impossible to catalog or quantify. The Jehovah's Witnesses initially lost and then in 1943 won a landmark free speech case, *West Virginia State Board of Education v. Barnette* (319 U.S. 624 (1943)), holding that government could not compel recitation of the Pledge of Allegiance over individual objections. They would be involved in a handful of other important free speech rulings as well.

The civil rights movement of the 1960s saw important free speech and free press advances as the editors of the *New York Times* and some civil rights leaders won heightened protection

continued on page 15