Northern Illinois University Law Review

Volume 12 | Issue 2 Article 2

5-1-1992

Current Challenges to Free Expression: A New Age of Repression?

Geoffrey R. Stone

ESSAY

Current Challenges to Free Expression: A New Age of Repression?

BY GEOFFREY R. STONE*

In recent years, we have witnessed a succession of sharp challenges to the principle of free expression. I would like in this essay to explore some of the implications of these challenges. I would like to begin with just a few of many possible examples.

First, as you may recall, there was the "Art Institute" incident in Chicago. Each spring, the students graduating from the school at the Art Institute participate in an exhibition and competition. In 1988, one of those students chose to exhibit a painting of the late Mayor Harold Washington which depicted the Mayor wearing women's lingerie. Within an hour, members of the school staff, offended by the painting, demanded its removal. Later that day, the Chicago City Council adopted a resolution stating that, whereas the painting "is a disgrace to the Mayor" and "to the citizens of the City," "all funds contributed by the City to the Art Institute shall be withheld until the painting is removed." Shortly thereafter, nine Chicago aldermen arrived at the Art Institute and, over the protests of the students, physically removed the painting from the exhibit. The next day, the Art Institute issued a statement announcing that it would not thereafter display the painting.

Second, there is the Jerry Falwell-Hustler dispute. As you may know, Campari Liqueur ran a series of ads that included interviews with celebrities about the "first time" they had tried Campari. The ads clearly played on the sexual double entendre of the general subject of "first times." A recent issue of Hustler magazine featured a parody of the Campari ads, presenting a purported interview with Falwell in which he stated that his "first time" was during a drunken rendezvous with his mother in an outhouse. Falwell sued. The jury ruled for Falwell on his claim that the parody constituted the intentional

* Harry Kalven, Jr. Professor of Law and Dean of the Law School, University of Chicago.

infliction of emotional distress and awarded him damages in the amount of $150,000.

Third, there is the question of pornography.[1] Following the lead of Andrea Dworkin and Catharine MacKinnon, many feminists have urged the enactment of legislation that would restrict "pornographic," as distinct from "obscene," expression on the ground that pornographic material employs sexuality to oppress and subordinate women.[2] Adopting this view, the city of Indianapolis enacted an ordinance prohibiting the production, distribution, exhibition or possession of any material that depicts "the graphic sexually explicit subordination of women"[3] and that presents women "as sexual objects who enjoy pain or humiliation,"[4] or in "positions of servility or submission or display."[5]

Fourth, there is the issue of flag burning.[6] At the 1984 Republican National Convention, Gregory Lee Johnson burned an American flag to express his opposition to government policy. He was prosecuted and convicted of violating a Texas statute[7] that prohibited any person from desecrating the American flag. The Supreme Court held the Texas statute unconstitutional.[8] An outraged Congress then enacted federal legislation designed to circumvent the Court's decision.[9] After the Court invalidated that legislation as well, President Bush called for a constitutional amendment to overrule the two Supreme Court decisions. A majority of the members of both Houses of Congress voted to enact the proposed amendment, but failed to muster the two thirds majority required by the Constitution.

---

1. *See generally* Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461 (1986).

2. *See generally* ANDREA DWORKIN, PORNOGRAPHY (1981); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); Catharine A. MacKinnon, *Pornography, Civil Rights, & Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

3. INDIANAPOLIS, IN., CODE § 16-3(q) (1984) (invalidated as contrary to the First Amendment by American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985)).

4. *Id.* § 16-3(q)(1).

5. *Id.* § 16-3(q)(6).

6. *See generally* Geoffrey R. Stone, *Flag Burning & the Constitution*, 75 IOWA L. REV. 111 (1989).

7. TEXAS PENAL CODE ANN. § 42.09 (West 1989).

8. Texas v. Johnson, 491 U.S. 397 (1989).

9. Flag Protection Act of 1989, Pub. L. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700 (Supp. I 1989) (declared void as a violation of the First Amendment by United States v. Eichman, 496 U.S. 310 (1990)).

Fifth, there is the controversy over hate-speech on university campuses.[10] In response to a series of incidents in which students were insulted or harassed because of their race, gender, or sexual orientation, a number of universities adopted regulations prohibiting such expression on campus. The University of Connecticut, for example, prohibited the use of "derogatory names"; the University of Pennsylvania prohibited the use of language that "stigmatizes or victimizes individuals" and that "creates an intimidating environment"; and the University of Michigan prohibited any person from stigmatizing "an individual on the basis of race, ethnicity, religion, sex or sexual orientation" where the "reasonably foreseeable effect" is to interfere with the victim's "academic efforts."[11] The University of Michigan regulation, by the way, was thereafter invoked against one student who stated in a social work class that he believed homosexuality to be a treatable disease and against another who stated in a dentistry class that he had heard that minorities had had an especially difficult time in that class.

Finally, there is the controversy at the National Endowment for the Arts (NEA). When it became known that the NEA had supported the work of Andres Serrano, including "Piss-Christ," a photograph of a plastic crucifix in a jar of urine, and Robert Mapplethorp, including a series of photographs explicitly depicting homoeroticism, various members of Congress directly attacked the NEA. Representative Philip Crane of Illinois, for example, called for the complete abolition of the NEA, and Senator Jesse Helms proposed legislation prohibiting the NEA from supporting any work depicting sadomasochism or homoeroticism, denigrating the objects or beliefs of any religion, or debasing any person on the basis of race, sex, handicap, age, or national origin.

This list is not, of course, exhaustive. One could add the effort in Florida to suppress the rap group 2 Live Crew, the efforts of prosecutors in Idaho to close the Church of Jesus Christ Christian/Aryan Nations, a neo-Nazi group, by having it declared a "public nuisance," the effort of the Federal Communications Commission to impose a 24-hour-a-day ban on "indecent" broadcasting,[12] and more.

There is a common theme in all these examples. In each instance, the effort to restrict expression is premised on the belief that the

---

10. *See generally* Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989); Timothy B. Zollinger, Casenote, 12 N. ILL. U. L. REV. 159 (1991).

11. *University of Michigan*, 721 F. Supp. at 856.

12. 47 C.F.R. § 73.3999 (1991).

particular speech at issue is unwise, disagreeable, inappropriate, or offensive. In each instance, the effort to restrict expression reflects an intolerance of dissident or offensive or outrageous speech and a paternalistic desire to dictate what speech our citizens should — and should not — be trusted to hear or see.

Taken together, these incidents reflect a trend that, at the very least, calls into question some of the most fundamental premises of our free speech tradition. Moreover, and more profoundly, these incidents may signal the dawn of a new age of repression, an age in which the right of one person to speak freely will turn on the sensitivities — or insensitivities — of others. In this new age, we may see increasing restrictions of expression as government caters to the fear, prejudices, and insecurities of those who are unwilling to tolerate speech they find disagreeable, offensive, or unwise. It is a disquieting prospect, indeed.

Why now? What circumstances have brought forth this extraordinary succession of efforts to suppress offensive expression? There can be little doubt that this phenomenon is due, in part, to almost a decade of national leadership that has turned its back on civil rights and civil liberties and that has failed to reinforce in our citizenry and in our government policy those values of tolerance, open-mindedness, and diversity that should be at the very core of a free and self-governing society. From the Meese Commission on Pornography, to the FCC's restrictions of "indecent" expression,[13] to candidate Bush's manipulations of the pledge of allegiance in the 1988 campaign, to President Bush's exploitation of flag burning for partisan political advantage, the national administration has reinforced and encouraged intolerance, self-righteousness, and suppression.

This is not, however, a complete explanation, for many of the incidents I have described were triggered, not by the political right, but by the political left. Indeed, women, blacks, and gays have been among the most vehement advocates of suppressing speech they find offensive. This is especially troubling. For although one can readily appreciate why these groups have come to think that pornographic, misogynist, racist, and homophobic speech contributes to their subordination, and although one can readily understand why they regard the toleration of such expression as a threat and its suppression as empowerment, one would nonetheless hope that these groups would also appreciate that their own best chance for gaining full legal protection lies, not in a dilution of the rights and liberties of others,

13. *E.g., id.*

but in a deeper and more universal commitment to the values of tolerance, diversity, and open-mindedness.

Now, a moment ago, I suggested — rather cavalierly — that we may be on the brink of a new age of repression. In fact, we should not be too quick to leap to that conclusion. A critical feature of the incidents I have described is that they involve efforts to restrict speech that would not have been thought protected by the First Amendment until quite recently. It is unlikely, for example, that twenty-five years ago a court would have interpreted the First Amendment as prohibiting a public university from disciplining students for holding a mock slave auction in black face or for telling racist jokes on a university owned radio station, the sorts of incidents that led to the promulgation of campus hate-speech regulations.

Similarly, when the Supreme Court first confronted the flag burning issue in 1969,[14] even such "liberal" Justices as Hugo Black, Abe Fortas, and Earl Warren went out of their way to observe that nothing in the United States Constitution prevented "the States and the Federal Government" from protecting "the flag from acts of desecration and disgrace."

And there can be little doubt that, when the Supreme Court first considered the question of obscenity in 1957, against the background of the suppression of such works as Theordore Dreiser's *An American Tragedy*, James Joyce's *Ulysses*, and D.H. Lawrence's *Lady Chatterly's Lover*, it could not have imagined that First Amendment doctrine would evolve to the point where Hustler, movies graphically depicting the sadistic sexual abuse of women, Andres Serrano's "Piss-Christ," and Robert Mapplethorp's photograph of a bullwhip extruding from his own anus would be claimed with a straight-face to be non-obscene, constitutionally protected expression — to say nothing of the claim that the government, through the National Endowment for the Arts, is constitutionally *compelled* to pay Serrano and Mapplethorp to produce such works.

What we see in these incidents, then, may best be understood, not *necessarily* as the dawn of a new age of repression, but, perhaps, as a last-ditch effort to forestall the virtually complete abolition of governmentally-enforced standards of decency and civility in public discourse. These incidents may represent, not an effort to turn back the clock to 1930 or 1957 or 1969, but an effort by those who have already been backed to the wall to draw one final line in the sand. The plain fact is that as our free speech tradition has evolved, we

14. Street v. New York, 394 U.S. 576 (1969).

have come to demand ever more toleration of our citizens. And viewed from this perspective, we should, perhaps, be more understanding of those who, like Jesse Helms, the Chicago aldermen, George Bush, Jerry Falwell, Catharine MacKinnon, and the University of Michigan, sometimes find it more difficult to comply with the demand that we tolerate ever more outrageous expression.

Moreover, in attempting to understand this phenomenon, it is important to note that, viewed on their own terms, each of these incidents may be seen as a relatively narrow and indeed, quite *reasonable* effort to limit expression. Consider, for example, pornography. The speech restricted by such legislation is, by definition, sexually explicit and non-political. It does not expressly address any issue of public or political concern. Indeed, it would be hard to argue that the process of self-government would be *seriously* threatened by a reduction in the availability of material that graphically depicts the subordination of women as sexual objects who enjoy pain and humiliation. Moreover, it seems reasonable to assume that, at least at the margin, pornography does, indeed, reinforce the image of women as sexual objects and thus increase the incidents of both violence and discrimination. In light of these considerations, one might quite reasonably conclude that little would be lost, and perhaps *much* gained, by restricting pornographic expression.

Consider also racist, sexist, and homophobic speech in the university setting. There can be no doubt that the more egregious forms of such expression can be degrading, hurtful, and intimidating to its victims. In a university setting, in which full and free discussion is a central aspiration, the failure to suppress such speech may, ironically, have a dampening effect on open and robust debate, for such speech may intimidate its victims, render them outcasts, and effectively silence them as contributing members of the community. The net effect of tolerating such expression may thus be to inhibit rather than to promote free and open discourse.

Similarly, consider the efforts to restrict the NEA. Although government may not ban offensive art, it does not necessarily follow that it must therefore subsidize such art. Surely, government is under no constitutional obligation to establish the NEA in the first place. Why, then, if it chooses to fund some art, should it be precluded from exercising reasonable judgment about the types of art it will support? For example, although government cannot *ban* "bad" art, it surely is under no constitutional obligation to *fund* "bad" art, even if it funds "good" art. Why, then, must government fund art that denigrates religion, or promotes unlawful or undesirable conduct, or is inappropriate for children, or deeply offends others? There is a

common sense difference between suppression and failure to subsidize, and government arguably should have greater discretion in the latter situation than in the former.

Finally, consider flag burning. For more than two hundred years the American flag has served as a unique and powerful symbol of national unity. Government could quite reasonably conclude that *any* physical abuse of the flag dilutes its symbolic value to the nation. Moreover, legislation directed at flag desecration does not in any meaningful way suppress anyone's speech, for those who would burn the flag as a means of expression have available to them innumerable other ways through which to express their views. They can criticize the flag or the nation or the specific policies they oppose; they can distribute leaflets, march, picket, use loudspeakers and make speeches; they can tear the Constitution, burn the president in effigy, and smash models of the Capitol. In short, flag desecration statutes may serve a legitimate governmental interest without in any appreciable way interfering with the opportunities for free expression.

Similar arguments could, of course, be made with respect to the Art Institute and Hustler situations as well, but I will spare you the effort. My basic point, however, is clear. In each of these situations, there is at least a *reasonable* basis for the claim to restrict expression. Accordingly, these efforts to limit speech cannot fairly be dismissed as draconian or as profoundly incompatible with the essential prerequisites of a free and open society. Their adoption would not make a mockery of the First Amendment or cause the Republic to fall.

Reasonableness, however, is not, and cannot be, the constitutional standard for government efforts to restrict speech because the message is unwise, disagreeable, harmful, or offensive. To the contrary, if there is a central principle in our First Amendment jurisprudence, it is that government ordinarily may not restrict expression for such reasons, for such suppression distorts public debate, mutilates the thought process of the community, violates the equality of status in the field of ideas and elevates the government to the role of platonic censor. Thus, in such circumstances, the First Amendment prohibits even seemingly reasonable efforts to restrict free expression.

As history teaches us, there is a serious risk of distorting public debate whenever we attempt to assess the reasonableness of such statutes on a case by case basis. This is so because ad hoc evaluations of the reasonableness of statutes that restrict the expression of particular messages are especially likely to become involved with the ideological predispositions of those doing the evaluating. There is a danger, in other words, that legislators, judges, and jurors — to say nothing of advocates — will be influenced by conscious or unconscious

biases that will undermine their ability to evaluate accurately and impartially both the costs of the restriction and the benefits to be gained. The safest, the most sensible course in such circumstances is to *over*protect the right of free speech — to invalidate even "seemingly" reasonable restrictions — in order to insure that we do not inadvertently and discriminatorily *under*protect the right of free expression.

The wisdom of this approach is evident in the six incidents with which I began. In each instance, the advocates of restriction are vehement about the wisdom of their approach. In each instance, the advocates of restriction assert that their claim is distinguishable from and stronger than the others. In fact, however, there is no firmly principled reason to accept any one of these claims without accepting the others. And although accepting any one of these claims may not have seriously deleterious consequences for the system of free expression, accepting them all — and accepting all of those that inevitably would follow — would have deleterious consequences, indeed. Put simply, to accept these sorts of arguments for restricting speech because of its message would invite an analogical stampede that would eventually swallow the First Amendment itself.

I would like to conclude with a few words about the role of the judiciary in interpreting and enforcing the First Amendment. It is instructive, I think, that most of the disputes with which I began this essay have thus far been resolved in a manner that is highly protective of the right of free expression. This is due largely to the intervention of the federal courts. The Supreme Court unanimously invalidated the $150,000 judgment won by Falwell against Hustler, holding that a cause of action for intentional infliction of emotional distress in such circumstances is absolutely forbidden by the First Amendment.[15] The United States Court of Appeals for the Seventh Circuit invalidated the Indianapolis pornography ordinance, holding that it violated the core First Amendment prohibition on viewpoint discrimination.[16] A United States District Court in Michigan invalidated the University of Michigan's restriction on campus hate-speech, holding that it was unconstitutionally vague and overbroad.[17]

The Supreme Court invalidated both the Texas flag desecration statute[18] and the federal Flag Protection Act,[19] holding that they

---

15. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

16. American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

17. Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989); *see also* Zollinger, *supra* note 10.

18. TEXAS PENAL CODE ANN. § 42.09 (West 1989).

19. 18 U.S.C. § 700 (Supp. I 1989) (declared void as a violation of the First

violated the "bedrock" First Amendment principle that government may not restrict speech because the ideas are offensive to others.[20] And, although the NEA issue remains a subject of controversy, the debate has been shaped — and sharply narrowed — by continued reference to the principles of free expression that the Supreme Court has articulated and enforced over the years. Thus, although it is fashionable these days to question whether courts make a difference, there can be little doubt, that in this corner of constitutional law, they make a *significant* difference, indeed.

We have recently witnessed the retirements of two of the greatest defenders of free expression our nation has ever known. For some thirty-five years, Justices William Brennan and Thurgood Marshall offered a powerful vision of free expression as a central component of our constitutional system. Whether dealing with the Communists or the Klansmen, civil rights demonstrators or anti-war protestors, flag burners or leafleteers, they articulated a broad conception of freedom of speech that has produced a more tolerant, a more open, and a more enlightened society. Can we continue to rely on the Supreme Court to articulate and defend this vision of free expression? I fear not. If last Term's decisions in *Barnes v. Glen Theatre*,[21] upholding a complete ban on nude dancing, and *Rust v. Sullivan*,[22] upholding a federal regulation[23] prohibiting federally-funded family planning clinics from informing women of their constitutional right to abortion, are any indication of the Court's future direction, we are in for hard times, indeed.

19. 18 U.S.C. § 700 (Supp. I 1989) (declared void as a violation of the First Amendment by United States v. Eichman, 496 U.S. 310 (1990)).

20. Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990).

21. 111 S. Ct. 2456 (1991).

22. 111 S. Ct. 1759 (1991).

23. 42 C.F.R. § 59.8(a)(1) (1991).