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Reining in Judges: The Case of Hate Speech

Danny J. Boggs

REINING IN JUDGES: THE CASE OF HATE SPEECH

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I am going to discuss the area of First Amendment free speech, as connected to the reining in of judges. My thesis is that judges are subject to legitimate efforts to rein them in only when their decisions or their new principles are not applied evenhandedly to all, such as when the nature or identity of the party seems to influence the outcome or the principles that a judge puts into effect. In fact, one area where, at one time or another, it seems as if every critic or every interest group has wished to rein in judges is the area of free speech. One commentator, Michael Kent Curtis,[1] posed it thusly, that Patrick Buchanan complains that the Supreme Court has protected "criminals, atheists, homosexuals, flag burners . . . and pornographers,"[2] while Professor Catharine MacKinnon and critics on the Left attack them because they protect "Nazis, Klansmen, and pornographers."[3] At the same time, the same general principles enforced by judges have protected the speech of advocates of integration, opponents of the war in Vietnam, and political radicals. I would take as a lesson that this is one area where judges have indeed stood up for neutral principles and that it has largely been the critics and, most recently, a group of academic critics who have been wholly unable or unwilling to propound a principled basis for their efforts at narrowing First Amendment protections. That is the story that I want to talk about today.

I

Obviously, the history of free speech in America could be the subject not only of a lecture but of an entire course, so I will skate very quickly over the fact that in America we have had a long struggle, going as far back as the Alien and Sedition Acts, through some of the Civil War activities and rising to significant attacks of free speech during the World War I and post World War II period. Over that time, there grew up a body of

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1. *See* Michael Kent Curtis, *"Free Speech" and Its Discontents: The Rebellion Against General Propositions and the Danger of Discretion*, 31 WAKE FOREST L. REV. 419 (1996).

2. Dan Balz, *Buchanan Takes on the Judiciary*, WASH. POST, Jan. 28, 1996, at A8.

3. CATHARINE A. MACKINNON, ONLY WORDS 109 (1993).

decisions leading to the overall idea, certainly by the 1950s and early 1960s, that we did not look at the ideas based on some intrinsic view of their worth. Courts looked directly and narrowly only at a set of potential evil effects that were initially under the rubric of "clear and present danger."[4] By the time of the case of *Brandenburg v. Ohio* in 1969, the Supreme Court required an even stricter standard of an imminent, lawless action that the speaker both directed or intended to bring about and was indeed likely to do so.[5] That essentially was the culmination of what Harry Kalven, who was my mentor at the University of Chicago, referred to as the free speech tradition.[6] You will find a lot of this laid out in an interesting book compiled by Professor Kalven's son, Jamie Kalven, called *A Worthy Tradition: Freedom of Speech in America*.[7] To me, the bedrock of that tradition was that we do not distinguish, in terms of protecting speech, as to whether it expresses an idea that we approve of or that we do not.

Mr. Justice Holmes, in the dissent in *United States v. Schwimmer*, put it thusly: "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[8] Mr. Justice Douglas in the *Terminiello* case in the 1940s put it more powerfully, that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[9] Mr. Justice Holmes, speaking again in the *Abrams* case put it perhaps most starkly, that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death."[10]

That had become the firmly established doctrine as of the 1960s and 1970s. It was a doctrine that was adhered to by people across the political spectrum. I am going to speak sometimes perhaps overly loosely of the Left and the Right, but culture critics and observers of politics will understand what I am talking about. In the 1960s and 1970s, the attacks on freedom of speech were primarily against speakers from the Left at the time of Vietnam and the time of the civil rights movement. The political Right, certainly in the academy, both students and faculty, was generally more tolerant and supportive. It is both instructive and perhaps little known that the original Berkeley Free Speech movement, before some violence had intervened, included on its executive committee representa-

4. Schenck v. United States, 249 U.S. 47, 52 (1919).
5. 395 U.S. 444 (1969).
6. *See* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965).
7. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jamie Kalven ed., 1988).
8. 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).
9. Terminiello v. Chicago, 337 U.S. 1, 4 (1949).
10. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

tives of the Young Republicans and of Youth for Goldwater.[11] Professor Elana Kagan in the *University of Chicago Law Review* put it in academic terms that:

> [T]he government may not restrict expressive activities because it disagrees with or disapproves of the ideas espoused by the speaker; it may not act on the basis of a view of what is a true (or false) belief . . . . [T]he government cannot count as a harm, which it has a legitimate interest in preventing, that ideas it considers faulty or abhorrent enter the public dialogue and challenge the official understanding of acceptability or correctness.[12]

Now this, of course, does not mean that any individual or the society as a whole may not come to a conclusion as to the good or evil of particular ideas, and indeed I think we hope that they will exercise that thought and that discretion. But this principle was perhaps put to its strongest test in the *Skokie* case, in 1977, where a parade by Nazis through a suburb of Chicago with a significant Jewish population was also permitted.[13]

Thus it is not to say that *society* thought that all ideas were equal. I think that it has been certainly part of the Zeitgeist, let us say, that Nazism was the ultimate evil, and that Communism was not looked at by the reigning authorities in quite the same way. In 1969, Jane Fonda told a college audience, "I would . . . think that if you understood what communism was, you would pray on your knees, that we would someday become communist."[14] Certainly, Ms. Fonda has come under a lot of attack in the years since, but I believe that if she had said the same thing about Nazism, her popularity would not have endured. And her husband, Ted Turner, confessed, "communism is fine with me. It's part of life on this planet."[15] Again, had he said the same of Nazism, I doubt he would be a major mogul today.

Well, that was the state of the law and academic beliefs up to the early 1980s. But starting in the early 1980s, in a series of articles by Professor Charles Lawrence[16] and Professor Richard Delgado,[17] and really coming to a flood in the late 1980s and early 1990s, in articles by Duke Professor Stanley Fish,[18] one of the leading "crits," and Professor Cass Sunstein[19]

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11. *See* Barbara Garson, *Me and Mario Down by the Schoolyard: Recollections of the Berkeley Free Speech Movement*, THE PROGRESSIVE, Jan. 1, 1997, at 24.

12. Elana Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 428 (1996) (footnote omitted).

13. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978); *see also* Skokie v. National Socialist Party, 373 N.E.2d 21, 25 (Ill. 1978) (holding "use of the swastika is a symbolic form of free speech entitled to first amendment protections").

14. Don Feder, *Communism's Victims Get a Monument*, BOSTON HERALD, Dec. 16, 1993, at 33.

15. *Id.*

16. *See, e.g.*, Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990).

17. *See, e.g.*, Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

18. *See, e.g.*, Stanley Fish, *Fraught with Death: Skepticism, Progressivism, and the First Amendment*, 64 U. COLO. L. REV. 1061 (1993).

19. *See, e.g.*, Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992).

from Chicago, among others, the critics made two major points. They first said it's really not true that sticks and stones may break my bones but words will never hurt me; that words really can hurt. Indeed, one of the major documents of that movement is called *Words that Wound.*[20]

The second point that was made was that suppressing some speech really would make a better society—that there really is no good reason to allow advocacy of racist, sexist, or fascist ideas. And at least in my observation, that was pretty much the extent of the analysis. I was rather bemused when I first began to read these articles because it seemed to me that they had really overlooked or failed to address two very major and obvious counterpoints. The first is that these arguments are *not* new. None of those supporters of free speech, whether the justices or the academics, ever believed that words could not be harmful to people. Whether you say to a Jew that Hitler was right or you say to a Ukranian that Stalin was right, that is going to be distressing and upsetting. It certainly hurts people to have Communist speakers out there saying that it is proper to liquidate the bourgeoisie or Jerry Rubin out there saying that it is proper to kill your parents.[21] It would be a very shallow view of the history of free speech controversies to think that the supporters of free speech never thought that words could be harmful.

The second counter-argument is that none of those articles that addressed the question of whether society would be better off without some kinds of speech ever considered that principle in light of the possibility of attacks on the speech that came from their side of the spectrum. Certainly many people, perhaps more people, think that we would be a better society without propaganda in favor of drugs, in favor of Communism, in favor of rioting, in favor of theft, yet those who spoke on that side were also under the protection of the worthy tradition. Professor Curtis in the *Wake Forest Law Review* put it as follows, "True hate speech and much pornography, like much protected political speech, are evil. Evil ideas can have evil consequences . . . . Bigoted speech can cause serious harm. It can help produce a bigoted society. Equality is a key constitutional value."[22] But one can simply take that same sentence and substitute other words about producing other types of societies, that would eliminate other values that we hold dear and that have been under attack by protected political speech.

The new academic authors did not repudiate those ringing old quotes that I gave you from *Abrams* and *Schwimmer*, from Holmes and Douglas.[23] They did not repudiate them directly, but either the authors of those quotes, on the one hand, or the academics, on the other, really did

20. MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

21. *See* William M. Kunstler, *'Ruckeses' Abbie Hoffman Raised Were Part of the Greening of America*, LOS ANGELES TIMES, April 19, 1989 (Metro Section) at 1-2.

22. Curtis, *supra* note 1, at 422-23 (citation omitted).

23. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

not take them very seriously. When Holmes talked of freedom for the speech we hate, did he really mean to refer to speech that we really, really hate? Did Holmes say it so easily because he really did not hate the pacifist speech or the socialist speech at issue in those cases? Did Mr. Justice Douglas in *Terminiello*, when he talked approvingly about upsetting people, do so because he thought it was okay to upset people with certain types of speech and did not think about how it would be with others?[24]

I must say that the third quote I used from Justice Holmes was from someone who really knew what he was talking about. Sometimes I think Douglas's rhetoric ran beyond what he was seriously thinking about. But when Holmes, in the *Abrams* quote, talked about being willing to hear even speech that we believe to be fraught with death, that was something Holmes knew about. Now, we think about Justice Holmes primarily from his decisions in the 1920s and 1930s, but he had fought in the Civil War. Not only that, he had been wounded on three occasions; at the time of Holmes's death in 1935, it is almost inconceivable that this man had fought at Antietam. Among his most intimate personal effects were a small paper parcel with a note reading: "These [musket balls] were taken from my body in the Civil War," and two Civil War uniforms with a note, "the stains upon them are my blood."[25] Now a man who had gone through that and still made that kind of statement, I think he at least knew what he was talking about and believed in it.

I began to think that there are three possibilities that could support the views of these academics. Maybe they have not been willing to put these forward, but I see only three possibilities. The first one is that they simply wanted to go back to the views of critics of free speech, as in the dissenting opinion of Mr. Justice Jackson in *Terminiello,* which said that a too even-handed approach could be corrosive of our national values and "convert the constitutional Bill of Rights into a suicide pact."[26] Now if these people who had supported free speech in the past had made a *mea culpa* and said, "We were wrong, Justice Jackson was really right and we should go back to that," that would be one way at least of justifying their current position on an even-handed basis. I have not seen any of them do that.

The second possibility is essentially one of pure power. It says that in the 1950s and 1960s we wanted freedom for our speech because we didn't have power, but now that we have the power to suppress others, we will do it. Whether or not that is what the critics actually believe, that is not the principle they have put forward, so we will pass that one.

The third possibility, although very few have put it forward, is that there could be some principled distinction, whereby speech, however de-

24. Terminiello v. Chicago, 337 U.S. 1 (1949).

25. Woody West, *Justice Holmes: The Man and the Myth*, INSIGHT MAGAZINE, Aug. 21, 1991, at 42, *available in* 1991 WL 5801558.

26. 337 U.S. at 37 (Jackson, J., dissenting).

fined to be of a racist, or sexist, or fascist nature, was in some way qualitatively and definitively worse than speech of a Communist or Socialist, or some other nature. If the critics could come forward with a good theory of that sort, then that would be something we could at least debate. Failing that, as Professor Eugene Volokh of UCLA Law School said when he looked at some of these articles that suggested revisiting *Brandenburg*:

> There are certainly good arguments in favor of revisiting Brandenburg. But the one thing that I think should be stressed is that if one revisits it, one will have to revisit it for everyone: for people who advocate killing abortion doctors, for people who advocate Communist revolution (how many murders did Das Kapital incite?), for people who advocate holy wars (Christian, Moslem, or what have you), for people who advocate race riots, and so on.
>
> This might, in fact, be the best reason not to revisit Brandenburg. Certainly speech can influence people to do incredibly nasty things. But if that's a justification, boy, will a lot of speech will be up for grabs.[27]

Now one professor I will acknowledge has at least made an effort. Professor Mari Matsuda, in an article in the *Michigan Law Review* in 1989, said, essentially, that it's really right that we can't distinguish the kinds of hate speech we want to suppress on any content-neutral basis that will not also be undermining free speech as a whole.[28] But she said we can tell why racist speech is worse than Communist speech, so that it can be suppressed. She said it is because there is no government in the world that is officially racist, but there are lots of governments in the world that are officially Communist. So, we will count heads, and if a speech has sufficient international support, then that is going to be the reason it cannot be suppressed.

Of course, 1989 was a particularly poor year in which to make that argument, as the number of Communist countries began to sink rather rapidly close to zero. There is also a more philosophical point of opposition, which asks why American free speech doctrine *should* rest on what other countries are espousing. Under that principle, if we were to have a rise of avowedly racist or fascist governments abroad, then suddenly that speech would become better protected, and as the number of Communist countries fell toward zero, that speech would not be protected.

That is the only explicit effort to make a distinction that I have seen, and as I say, I do not think that it succeeds at all.

That summarizes what I would call the academic attack on the tradition. Given the success of a whole series of academic movements, from expansion of torts, to various types of civil rights litigation, to criminal procedure protections, one might have thought that this flood of academic writing, which while it was criticized in the academy certainly had

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27. Eugene Volokh, *In "The Limits of Hate Speech: An On-Line Exchange,"* LEGAL TIMES, May 1, 1995, at 17.

28. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

by far the preponderance of numbers of articles, might lead to some echoes in and favorable reception by the courts. But instead, I think the history is that it ran into a complete stone wall. You might call it a counterattack by the courts on the academic attack or simply a rejection of it (because, of course, the courts don't get into these things until somebody brings a case to them). But the court history, as I say, has been almost a complete rejection.

It began most notably in 1989 in a case called *Doe v. University of Michigan*.[29] The University of Michigan, a state institution, and therefore generally subject to First Amendment free speech principles, had enacted a fairly garden-variety university speech code. It had received some favorable attention because it was at least rumored that it had been vetted by the Michigan Law School and by leading academics there.[30] An action was brought against this code by a graduate student who said that his speech was being chilled by not being able to say things that might be considered actionable and offensive under the code. Judge Avern Cohn of the United States District Court for the Eastern District of Michigan, a Carter appointee, who would generally be considered as one of the more liberal judges on the court, simply demolished the code in an extensive but not extremely respectful opinion, simply reciting the litany of free speech cases and adding one that concerns speech in the sense of symbolic speech, *West Virginia Board of Education v. Barnette.* That was the flag salute case containing the famous quotation that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[31] Indeed, after Judge Cohn's ringing rejection, the University went back to the drawing boards and did not even try to appeal.

In 1992, the Supreme Court of the United States decided a case called *R.A.V. v. City of St. Paul*, which began with perhaps the most infamous of political symbols, a burning cross, being placed on the lawn of a black family in Saint Paul.[32] Of course, that act could easily have been prosecuted under any number of other statutes. It constituted trespass; it constituted arson; it probably constituted what in Kentucky we call terroristic threatening, but the statute under which it was prosecuted instead forbade the placement on any property, even your own property, of any "symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[33]

This was the statute that went to the Supreme Court and, of course, from the terms of the statute as I read it, the statute was broad enough to

29. 721 F. Supp. 852 (E.D. Mich. 1989).
30. *See id.* at 855.
31. *Id.* at 863 (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
32. 505 U.S. 377 (1992).
33. *Id.* at 380 (citing ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

cover, for example, a Nazi party flying a swastika flag over its own property and headquarters. It would not have covered a Communist party flying the hammer and sickle because, presumably, it would offend everybody, or at least would not distinguish on the basis of race, creed, color, or gender. So on those two bases, and the basis of a perhaps novel doctrine of underbreadth, rather than overbreadth, the Supreme Court unanimously by outcome (although there were, I believe, four opinions) struck down this attempt to differentiate among kinds of speech.

Most recently, in 1995, in *Corry v. Leland Stanford Junior University*, a state court decision rendered under a state First Amendment analog, a similar decision was reached on what Stanford had thought was a code that was even narrower and more nuanced (as the phrase is).[34] Now the reason that this rested on a First Amendment principle is that in California, there is a law called the Leonard Law[35] stating that California private schools are subject to the same restrictions as are imposed by the First Amendment. A California state court struck down the Stanford code because it banned "fighting words," but only fighting words that grew out of sex or race considerations, not out of political considerations. So, it was improper to say unkind things about a person because of their sex or race, but it is not impermissible to, for example, (and it was quite common, at least when I was in school) call someone a fascist. The California court struck that down, and again the University did not even appeal. Professor Gerhard Casper, who had been the Dean at the University of Chicago Law School, then became the President of Stanford. Although expressing some dismay, he decided not to take the case up and get an even more resounding appellate judgment against the University.

So, we have an academic attack. We have the court counterattack, based again not on denying that harm may occur, but on indicating that the application of the laws must be even-handed. We cannot say we are going to look at harm from one group and not harm from another and we are not going to undermine the overall principle that simply avoiding individual emotional harm is not a ground for violating free speech. I would add as a footnote, not a direct holding but the implication of the Supreme Court's decision in *Rosenberger v. University of Virginia* in 1995.[36] This was the case in which the University of Virginia funded various student publications that could be considered of all sorts of views, even anti-Christian from a political point of view, but would not fund an overtly Christian publication. The Supreme Court held by five to four

34. No. 740309, slip op. at 40-42 (Cal. Super. Ct. Feb. 27, 1995) *available in The Robert Crown Law Library: Stanford Law School* (last modified Jan. 24, 1996) <http://www.stanford.edu/group/law/library/what/corrybc.html>; *see also* Symposium, *Voices of the People: Essays on Constitutional Democracy in Memory of Professor Julian N. Eule*, 45 UCLA L.R. 1537, 1634 n.299 (1998). John A. Russ, *Shall We Dance? Gay Equality and Religious Exemptions at Private California High School Proms*, 42 N.Y.L. SCH. L. REV. 71, 123 n.82 (1998).

35. *See* CAL. EDUC. CODE f48950 (West 1998) (applying to elementary and secondary shcools); CAL. EDUC. CODE f943671a) (West 1997) (applying to post secondary education).

36. 515 U.S. 819 (1995).

that even on the grounds that state spending was involved they could not make this discrimination; and certainly from the decisions on both sides, it would have been perfectly clear had the school decided to say that we are going to suppress the Christian speech but not the anti-Christian speech that such a code would have gone down nine to zero, with little debate.[37]

So, that is the historical status of the free speech doctrine today. I want to say a few things about what I consider the cultural background of this. That is, given what I thought would be the legal outcome, why did the critics press forward? How were they blind to the faults in their reasonings? Why did they start in on this argument in the first place? And here, as I say, I am talking culture, not law. It is my opinion that for all the talk in the legal academy of story-telling, of empathy for persons of different experience, that the critics simply could not conceive that the harm they could see in racist or sexist speech could also be a harm in political speech, in anti-family speech, or any other type of speech.

They could not conceive of what a Ukranian or Cambodian might think about Communist speech. They could not conceive of a person like a friend of mine who is an immigrant doctor from the former Soviet Union who said she had a very hard time going to *Les Miserables* (a play that I think is wonderful) because the revolutionaries are waving red flags. That to her was as hurtful as was a swastika to a Jew, or a burning cross to a black person. That is something, I think, these academics could not even conceive of.

Professor Catharine MacKinnon, who has been very active in this area, was asked about an incident at the University of Pennsylvania where the student newspaper had run an article critical of affirmative action and of Malcolm X, and a student group seized all the copies of the newspapers and burned them. Professor MacKinnon said, "[t]here is expressive value in what the students did, and there is also expressive value in letting the paper publish," and she was not prepared to try to balance between these two.[38] I was immediately struck by this, because as Winston Churchill said, "I decline utterly to be impartial as between the fire brigade and the fire."[39]

And it is certainly clear that Professor MacKinnon would not have the same view had it been a male supremacist group that had been burning a women's magazine. So the simple failure of understanding or imagination, I think, is one part.

The second part, I think, is that in the 1980s and as we moved into the 1990s, there was essentially a decline of the Left on a world wide basis, certainly in the cultural and intellectual areas. Earlier, the Left both tac-

37. *See id.* at 819-20.

38. Anthony Lewis, *First Amendment, Under Fire from the Left*, N.Y. TIMES, Mar. 13, 1994 (Magazine), at 42.

39. 4 SIR WINSTON S. CHURCHILL, WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES 4034 (Robert Rhodes James ed., 1974).

tically and strategically found the principle of equality of ideas to be useful and favorable. Tactically, because the Left was likely to be the main target of efforts to suppress speech and strategically because by and large in the 1950s and 1960s, it seemed that the ideas of the Left were winning. That is, in an open competition, the Left—whether you think of the Left as radicalism or socialism at home, or Communism abroad—saw itself by and large as being on the march.

As we got into the 1980s, with the rise of Margaret Thatcher in England, of Reagan in the United States, and then the complete collapse of Communism abroad, this no longer seemed to be the case. The tactical and strategic advantages of a doctrine of equality were no longer working as they once had. I see many of the academic articles as having been an attempt to relegitimize that point of view by attacking other ideas and indicating that ideas were no longer equal in legal protection, and that implicitly, their ideas were better because the others were worse, as shown by the arguments for suppressing them. Thus, we have seen in the case of Timothy McVeigh, an attack on a truly hideous book, called *The Turner Diaries,*[40] as having been the blueprint for his notion of race war, ignoring at the same time that Pol Pot, who told us that he slept peacefully, was directly inspired by the writings of Marx to impose his ideas of the equality of death on Cambodia.[41]

So the idea that we should try to suppress only at the bad ideas from one side and not on the other, I think is, at bottom, what has stimulated these attacks. There was also the shock of opposition to left ideas and attacks coming even on the campus itself. Perhaps the most intriguing example of this was a set of incidents that occurred at Yale in the 1970s and 1980s. In 1975, Professor C. Vann Woodward, the famous historian of the South and of racial issues, led a committee that made a report to President Giamatti, basically upholding in the strictest terms the free speech tradition.[42] Giamatti, as you know, then went on to become the commissioner of baseball.[43]

In 1986, Yale was in an uproar. A set of posters that announced and supported, with appropriate pictures, GLAD, or Gay and Lesbian Awareness Days, found itself mocked by a student who put up posters supporting "Bestiality Awareness Day," or BAD.[44] The student was promptly brought up on charges and suspended from Yale for two years until Professor Woodward and others came to his defense. Professor Benno Schmidt, a law professor and Dean of the Columbia Law School, had become President of Yale University and ultimately rescinded the punishment.[45] But that is just one example, and I say why did this all

40. William L. Pierce, writing as ANDREW MACDONALD, THE TURNER DIARIES (1978).
41. *See* Jeff Jacoby, *Pol Pot's Clear Conscience*, BOSTON GLOBE, Nov. 4, 1997, at A17.
42. *See Yale's Beastly Behavior*, WALL ST. J., Sept. 23, 1986, at 30.
43. *See id.*
44. *See Yale's Beasty Beharior*, *supra* note 42.
45. *See id.*

start? People on the Left found themselves under attack from unexpected quarters rather than being the attackers.

Before I finish, let me say that one of the criticisms of a position such as mine, which as I say was the tradition when I was coming through school, is that it is a position of moral skepticism; that we simply believe that all ideas are equal. Justice Holmes was thus attacked in one of the articles that I have cited. As I say, I think that, looking at Holmes's life that is not a fair criticism of Holmes, for not believing in anything, and I know that for myself, I do not think I am a moral skeptic at all. I think I am very clear on what ideas I think are better than others. But what I do believe is that I disdain giving to others or even to myself the power to impose by governmental force that nonskeptical view that I have of the world. It is fine for me or any individual to decide for ourselves what are the true ideas. But the power to decide when it is true enough to impose on others is one that I do not claim for myself. And it is certainly one that I do not wish to give to others.

So, to summarize, I believe we have a First Amendment doctrine that has served us well. There will certainly continue to be close questions in individual cases, such as, the concept of what is a present danger; what is imminent lawlessness; when is speech brigaded with action enough to be restricted; or when do we apply conventional libel law or the *Garrison v. Louisiana* principle of punishment for false statements of fact.[46] But all of these issues can be decided on neutral principles, independent of who the speech favors or who it attacks. If we face those questions with a clear eye to the nature of the actions and the words, not to who the speakers are or what the words espoused, we will best serve both political discussion and freedom from arbitrary government power.

I will predict, both as a matter of constitutional law and of policy, that all efforts at speech regulation will fail that are not put forth under what I would call "the Golden Rule of Speech": that we will suppress the speech of others only under the same kind of rules by which we are willing to allow others to suppress our speech. And I believe that we will continue our worthy tradition where government keeps its hands off virtually all speech without trying to decide whether that speech, in the view of the government or the governors, is worthy or unworthy.

46. 379 U.S. 64 (1964).

Comments