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## Free Trade in Ideas Is (or Ought To Be) Absolute for Adults

*Arnold H. Loewy\**

Free trade in ideas is tough medicine. It includes all sorts of things that we would rather not hear. In fact, it is typically only relevant when the government seeks to punish unusually bad speech. Let us examine why that is. No government would ever punish what it considers good speech. The most virulent dictatorship imaginable would not punish a speaker that says: "My government and its leaders are wonderful." Neither would it punish neutral speech such as "blue is prettier than red." The most dictatorial governments, however, would punish what it considers bad speech, e.g., "our president is doing a bad job and should be thrown out of office." But no country that purports to call itself a democracy would even consider punishment for such speech.

The only time it is necessary to add free speech principles to general democratic principles is when the speech is very bad. Hate speech is certainly an example. Not uncommonly, when a speaker spews hatred, some contend that he is abusing speech and that his free speech rights should not be protected. The irony of this contention should be apparent. The only time that free speech, as a separate principle from democracy, may be needed to protect the speech is when many will say: "This is an abuse of free speech and should not be protected at all."

Candidly, it is counterintuitive to protect very bad speech. If within the democratic process, society thinks that the idea is so bad that we would be better off without it, why do we tolerate it? I think that the core principle is our lack of trust in government to separate good ideas from bad ideas for us. That is, just as we do not allow government to decide religious truth for us, we do not allow it to decide any form of philosophic truth. Instead, we leave the search for philosophic truth in the realm of individual decision making. This concept is encapsulated in such well-known Supreme Court

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utterances as: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,"<sup>1</sup> or just simply: "There is no such thing as a false idea."<sup>2</sup> First, this Article will briefly show the costs of tolerating bad speech, but it will also show why society should bear this cost and why other models of speech regulation fall short. Second, it will address obscenity regulation and demonstrate that the Supreme Court has created a philosophically flawed exception to its First Amendment jurisprudence. Finally, this Article will address the effects of obscenity and how it intersects with children's rights and the need to protect minors against obscenity.

### I. THE COST AND NECESSITY OF FREE SPEECH

Let us examine some of the costs of this approach. First, it means that we all have to tolerate speech that many of us find intolerable. I, for example, as a citizen of German/Jewish ancestry have to tolerate Nazi marches in Skokie, Illinois, a suburb of Chicago, which is populated by a substantial number of Holocaust survivors.<sup>3</sup> Many of us have to feel "awful" and "terrible" that people like Barry Black and his friends are saying bad things about African-Americans at a Klan meeting.<sup>4</sup> Similarly, we can do nothing to prevent women from being portrayed as enjoying humiliation and hurt.<sup>5</sup>

An important corollary to this principle is that any harm that comes from the expression of a hateful idea cannot count as harm for constitutional purposes. As the Court put it: "[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."<sup>6</sup> So, the fact that speech frightens or angers people is a reason for its very existence, not a harm that can be weighed against the value of speech.

Yet Professor Kende argues that hate speech should be treated as

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1. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

2. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

3. *See Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

4. *See Virginia v. Black*, 538 U.S. 343, 349 (2003) (testimony of Sechrist).

5. *See Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

6. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

lower value speech than commercial speech because it has a greater capacity for harm.<sup>7</sup> Even apart from the fact that what Kende calls harm cannot count as First Amendment harm, greater capacity for harm is not the basis for classifying speech as “low value.” Speech is classified as low value only where the message is less important for First Amendment purposes than other speech. Thus, commercial speech, which at one time was not recognized as speech at all,<sup>8</sup> is treated as lower value speech than political speech because it merely proposes a commercial transaction. Yet, even with low value speech, if the purpose of the regulation is to silence rather than channel or regulate the speech, it would be unconstitutional.<sup>9</sup> Consequently, even if Professor Kende were successful in treating hate speech as low value speech, he could not inhibit its dissemination.

But, says Professor Kende, why not employ the more balanced approach of Europe or South Africa? In the first place, it is hard to see what there is to balance. Despite arguments to the contrary, speech, because it is only that, cannot conflict with other values. And so when Klansman Clarence Brandenburg says: “Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel,”<sup>10</sup> his remarks do not conflict with the Equal Protection Clause because states need not (indeed cannot) implement his suggestion. Obviously, implementation of Brandenburg’s views would conflict with equal protection, but recitation of them does not.

Beyond that, we have already experimented with the European/South African model and it was an unsuccessful, short-lived experiment at that. In *Beauharnais v. Illinois*,<sup>11</sup> the Court, in what was styled a group libel case, upheld the conviction of a man for distributing leaflets seeking membership in the “White Circle League.” These leaflets contained several demeaning and derogatory characterizations of African-Americans.<sup>12</sup> The Court decided that it

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7. Mark Kende, *Regulating Internet Porn: A Comparative Constitutional Perspective on Passing the Camel Through the Needle’s Eye*, 2007 BYU L. REV. 1623.

8. See *Valentine v. Christensen*, 316 U.S. 52 (1942).

9. See Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low Value Speech*, 58 WASH. & LEE L. REV. 195, 222 (2001).

10. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

11. 343 U.S. 250, 267 (1952).

12. *Id.* at 253.

was rational, and hence constitutional, to punish group libel.<sup>13</sup> Of course, as we have already noted, such a test would uphold a conviction against any speech the government chose to punish, because governments do not go about punishing speech without reason.

More importantly, if the *Beauharnais* model had survived, the civil rights successes of the sixties might not have. Imagine a Louisiana court<sup>14</sup> faced with a sit-in demonstration under the *Beauharnais* model. The court's opinion might have looked something like this: "These demonstrators threaten and insult the very way of life this community has come to accept as the norm. As a result, it makes us feel unsafe, insecure, and exacerbates racial tensions. Indeed, the very concept of integration is libelous to the white race (*Beauharnais*). Conviction affirmed." Fortunately, we did not stay the *Beauharnais* course: civil rights demonstrators were constitutionally protected, and America changed for the better. I would not abandon that course in favor of one where the government gets to decide which ideas are worthy of protection and which are not.<sup>15</sup>

## II. OBSCENITY EXCEPTION

For reasons which have never been entirely clear or coherent, the Court has engrafted an obscenity exception onto its otherwise libertarian free speech jurisprudence. Under this exception, material that predominantly appeals to the prurient interest in sex, describes sex in a patently offensive way, and lacks serious literary, artistic, political, or scientific value is to be treated as obscene, and hence not constitutionally protected.<sup>16</sup> In measuring prurience and patent offensiveness, the benchmark is contemporary community standards.<sup>17</sup>

It should be apparent, though it has not been to the Court, that

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13. *Id.* at 262-64.

14. I do not have to limit this to Louisiana, though that state seems to have a disproportionately large number of cases that reach the Supreme Court.

15. Perhaps that is what Justice Black had in mind when dissenting in *Beauharnais*, he said: "If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'Another such victory and I am undone.'" 343 U.S. at 275 (Black, J., dissenting).

16. *Miller v. California*, 413 U.S. 15, 24 (1973) (citations omitted).

17. *Id.*; see also *Pope v. Illinois*, 481 U.S. 497 (1987).

this standard is anathema to the First Amendment. If the speech were denied constitutional protection simply because it was non-ideological, that would be one thing.<sup>18</sup> But to deny protection to speech because it is contrary to contemporary community standards is to deny protection because the speech is doing exactly what it is supposed to do, namely, offending (challenging if you will) contemporary community standards.

The closest the Court has ever come to explaining the reasons for its obscenity jurisprudence was in *Paris Adult Theatre I v. Slaton*,<sup>19</sup> where the Court opined: "These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."<sup>20</sup>

Strikingly, there has always been a disconnect between the Court's obscenity test and its rationale for the obscenity exception. Presumably, the Court is worried that persons of ill repute will congregate at places that market obscenity.<sup>21</sup> But, since most sexually explicit material is not obscene, it is hard to see how moving over an extremely ephemeral line will make a difference in terms of the kind of harm the Court fears. For example, if the movies at Paris Adult Theatre were offensive, but (according to the jury) not patently offensive, or, if they had some serious artistic value, but were otherwise prurient and patently offensive, they would bring about the same harm that *Paris Adult Theatre's* actual movie is said to cause.

Furthermore, whatever may have been said for the *Paris* rationale when handed down, it makes even less sense now. Today, apparently hard-core pornography is available at the most staid of places. For example at the Marriott Residence Inn in Provo, Utah, where the participants of this conference are being housed, at least nine sexually explicit movies are offered. Unless the hotel is guilty of false advertising, these appear to be of the hard-core variety. It is likely

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18. *Roth v. United States*, 354 U.S. 476 (1954), seemed to suggest that obscenity was nonideological. "All ideas having even the slightest social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] . . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Id.* at 484.

19. 413 U.S. 49 (1973).

20. *Id.* at 58.

21. *See id.* at 58 n.8.

(although I confess that I did not watch these particular films) that at least some are in the category that Justice Stewart would have recognized as obscene.<sup>22</sup>

If mainstream hotels such as the Provo Marriott are showing such films, it seems unlikely that a jury would find, or an appellate court would uphold, a verdict of “obscene” under contemporary notions of community standards. If this assertion is correct, one would expect great difficulty in prosecuting all but the most extreme obscenity cases, which may explain why obscenity prosecutions across the country appear to be dropping.

In my view, the solution is to channel sexually explicit material in such a manner as to avoid exposure to unwitting adults and, more importantly, children. Justice Stevens had it exactly right when he characterized obscenity,<sup>23</sup> as well as non-obscene sexually explicit speech,<sup>24</sup> as a nuisance, much like a pig in the parlor as opposed to the barnyard.<sup>25</sup> So, in his view, if the sexually explicit material was causing the harm envisaged in *Paris*, it could be channeled to another time or place where it didn’t do that harm, but it could not be totally banned.

Consequently, I am generally in sympathy with Kevin Saunders’ approach to protecting children by channeling material away from children and towards adults.<sup>26</sup> Knowing considerably less about technology than some, I will venture no suggestion as to how to do it; but to be constitutional, we must ensure that we do not reduce the adult population’s access to material that is fit for children.

Professor Saunders asks that given *Ginsberg v. New York*,<sup>27</sup> which upheld the conviction of the owner of Sam’s Luncheonette for selling obscene (as to children) material to a minor, why can’t we have a “Sam’s Luncheonette.com” which would do the same thing for the Internet? The short answer is that we can, so long as we remember that *Ginsberg* does not stand alone. Rather, it is a

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22. Justice Stewart claimed to know obscenity when he saw it. See *Ginzburg v. United States*, 383 U.S. 463, 499 n.3 (1966) (Stewart, J., dissenting); *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

23. See *Smith v. United States*, 431 U.S. 291, 311–12 (1977) (Stevens, J., dissenting).

24. *Young v. Am. Mini-Theatres*, 427 U.S. 50, 85 (1976) (Stewart, J., dissenting).

25. *Smith*, 431 U.S. at 317.

26. Kevin Saunders, *www.Sam’s\_Stationary\_and\_Luncheonette.com: Bringing Ginsberg v. New York into the Internet Age*, 2007 BYU L. REV 1661.

27. 390 U.S. 629, 633 (1968).

bookend case paired with *Butler v. Michigan*,<sup>28</sup> which had invalidated a law that forbade the sale of any book that was unfit for children.

Both *Butler* and *Ginsberg* were easy cases in that *Butler* clearly affected adults, whereas the effects of *Ginsberg* were strictly limited to juveniles. Most cases, however, are not that easy. The typical case to reach the Supreme Court in recent years has involved legislation or administrative regulation that inconveniences, but does not absolutely preclude, adult access in order to protect minors. Unsurprisingly, these cases have proven difficult for the Court.

For example, two cases, *FCC v. Pacifica*<sup>29</sup> and *United States v. Playboy*,<sup>30</sup> seem to cut in opposite directions. In *Pacifica*, the Court upheld time channeling of George Carlin's seven dirty words monologue to late night radio.<sup>31</sup> On the other hand, the *Playboy* Court refused to allow similar channeling of the Playboy channel on cable television.<sup>32</sup>

The major premise of *Pacifica*, which is that material that is protected for adults may be potentially harmful for children and may not be protected as to them, is undoubtedly correct. Whether the particular material in *Pacifica* was in fact realistically accessible to children is more doubtful. The offending broadcast was made at 2:15 in the afternoon, a time when most children were in school. Furthermore, because it was broadcast on an adult (in the sense of boring to children) radio station, it was highly unlikely that minors listened to it anyway. So far as we know, only one child heard the broadcast and he was in a car accompanied by his father for the entire fifteen minutes. The record does not divulge why the father was sufficiently outraged to complain to the FCC, but not sufficiently outraged (or protective of his child) to turn the radio off.<sup>33</sup> Regardless, there was no real evidence that time channeling was necessary to protect children.

*Playboy* distinguished *Pacifica* on the ground that cable is different from broadcast television or radio because cable is

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28. 352 U.S. 380, 384 (1957).

29. 438 U.S. 726 (1978).

30. 529 U.S. 803 (2000).

31. *FCC*, 438 U.S. at 751.

32. *Playboy*, 529 U.S. at 827.

33. Perhaps he was more concerned with filing a complaint with the FCC than he was with protecting his child.



voluntary.<sup>34</sup> Furthermore, it is at least theoretically possible to block Playboy's signal, thereby fully protecting the household.<sup>35</sup> Therefore, *Playboy* at a minimum establishes that channeling to protect children will be closely scrutinized, and that a governmental mandate to channel will likely only be successful if the government can establish a real need to do so.

### III. CHILDREN'S RIGHTS

Heretofore, we have assumed that children do not have First Amendment rights that need to be considered. This is not completely accurate. Although children's rights are not coterminous with adult rights, they do exist. In the school context, the Court has held that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."<sup>36</sup>

Presumably, the same holds for parents. Although the exact parameters are not clear, it is clear that minors have some constitutional rights independent of their parents. Surely, the right to obtain an abortion is one such right.<sup>37</sup> Perhaps the right to practice one's religion is another.<sup>38</sup> While no case has so held, I have little doubt that children may have a right to read or view certain material, contrary to the wishes of their parent. For example, if staunch Republican parents forbade their teenager to read a book critical of Republicans and supportive of Democrats (or vice-versa), I would expect the teenager to prevail in a law suit against his parents.<sup>39</sup>

Because this is not a paper on children's rights, we do not seek to explore this question in depth. Rather, it is my purpose to simply raise the question so that the readers, including those who would "child-proof" the Internet, will understand that it may not be just adult rights that have to be balanced against children's protection, but it might also include children's rights.

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34. *Playboy*, 529 U.S. at 815.

35. Although there was evidence that some attempts at individual blocking were not successful. *See id.* at 844 (Breyer, J., dissenting).

36. *Tinker v. Des Moines Indep. County Sch. Dist.*, 393 U.S. 503, 511 (1969).

37. *See, e.g., Bellotti v. Baird*, 443 U.S. 622 (1979).

38. *See Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting).

39. Of course, in the real world, he would not sue his parents; he would just read the book at a friend's house, which may explain why we have no litigation on the question.

On the other hand, children's rights, because they are not coterminous with adult rights, can, and probably should, be subordinated for their welfare. I do not believe that children, especially young children, have a right to view graphic violence or explicit sex. Consequently, I do believe that Kevin Saunders' approach holds great promise for finding the ultimate solution.<sup>40</sup> Anything that can keep inappropriate material from minors without significantly impeding adult access, is an idea worth exploring. Let us just hope that the technology is there to make it work.

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40. See generally Saunders, *supra* note 26.

