Early Neutral Evaluation

Recently however, I had the opportunity to use another procedure known as 'Early Neutral Evaluation'. This process is without prejudice to the rights of the parties and confidential. It requires an evaluator to consider the issues in dispute which by agreement are put before him/her to enable the evaluator to express a view as to the likely outcome of the dispute. The evaluation is not binding on the parties and the manner in which it is conducted is entirely within the agreement of the parties.

The evaluation can be arranged through the National Dispute Centre which provides a draft agreement and the names of a number of possible evaluators who, in this instance, were experienced defamation practitioners. The issue was limited to the evaluation of the degree of probability of the claimant succeeding on the alleged defamatory meaning of the words complained of. It was not limited to a determination of whether the meaning complained of was capable of being conveyed. At the end of the process, the parties had an opinion from a neutral Queen's Counsel as to whether the meanings were in fact conveyed.

Once the evaluation had been made, the parties were able to negotiate a mutually satisfactory settlement.

The benefit in this process was a considered opinion at an early stage of the dispute on which the parties could objectively base their settlement negotiations.

Further details of the process can be obtained from:

National Dispute Centre
233 Macquarie Street
SYDNEY NSW 2000
Telephone: (02) 223 1044

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The Law of Hate Speech

The difficult balance between protecting freedom of speech and regulating 'hate speech' is the subject of this talk by Melvin Urofsky.

One of the questions which American courts are now considering is one that is loosely labelled hate speech, the use of language to demean, insult and injure others. We are not talking about traditional notions of libel and slander, but epithets aimed at a group, the purpose of which is, in the words of one university's speech code, to intentionally demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age of the individual or individuals.

One would think that in a civilised society, one would have no need for such regulations, that common courtesy would prevent one from uttering such crude insults. Alas, civilized society is not what we live in today, and not only in the United States. There appears to be rising tensions between ethnic and religious groups all over the world, of which the fighting in Bosnia is only the most visible and the most bloody manifestation.

The rise in tensions in the United States is a result, I believe, of the great social changes of the last thirty years which include civil rights for people of color, the women's movement, the gay rights movement, advocacy for people with disabilities, in short, the various movements that have attempted to bring people who were excluded from mainstream society into a full and equal citizenship.

This has, in turn, created a backlash, in which some people blame today's social problems on these groups. "If only blacks had stayed segregated, if only gays had stayed in the closet, if only women had stayed at home, if only people with disabilities had stayed in institutions, then we would not have problems with drugs, crime, abortion, affirmative action, irreligiosity" - the list goes on and on.

But these groups are not going back into the closet, kitchen, institution or rooms marked "colored only". They are fighting to preserve the gains they made and that is the context in which the current drive to secure so-called hate speech regulations must be viewed.

Under the United States Constitution, the First Amendment declares that "Congress shall make no law...abridging the freedom of speech, or of the press," and the Supreme Court has ruled that this prohibition applies against the states as well as against the national government.

The late Justice Hugo L. Black argued that the Framers of the First Amendment meant exactly what they said - no law means no law, of any sort. But the Supreme Court has never adopted that view, and over the last sixty years or so has erected a jurisprudence of free speech that gives great protection to expression, both oral and written, but also includes a balancing of interests.

The key - indeed the crucial - value of the First Amendment is its protection of political speech, and that is a principle accepted by both conservatives and liberals. No democratic society can hope to survive and prosper unless its citizens are free to speak their minds about public affairs. The greatest expression of this view is Mr. Justice Brandeis's concurrence in the 1927 case of *Whitney v. California.*

Brandeis wrote:

'Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliverative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the spread of noxious doctrine...Fear of serious injury

cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.'

Here we have in a nutshell the rational of the First Amendment. That in order for men and women to be involved citizens, in order for them to understand the issues of the day, in order for them to rise above prejudice and superstition, they must be free to talk these issues out.

But what about speech that does not relate to political matters? What value is there, for example, in slander, in pornography, in hate speech, that would justify bringing such vileness within the protection of the First Amendment?

For a while, the Courts did in fact exclude such speech. In a 1942 decision, *Chaplinsky v. New Hampshire*, the Court stated explicitly that First Amendment protection did not cover obscene or libellous speech, no so-called "fighting words," that type of speech which would provoke the average person to violence.

During World War Two several legislatures, trying to prevent the rampant racism that characterized Hitlerian Germany, enacted group libel statutes extending the rules of defamation against individuals to groups. Under this law Illinois prosecuted Joseph Beauharnais, the president of the "White Circle League," for remarks about Negroes, including charges that they would bring "rapes, robberies, knives, guns and marijuana" into any neighbourhood in which they lived. The Court, by a narrow 5-4 vote in 1952, upheld the statute prohibiting group libel, and as late as 1978 reaffirmed the validity of the ruling.

In recent years, however, the Court has abandoned this position. The Warren Court wrote finis to seditious libel and also protected the press from retribution under the libel laws for articles on public figures. Although obscenity is not fully protected, the Court has imposed a test that makes it difficult to exclude most sexually-oriented material from constitutional protection. And in recent cases the Rehnquist Court, which is undoubtedly one of the most conservative courts of this century, has not only upheld basic First Amendment protections, but extended them to include at least some forms of hate speech.

A few years ago there was a rash of flag-burning, which incensed many Americans, and became a rallying cry of conservative groups who pointed to such actions as resulting from the permissive attitudes promoted by liberals. The Supreme Court struck down first a state statute banning flag-burning, and then a congressional enactment.

The Court held that since the flag had been burned as a protest against certain governmental policies, it constituted political speech, and therefore was expressive conduct protected by the First Amendment. The Court also moved to narrow the "fighting words" doctrine because the flag-burning did not insult an individual or invite the exchange of blows. The majority held that, "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

The most recent and extensive Supreme Court decision on hate speech is *R.A.V. v. St. Paul*, decided in 1992, with the majority decision written by Justice Antonin Scalia, one of the most conservative members of the Court, but also who, like Justice Black, takes the proscription of the First Amendment seriously. The facts of the case indicate how nasty and hurtful hate speech can be.

In the predawn hours of June 21, 1990, a group of white teenagers assembled a crudely made cross and then burned it within the fenced yards of a black family. Although the youths could have been charged with a variety of offences, the city booked them under the St. Paul "Bias-Motivated Crime Ordinance," which provides:

> Whoever places on public or private property a 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 commits disorderly conduct and shall be guilty of a misdemeanor.

The decision, in which all of the members joined in the result if not in the reasoning, struck down the local ordinance on the grounds of content discrimination. As Justice Scalia explained "the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government."

The St. Paul ordinance, "has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas."

I have so far neglected to tell you what my own views on hate speech are, but to be blunt about it, I don't like it. As a Jew, I am perhaps overly sensitive not just to blatant expressions of prejudice but also to nuance, to code words. Yet I am also a member of the American Civil Liberties Union, and the editor of the Brandeis Papers, and believe that once you start limiting speech, you start down a slippery slope that can lead only to tyranny. Free speech, as Oliver Wendell Holmes once declared, is not for the speech with which we agree, but for the speech we hate.

Is there a slippery slope, or is this merely a bogey-man that civil libertarians bring up all the time? Regrettably, the record indicates that our fears are all too justified.

Hate speech is not funny. It is not amusing to its victims, nor is it the sort of behavior that should be encouraged in a society dedicated to principles of freedom and equality. Ask any black who has been called a nigger, any woman who has been called a bitch, and Jew who has been called a kike, any Italian who has been called a dago, and they will tell you how it hurts, how it made them feel marginalized, expelled from a society to which thy thought they belonged.

I quote:

'It is unlawful for a person to do an act, otherwise than in private, if:

> (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
>
> (b) the act is done because of the race, color or national or ethnic origin of the other person or of some or all of the people in the group.

That language is taken from s. 18C of the proposed Racial Hatred Act of 1994, introduced into the Australian Parliament last November. As I always tell my students, laws to solve particular problems are never introduced nor enacted sufficient people believe that the problem actually does exist.

I wish I could tell you that there is an answer to the hate speech problem, but there isn't, and the recent tragic bombing of the federal building in Oklahoma City merely points up how difficult the issue is. In its wake we in the United States have had an intense debate over the limits of free speech, and whether we are too lenient in how we treat what Newsweek has called "toxic" speech.

Under the protection of the First Amendment, right-wing radio talk show hosts have broadcast recipes for explosives, and if you cannot copy it down fast enough, you can get the details on the Internet or from the so-called militia magazines.

Talkshow host G. Gordon Liddy, of Watergate fame, advises his listeners that if federal agents burst into their homes they should aim for the head - no, he says, go for the torso, it's a bigger target.

President Clinton, who used to teach constitutional law at the University of Arkansas, has encouraged the debate, and in good Brandeisian style, has suggested that the cure for awful speech is more speech. "I remind you that we have freedom of speech, too," he said, "and it is time we all stood up against that kind of reckless speech and behavior."

But there are other voices who believe that the traditional remedy of good speech driving bad speech out of the market no longer holds true in an environment of fanatics and a communications system which allows every one of them to reach tens of thousands of listeners at little or no cost. The United States, as Maxwell Yalken, chief commissioner of the Canadian Human Rights Commission, has noted, is "the odd man out." We are about the only country that does not have a strong anti-hate speech statute.

For the most part, the media in the United States have been opposed to hate speech regulations, in part because they have seen how such regulations can be perverted, as happened in Canada. There is also the question of whether reporting hate speech constitutes a criminal act.

Suppose a neo-Nazi gives a speech in which he attacks Jews and Negroes before a handful of people. He is arrested under a hate speech law. The media then report his arrest, and what he said, which constitutes the crime. Their report may reach many times more people than heard the original speech, and if the aim of the measure is to prevent the spread of such doctrine, then shouldn't the media be stopped from what had been said? The logic of the law could seem to require it.

In the United States, the media treats the classic decision of *New York Times v. Sullivan* (1964) as a landmark of freedom of the press. In that decision, Justice Brennan lifted the threat of libel (defamation) from journalists reporting on public affairs and public figures. According to some of your scholars, the recent 1994 High Court decisions in *Theophanous v. Herald & Weekly Times* and *Stephens v. West Australian Newspapers*, are, like our Sullivan case, "occasions for dancing in the streets."

Without getting into the debate of whether your High Court has become "too activist," a debate that, as it relates to our Supreme Court, I have been listening to for more that thirty years, I wonder if the Australian media will want to give up an iota of this newly expanded freedom.

Yet that is what the slippery slope, much as it may be derided at times, is all about. If we can stop people from saying certain things today, because in fact those things are spiteful and racist and bigoted, then tomorrow we can stop them from saying other things as well under a similar rationale. And if free speech is limited for the individual, it will soon be limited for the press as well.

As I said, I have no answer, but for now, I prefer to stick with the Holmes-Brandeis tradition, that the cure for bad speech is good speech, that when we stifle speech we harm not only the person who speaks but the society as well. Similarly, when we restrict the press, freedom suffers. The patron saint of American democracy, Thomas Jefferson, believed that a free press, and by that he meant a totally unrestricted press, was the greatest bulwark of a democratic society.

There may come a time when we can no longer afford the luxury of such liberty. But if and when that time comes, It will not be just freedom of speech that will suffer, but the liberties that are enjoyed in a democratic society. It is not a prospect that any of us can imagine without a cold shiver of fear.

This is an edited version of a speech given by Professor Melvin I. Urofsky Professor of Constitutional History Virginia Commonwealth University Richmond, Virginia to a luncheon jointly conducted by the Free Speech Committee and CAMLA on 29 June 1995. A copy of the full text of the speech can be obtained from John Corker on Tel: 3347808.

STOP PRESS

On December 20, 1995, the Federal Government issues the Exposure Draft for telecommunications regulation post 1997. Submissions are sought by 16 February 1996.

The ABA released an issues paper on a code of practice for the development of the on-line services industry on 20 December 1995. Comments are sought by 16 February 1996.