

Chapter 7:

Perform at Your Own Peril

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One of the prices of freedom is that most hate speech is protected by the First Amendment. Those who want to restrict speech have found it difficult to do so because good taste cannot be legislated. However, a circumvention of constitutional protection has been developed within the court of public opinion that directly and indirectly affects those who utter non-prosecutable hate speech. The method that is used is public shaming by media outlets. While none of us condone hate speech, we need to be leery of any solution that smacks of censorship. We need to avoid solutions that shut down the free marketplace of ideas. So this chapter examines this troubling phenomenon to attempt to develop a healthier way of dealing with public hate speech.

The bias in the media toward short dramatic or humorous sound bites over longer informed stories is well known. What is newsworthy tends to be what is live, dramatic, and/or humorous. More than other media, broadcast television, radio and the Internet create the context for censorship in the public arena. We hope to show that a more rational and enlightened solution – admittedly less dramatic and exciting – has been developed by First Amendment scholar Franklin Haiman. However, we are not naïve about its possibilities. The media follow their audiences. Thus, unless audiences demand a more enlightened approach on the part of the media, it will not occur.

The Haiman Solution

There are plenty of ways to label words that one does not like, and these labels fall into at least four categories. The courts have recognized that speech can create a hostile environment in which it is difficult work.¹ Such speech is actionable only if it is “pervasive” and “persistent.” A one-shot joke does not constitute a “hostile work environment” even though it may offend. Second, the courts have recognized that hate speech when uttered in the commission of a crime can be used by the judge or jury to enhance the penalties for that crime.² Third, hate speech can be categorized as fighting words; that is, as if one has thrown the first blow in a fight.³ It is actionable

¹ Harris sued Forklift Systems because the president sexually harassed Harris and made sexual innuendos to her. The District court found that the president's behavior did not create a hostile work environment because it did not cause Harris to suffer injury or serious psychological problems and rejected Harris' claim, but the Supreme Court, in *Harris v. Forklift Systems*, 510 U.S. 17 (1993), reversed the decision because this standard was too high.

² In *Wisconsin v. Mitchell*, 508 U.S. 47 (1993), the Supreme Court upheld a statute in Wisconsin that allows for greater sentencing because the crime was based on "race, religion, color, disability, sexual orientation, national origin, [and/or] ancestry." An African-American, Mitchell beat a white man and when it was decided that the crime was based on race, was sentenced to serve two more years than the regular sentence. The Wisconsin Supreme Court reversed the additional sentence. The Supreme Court re-instated the sentence, deciding that "the defendant's motive for committing the offense is one important factor" for the judge.

³ In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), Chaplinsky called a Marshall a "God damned racketeer" and a "damned fascist." The Supreme Court ruled that some words, 'fighting words', are words that "inflict injury" or an "immediate breach of the peace." Words can be viewed as violent actions. *Terminiello v. Chicago*, 337 U.S. 1 (1949), modified *Chaplinsky v. New Hampshire* when the Supreme Court overruled the ruling because the sitting judge instructed the jury that the prosecution's burden was merely to prove that the statements [in question] "stirs the public anger, invites disputes, brings about a condition of unrest, or

and prosecutable if in context it provokes violence. By re-categorizing the words as an act of physical violence, one justifies the response that the words provoke as well as demonizing the speaker as violent. This too has an extremely difficult standard to meet. The words must bear immediacy, specificity and likelihood of causing palpable injury.⁴ Finally, the courts have determined that some hate speech is not actionable. Generally, this includes humorous speech,⁵ one-time insults,⁶ or remarks aimed at a group.⁷

Professor Haiman, at one time the Vice Chair of the national board of ACLU, came up with a solution for combating speech that one finds offensive: engage in a dialogue. He believed that we actually empower speech by censoring it, and therefore, it would be better to engage that speech in an enlightened way. Instead of excluding hate speech, which might force our dissidents and enemies underground, it is better to surface them in the marketplace of ideas. This has several useful consequences: In many cases, those who utter inflammatory speech don't know that it is offensive. They are simply uninformed about it or the culture that is insulted by it. By engaging the speaker, he/she is forced to understand that his/her speech is offensive to someone and/or the offended responder is allowed to justify their feelings.⁸ The legitimacy of each position can also be evaluated. A recent example of the Haiman solution was to allow the President of Iran to speak to at Columbia University. After President Lee Bollinger of Columbia got past his rather undiplomatic introduction, he was able to allow President Ahmadinejad to embarrass himself with his own words. For example, the Iranian leader claimed there were no homosexuals in Iran and that since we doubted physics, we could have doubts about the holocaust.

Unfortunately, the current media culture does not encourage this kind of dialogue. The main-stream media is the judge of what is offensive, and there is very little room for dissent in a politically correct world. The accused is almost always forced to apologize rather than explain and explore. What makes this hegemony of the media so insidious is that the standards imposed are not transparent. There is no obvious and

creates a disturbance." Writing for the majority, William O. Douglas argued that free "speech is often provocative and challenging."

⁴ In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court overturned the conviction of a KKK leader, Brandenburg, for encouraging violence against Jews and Blacks. The court set a standard that speech cannot be prohibited unless it "is directed to inciting or producing imminent lawless action, and is likely to produce such action."

⁵ In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), Hustler Magazine published an advertisement "parody" which portrayed Jerry Falwell engaged in an intoxicated affair with his mother. The jury ruled that no libel occurred, but awarded punitive and compensatory damages for intentional infliction of emotional distress. The Supreme Court overturned this ruling because, "the states interest in protecting public figures from emotional distress is not sufficient to deny first amendment protection speech that is patently offensive and is intended to inflict emotional injury when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved."

⁶In *Buckley v. Littell*, 429 U.S. 1062, Buckley sued Littell for writing that Buckley was a fascist. The Supreme Court ruled in Littell's favor deciding that in this instance the definition of fascist was an opinion and not a fact based on verifiable evidence.

⁷ In *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, 733 F.Supp. 792 (E.D. Va 1991) the Federal Court prevented action George Mason University wanted to take against students of a fraternity who dressed up as racial and sexual stereotypes.

⁸ Franklyn Haiman, *Speech Acts and the First Amendment* (Carbondale: Southern Illinois University Press, 1993).

open decider of what is offensive and what is not. Consequently, there is no prior knowledge of what exactly are the words or concepts that are offensive, why these words and concepts are offensive and if it is functional for our society as a whole to have such standards.

To investigate this problem, this chapter examines three recent cases of what might be considered hate speech. The first case is the most noxious; the third case is unintentional; the second case is somewhere in between.

Michael Richards at a Comedy Club

Michael Richards was primarily known as the quirky neighbor on the sitcom "Seinfeld" until he walked on stage at the Laugh Factory on November 17th, 2006 for his now infamous set.⁹ He said of two black men in the audience, "50 years ago we'd have you upside down with a fork up your ass." The remark elicited cheers and applause. Encouraged, Richards continued, "Throw his ass out, he's a nigger, he's a nigger, he's a nigger." Then the attack got even uglier with an exchange between Richards and at least one of the men who Richards singled out.¹⁰

Soon afterward, Michael Richards decided to apologize publicly through Al Sharpton and Jesse Jackson.¹¹ His friend Jerry Seinfeld used an appearance on the David Letterman Show to issue yet another apology.¹² These occasions could have been a discussion of Michael Richards' hateful remarks or even delved into the subject of racial relations. The Haiman Solution could have been utilized, but it was not. What did occur was that Michael Richards admitted that he was wrong and that it was some sort of personal defect that he would explore and eradicate in himself that had caused the racist tirade.

Representing the two men who claimed to have been called "niggers," Kyle Doss and Frank McBride, Gloria Allred offered a resolution when she appeared on the *Today Show* with Matt Lauer. "After [Michael Richards] hears the pain that he has inflicted on [Kyle Doss and Frank McBride] he should listen to the recommendations of a retired judge as to how much compensation he should pay to them."¹³ Allred proposed taking the issue out of the public court of opinion and into the province of a retired judge.

⁹ AfroMichael, "Michael Richards: The Laugh Factory Incident." Youtube.com. 21 Nov. 2007. <<http://www.youtube.com/watch?v=JdhkUtx0LHM>>

¹⁰ Paul Farhi "'Seinfeld' Comic Richards Apologizes for Racial Rant." *Washington Post* (Nov. 21, 2006) C1.

¹¹ Solvej Schou, "Michael Richards Hires 'Crisis Management' Expert and Apologizes to Jesse Jackson, Al Sharpton." *The Associated Press* (Nov. 23, 2006) Los Angeles: Entertainment News.

¹² Lynn Elber. "Michael Richards, AKA Kramer, Spews Racial Slurs During Stand-Up." *The Associated Press State & Local Wire* (Nov. 21, 2006) Los Angeles: Entertainment News.

¹³ "Targets of Michael Richards' Tirade, Kyle Doss and Frank McBride Joined by Gloria Allred, Speak About That Night at the Laugh Factory," *Today* (Nov. 22, 2006).

On other media outlets, we learned that Richards engaged in heinous speech; however, we were not given much of an opportunity to learn from it. CBS News called what Michael Richards did a "Racist Tirade."¹⁴ ABC News' headline was "Kramer's Racial Outbursts: Seinfeld Star Uses the 'N' Word."¹⁵ Matt Lauer on NBC interviewed the "Targets of Michael Richards' Tirade."¹⁶ He did not explore why the comedy set was racist. Why can a black man call another black man a "nigger" and a white man cannot? While there are many academic arguments that attempt to answer these questions, the public in general was not exposed to them. Unless we are informed, we have no control over what is offensive or not, and the fact of the matter is that every day we choose to make this word one of the most offensive in the English language. Why do we do this? Does this help integrate the African American community into mainstream American society or does it hurt it? What are the First Amendment implications of this media condemnation without exploration?

Don Imus on the Radio

Shock Jock Don Imus' controversy, compared to the tirade of Michael Richards, was tamer, but just as incendiary. Enthusiastically commenting on a women's basketball championship game, Don Imus referred to the women as "some nappy-headed hoers."¹⁷ After an apology¹⁸ and a two-week suspension,¹⁹ Don Imus was fired from his radio show by CBS.²⁰ Imus filed a lawsuit based in part on the fact that his contract specifically called for controversial programming and that his contract had a clause that there must be a written warning after an inappropriate comment before a job action could take place.²¹

In general, media coverage focused on the racial transgression. The remarks were not contextualized in terms of the intent, which appears to be praise for the women. The *New York Times* headline read, "Don Imus Suspended from Radio Show Over Racial Remark."²² CBS News reported, "Community Leaders Calling for Don Imus' Resignation After his Racist Comments."²³ And ABC News reported, "Controversial Radio Comments: Don Imus Criticized as Being Racist."²⁴

¹⁴ "Michael Richards' Racist Tirade at Comedy Club," *The Early Show* CBS. (Nov. 21, 2006).

¹⁵ "Kramer's Racial Outbursts; Seinfeld Star Uses the 'N' Word," *Good Morning America* ABC. Nov. 21, 2006.

¹⁶ "Targets of Michael Richards' Tirade," *Today* NBC (Nov. 22, 2006).

¹⁷ Aclusux, "Don Imus and Nappy Headed Hos." Youtube.com. 7 Apr. 2007.

< <http://www.youtube.com/watch?v=RF9BjB7Bzr0> >

¹⁸ Larry McShane, "Imus Apologizes for Disparaging Remarks About Rutgers Women's Basketball Team," *The Associated Press*. Apr. 7, 2007.

¹⁹ Matea Gold, "Imus Show Is Suspended As Furor Mounts; CBS Radio and MSNBC Will Take the Shock Jock Off the Air for Two Weeks for Slur About Women's Basketball Team," *Los Angeles Times* (Apr. 10, 2007): A15.

²⁰ John Horn, "The Imus Scandal: Chronology and Aftermath; Timeline," *Los Angeles Times* (Apr. 13, 2007): A21.

²¹ Howard Kurtz, "Legal Battle Brews Over Imus Contract with CBS," *Washington Post*. (May 4, 2007): C1.

²² Bill Carter, Motoko Rich, and Rebecca Cathcart, "Don Imus Suspended from Radio Show Over Racial Remarks," *New York Times* (Apr. 10, 2007): C1.

²³ "Community Leaders Calling for Don Imus' Resignation after his Racist Comments," *CBS Evening News* (Apr. 8, 2007).

²⁴ "Controversial Radio Comments; Don Imus Criticized as Being Racist," *Inside the Newsroom*, ABC (Apr. 9, 2007).

Don Imus' remarks were certainly insulting. However, were they intentionally racist and/or hateful? This question was not usually asked. No dialogue over intent and effect was carried in the press. Again, a white male had crossed a line reserved for black performers.

Months later, Kia Vaughn, one of the Rutgers's basketball players, said that she would sue because of the defamatory slander.²⁵ The lawsuit may finally provide a forum in which intentionality and contextuality will be addressed. Vaughn's burden of proof will include showing that her reputation was damaged in some way. Off hand humorous remarks, even if they are offensive, have been protected by the First Amendment.²⁶ Even non-humorous remarks that are "opinion" have sometimes been protected by the First Amendment.²⁷ On the other hand, if the parties settle out of court, those issues will not be addressed.

What is most significant about the handling of this case by the media is an unfortunate lack of discussion. We need to learn why calling a woman "a nappy headed hoe" has a different effect depending on the race and gender of the name caller and the context in which the remark is made. Without an informed discussion about the incident, we may not prevent other incidents of this type.

Joe Biden in a Political Context

On January 31, 2007 Joe Biden announced his presidential candidacy. In an interview about the other Democratic Presidential Candidates, Joe Biden complimented Barack Obama, "I mean, you got the first mainstream African-American who is articulate and bright and clean and a nice-looking guy. I mean, that's a storybook, man." This assessment was quickly picked up by the media and interpreted as an insult to past African-American candidates and/or a racist remark.²⁸

The CBS Evening News with Katie Couric reported that presidential candidate Joe Biden got off on wrong foot.²⁹ After exhaustively playing his comments on air, CNN headlined the issue this way, "Biden's Description of Obama Draws Scrutiny."³⁰ A *USA Today* article claimed the remark showed the "true colors" of Biden's unconscious.³¹ Since Biden had dropped out of the 1988 presidential race because he

²⁵ Colleen Long, "Rutgers Basketball Player Sues Imus for Slander," *The Associated Press State and Local Wire*. Aug. 15, 2007.

²⁶ *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

²⁷ In *New York Times v. Sullivan*, the *New York Times* published an ad that stated that Montgomery County was abusing the rights of non-violent civil rights protestors. Although there were factual errors in the ad, the Supreme Court ruled in the *New York Times* favor setting a new standard: even false statements are protected by the First Amendment as long as they are not made with malice.

²⁸ "Presidential Candidate Joe Biden Gets Off on Wrong Foot," *CBS Evening News*, Jan. 31, 2007.

²⁹ "Biden's Description of Obama Draws Scrutiny," *CNN.com*. Feb. 2, 2007

<<http://www.cnn.com/2007/POLITICS/01/31/biden.obama/>>

³⁰ "Biden: First Day Flameout," *USNEWS.com*. Feb. 1, 2007.

<http://www.usnews.com/usnews/politics/bulletin/bulletin_070201.htm>

³¹ "Remark Shows 'True Colors' of Biden's Subconscious," *USA Today* (Feb. 6, 2007): 10A.

plagiarized his campaign speech from British candidate Neil Kinnock and was discovered to have committed other plagiarisms, it was not difficult to portray Biden as someone who was injudicious with words. One reporter claimed that he suffers from "a foot in the mouth disease."³² Others claimed he was unconsciously racist and/or destroyed his presidential candidacy. Months after the gaff Biden's campaign continued and few people claimed that he was a racist. As in the case of Imus, there are very important issues of intent and context in this case which may explain the outcome.

An examination of these news reports reveals that few reporters seemed able to ask Biden why he did not know that this remark was racist, although there is nothing actionable in his statement because it was a compliment. Had Biden been a Republican, would his remark have been treated even more harshly? If so, why?

The media coverage of Biden's statement could chill the speech of the other candidates. Since political speech was intended to be the most protected by the First Amendment, have we created a situation in which de facto censorship exists?

Solution

The First Amendment was created to protect the free marketplace of ideas. However, current media reporting often censors and chills speech. It avoids the best solution to fight hate speech, the Haiman Solution, that more speech is better than censorship, that engaging in dialogue is enlightening, and that marginalizing hate speech is dangerous. The alternative is to have the news media impose its own values upon us, punishing those that do not conform to its view of what is politically correct.

The First Amendment is protected by the courts, not by the media. With the media circumventing the First Amendment, a new consensus needs to be created with respect to hate speech. In the examples presented here, only Michael Richards' words could be argued to have been intentionally hateful. Don Imus was trying to be funny and complimentary, but was demeaning sexually and racially. Joe Biden's intent was to praise Barack Obama, not insult African Americans, though he wound up doing just that. There are many standards that can be used to judge each case, but those standards should be subject to the same scrutiny as the speech that was uttered. The dialogue should begin by examining issues of intent, effect, and context to determine degrees of culpability in each case. The dialogues might raise such questions as: Is an integrated society our goal? What is the definition of an integrated society? If our goal is an integrated society, why is it that people of other races are forbidden to say words that some cultures use in a humorous way? Without discussions about questions such as

³² Jake Tapper, "A Biden Problem: Foot in the Mouth," *ABCnews.com*. Jan. 31, 2007. Washington. <<http://abcnews.go.com/Politics/story?id=2838420&page=1>>

these, we are doomed to repeat our past transgressions, and we leave ourselves vulnerable to the disingenuous among us who wish to manipulate these standards in order to achieve their own objectives.

Short of a meaningful dialogue, the media chills discussions of race, doing the very opposite of what the Haiman Solution intends. Very often those who fight hardest in the media against hate speech often fail to embrace the openness of the First Amendment.

Chapter 8: Conclusion

By Craig Smith, Director

In the preceding pages, we have examined seven important tensions between the First Amendment and the media. We believe that unless the government can demonstrate that a regulation advances a compelling government interest that the First Amendment should be allowed to protect speech. We began by demonstrating that censoring so-called indecent speech is fraught with danger. No reputable study has shown such speech to be harmful. However, even it was, the regulations imposed by the FCC are arbitrary and capricious, sometimes relying on words, sometimes relying on context, and often in two very similar situations, fining one person and not the other. Therefore, we support the law suit of the major networks to end these perfidious regulations and we encourage the Supreme Court to revisit their wrong-headed decision in the *Pacifica* case and reverse it.

We also believe, as Chapter Two makes clear, that conflating violence with indecency compounds the problem. The social scientific and legal communities have yet to come up with a definition of violence that is legally viable. In demagogic statements on the floor of the Senate, legislators have condemned everything from “Roadrunner” cartoons to “Saving Private Ryan” as the kind of violence they would censor. If the indecency standard is arbitrary and capricious, why incorporate violence under that banner?

Little more need be said about the V-Chip. It doesn’t work and it was forced upon broadcasters in a heavy-handed way by legislators who should have known better.

Our review of the situation surrounding the Internet concludes that it is one of the places where encroachment on First Amendment rights has been denied. Certainly, many of the items that can be found on the Internet are distasteful, but unless they are illegal or harmful, they must be allowed into the free marketplace of ideas. That is the price of freedom. Parents wishing to protect their children from the wiles of the Internet have ample screening software available to them to achieve that end without infringing on the rights of others.

In every society, people are in danger of being marginalized. In a large society such as ours where access to the media can be costly, we must be vigilant about this problem. Luckily, the unfettered Internet and the wide variety of programming available on cable ensures that one’s ideas are likely to be heard even though a particular voice may have trouble being recognized.

Media ownership needs to be monitored to assure that acquisition does not corrupt the free marketplace of ideas. However, there are counter-intuitive solutions which would guarantee more speech rather than less. For example, the cross-ownership rules are

unfairly applied and often prevent the cross fertilization and economies of scale that would rescue failing independent newspapers which may dry up without the support of local broadcast units.

Finally, the media needs to be much more circumspect in its coverage of hate speech if we are to learn from it. Bringing the tools of critical thinking and exploration to these situations would do more to prevent them in the future than to sensationalize these moments without contextualizing them and examining issues of intent.

We are proud of this report on the First Amendment and the media. We hope it starts conversations and even controversies among its readers. After all that is what Thomas Jefferson had in mind when he wrote, “Here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it.”