

Inglorious Bastards and Other Patriotic Americans

CHARLES D. TOBIN

Why do we rely on the expressions of despicable people to bring us such great First Amendment law?

Can anyone envision a more unlikeable group than the Westboro Baptist Church crowd? Did they really have to pick public property 1,000 feet from the funeral of a war hero, Marine Lance Cpl. Matthew Snyder, to protest their dislike for American society's growing acceptance of gays? Yet with a heavy sigh of resignation—knowing that, to preserve healthy debate, we must often protect malignant hatemongers—we greet the entry of the banner on the church's signs, "God Hates Fags," into the lexicon of constitutionally protected speech. And *Snyder v. Phelps*, a beautiful decision except for the awful words of the protestors that Chief Justice Roberts cited in the Supreme Court's decision this term, becomes the new high-water mark for protection of political expression.

Snyder, of course, is not the first time the Supreme Court has extended the First Amendment's aegis to speech that would prompt most of us to punch the speaker in the face or storm out of the room. Consider that, whenever we are confronted with a prior restraint, the 1931 case *Near v. Minnesota* immediately leaps to mind. As every Conlaw schoolchild knows, *Near* stands for



Charles D. Tobin

the proposition that a prior restraint is presumptively unconstitutional, justifiable only when prompted by a government interest of the highest order. Many may not be aware, however, that Jay Near's Minneapolis rag—afforded the same stature under the Constitution as the Tea Party platform would receive—decried the alleged domination of the city's power base by Jews.

In fact, much of the jurisprudence of our freedom of speech rests on a foundation of authors and expressions that range from the tacky to the deplorable:

- Paul Cohen's questionable decision to wear his "Fuck the Draft" jacket into the L.A. County Courthouse prompted Justice Harlan to coin the oft-repeated doctrine, "One man's vulgarity is another's lyric." And with that magical intonation, the Court in *Cohen v. California* overturned Cohen's conviction for disturbing the peace.
- The John Birch Society's publication *American Spectator* accused civil rights lawyer Elmer Gertz of being a "Lenninist" and a "Communist-fronter"—words almost as scandalous during the Cold War as accusing someone today of belonging to Al-Qaeda. Yet that dubious publication provided the occasion for the Supreme Court, in *Gertz v. Welch*, to further define the constitutional protections for commentary about public figures.
- Intentional infliction of emotional distress, thankfully, has all but died as a viable claim by

public figures. And for that, we are all grateful to Larry Flynt. His magazine's sophomoric depiction of Jerry Falwell reminiscing about having sex with his mother in an outhouse led to the Court's ruling in *Hustler Magazine v. Falwell*.

- Just last year, in *United States v. Stevens*, the Court overturned a federal law criminalizing the sale of videos that depict cruelty to animals. Congress passed the law with the goal of drying up the market for "crush" videos, which depict the torture of animals for the sexual gratification of viewers.
- The Nazi marchers in the Chicago suburb of Skokie never saw their case reach the Supreme Court on its merits. But the lower courts' rulings authorizing the demonstration—along a Jewish ACLU lawyer's decision to represent them—stand as an iconic reminder that, in our system, the courts must protect every voice, no matter how hateful.

The inglorious litany of protected expressions and colorful speakers will likely grow in the coming years. The Solicitor General has recently asked the Court to consider the Second Circuit's decision holding that the FCC has less power than it thinks to regulate broadcast indecency. If the Court takes the case, the outcome could realign the entire power structure between the communications industry and the federal government.

Now just what expressions will the Supreme Court review if it accepts the Solicitor General's invitation to take this high-moment case? Rock star Bono's excited utterance "Fucking Brilliant!" on a 2003 televised award show,

Charles D. Tobin (charles.tobin@hklaw.com), Chair of the Forum on Communications Law, is a partner in the Washington, D.C., office of Holland & Knight LLP, where he heads the firm's National Media Practice Team.

and the glitter that we all glimpsed when Justin Timberlake enabled Janet Jackson's wardrobe malfunction during the 2004 Super Bowl.

Contemplating the often sordid and silly way we Americans express our patriotism has made me yearn for the days when the language of our debate was sober and our message was clear.

Now where did I put my "Nuke the Whales!" T-shirt?

* * *

This issue of *Communications Lawyer* contains an eloquent memorial tribute to Dick Goehler written by his law partner Jill A. Meyer. Please be

sure to read it.

Dick served as Chair of the ABA Forum on Communications Law from 2006–08. He was a career-long defender of freedom of the press. He also was a tireless contributor to many civic organizations and his church, a loving father to his two children, and a devoted son to his mother.

We are fortunate to have had decades of Dick's strong leadership and cheerful outlook in our professional community. He will be missed. 