1992

Liberty, Equality and Democracy: Three Bases for Reversing the Minnesota Supreme Court's Ruling Symposium: Hate Speech after R.A.V.: More Conflict between Free Speech and Equality

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LIBERTY, EQUALITY AND DEMOCRACY: THREE BASES FOR REVERSING THE MINNESOTA SUPREME COURT'S RULING

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I want to focus on the subtitle of this conference: "More Conflict Between Equality and Free Speech?" The answer to that question—and it is posed as a question—is an emphatic "no." As the head of an organization which is profoundly committed to, and for seventy-one years has worked zealously on behalf of, both free speech and equality, I stand here to say that we must resist very well-intentioned, but ultimately misguided, attempts to deal with the very real problem of intergroup hate through overbroad restrictions on speech. Well-intentioned as the St. Paul ordinance was, it does fall into that category. These overly broad restrictions on speech are to be faulted because of their ineffectiveness in doing anything real to combat race hatred or anything real to promote equality, as much as they are to be faulted for cutting back on free speech.

Now, I'm going to return to that basic canard which so often characterizes these debates—that somehow there's a tension between free speech and equality. I think they really go hand in hand, rather than being at war with each other. But before doing that, I want to dispel a couple of other canards which I think too often have plagued discussions about this case and about the generic issue of regulating hate speech and hate crimes.

To oppose the St. Paul ordinance as overbroad is not at all to condone the conduct at issue here. I just want to echo the sentiments that were first voiced by Mr. Cleary. This conduct is clearly subject to lawful, constitutional criminal prosecution on a number of grounds. What is at issue here is not the lawfulness of the underlying behavior but rather the lawfulness of prosecuting it under this particular statute. And yes, I do

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This essay is a transcription of Professor Strossen's oral remarks at the *R.A.V.* Symposium on April 24, 1992.

agree with Professor Jones on this point: the ACLU is profoundly troubled by the rise of racist incidents that he described. We are equally concerned about the anti-Semitic incidents that were mentioned by Mr. Sandberg. Indeed, I might note that around the country, the most violent acts of group-based hatred are directed against gay men, and they have suffered disproportionately vicious attacks. We are profoundly concerned about all of these crimes, and about the bigotry they reflect. We do not believe, however, that the effective, let alone principled, way to deal with these problems is through overly broad laws such as the St. Paul ordinance.

I want to give you one illustration of why there seems to be a consensus on this panel—with perhaps one exception—that the St. Paul approach is dramatically overbroad and would restrict much valuable speech on the crucially important issues of race, religion, national origin, and so forth. If the Jones family, after they were subject to this cross-burning on their lawn, had, on their own lawn, put up a sign denouncing white racism, they would have been subject to prosecution under this ordinance as it is written. Now, all of you may say, "Oh well, we trust (St. Paul City Attorney) Tom Foley; we know he would use his prosecutorial discretion not to actually prosecute that." But that, you see, is the inherent danger of this kind of overly broad statute: it inevitably vests enormous discretion in the prosecutor. We may trust him, but what about his successors? What about some of his deputies? And I can tell you that around the world, throughout history, this kind of law consistently has been used disproportionately to penalize the speech of the very groups that hope they will be protected by it—the racial minorities, the religious minorities, the minorities in terms of political opinion.

Another canard that I want to dispense with here is that to oppose the St. Paul ordinance as overly broad is to suggest that one is inherently opposed to all attempts to suppress any kind of hate speech and hate crime. That is not correct. The ACLU has submitted a brief in this case in which we urge the Supreme Court to send the ordinance back to the St. Paul City Council, which we believe, under principles of democracy, is the institution that should be in the business of writing law (with all due respect to the Minnesota Supreme Court, for which I was a judicial law clerk many years ago). We elect our representatives in this society to write our laws, and it is not

the business of the courts to attempt to do that. So we urge the United States Supreme Court to send this back to the City Council, the people's representatives, and to give certain very specific instructions about how the law could be more narrowly drafted to withstand constitutional scrutiny. We basically suggest that there be an attempt to focus on a threat.

What is a threat? It's not something that can be precisely defined, but there are certain key criteria. Most importantly, it is speech or expression that must be specifically targeted at a particular individual or a small group of individuals. Secondly, the speaker must intend that that speech or expression convey a message that instills fear in its listeners. Finally, the fear that violence is in the offing must be a realistic one.

This kind of limiting construction—or, I should say, *rewriting*, because to call this a "construction" is a fiction—is the appropriate route to take. The law should apply only to specific threats, targeted at particular individuals, that are intended to, and reasonably do, instill a fear of violence. To go beyond that, though, would punish much speech that is very valuable in this society.

As I said I would do, I want to go back to the point that I opened with: that equality and free speech go hand in hand. The important goal of combating race discrimination, racial violence, and other forms of discrimination and violence are furthered through free speech and will be retarded to the extent that we have laws going beyond the very narrowly drafted approach to threats that we've suggested in our Supreme Court brief. There are many reasons for this. Because I'm running out of time, I will briefly tick off a few of them.

First, pernicious ideas, including racist ideas, are more dangerous when they are suppressed than when they are exposed. Just a few months ago, I addressed this subject at another university in the Twin Cities, Hamline University, and a student in the audience used a metaphor that I thought was wonderfully apt. I told him I would use it in my future speaking, and here I am bringing it back home to St. Paul. He said, "You know, to suppress racist speech when people have racist ideas is like putting a silencer on a gun." In other words, it doesn't do away with the underlying problem and, in fact, may make it harder for us to deal with it.

Second, there is no correlation between suppressing hate

speech and suppressing group-based hatred. Exactly a year ago today I took part in an international conference of lawyers and activists from all around the world to compare notes on the experience of different countries with laws that target hate crimes and hate speech. And of all the countries that were represented there, which one do you think had the longest experience of operating under a neutrally written law that makes it a crime to express hatred on the basis of race, religion, national origin, and so forth? The answer is, that model of racial integration and harmony, South Africa.

We've recently seen another example of the lack of correlation between laws that suppress hate speech and the promotion of inter-group harmony: central and eastern Europe and the former Soviet Union. Since World War II and earlier, under their Communist regimes, those societies all had laws that criminalized this kind of speech. Now what has happened? The minute the lid is lifted off Communism and people can express themselves, they express not only hateful ideas, but also burst forth into actual, ugly, vicious, physical violence. This experience offers further evidence that suppressing hate speech is not an effective way to deal with the underlying problem.

Third, as I suggested earlier, for society to pursue the politically popular quick fix of suppressing a few words is a distraction. It's a side show. It makes it easier to avoid taking really constructive steps to combat the actual underlying causes of hatred and to combat actual acts of discrimination and violence.

Fourth, overly broad hate speech laws give the government a very powerful tool that can be—and, historically, consistently has been—used against the very minority groups that it is intended to protect.

Finally, minority groups and civil rights causes are themselves more dependent on free speech than any other groups, and any other causes. History demonstrates that.

I'll end on that point by quoting two civil rights activists. First, Benjamin Hooks, the leader of the NAACP, who recently said, "The civil rights movement depended on the shield and the spear of the First Amendment." Second, Michael Meyers, Executive Director of the New York Civil Rights Coalition, said, "As a black militant, I believe that free speech is the mi-

nority's strongest weapon. Laws banning hate speech are tranquilizers. What we need is an alarm clock. Free speech, and more free speech!"