HATE CRIMES AT THE FRONT AND BACK END OF FREE SPEECH LAW

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Contemporary free speech law is pushing Professor Danielle Citron and other proponents of banning hate crimes on the internet to concentrate their efforts of the back end of First Amendment law when regulating utterances and publications that ought to be excluded at the front end. The front end of constitutional free speech rights concerns what counts as constitutionally protected speech. This essay is constitutionally protected speech. Ax murders are not, although such cases as *Brown v. Entertainment Merchants Association*[1] cast some doubt on this common sense proposition. The back end of constitutional free speech rights concerns when, where and how government may regulate constitutionally protected speech. Congress may forbid my efforts to nail this essay to the White House doors, but not my effort to read this essay in the town park during daylight hours. Over the past half century, constitutional law has lost substantial capacity to exclude utterances and publications at the front end, while gaining substantial capacity to regulate constitutionally protected speech at the back end. This dynamic makes regulating revenge porn harder than constitutionally appropriate and regulating core political speech easier than constitutionally appropriate.

Chaplinsky v. New Hampshire[2] is the canonical libertarian attempt to exclude at the front end of free speech law. The most famous passage of Justice Frank Murphy's unanimous opinion places some categories of expression outside of constitutional protection in light of the underlying purposes of the First Amendment. He wrote:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to

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[1] 564 U.S. ___, 131 S. Ct. 2729 (2011).

[2] 315 U.S. 568 (1942)

> truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[3]

These words articulated Murphy's commitment to liberalism and civil libertarianism and not any hostility to progressivism or progressive understandings of free speech. Murphy was the most liberal and libertarian member of the Stone Court. Frank Murphy established the Civil Liberties Bureau in the Justice Department, was a leading champion of labor rights and authored the only opinion in *Korematsu v. United States* which spoke of "the ugly abyss of racism."[4] Murphy was as liberal on free speech matters. He joined the majority in *West Virginia School Board of Education v. Barnette*[5] declaring mandatory flag salutes unconstitutional and in *Harzel v. United States*[6] implicitly overruled on statutory grounds the Supreme Court's opinion in *Abrams v. United States*.[7] The mark of his libertarianism was vigorous opposition to regulating constitutionally protected speech at the back end, not permissiveness at the front end. Murphy wrote the majority opinion in *Thornhill v. Alabama*,[8] which declared picketing to be constitutionally protected speech and dissented in *Kovacs v. Cooper*[9] when the Supreme Court sustained broad regulations on sound amplification devices.[10]

Contemporary free speech doctrine flips classical civil libertarianism. The Roberts Court makes almost no effort to exclude utterances at the front end. Persons who sell violent video games are engaging in constitutionally protected expression as are those who sell videos depicting cruelty to animals.[11] Contemporary judicial majorities maintain that empowering Congress to prohibit brazen lies "would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition,"[12] they insist that commercial advertising should enjoy almost the same constitutional protection as traditional advocacy[13] and regard corporation efforts to increase their profits through political contributions as core constitutional speech.[14] This permissive attitude toward speakers on the front end of free speech law is matched by an unprecedented deference to government regulation on the back end of free speech law. The Supreme Court has sharply limited the public fora

[3] *Id.* at 571-72.

[4] Korematsu v. United States, 323 U.S. 214 (1944).

[5] 319 U.S. 624 (1943).

[6] 322 U.S. 680, 686 (1944).

[7] 250 U.S. 616 (1919).

[8] 310 U.S. 88 (1940).

[9] 336 U.S. 77 (1949).

[10] Murphy also joined the majority in *Saia v. New York*, 334 U.S. 558 (1948), which declared unconstitutional a different regulation of sound amplification devises.

[11] United States v. Stevens, 559 U.S. 460 (2010).

[12] United States v Alvarez, ___ U.S. ___, ___, 132 S.Ct. 2537, 2548 (2012).

[13] *See* Sorrell v. IMS Health Inc., ___ U.S. ___ , 131 S.Ct. 2653 (2011).

[14] *See* Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

held open for speech[15] and conditions under which persons may speak in traditional public fora,[16] curtailed the free speech rights of public employees[17] and public school students,[18] and empowered government officials to restrict speech by persons who receive federal funds.[19] A fair summary of contemporary First Amendment law is that Americans are freer to say more about more subjects in fewer places, at fewer times and in fewer manners than at any time in American history.

This combination of front end permissiveness and back end regulation has differential consequences for revenge pornography and traditional political speech. Recent precedents make increasingly difficult front end efforts to ban hate crimes in cyberspace. If violent video games and brazen lies are constitutionally protected speech, then a plausible case can be made that assertions of the form "so-and-so ought to be raped" and pictures of naked former lovers also seem within the ambit of the First Amendment. The argument to that effect is hardly implausible. This permissiveness on the front end generates regulation at the back end. Contemporary precedents that offer a plausible basis for claiming that revenge porn is constitutionally protected speech create substantial pressures for courts and elected officials to find a regulatory basis for restricting such uses of the internet. The end result will expand the interests government may balance against free speech rights and weaken the connection between constitutionally protected special and the harms which government is permitted to prevent. If the harms associated with revenge pornography are sufficient to justify regulation of constitutionally protected speech, then perhaps the harms generated by advocacy of radical Islam are sufficient to justify regulation of constitutionally protected speech.

These observations are intended to foster greater self-awareness among those seeking to prohibit hate crimes on the internet. Professor Citron devotes much of a chapter in *Hate Crimes in Cyberspace* to detailing how her proposed regulations are aimed at utterances and publications that are not constitutionally protected speech. She correctly points out, for example, that "posts with a woman's nude photo, home address, and supposed interest in sex are not facts or ideas to be debated in service of truth."[20] Still, ambiguous passages suggest that contemporary law tempts Citron and others to seek regulation at the back end. Once the debate centers on whether "the costs to free expression would exceed the law's benefits,"[21] the tendency may be to treat revenge porn and on-

[15] *See* United States v. American Library Association, Inc., 539 U.S. 194 (2003).

[16] *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

[17] *See* Garcetti v. Ceballos, 547 U.S. 410 (2006).

[18] *See* Morse v. Frederick, 551 U.S. 393 (2007).

[19] *See* Rust v. Sullivan, 500 U.S. 173 (1991).

[20] DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 198 (2014). I might say, "make no contribution to debate on matters of public interest." *See generally id.* at 190-225.

[21] *See* Danielle Keats Citron, Online Engagement on Equal Terms 1 (U of Maryland Legal Studies, Research Paper No. 2015-34) available at http://ssrn.com/abstract=2671837. I

line harassment as constitutionally protected speech that may be regulated in light of their clear, severe harms rather than constitutionally unprotected activity that is subject to any reasonable exercise of the state police power.

Justice William Brennan's famous assertion that free speech may be "uninhibited, . . . vehement [and] caustic"[22] hardly entails that being "uninhibited, vehement and caustic" make for constitutional protected speech. This is and should remain the core insight of those activists seeking to kick hate crimes off the internet. The defenders of the totally open internet are doing a disservice to the system of free expression by either trivializing the importance of deliberation of matters of social importance or making opposition to government regulation the bedrock principle of the First Amendment. Constitutional protection of speech is derived from the democratic commitment to debate on matters of public interest. Communications and other conduct that does not debate or is not about matters of public interest is not constitutionally protected speech. If the Supreme Court and proponents of a totally free internet do "not temper [their] doctrinaire logic with a little practical wisdom,"[23] present constitutional trends suggest that the result will soon be that all forms of human action are constitutionally protected speech that can be regulated at every time, in every place and in every manner.

confess to some queasiness about "online engagement on equal terms" as opposed to "hate crimes in cyberspace." The first is far more likely than the second to be justified as an interest that justifies regulation of constitutionally protected speech.

[22] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[23] Terminello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).