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ABSTRACT

Seven suggestions are made in response to the question, "What kind of speech communication research can one do in the area of First Amendment rights?": (1) that rhetoricians reexamine loyalty-oath cases and examine lines of argument, reasoning, and language of the attorneys and judges; (2) that experts in language and style lead research in the areas of "fighting words," "obscene" speech, and group libel; (3) that those interested in listening provide scholarship on the right to listen; (4) that those interested in parliamentary procedure provide scholarship on the rights of assembly and association; (5) that those interested in oral interpretation lend their expertise on the freedom to read and freedom from literary and artistic censorship; (6) that those in speech education examine the rights of teachers and students, in and out of the classroom; and (7) that those interested in theater research the speech/nonspeech or speech/conduct distinction which has been used on occasion to suppress "obscene" drama productions. (HOD)

PROMOTING SCHOLARSHIP IN THE AREA OF FREEDOM OF SPEECH

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"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties,"[1] declared John Milton in his famous 1644 "speech" attacking censorship.

Exactly three hundred years later, in 1944, this high priority given to freedom of expression was reiterated by Supreme Court Justice Wiley Rutledge when he said in Thomas v. Collins, speaking for the majority: "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment....That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions."[2]

In his 1957 Roth dissent, Justice Douglas (with Justice Black concurring) asserted that "the First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment put free speech in the preferred position."[3]

One would assume that there really would be no need to actively promote interest in freedom of speech scholarship in our Speech Communication discipline; yet, aside from the research reported over the past

decade in our Free Speech Yearbook, freedom of speech scholarship appearing in our journals has been minimal. For example, the number of scholarly articles directly related to freedom of speech appearing in the sixty years of publication of The Quarterly Journal of Speech has been shamefully small and inadequate, averaging out to something like one scholarly free speech article every ten years in what traditionally has been considered the major journal in our field of study.

There are, of course, a variety of reasons for the interest in free speech scholarship in the Speech discipline developing so slowly over the past half century. One could assume that there simply have not been enough qualified professors in this interest area who could offer freedom of speech courses or direct free speech theses and dissertations. One could also assume that there have been and still are professors and journal editors who have not seen freedom of speech as an integral part of our discipline. One could also assume that some of the freedom of speech scholarship we have published has really not been very valuable.

I am going to assume today, however, that one important reason for the slow development of scholarship in freedom of speech has been a lack of an awareness of the types of scholarly studies which are possible and needed. More than once have I been asked, "What do you teach in a freedom of speech course?" or "What kind of Speech Communication research can one do in the area of First Amendment rights?"

Therefore, I will focus my remarks on several First Amendment questions, problems, and controversies which warrant scholarly treatment, whether in the form of theses, dissertations, journal articles or books. One research advantage we in Speech Communication have is that the First

Amendment rights cut across all our areas of specialization and offer opportunities for scholarly work in these areas: Rhetoric, Speech Education, Oral Interpretation, Parliamentary Procedure, Experimental studies, Radio-TV, and Theater.

We can apply our diverse perspectives and tools of analysis to the First Amendment rights. The expertise of the rhetorician in areas such as argumentation, style, value systems, and language need to be brought to bear on some of the classic First Amendment cases and free specch essays. For example, it would be worthwhile for someone in our discipline to look at the "cold war" cases related to the un-American activities investigating committees, federal and state. In some cases we have available the transcript the Congressional hearing at which a witness refused to answer quest about his or her associations; we have the contempt citation records; we have the lower court opinions upholding the contempt citations; we have the briefs prepared for presentation before the United States Supreme Court; we have tape recordings of the oral arguments delivered before the Court; we have the Court's opinions. It is all there to be examined, evaluated, and criticized.

It would be worthwhile to re-examine the loyalty oath cases (with all the same kinds of materials available: transcripts, briefs, tapes, opinions), one decade after the Supreme Court struck down New York's loyalty oath required of teachers and the more recent decisions finding unconstitutional requirements that persons about to become practicing attorneys disclose their associational ties.

While the rhetorician is examining the lines of argument, the reasoning, the language of the attorneys and the judges, the empirical

scholar might examine the "hypotheses" used in some of the opinions. In a number of cases related to investigating committees, loyalty oaths, and government surveillance, the "chilling effect" argument has been one that has been used to strike down the oaths, curtail committee activities and question the legitimacy of government surveillance. For example in Watkins v. United States, the Supreme Court, finding for Watkins who had refused to answer some questions put to him by a Subcommittee of the House of Representatives Committee on Un-American Activities, declared:

> Abuses of the investigative process may imperceptibly lead to abridgment of protected freedoms. The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous....Beyond that, there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial view and associations in order to avoid a similar fate at some future time.[4]

First, I think it would be valuable if some Speech Communication scholars took their tape recorders and interviewed some of those individuals who were brought before the various state and federal un-American activities committees. We should have an oral historical record of what these people went through. To what extent was the Court correct when it said that "the reaction in the life of the witness may be disastrous."

In Baird v. State Bar of Arizona, the Supreme Court in finding for Sara Baird whose application was not processed by the Bar Committee because she had refused to answer the Bar Committee question asking whether she had ever been a member of the Communist Party or any organization "that advocates overthrow of the United States Government by force or violence," said that "when a State attempts to make inquiries about a person's beliefs and associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas, as Arizona has engaged in here, discourage citizens from exercising rights protected by the Constitution."[5]

In 1972, Chief Justice Burger, delivering the opinion of the Court in Laird v. Tatum, contended that the "chilling effect" complained of by citizens who were asking that the United States Army stop conducting surveillance activities at lawful and peaceful civilian meetings, was not a demonstration of any specific harm coming to the respondents in the case. The Chief Justice declared: "That alleged 'chilling' effect may perhaps be seen as arising from respondents' very perception of the system as inappropriate to the Army's role under our form of government, or as arising from respondents' beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector, or as arising from respondents' less generalized yet speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents. Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm...."[6]

Justice Douglas dissenting, along with Justices Marshall, Brennan and Stewart, wrote: "The Constitution was designed to keep government off the backs of the people....The Bill of Rights was designed to keep agents of government and official eavesdroppers away from assemblies of people. The aim was to allow men to be free and independent and to assert their rights against government. There can be no influence more paralyzing of that objective than Army surveillance."[7]

Many of us have argued against loyalty oaths, surveillance, and investigations because we have contended that such governmental inquiries and activities have a chilling effect on our freedoms of speech and assembly. We look back into history and see the silencing effects of the investigation and persecution of Galileo. But is it possible that such oaths, investigations, and surveillance have the effect of motivating some citizens to more dissent, more speech? During the Vietnam war we know that thousands of dissenters were harassed, arrested, and beaten for their anti-war speech and activities. Yet the dissent continued. If the harassment and jailings did have a chilling-effect, what kinds of people were intimidated into silence for fear of losing their jobs, offending their neighbors, or being harassed? Such a question needs to be answered by Speech Communication scholars, for it is the fear of speaking out that we are concerned with here.

Our expertise in language and style should lead us to research in the areas of "fighting words," "obscene" speech, and group libel. For example, there are those of us in the field of Speech Communication who contend that anti-Semitic, racist, and sexist language has damaging effects on the well being of the people against whom the racist and sexist language is directed.

There are others who argue that such language does not seriously affect our attitudes and behavior towards the persons who are disparaged and denigrated by being labelled vermin, mongrel, lazy, and inferior. The fact remains that a variety of groups and individuals affected directly by such language have made efforts to prohibit its expression.

The Japanese-American Citizen League objected in 1973 to the TV reruns of World War II movies such as Across the Pacific, Purple Heart, and Behind the Rising Sun.[8] In 1971, the Mexican-American Anti-Defamation Committee announced that it planned to file a suit asking for $610 million in damages because the 'Frito Bandito' television advertisements allegedly constitute defamation of character. The Committee contended that the 'Frito Bandito' ad leaves the impression that Mexican-Americans are lazy, thieving people."[9]

In the Autumn of 1975, members of the NAACP and the Association for Black Progress exerted pressure in South Portland, Maine "for the removal of D. W. Griffith's 1915 classic Birth of A Nation from the city library's fall film series. The groups objected to the showing of the film because it is 'so negative in regards to the black contribution to the birth of the nation;' according to the President of the local NAACP chapter."[10]

One could reasonably argue that in comparison to the prohibitions of sexually "obscene" materials, a stronger case can be made to demonstrate that scurrilous, vicious, insulting language directed against groups has had more harmful effects on individuals over the past half century than all the obscene works published over the past four centuries. One could argue that more misery, more beatings and tortures, more deaths have come about as a direct or indirect result of group defamation than as a result of obscenity. Yet, for a century the courts in this country have dealt with

hundreds of obscenity cases and comparatively few group defamation cases. While handing down scores of obscenity decisions the United States Supreme Court has directly spoken only once, in 1952, on the question of group defamation.[11]

We have before us the task of doing more research into the effects of language in defining humans into subhumans, the consequences of allowing such language to be expressed, and the First Amendment protection to be accorded such speech.

The analogies appearing in the pro-censorship opinions coming from the Supreme Court need to be examined and criticized in our scholarship. As scholars competent to analyze and judge arguments we might do well to look at Chief Justice Burger's analogies used to support the five majority decisions of June 21, 1973 to prohibit the sale and distribution of obscene materials. In Miller v. California Warren Burger compared obscenity with heroin: "One can concede that the 'sexual revolution' of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does not follow that no regulation of patently offensive 'hard core' materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine."[12]

In Paris Adult Theatre I v. Slaton, Burger compared obscenity with garbage, sewage, and controls over securities claims: "...neither the First Amendment nor 'free will' precludes States from having 'blue sky' laws to regulate what sellers of securities may write or publish about their wares....Such laws are to protect the weak, the unarmed, the unsuspecting and the gullible from the exercise of their own volition.

Nor do modern societies leave disposal of garbage and sewage up to the individual 'free will' but impose regulation to protect both public health and the appearance of public places."[13]

Such arguments deserve scholarly examination by Speech Communication professors and students who have an expertise in argumentation and debate.

In an age when the individual citizen's voice is sometimes hard to hear or is stifled, we in Speech Communication need to be doing research related to the question of where one legitimately can be prohibited from communicating with his or her fellow citizens. Various restrictions on where I can speak may in the end determine whether I can speak at all.

In 1972, the Supreme Court said in Lloyd Corp. v. Tanner that the Portland, Oregon shopping center was different from the "company town" in Marsh v. Alabama where the prohibition to distribute religious literature was declared unconstitutional and different from Logan Valley in which the majority had decided in 1968 that the Logan Valley Plaza could not prohibit peaceful picketing of a store located in the shopping center. Hence in 1972 the Court decided in Lloyd against the handbill distributors inside the Portland shopping mall inviting passersby to an anti-draft, anti-Vietnam war meeting.[14] So much for shopping centers as a forum for communicating on public issues.

Military bases? In 1972, the Supreme Court did find for John Flower of the American Friends Service Committee, a civilian who had been arrested for distributing leaflets at Fort Sam Houston in Texas. The Court said, with Justice Burger, Blackmun, and Rehnquist dissenting: "Whatever power the authorities may have to restrict general access to a military facility ..., here the fort commander chose not to exclude the public from the

street where petitioner was arrested....The base commandant can no more order petitioner off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street."[15]

But in 1976, the Supreme Court, with Justices Marshall and Brennan dissenting, decided that 1972 Presidential candidates Benjamin Spock of the People's Party and Linda Jenness of the Socialist Workers Party could be prohibited from distributing campaign literature and holding a meeting at the Fort Dix parking lot to discuss election issues with service personnel and their dependents.[16] So much for military bases as a forum to communicate on public issues.

What warrants our concern and should initiate research is whether such restrictions against handbilling and holding public meetings at these military-industrial complexes can lead, for all intents and purposes, to no public speech and assembly in certain communities. Where is one to speak, to assemble, to petition for a redress of grievances with other citizens if one lives in an area where the shopping center is the only place where large numbers of people gather daily or if one lives near a military base which has no adjacent public "downtown" area, but only a shopping plaza nearby? We need to determine whether handbilling in a shopping center seriously interferes with the proper functioning of a shopping mall. We need to determine whether handbilling and campaign speaking on a military base have a deteriorating effect on the morale of the troops.

These then are just a few of the areas where scholarship is needed. Further, from those interested in the area of listening and listening

nkills, we need scholarship on the right to listen. From those interested in the area of parliamentary procedure, we need scholarship on the rights of assembly and association. From those interested in oral interpretation, we need scholarship on the freedom to read and freedom from literary and artistic censorship. From those interested in speech education, we need scholarship on the First Amendment rights of teachers and students, in and out of the classroom. From those interested in theater, we need scholarship on the speech-nonspeech or speech-conduct distinction which has been used on occasion to suppress "obscene" drama productions.

For the welfare of our society, for the protection of our freedoms, for the interests of our profession, for the integrity of our academic discipline, let us demonstrate our commitment to the concept that freedom of expression holds a preferred position in our hierarchy of values by getting on with the job of producing more scholarship related to our First Amendment freedoms - without which most of our Speech Communication classes would be mockeries of what most of us conceive as education in a free society.

NOTES

1 John Milton, Areopagitica, in The Principles and Practice of Freedom of Speech, ed. Haig Bosmajian (Boston: Houghton Mifflin, 1971), p. 32.

2 Thomas v. Collins, 323 U.S. 516 (1945).

3 Roth v. United States, 354 U.S. 476 (1957).

4 Watkins v. United States, 354 U.S. 178 (1957).

5 Baird v. State Bar of Arizona, 401 U.S. (1971).

6 Laird v. Tatum, 408 U.S. 1 (1972).

7 Ibid.

8 Newletter on Intellectual Freedom, January 1974, p. 17.

9 The New York Times, January 1, 1971, p. 31.

10 Newletter on Intellectual Freedom, January 1976, p. 10.

11 Beauharnais v. Illinois, 343 U.S. 250 (1952).

12 Miller v. California, 413 U.S. 15 (1973).

13 Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

14 Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

15 Flower v. United States, 407 U.S. 197 (1972).

16 Greer v. Spock, 96 S.Ct. 1211 (1976).