TOWARD FLAWLESSNESS

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This “ticket of admission” is inspired by reading Rebecca L. Brown’s ticket, which is called “Confessions of a Flawed Liberal”. So since this is in some ways an attempted response, I would like to call it “Aspirations to Liberal Flawlessness” or just “Toward Flawlessness.”

The question is whether it is a form of apostasy from the liberal creed to think (a) that the Constitution might permit (or indeed require?) the legal limitation of hate speech, and/or (b) that federal or state law may constitutionally limit individual contributions to electoral campaigns in a significant number of instances. It could be argued that both propositions represent the abandonment of basic liberal positions on the importance of the broadest possible scope for the freedom of speech.

The basic conceptual problem arises from the tension between two liberal values. What we seem to confront -- both on the question of hate speech and

also on the questions of “money as speech” -- is a clash between two sets of values that most liberals have always held in the highest esteem: on the one hand, the values of the freedom of speech and on the other hand the values of equality.

In the history of the Supreme Court these two values came to maturity at approximately the same time. The decision of Brown v. Board of Education in 1954 brought the theme of equality to the forefront of popular, political and scholarly attention for the first time in the history of the Supreme Court -- notwithstanding earlier partial steps in cases like Shelley v. Kraemer, Sweatt v. Painter, and McLaurin v. Oklahoma Board of Regents. (Of course, the Court had long since turned away from using the equal protection clause to protect businesses against regulation -- by asserting, for example, the “equality” of manufacturers and agriculturalists -- in such cases as Tigner v. Texas in 1940.[1]) It is often said that equality was the principal Leitmotiv of the Warren Court -- an assessment that owes as much to the reapportionment cases, such as Baker v. Carr and

1. 310 U.S. 132, overruling Connolly v. Union Sewer Pipe Co., 184 U.S. 540.

Reynolds v. Sims, as it does to Brown. But for the anchoring of equality as a prime liberal achievement of the Supreme Court, the post-Warren Court development of gender discrimination jurisprudence -- from Reed v. Reed to the VMI case -- is also essential, and last year's decision in Lawrence v. Texas may also eventually take its position in this role call of the major steps in the liberal jurisprudence of equality.

It was during the same period -- in New York Times v. Sullivan in 1964 -- that the Supreme Court began to accord serious weight to the freedom of speech as a fundamental constitutional value. This development was confirmed in 1968 in Brandenburg v. Ohio, which drew together earlier fundamental contributions by Justices Holmes, Brandeis, Harlan (in Yates), and Judge Learned Hand. Slightly later cases like Cohen v. California (Harlan again) and the Pentagon Papers case (Black, Douglas, Brennan -- but not Harlan) represented further confirmation of the central role that freedom of speech had finally assumed in the jurisprudence of the Supreme Court.

For liberals, it is an important fact that the decision of the New York Times case marked a majestic moment in which the values of speech and the values of equality coincided and reinforced each other. The same thing could be said about several other important cases of the Civil Rights era, such as NAACP v. Alabama and NAACP v. Button.

The problems we face today, in an attempt to secure a flawless liberalism, arise because these two values perhaps most prized by liberals -- speech and equality -- seem to weigh on separate sides of the scale in a number of contemporary constitutional problems. In hate speech legislation, for example, the desire to achieve equality in society seems to run contrary to the broadest protection of speech. And in the context of electoral regulations, the legislative attempt to avoid gross inequalities through limiting massive electoral contributions is said to violate a concept of the freedom of speech that would result in the most numerous instances of the promulgation of political opinion.

In an attempt to achieve flawlessness, I tend to choose the speech side on “hate speech” and the

equality side on the problems of Buckley v. Valeo. But actually I think that the equality side on Buckley is, at bottom, the speech side as well.

With respect to hate speech, I tend to favor full constitutional protection against criminal penalization, because it seems to me that this sort of legislation fosters an atmosphere of suppression which threatens to go much farther than the suppression of some particular kind of hate speech that any particular author of legislation or proponent would want to suppress. Each of us perhaps has a visceral sense of what sort of hate speech could be suppressed without endangering “true” speech values but the relaxation of speech protections -- if allowed -- will not be controlled by any particular individual, and the risks of undue extension of the exceptions are, in my opinion, unduly great. Moreover, I doubt that the criminal suppression of hate speech will really make any significant contribution toward the achievement of equality. I think, rather, it is more a symbolic

statement that will fall whimsically upon particularly annoying individuals.[2]

Sometimes the more vigorous criminalization of hate speech in Germany is cited in favor of a similar approach in the United States. But having closely observed how some of these rules work in the Federal Republic of Germany, I am very skeptical about whether such constitutional doctrines should be adopted here. First, let me say that I have no doubt that rules of this kind may be appropriate for Germany -- for obvious historical reasons -- and in this respect I am not a “universalist” in constitutionalism. But the prohibition of hate speech in Germany is also very closely connected with the view that extreme political parties, and other forms of “extreme speech” can also be suppressed. Indeed the German Constitutional Court did “prohibit” two political parties in the 1950s

2. On the other hand, I think that in relatively closed communities, like those of universities and schools, certain forms of hate speech may be subject to some degree of regulation (without criminal penalties) on the same grounds that many other forms of speech can be regulated -- such as vigorous public tirades against one’s colleagues in an office setting. The point is that a certain level of civility is necessary for the functioning of the specific institution. But I do not think that this argument can be extended to society in general.

(including a neo-Nazi party[3] and the historic German Communist Party in the West[4]), and the government has tried (as yet without success) to ban a right-wing party in recent years. It may be said that effectively the same thing occurred in the United States in the 1950s, in the Dennis case among others. But is this really the kind of model that we would like to emulate today?

The German suppression of hate speech is also very closely connected with a form of constitutional balancing that I think many American liberals would find particularly unsettling. It is true that in the last few years most results in the German Constitutional Court on freedom of speech have approximated the results that would have been reached in the United States also. Yet the technique applied by the Constitutional Court -- and the doctrine acknowledged by the Court -- would allow the penalization of certain political speech that would be protected here. The current doctrine of the Constitutional Court would, for example, allow

3. 2 BVerfGE 1 (1952).

4. 5 BVerfGE 85 (1956).

penalization of certain speech on grounds that come perilously close to what would be viewed as the doctrine of seditious libel in the United States. For example, it appears that, under the current doctrine of the Court, the statement "all members of the German army are murderers or potential murderers" -- a provocative and hyperbolic remark the likes of which were commonly heard in the United States in the Vietnam era -- could be subject to criminal penalization.[5]

Indeed, as late as the 1970s, the Constitutional Court upheld prior restraints against a novel by Klaus Mann (because it supposedly libeled the well-known actor Gustaf Gründgens, who was both Mann's former brother-in-law and a Nazi fellow traveller[6]). The Court also upheld a prior restraint against the showing of a documentary drama about a terrorist attack on a Germany Army unit, on the grounds that it might

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5. See 93 BVerfGE 266 (1995). The German Constitutional Court also upheld a criminal conviction in the case of a cartoon that portrayed a famous political figure as a copulating pig. 75 BVerfGE 369 (1987). The "striking contrast" with the Falwell case in the United States is obvious. David P. Currie, The Constitution of the Federal Republic of Germany 206 (1994); see Nolte, 15 EuGRZ 253 (1988).

6. 30 BVerfGE 173 (1971) (Mephisto).

interfere with the rehabilitation of a convicted felon recently released from jail.[7] In 1980, furthermore, libel damages were upheld in favor of the writer Heinrich Böll against a TV critic who had issued a bitter attack against Böll's writing, on the grounds that (as Böll claimed) his views were misquoted or cited out of context.[8]

Moreover, in more recent German legislation we can see the perils of such an approach. In a statute, intended to prohibit denial of the Holocaust, language was also inserted that was intended to impose penalties for denial that German-speaking people had been expelled from Eastern European countries after the Second World War.[9] If we prohibit the denial of the undeniable, can we be certain that government will refrain from punishment of other views of history? Do we really want to fight these battles? Rather, we should have the degree of confidence in our society that would allow us to protect -- as Holmes admonished -- even the thought "that we loathe and believe to be

7. 35 BVerfGE 202 (1973).

8. 54 BVerfGE 208 (1980).

9. See Eric Stein, "History Against Free Speech: The New German Law Against the 'Auschwitz' -- and Other -- Lies," 85 Mich. L. Rev. 277 (1986).

fraught with death”. This is the path of free speech, and I do not think that the prosecution of an occasional hapless hater -- probably a “puny anonymity” as was Keegstra in Canada[10] -- will actually move us in any significant way toward the goal of social justice in a more egalitarian society.

On the other hand with respect to the problems of Buckley v. Valeo and its successors -- the idea that money is speech -- I tend to come down on what seems to be the side of equality. The government ought to be able to regulate the expenditure of funds in order to achieve a degree of equality or proportionality in political power. Here I think the equality principle of Reynolds v. Sims is important. The government may not structure the electoral system so that particular individuals are granted a substantially higher degree of political power than others. The general principle is one of equality of each individual within the electoral system. As Deborah Hellman indicates in her “ticket”, we certainly would not allow a financially strapped state to sell more extensive voting rights to the highest bidder.

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10. R.V. Keegstra, [1990] 3 S.C.R. 697.

In the same way, it seems to me that the government should be allowed to act affirmatively to preserve this general principle of electoral equality -- to the extent that it finds it possible to do so -- through the regulation of expenditures that might distort the effective political power that a particular individual or group may have. Here it might be said that the values of equality are being preferred over the values of speech, but I am not sure that that is really the best way to look at this result. I would prefer to view limitations on electoral expenditures -- which, after all, are not regulations on the content of speech, but rather regulations of the circumstances of speech -- as more closely analogous to regulations that might allocate opportunities to speak in a particular public forum, or might limit overbearing uses of speech, such as sound trucks, etc. Because these regulations are limits on the amount of contributions -- and do not actually provide support for any particular opinion -- I hope that a view of this kind may avoid the difficulties associated with arguments based on “false

consciousness” etc.[11] In any case, I think that if equality in voting power is a fundamental aspect of voting, some degree of equality in effective political power should also be viewed as an essential component of the political process -- and therefore of speech -- as well.

11. See Charles Fried, “The New First Amendment Jurisprudence: A Threat to Liberty,” 59 University of Chicago Law Review 225 (1992).