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> In closing, I would ask the Court to consider this, that it would be a sad irony if we diminished the First Amendment right of free expression to American citizens in this way when the countries of Eastern Europe and the Baltic States and the Soviet bloc are returning their liberties to their citizens.

These were my closing words as arguing counsel when I appeared before the United States Supreme Court on December 4, 1991 in the case of *R.A.V v. City of St. Paul*,[1] known to the public as the "cross burning case." I represented the alleged cross burner and was challenging a St. Paul hate speech ordinance. I had planned ahead of time to close my argument in this manner, provided enough time remained to do so, because I believed it important to remind the Justices that there was a new spirit of freedom abroad — a spirit that many had feared ceased to exist after several generations of Soviet dominance, a spirit that owed much to the American vision of democracy

Perhaps I was naive in ending my presentation in this fashion; it would have been more accurate to note the return of "freedom" to the countries of Eastern Europe rather than the return of "liberties" to the citizens of those nations. In the months that have passed since the Court found in favor of the First Amendment in the *R.A.V* decision, there have been a number of reminders that, while a level of respect for individual liberty continues in America, the governments of a number of newly liberated nations (and

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1. 505 U.S. 377 (1992).

others not properly designated as newly liberated) have been less than willing to extend the type of civil liberty to their citizens that Americans feel is their birthright and a natural consequence of a free society

A Look Back at the American Experience

Five years ago, Washington and Lee Law School sponsored a Symposium on "Offensive and Libelous Speech."[2] Noted First Amendment scholar Rodney A. Smolla contributed a fascinating look at racist and sexist speech and efforts to control it.[3] Before examining modern attempts at circumscribing offensive speech, Smolla considered the opposing political philosophies that led to our vision of democracy, contrasting the "Aristotelian vision" of the common good with John Stuart Mill's "libertarianism"[4] or, as I prefer to think of it, government as parent as opposed to government as partner.

As Smolla noted, these competing philosophies represent "two quite different impulses concerning the nature of law and the role of the state that continue to vie energetically for control of our legal culture."[5] On the one hand, when the "Aristotelian impulse becomes the dominant mode of thinking in a society, there will be an inexorable tendency for the state to think that it is reasonable to exercise control over speech."[6] Accordingly, "[s]peech that promotes the good life and that affirms values of community, justice, and the rule of law will be fostered and nurtured by the state; speech destructive of those ends will be condemned."[7] This then is the epitome of the paternalistic vision of government: the codification of community opinion, providing censorship powers to the state in furtherance of the public good.

Contrasted with that vision, as Smolla noted in 1990, is a "far brasher, more youthful, more daring, and disorderly philosophy" — what he called

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2. *Offensive and Libelous Speech Symposium*, 47 WASH. & LEE L. REV 1 (1990).

3. *See* Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV 171 (1990).

4. *Id.* at 172-74

5. *Id.* at 173.

6. *Id.*

7 *Id.* Interestingly, Smolla anticipated the majority rationale in *R.A.V* two years before the decision, stating that "[i]t might be argued that it would be unconstitutional to draft a fighting words statute that singled out only one species of fighting words — racist and sexist attacks — for coverage." *Id.* at 199 n.104. Although Smolla went on to criticize such analysis, two years later he apparently thought better of it, hailing the *R.A.V* decision as one that "will prove to be a long-term enhancement of free speech in America." *See* EDWARD J. CLEARY, BEYOND THE BURNING CROSS xvi (1994).

the "counter vision of individual autonomy "[8] Those who embrace this libertarian philosophy see a much narrower role for government, one where government is more of an equal partner than a father figure, providing for the common good, punishing criminal conduct, but stopping short of censoring offensive or dissenting expression that fails to affirm the values of "community, justice and the rule of law "[9] It is this right — the right to express an opinion even though it may be discredited, not useful, and not progressive, even though it may be offensive, even though it may be wrong — that is an essential element of a citizen's search for self-fulfillment in a free society

The tension between these conflicting beliefs has existed in some form in the United States since the debates between the Federalists and the anti-Federalists two centuries ago. The off-year elections in 1994 were perhaps a reminder that many Americans are concerned with the amount of government intervention in their lives. An overdue recognition has arisen that only individual choice will voluntarily achieve progressive social policy and that education is the key to acceptance of different attitudes, physical characteristics, economic backgrounds, and racial and ethnic differences. We may well be living in a time of backlash caused in part by well-intentioned leaders who attempted to accomplish by force what can only be achieved by consensus. As James Madison wrote to Thomas Jefferson almost two centuries ago, much time must pass before "truths seen through the medium of Philosophy become visible to the naked eye of the ordinary politician."[10]

This has been particularly true in the area of free expression, where leaders of various groups have engaged in a dangerous exercise of citing historical wrongs as justification for new interpretations of the First Amendment. This futile exercise does not lead to multicultural empowerment, but it does result in a type of enforced silence in which each group claims the status of victim and argues their cause is the most just. The continuing tension between group rights and individual rights that so preoccupies constitutional theorists is somewhat misleading. One can strongly support the Fourteenth Amendment and efforts to end discrimination without standing idly by while the First Amendment becomes a subordinate clause.

Whether or not a group has a viable claim to historical oppression, the mistake is in believing that enforced civility can coexist with the dissenting

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8. Smolla, *supra* note 3, at 174.

9. *Id.*, *see also supra* text accompanying note 6.

10. Alan P Crawford, *Founding Fathers' Forum*, WALL ST. J., Feb. 2, 1995, at A16 (reviewing THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON (James M. Smith ed., 1995)).

opinion. We believe that speech is either an end in itself or a *means* to an end; if it is protected only as a means to an end, then expression will always be subject to censorship based upon the majority's disapproval of the message. Whether the aggrieved group is defined on the basis of race, religion, gender, economic status, or sexual orientation, as Ronald Dworkin of New York University Law School has stated, "It is the central, defining premise of freedom of speech that the offensiveness of ideas, or the challenge they offer to traditional ideas, cannot be a valid reason for censorship; once that premise is abandoned it is difficult to see what free speech means."[11]

Further, this freedom to offend or to dissent must be treated apolitically The central premise of the First Amendment is threatened if either end of the political spectrum attempts to politicize the basic right of self expression. Consider these sentiments expressed four decades ago by two major public figures who could not have been farther apart politically First are the words of Senator Robert A. Taft of Ohio, perhaps the best known conservative serving in Congress in the mid-twentieth century·

> Liberalism implies particularly freedom of thought, freedom from orthodox dogma, the right of others to think differently from oneself. It implies a free mind, open to new ideas and willing to give attentive consideration When I say liberty I mean liberty of the individual to think his own thoughts and live his own life as he desires to think and live.[12]

Now consider the words of Justice William O. Douglas of the United States Supreme Court, perhaps the most liberal Supreme Court justice of the twentieth century·

> The Framers of the Constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for restrained speech and thought against the abuses of liberty They chose liberty [13]

This common ground between the Left and the Right as it pertains to free expression is often lost in the tension of the moment. Liberals often raise little objection to flag burning, nor do they often see the threat posed by speech codes; conservatives, on the other hand, have come to realize that,

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11. Ronald Dworkin, *The Coming Battles over Free Speech*, THE NEW YORK REVIEW OF BOOKS, June 11, 1992, at 55, 61 (reviewing ANTHONY LEWIS, MAKE NO LAW· THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991)).

12. JOHN F KENNEDY, PROFILES IN COURAGE 196, 197 (1964).

13. Beauharnais v Illinois, 343 U.S. 250, 287 (1952) (Douglas, J., dissenting).

although they may find offensive expression originating on the Left objectionable, by protecting the freedom to display such opinions, they may prevent the attempts at "progressive" censorship that take place in local communities and on campuses, attempts clearly aimed at conservative thought and speech.

In recognition of the close relation between the dissenting opinion and offensive speech, the United States Supreme Court has on occasion protected expression that many find unworthy of such protection, lacking the characteristics of traditional political speech.[14] Some commentators suggest that the Court should wait until the threat of censorship is aimed at expression clearly political in nature.[15] This approach is not a good idea for a number of reasons. The expression that is involved in a case (i.e. flag-burning or cross-burning) is often irrelevant to the challenge of the law used to prosecute such behavior. In other words, laws such as the St. Paul ordinance in *R.A.V* and typical speech code provisions have a far wider sweep than a law targeted simply at fringe expression or opinion. Further, political speech is almost always put at risk when fringe expression itself is targeted. Better to protect the frontiers of free expression than to endanger the constitutional system by waiting until core political speech is put at risk before challenging an unconstitutional law One could maintain that, just as America has fought foreign wars far from its shores in defense of freedom, so too, as Justice Frankfurter stated, the "safeguards of liberty have frequently been forged in controversies involving not very nice people."[16]

Our nation has not always been willing to "forge" "safeguards of liberty " In the past seventy years since the rebirth of the First Amendment under Justices Holmes and Brandeis, America has been forced to reassess the cost of liberty generation by generation. On too many occasions, as reflected in myriad Supreme Court cases, we have carved out exceptions to the First Amendment with little justification other than collective fear. During the World War I era, a fear of Germany permeated society (see

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14. See Cohen v California, 403 U.S. 15, 25, 26 (1971), wherein Justice Harlan, speaking for the Court, noted that even speech lacking "cognitive content" and thus perhaps not recognizable as traditional political speech deserves protection for its "emotive function, which practically speaking, may often be the more important element of the overall message sought to be communicated."

15. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 127 (1990). Bork objected to the Court's decision in Texas v Johnson, 491 U.S. 397 (1989), suggesting that Texas should have been allowed to prohibit flag burning as long as more traditional avenues of dissent were available.

16. United States v Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

Abrams v. United States).[17] By the 1930s our nation was gripped by a fear of communism and fascism (see *Stromberg v. California*).[18] Later in the 1940s, the fear of and anger at the Japanese led to the unconstitutional internment of thousands of innocent Americans as racism overcame basic civil liberties. Following the war, the fear of communism returned (see *Dennis v. United States*),[19] and the 1960s brought a distrust and dislike of antiwar symbolism and civil rights demonstrations (see *Tinker v. Des Moines Independent Community School District* and *NAACP v. Button*).[20] Finally, the past twenty years have brought a fear of anarchists (see *Texas v. Johnson*),[21] skinheads (see *R.A.V. v. City of St. Paul*),[22] pornographers (see *Alexander v. United States*),[23] and anti-abortion demonstrators (see *Winfield v. Kaplan*).[24]

It should be noted that, although the Court has not always given a broad reading to the free speech clause of the First Amendment, it has more often than not protected expression that goes well beyond traditional political speech and in doing so has given even more strength to the right of dissent in America. Three decades ago in *New York Times Co. v. Sullivan*,[25] the Court recognized that the right to criticize public officials was a sacred right in our country, and in the years since, the Court has continued to demonstrate a belief that it is better to err on the side of freedom than on the side of those most easily offended.

Liberty did not follow closely on the heels of freedom in America. It was only after our nation passed through the crucible of the voluntary relinquishing of power by Washington, the later election of Thomas Jefferson signifying the birth of a two-party system and an end to the Alien and Sedition Acts, and the interpretation by Chief Justice Marshall of the separation of powers in *Marbury v. Madison*[26] that it became possible, both legally and politically, for later Courts to interpret the First Amendment in an expansive fashion.

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17. 250 U.S. 616 (1919).
18. 283 U.S. 359 (1931).
19. 341 U.S. 494 (1951).
20. 393 U.S. 503 (1969); 371 U.S. 415 (1963).
21. 491 U.S. 397 (1989)
22. 505 U.S. 377 (1992).
23. 113 S. Ct. 2766 (1993).
24. 114 S. Ct. 2783 (1994).
25. 376 U.S. 254 (1964).
26. 5 U.S. (1 Cranch) 137 (1803).

The Experience of Other Nations

The respect for individual liberty and the dissenting opinion continues in our nation, but only because we have been "eternally vigilant" about our birthright. We need only look to other nations to see how fragile liberty is and how it is not a natural consequence of a free society Consider the following recent examples.

England

As every law student is taught, the common law rests on well-tested principles of Anglo-American jurisprudence. The American legal system has much in common with the English form, yet our nation was founded by those who rebelled against that legal system, and that right to rebellious dissent is clearly reflected in the divergent views of libel held by the Americans and the British. One recent case, *Matusevitch v Telnikoff*,[27] demonstrates the significance of the First Amendment in distinguishing the American constitutional system from the British form of government. Several years ago, the *London Daily Telegraph* published a commentary by an English citizen criticizing the BBC for employing certain "Russian-speaking national minorities." Taken umbrage at the criticism, a Russian Jewish emigre to the United States wrote a responsive letter to the editor to the same newspaper accusing the commentator of engaging in antisemitic references. The commentator sued and won a large judgment in England against the angry composer of the letter. Judge Ricardo M. Urbina of the U.S. District Court in Washington, D.C., was asked to rule on the issue of whether or not the judgment was enforceable in a nation with a First Amendment. Judge Urbina ruled that British libel law was repugnant to American constitutional standards of free speech.[28] In order to collect damages in the United States, public officials must show malice or reckless disregard for the truth, and both public and private plaintiffs carry the burden of proving that the allegedly defamatory statements are false. In Britain, the burden shifts, making it easier to obtain damages because defendants must prove allegedly defamatory statements are true since they are presumed to be false and there is no need to show malice.[29]

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27 877 F Supp. 1 (D.D.C. 1995)

28. *Id.* at 4.

29. *See* Wade Lambert, *Libel Enforcement*, WALL ST. J., Feb. 2, 1995, at B7 See also *No Reading Behind The Lines*, N.Y. TIMES MAG., Dec. 25, 1994, at 8, reporting that Canada also allows censorship of media, forcing at least one publisher to black out portions of published work. Such prior restraint would not occur in the United States. Canadian

Undoubtedly the British interpretation of libel contributes to a more civil discourse and is applauded by public figures in that nation. However, because Britain has no First Amendment, restrictive libel laws prevent the openness Americans take for granted, allowing men like Robert Maxwell to hide financial wrongdoing until it is too late.[30]

Singapore

On October 7, 1994, the *International Herald Tribune* published an article by Christopher Lingle in which he stated that some Asian governments utilize "a compliant judiciary to bankrupt opposition politicians."[31] The article did not mention any country by name, but Singapore officials believed the remark to be aimed at their court system.[32] The comments stemmed from the belief that "a number of opposition politicians" had been "driven to financial ruin after losing defamation cases brought by senior officials" of Singapore's governing party [33] Ignoring State Department protests, a Singapore judge ruled in January 1995 that Mr. Lingle and the *Herald Tribune* be tried on criminal contempt charges.[34]

The right to criticize public officials, even court officials, is protected in America in most instances. In other nations such as Singapore, "the law values official reputation more than freedom of speech."[35] Since 1941 and the case of *Bridges v California*,[36] Americans have been free to express their opinion, even offensively, even when it is directed at those who control their freedom — the courts.

Hugo Black wrote in announcing the Court's opinion in *Bridges* that "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."[37] As Anthony Lewis has noted, even the courts in Britain have relaxed "their views so that one can

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authorities profess to believe in free expression yet appear to remain tied to British notions of censorship.

30. *See* Arthur S. Hayes, *Britain's Libel Laws Helped Maxwell Keep Charges of Misdeeds from Public*, WALL ST. J., Dec. 9, 1991, at B6.

31. Phillip Shenon, *Singapore Judge Orders U.S. Scholar and Paper To Stand Trial*, N.Y TIMES, Jan. 10, 1995, at A6.

32. *Id.*

33. *Id.*

34. *Id.*

35. Anthony Lewis, *A Prized American Privilege*, N.Y TIMES, Jan. 23, 1995, at A15.

36. 314 U.S. 252 (1941).

37 *Id.* at 270.

criticize judges with little fear of punishment."[38] Not so in Singapore; not so in many parts of the world.

Japan

There has been a trend in Japan that has "profoundly shaped broadcasting, journalism, literature and public discourse over the past several decades."[39] Commentators have referred to this as a "linguistic reign of fear, a regime of self-censorship in which phrases that could be perceived as controversial are often suppressed."[40] "Word hunting,"[41] as some have dubbed it, has infected all forms of communication in Japan. The largest newspaper in the country deletes 175 offensive words, while a major television network forbids the mention of 162 words. It is a particularly virulent form of political correctness, a dangerous attempt to force compassion in a society that has a long history of militarism. Some of the words censored include blind, crazy, ugly, bald, short, and any references to unmarried status or class membership. Publishing and broadcast companies hire "word police," who review all forms of communication to delete an ever expanding list of words found to be offensive. Such censorship is paternalism at its worst. It does not take a great deal of imagination to realize that, if one were forbidden from using words that are physically descriptive but offensive to some, one would incur a substantial risk when saying anything critical of a government that enforces such an arbitrary and destructive form of censorship.

Eastern Europe: Poland/Czech Republic

It seems like only yesterday that Americans were joining with others in celebrating the return of freedom to the countries of Eastern Europe. Yet if recent events are any indication, liberty will not be following freedom anytime soon in at least some of the newly liberated nations. As one observer has noted, "From Hungary to Uzbekistan, governments have enacted laws authorizing prior censorship, classifying routine information as official secrets, and granting public officials such comprehensive protection against 'defamation' that in some countries debate about government policy has been muted to the point of silence."[42] In a horrible and stunning reversal, some

38. Lewis, *supra* note 35, at A15.

39. James Sterngold, *Fear of Phrases*, N.Y. TIMES, Dec. 18, 1994, § 4, at 1.

40. *Id.*

41. *Id.*

42. Tina Rosenberg, *Writer's Bloc*, NEW YORKER, Oct. 10, 1994, at 7

of the nations "simply revived laws the Communists had used to jail dissenters, sometimes increasing the prison terms."[43]

While many observers will not be surprised by this turn of events, other developments will astonish and disappoint many People in many parts of our nation look upon former Polish President Lech Walesa and Czech Republican President Vaclav Havel with respect and reverence. Yet even enlightened men make mistakes once in power. If President John Adams could look favorably upon the Alien and Sedition Acts in the late eighteenth century, perhaps it shouldn't be surprising that "President Walesa allowed police to beat up anti-Walesa demonstrators outside his office. Polish journalists have been jailed for attacking politicians in print; the author of an article in a provincial newspaper served two and a half months for calling local solidarity leaders 'dopes' and 'small-time politicos and careerists.'"[44] In the Czech Republic, the parliament renewed at least one "Communist-era statute outlawing defamation of public officials and institutions" — a law similar in nature to that used to jail President Havel fifteen years earlier.[45]

It is sobering to consider that the governments of Poland and the Czech Republic are among the more enlightened of Eastern Europe. Governments in Slovakia, Romania, and Albania are even more authoritarian as they move to censor and punish criticism of government officials. As one commentator noted:

> East Europe's totalitarian nightmare is surely as dead as the ideology that animated it, but there are many varieties of unfreedom, and the milder ones are hardly to be recommended simply because they fall short of the Stalinist prototype Today's public officials spent their lives in societies where the leader's word was law and independent institutions were scarce; criticism was tantamount to treason, and honest dissent was an oxymoron.[46]

All this serves to reinforce the notion that we are lucky indeed to live in a society where liberty has followed freedom and where our nation's leaders, over time, have come to recognize that the two are inseparable.

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43. *Id.* One commentator suggests that noncommunist Russia has also failed to embrace freedom: "It is becoming clear that Russian society does not share the democratic values of the United States. Many 'average' Russians are quite tolerant of repression and contemptuous of liberty " Liah Greenfeld, *The Intellectual as Nationalist*, CIVILIZATION, Mar./Apr. 1995, at 25.

44. Rosenberg, *supra* note 42, at 7

45. *Id.*

46. *Id.* at 8.

To believe in the supremacy of free expression is to be an optimist, as Anthony Lewis has noted, and a number of European scholars feel that America is unique in this regard. Many countries around the world do not have our history of freedom and thus ban symbols and offensive speech, as well as encroach upon freedom of the press, in response to their belief that the dissenting and often hateful viewpoint may undermine the legitimacy of their government. In spite of all the partisan bickering and despite the low image of the Congress among the citizens of the United States, we are indeed optimists and believe that the legitimacy of our government is rock solid, for too many men and women have given their lives to protect liberties that we often take for granted. Many have not forgotten the words of Justice Louis Brandeis, reminding us of our legacy as American citizens: "Those who won our independence valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty they eschewed *silence coerced by law* — the argument of force in its worst form."[47]

Every time we, as American citizens, greet the dawning of a new day, read newspapers, listen to the radio or television, engage in political discussions, read books, or watch movies, we should stop to consider the individual liberty we possess as citizens of a nation where liberty followed freedom. Then we should consider how different our world would be if expression that offended a group, any group, could be outlawed. By demonstrating the confidence to deal with even the most offensive expression, we provide a framework for succeeding generations of Americans whose defining moments may well be attributable to the freedoms we protected so conscientiously years before.

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47 Whitney v California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (emphasis added).