

The Boston Phoenix

May 9, 2002

Rounding up the thought police

A recent Supreme Court decision marks the end of political correctness

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THIS MONTH, the United States Supreme Court issued one of the half-dozen most important First Amendment decisions in recent decades. On the surface, the majority opinion in *Ashcroft v. Free Speech Coalition* looks like the latest in a series that try to draw a line between protected and prohibited sexual images. But in fact the Supreme Court has done far more than that. It's issued a wake-up call to those who would, under whatever guise, seek to impose on others their ideological agendas by criminalizing *thoughts* as well as the graphic depiction of those thoughts. In short, this decision protects much more than the freedom to create child porn on a computer; it reaffirms the Constitution's historic mission of protecting the right to think one's own thoughts.

In 1996, Congress passed the Child Pornography Prevention Act, which made it a felony to possess "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or *appears* to be, of a minor engaging in sexually explicit conduct [italics added]." It also prohibited the advertisement, promotion, presentation, description, or distribution of any sexually explicit image that "*conveys the impression*" that it depicts "a minor engaging in sexually explicit conduct [italics added]." In other words, *simulated* child pornography was to be treated as if had been created by exploiting real children as models and actors.

In challenges to the law, four of the 11 federal circuit courts of appeals (including the First Circuit, located in Boston) upheld the constitutionality of the statute. These appellate-court rulings weren't all that surprising, given the Supreme Court's leniency toward legislative efforts to stamp out child pornography: in 1982, in *New York v. Ferber*, it created a distinction between pornographic

material that depicts children and such material that depicts adults by ruling that the production and distribution of child porn is not constitutionally protected; in 1990, in *Osborne v. Ohio*, the Court refused to give First Amendment protection to the mere possession of child porn in the privacy of one's own home. The appellate courts merely assumed, however cynically, that the Supreme Court would continue to make broad exceptions in the First Amendment when it comes to dealing with child pornography - even *simulated* child porn.

In 1999, however, the US Court of Appeals for the Ninth Circuit, which sits in California, declared the law invalid. It narrowly interpreted the Supreme Court's earlier decisions—which gave the government unusually broad powers regarding child porn—by taking seriously the Supreme Court's claim that it was seeking to prevent the exploitation of children rather than to establish a national standard of morality. In a decision that took an expansive First Amendment approach, the Ninth Circuit ruled that the government could not prohibit speech merely because it might tend to persuade viewers to commit illegal acts.

By affirming the decision of the Ninth Circuit, the Supreme Court has made a significant distinction between unsavory speech and thought on one hand and unlawful conduct on the other. Real child porn, pointed out the Court, is made by exploiting real children, while cyber porn is a product of the imagination and does not involve the participation of a real child. Images that spring totally from the human mind, aided perhaps by a computer's graphics capabilities, do not harm real children. To outlaw such material is, in effect, to ban an idea, not the actual exploitation of children. The Court thus made clear that it was interested in protecting kids, not controlling adults' thoughts and attitudes.

This decision has far-reaching implications for the ongoing battles between civil libertarians and the political-correctness brigade sweeping workplaces and college campuses. In recent decades, the proponents of political correctness have shown a marked tendency to confuse *thoughts* and *words* with unlawful *actions*; they then take the additional step of seeking to control and even reform people's views on important social and political issues through that pernicious invasion of

the human mind and spirit known as "sensitivity training." So how, one asks, can a decision limiting the reach of the federal anti-child-pornography statute end up as a weapon in liberty's arsenal against the proliferation of politically correct thought-reform programs? Here's how.

THE COURT'S sharp distinction between real and cyber-generated child porn is crucial, for it draws a First Amendment line in the sand that is fundamental to what freedom is really all about - the freedom to *think*. The statute, as enacted by Congress, "proscribed the visual depiction of an idea," wrote Justice Anthony Kennedy for the Court majority. And the right to depict ideas is the fundamental core of what the First Amendment, at its most profound, protects. As Kennedy further wrote: "The government cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. First Amendment freedoms are most in danger when the government seeks to control thought.... The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."

The distinction between speech, thought, and attitudes on the one hand, and action on the other, may seem simple and obvious. But it has been under sustained attack in recent decades not only by those who seek to rid the marketplace of "bad" words, pictures, and thoughts that might arguably induce bad actions in vulnerable individuals, but also by the politically correct social engineers who would expose—sometimes forcibly—workers, students, and even teachers to "sensitivity training" in an effort to change both their actions *and* their attitudes. Such "harassment" codes, which are ubiquitous in industry and education, already endanger freedom by confusing words and actions, and by classifying offensive words as "harassment" when they "create a hostile environment" on the basis of race, gender, or ethnicity. Insofar as they deal with mere speech, these codes should be ruled unconstitutional because they censor speech. But mandatory "sensitivity training" programs, which are increasingly common, go even further by inculcating politically correct *attitudes*, in addition to censoring politically incorrect speech. And it is precisely these programs' intent to change attitudes, often through forced attendance, that will now run up against

the explicit First Amendment protection enshrined in the *Free Speech Coalition* opinion. This is a vital victory for a more fundamental but less recognized aspect of First Amendment liberty: protection not only from being censored for expressing views in which one believes, but also from being coerced - successfully or not - into expressing views in which one does not believe. The recognition that the First Amendment protects *thoughts* and *attitudes* - the mind and spirit as well as the tongue - is basic to understanding the core of liberty.

In 1943, for example, in the landmark case of *West Virginia Board of Education v. Barnette*, the Court, in the midst of World War II's patriotic fervor, ruled that Jehovah's Witness children could not be forced to pledge allegiance to the flag, since their religion deemed such an act to be akin to idol worship and hence biblically prohibited. In 1969's *Stanley v. Georgia*, which protected the possession, in one's home, of hard-core pornography featuring adults, the Court noted that the drafters of the Constitution "recognized the significance of man's spiritual nature, of his feelings and of his intellect." Added the Court: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." And in 1977, the Court invalidated a New Hampshire requirement that all citizens' cars bear the motto LIVE FREE OR DIE on their license plates, ruling that the state did not have the power to coerce a citizen to broadcast a point of view "which [he or she found] morally, ethically, religiously, and politically abhorrent." The Court was clear that "the right of freedom of thought protected by the First Amendment ... includes both the right to speak freely and the right to refrain from speaking at all."

The fact that the Supreme Court reaffirmed the right to hold offensive attitudes, and did so in a case involving the volatile area of virtual child pornography, is what makes *Ashcroft v. Free Speech Coalition* so important and impressive. As a result of this ruling, would-be social engineers of both the right and the left should be inhibited from seeking to enforce "correct" *attitudes*. The court recognized the production of child pornographic images directly from one's imagination as more akin to thinking than to producing or distributing actual child porn. The cultural right, represented by the so-called pro-family forces that have

been pushing the federal government to stamp out all sexually explicit material, has essentially taken the position that books or movies involving explicit sex should be banned, with especially heavy punishment meted out to works involving children in even the most mildly erotic depictions. Cultural conservatives ostensibly want to protect children from exploitation, but since they oppose even *virtual* porn, one suspects that their real agenda includes trying to control the thoughts and emotional processes of adults. As the *New York Times* reported, the right's reaction to the ruling "was swift and passionate." Representative Mark Foley, the Florida Republican who co-chairs the Congressional Missing and Exploited Children's Caucus, said the Court had "sided with pedophiles over children." Similarly, the National Law Center for Children and Families weighed in, as did the Family Research Council. However, the Court's opinion manifestly had nothing at all to do with pedophiles; it had to do, instead, with the right to think "bad" thoughts.

In addition to stymieing the cultural right, the Supreme Court's rejection of this effort to control the contents of the human mind has implications for the forthcoming clash between First Amendment supporters and those who wish to coerce changes not only in spoken language, but also in privately held attitudes in the name of making campuses and workplaces "safe" for members of "historically disadvantaged groups," including women, blacks, and gays. The usual "harassment" code, found at virtually every large company and on the vast majority of college and university campuses today, outlaws not only true harassment, but also offensive words that, in the language of the typical code, "creates a hostile working [or educational] environment." Such harassment codes are simply an indirect way of banning offensive speech that would otherwise enjoy First Amendment protection. They are based on regulations conceived by federal bureaucrats years ago, who took the remarkable—and unconstitutional—position that saying things that might offend people is equivalent to violating their civil rights. As a result, employers and educational administrators claim that such codes are required by the government. But in fact harassment codes are not only not required; insofar as they apply to merely offensive speech, they are unconstitutional.

These codes, which began cropping up in the mid 1980s, are especially problematic on campuses of higher education, where sharp debate is a close relative of academic freedom, and where giving and taking offense is supposed to be par for the course rather than prohibited activity. But it is the more recent innovation of "sensitivity training," which seeks to force people to adopt politically correct attitudes, that has caused civil libertarians to sit up and really take notice.

Such a harassment code coupled with "training" is in place, for example, at the University of Massachusetts, which is currently trying to strong-arm its faculty into attending training sessions to become more familiar with the expectations of our new "sensitive" era - when offense can result in lawsuits for "harassment." While UMass has not made attendance at such training sessions mandatory - that would likely spur an immediate court challenge, since UMass is a public campus bound by First Amendment restrictions - it has gone nearly that far by insisting that faculty attend harassment training if they wish to be covered by the university's liability-insurance policy. If faculty members want the university to pay the costs in the event they are sued for offending a student or staffer, they must attend "harassment" training. Few faculty members are likely to waive such insurance coverage in our litigious age, when so many people feel that they have a right not to be offended and are willing to sue at the drop of a hat.

At the University of Alabama, the administration initially required professors to attend sensitivity training, but backed down and made attendance voluntary after members of the state legislature raised questions. Yet Wyeth W. Holt Jr., chair of the Faculty Life Committee of the UA Faculty Senate, recently asserted without qualification that, in his view, the university had the absolute power to require a faculty member to attend training sessions on issues of "diversity" and related areas that are currently in serious ideological dispute all over the country. Indeed, many campuses already require students to attend such sessions, often as part of freshmen-orientation programs. Sensitivity training is also commonly part of the preparation for dormitory counselors and resident advisers, who in turn are

expected to inculcate in students the values thus learned as the only acceptable attitudes. And in the midst of a recent brouhaha at Harvard Law School over an incident of allegedly racist speech by a student, HLS dean Robert Clark has established a "Committee on Healthy Diversity," as well as summer faculty workshops that can "help improve pedagogy regarding sensitive cleavage lines in our society." This appears to be fancy Harvard language for what UMass more honestly dubs "harassment training." Indeed, the point was made even more clearly when, on April 27, Dean Clark, addressing the Harvard Law School Class of 1967 Reunion - my class - stated that it is his goal not only to eradicate offensive racist speech from the campus, but also to make Harvard Law students like one another. It is very difficult to imagine the thought-reform and re-education camps that would have to be established to force HLS students to like one another when the dean cannot even generate affection among his own notoriously fractious faculty.

There can be little doubt that a First Amendment battle over "harassment" codes that encompass prohibitions against speech will be upon us very soon, given how ubiquitous such codes are in the workplace and on college campuses. This is especially likely since those who adopt harassment codes claim, in part, that they do so to comply with governmental statutes and regulations guaranteeing non-discrimination and equal access to jobs and college education. By "creating a hostile environment" on the basis of gender, race, or sexual orientation, goes the theory, employers and universities discourage members of historically disadvantaged groups from participating in work and education. Therefore, civil liberties (free speech) must be sacrificed to promote civil rights (equal access to work and education)--that's the view that has taken hold in many segments of government, industry, and education. The theory is perverse not only because it seeks to promote a notion of equality by enforcing speech and ideological restrictions, but because it assumes that members of historically disadvantaged groups will achieve full equality by being shielded from the harsh realities of other people's views.

However, it is "mandatory sensitivity training" that likely will trigger the larger

court battle, since Americans are, justifiably, even more outraged when they are told not only that they may not say what they believe, but that they must say and even believe ideas that are not theirs. In this battle, *Ashcroft v. Free Speech Coalition* likely will play an important role. It reveals the First Amendment as an obstacle to the mandatory imposition of any moral and political agenda, whether from the left or right.

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