THE LIBERAL DIVIDE AND THE FUTURE OF FREE-SPEECH LAW

RONALD K.L. COLLINS*

It is now obvious: When it comes to the First Amendment, liberals are badly divided. Some liberals are more attracted to the equality side of the constitutional divide than they are to the liberty side, and vice-versa. This has real consequences for those of us caught in the liberal crossfire of a war over words, which is nothing short of a philosophical and cultural battle to capture the liberal mind.

There was a time, in the closing years of the Warren Court Era, when liberals applauded First Amendment victories. No more. Liberals now clash with liberals. Today division has replaced celebration, quarreling has supplanted accord, and the accolade "hero" is no longer routinely reserved for a First Amendment victor.

This schism was on my liberal mind the evening I prepared to offer a few preliminary comments on Danielle Keats Citron's perceptive new book, *Hate Crimes in Cyberspace*. While there is much in this all-too-humane book with which I agree, something in the old liberal in me started to reach for my First Amendment pause button when I came to Chapter 8 ("'Don't Break the Internet' and Other Free Speech Problems"). Was it my OWH/ LDB/ HLB/ WOD/ and WJB liberal First Amendment absolutist tendencies that triggered this response? Perhaps.

Key passage: "A legal agenda would not undermine our commitment to free speech. Instead, it would secure the necessary preconditions for free expression while safeguarding the equality of opportunity in our digital age."[1] Note the words I italicized. In one First Amendment world those terms are very suspect. They stack the deck by dealing Liberty a difficult hand, or so some would say. No wonder John Roberts got his First Amendment back up when someone played the Equality Card (is EC is the cousin of PC?) in a free-speech case: "No matter how desirable it may seem," Roberts scoffed, "it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equaliz[e] the financial resources of candidates.'"[2] To be sure, Justices Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan disagreed. And why? Well, because those liberals were more

* Harold S. Shefelman Scholar, University of Washington School of Law.

[1] DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 190 (2014) (emphasis added).

[2] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1450 (2014) (citations omitted).

concerned with the equality equation, with what they viewed as the necessary preconditions for free speech. Sounds Citron-like, no?

To be fair, Professor Citron carefully constructed her conceptual platform with planks borrowed from judicially-recognized First Amendment exceptions such as defamation, true threats, crime-facilitating speech, obscenity, invasion of privacy, fraud, criminal incitement, and the intentional infliction of emotional distress.[3] Here she is on terra firma, up to a point anyway. My qualification stems from the fact that over the years even in these areas we have witnessed a real deterioration of the doctrinal gatehouses. Merely consider cases such as *Brandenburg v. Ohio*,[4] *New York Times Co. v. Sullivan*,[5] *Hustler Magazine v. Falwell*,[6] *Virginia v. Black*,[7] and *Snyder v. Phelps*.[8] As for obscenity, the Internet has either obliterated the obscenity bar of *Miller v. California*[9] or so demolished community standards as to functionally legalize obscenity (other than kiddie porn). Thus, on the one hand, Professor Citron makes a strong case insofar as her reform agenda involving the regulation of cyber-hate crimes (judiciously defined[10]) moves closer to recognized exceptions (duly confined) to the First Amendment as construed in modern times. On the other hand, the more that agenda veers closer to any equality (or leveling) paradigm, the more her case weakens when judged by contemporary (libertarian) decisional-law norms.

Any commitment to free speech, it must be remembered, depends entirely on what that commitment is and how we (liberals, libertarians or conservatives) define and value free speech. Right now, a battle is being waged over what precisely it means to vindicate a First Amendment right of free expression.[11] What some on one side consider a vindication of a right (e.g., in a campaign finance case), those on the other side view as a First Amendment violation. For

[3] CITRON, *supra* note 1, at 190-91, 200. A new article by Professor Eugene Volokh—titled *The Speech Integral to Criminal Conduct Exception* (forthcoming in CORNELL L. REV.)—contains a thoughtful and informative account of how the criminal conduct exception has been misapplied in a variety of circumstances, thus raising serious free-speech concerns.

[4] 395 U.S. 444 (1969) (criminal incitement).

[5] 376 U.S. 254 (1964) (defamation).

[6] 485 U.S. 46 (1988) (emotional distress).

[7] 538 U.S. 343 (2003) (true threats, not all of the convictions of the Defendants in the case were upheld). Professor Citron wrote of the case as involving "two men" (Citron, Hate Crimes, supra note 1, at 201), while the facts actually involved three men—Richard Elliott, Jonathan O'Hara, and Barry Black. The latter's conviction, unlike the other two, was invalidated by a majority of the Court.

[8] 131 S. Ct. 1207 (2011) (emotional distress & invasion of privacy).

[9] 413 U.S. 15 (1973) (obscenity).

[10] *See, e.g.*, Eugene Volokh, *Florida "Revenge Porn" Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013), http://volokh.com/2013/04/10/florida-revenge-porn-bill/; Eugene Volokh, *One-to-One Speech vs One-to-Many Speech, Criminal Harassment Laws, and 'Cyberstalking,'* 107 NW. U. L. REV. 731 (2013).

[11] *See* Ronald Collins, *What Does It Mean to Vindicate (or Violate) a First Amendment Right?* (forthcoming).

some, vindicating a First Amendment right means leveling the speaking field (as in the case of net neutrality), whereas for others that is tantamount to abridging the First Amendment. In this tug-of-war, there is a shifting of the normative paradigms that once pitted liberals (those said to be committed to free speech) against conservatives, but which today pits libertarian free-speech liberals against egalitarian free-speech liberals. Take note: Professor Citron's book is situated in the context of that contemporary conflict over the meaning of the First Amendment.

As David Skover and I argued decades ago in The Death of Discourse (1996), our highly capitalist, entertainment, and technological[12] (CET) culture is producing (for better or worse) a world more sensitive to First Amendment freedoms and less sensitive to so-called societal harms. Like it or not, that is the culture of our times . . . and yet so many free-speech theorists remain oblivious to that fact. Know this: Jurisprudence cannot be divorced from the demands of Realpolitik. Too many liberals construct theories situated in the ether of egalitarian utopias devoid of real-capitalistic-world content, as if a free-speech regime could stand apart from our own highly Huxleyan[13] regime.

In our modern world, free-speech freedoms tend towards deregulation and away from hierarchical, value-laden categories of protected versus unprotected expression. It is a world of an ever-ascendant libertine way of life. In that domain, capitalism dominates, pleasure dictates, and technology permeates all. In the process, many traditional norms are drained of some of their staying power in the name of Huxleyan liberty. By that measure, what we define as "speech" or "harm" is up for conceptual grabs as the liberty model of free speech becomes more dominant.[14] All of this will affect the reform plan Professor Citron hopes to gloss onto existing First Amendment law. "A legal agenda will take time,"[15] she correctly concedes. Indeed, it may take a decade or a lifetime along with a shakeup in the Supreme Court. Worse still, there is the specter of a CET culture clash. If so, Citron's task could be Sisyphean. And then to add to the weight of that rock, libertarians might even brand parts of her agenda Orwellian.

Why do certain liberal scholars delight in chipping away at the edifice of the libertarian First Amendment? Answer: Because that structure overshadows their liberal creed. Speaking of that edifice, it is noteworthy that the liberal Justices have written relatively few of the Roberts Court's 41 First Amendment free-speech opinions. The Chief Justice (13 opinions), Anthony Kennedy (5 opinions), Justice Antonin Scalia (5 opinions), Samuel Alito (4 opinions), and

[12] In one of our next books—ROBOTICA: FREE SPEECH & THE DISCOURSE OF DATA—Professor Skover and I grapple with the latest incarnation of the communicative technology and its relation to the First Amendment.

[13] *See* RONALD COLLINS & DAVID SKOVER, THE DEATH OF DISCOURSE 3-7 (2d ed. 2005).

[14] Consider in this regard the ruling in *American Booksellers v. Hudnut*, 771 F.2d 323, 328-329 (7th Cir., 1985) (striking down anti-pornography ordinance though noting "we accept the premises of this legislation"), *aff'd*, 475 U.S. 1001 (1986).

[15] CITRON, *supra* note 1, at 226.

Clarence Thomas (3 opinions) have written 73% of the lead First Amendment free-speech opinions for the Court. Of the current Court's five-to-four First Amendment free-speech opinions, conservatives authored 9 out of 12. And tellingly, Justice Elena Kagan has not authored a single lead opinion in this area since she came on the Court in 2010. What is important here is that many liberals (e.g., Floyd Abrams and Nadine Strossen, among others) applaud major tenets of the Roberts Court's free-speech canon while other liberals (e.g., Robert Post and Tamara Piety, among others) condemn it.

Without discounting all the welcome nuance in this well-thought-out book, I wonder if the subtext of *Hate Crimes in Cyberspace* is an abiding hope to reclaim and recalibrate the First Amendment so that it is more sensitive to new liberal-egalitarian values. And why is that so bad? After all, if the First Amendment counsels free thinking and open minds, why not be a free thinker and consider the First Amendment anew? More than all else, that is what I gleaned from *Hate Crimes in Cyberspace*—modest liberal in presentation, staunch progressive in principle. In all of this, keep in mind that one need not necessarily recalibrate the way he or she thinks about the First Amendment[16] in order to pause and ponder one's thinking on this subject. Then again, seduction does not always lead to abdication.

There is more, far more, to say about *Hate Crimes in Cyberspace*. Questions about how we define "hate crimes," how we delineate the relevant circumstances, how we view the pertinent First Amendment "norms" (cultural, constitutional, and economic) in a post-Reno[17] and post-Ashcroft[18] world, how much weight, if any, the defense of truth should carry with it, how narrowly tailored must laws be to survive legal analysis, how in light of Reed[19] will questions of content discrimination affect the constitutional calculus, and how much elasticity must we assign to the notion of harassment—these are all matters that must considered. Another important free-speech issue, though not a First Amendment one, is the extent to which private entities (Twitter, Facebook, Google, etcetera) might act where the government cannot. And then there is this: To what extent, if any, is the stirring sprit behind Professor Citron's work similar, at least in basic principle, to that of the feminist Catharine MacKinnon?

Unfortunately, these and other questions must remain dangling since the editorial boundaries of this digital venue cabin the reach of my comments. So I must rein in my many thoughts, duly mindful that the laws of discourse demand further elaboration and exploration.

Meanwhile, the liberal chasm widens as liberty-minded liberals square off against equality-minded liberals. The breach is no longer simply along liberal-

[16] Perhaps the best example of this is Professor Steven Shiffrin's provocative forthcoming book WHAT'S WRONG WITH THE FIRST AMENDMENT?, a work certain to make liberals pause and ponder, yet again, about what speech should or should not be protected.

[17] Reno v. ACLU, 521 U.S. 844 (1997).

[18] Ashcroft v. ACLU, 535 U.S. 564 (2002).

[19] Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

conservative lines. Liberals now war with one another. While liberals of all stripes will surely find much in *Hate Crimes in Cyberspace* with which they agree, there will also be plenty of philosophical bickering. This is, after all, the Age of the Liberal Divide. Take heed![20]

[20] Recall the use of the word "heed" in *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964), wherein it was a liberal call to action.