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FOREWORD

CENSORSHIP & THE MEDIA: A FOREWORD

BARRY P. McDONALD*

This symposium edition of the *Notre Dame Journal of Law, Ethics & Public Policy* focuses on issues that are of unquestionable importance in a self-governing society that places a high value on an uninhibited flow of human expression to make good decisions about how we live, and to fulfill our own personal strivings. These issues concern the types of decisions that those who provide and control the mass channels of these flows make to regulate their content in different ways (including government actors who may place restrictions upon them). They also concern the legal, professional, economic, and other factors that influence those decisions, and proposals about the way these factors themselves might be modified to result in decisions that are best for all. This is serious business, because those who regulate the content of modern communications flows are deciding what many citizens will see and hear about events of the world, in effect shaping their opinions on key matters that individuals will eventually make important decisions about—not the least being which elected representatives seem best equipped to address and influence those events.

The articles presented in this edition deal with three critical types of decisions that are made by media or government actors regarding the content of communications flows. The first concern voluntary choices that media organizations make as to what material, including both what they come into possession of and generate themselves, they will present to the public. In other words, these decisions regard what are frequently called choices involving media self-censorship or the exercise of editorial discretion. The authors addressing this issue—Robert Sedler, Hannibal Travis, and Clay Calvert and Mirelis Torres—discuss the range of legal and other factors that affect these choices, how those factors can operate to foster both desirable and undesir-

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able decisions, and proposals regarding ways in which current media decision-making can be improved.

The next type of censorial decision these articles address concern decisions that media consumers themselves make, either consciously or unconsciously. Here, contributing author George Wright contends that in the process of choosing their content sources, Internet users themselves effectively engage in self-censorship, weeding out disagreeable sources of views and information to the detriment of the individual user and public discourse generally. Wright proposes a creative solution to this asserted challenge.

The third and final type of censorship decision dealt with herein concerns more traditional notions of that concept: restrictions on communication flows imposed by the government rather than the media itself or consumers of it. Contributions in this area by Derigan Silver, Kevin Saunders, and Terence Lau examine, respectively, the age-old question of the best legal approach for balancing national security concerns versus the public's "right to know" in the more "new-age" context of terrorist trials, as well as more modern questions concerning the constitutionality of restrictions on sales of violent video games and the desirability of proposed restrictions on the distribution of private information on the Internet.

All three of these types of alleged censorship involving various media present difficult and important legal and public policy questions regarding the shaping of communication flows in our society. I will examine each of the substantial contributions made by our authors to these questions in more detail below.

PROBLEMS OF MEDIA SELF-CENSORSHIP

Robert Sedler very usefully leads off the discussion of media self-censorship by organizing that phenomenon into two component parts—what he terms "bad" self censorship and "good" self censorship—and arguing that the former is properly deterred, and the latter properly fostered, by the United States Supreme Court's First Amendment jurisprudence. In Sedler's view, bad self-censorship occurs in a wide variety of media when the producers and distributors of content are "chilled" into altering or withholding it from the public by the prospect of legal sanctions attaching to its communication. Amongst examples of such self-censorship, Sedler cites Supreme Court decisions dealing with laws giving political candidates a right of reply to attacks in newspapers that allegedly chilled the newspapers from publishing the attacks in the first place, and laws setting up motion picture cen-

sorship boards that allegedly chilled the making of movies containing non-obscene sexually explicit content. He argues that Court-created law, such as the overbreadth doctrine and the actual malice standard of *New York Times Co. v. Sullivan*,¹ deters such undesirable self-censorship by establishing the “chilling effect concept” as “the most fundamental and pervasive concept in the ‘law of the First Amendment.’”²

On the other hand, according to Sedler, good self-censorship by the media, such as decisions to withhold the name of rape victims or information that might harm national security interests (in both cases, of course, where the costs of disclosure are deemed to outweigh the public benefits), is also made possible by First Amendment protections—namely, a “right to silence” embodied in Court decisions that have protected the exercise of the media’s editorial discretion to publish certain information or not.³ Sedler concludes that we rely on First Amendment law to prevent the bad forms of media self-censorship, and to bring about its good forms.

Sedler makes some very important points. Certainly a desire to minimize the chilling effects of imprecise forms of speech regulations, including those that apply to the media, is a principal driver in much of the Court’s First Amendment jurisprudence. Very recent examples of this include the Court’s invalidation of a federal law restricting the sale of animal cruelty videos that it thought might chill the production and sale of hunting videos,⁴ and even its invalidation of a private tort verdict against offensive funeral protesters in part on the unstated assumption that allowing juries to determine what speech activities constitute outrageous conduct might chill protected speech on matters of public concern.⁵ But while the First Amendment does much to protect against undesirable media self-censorship resulting from unduly imprecise or discretionary laws, we must not forget that there are other non-legal causes of undesirable self-censorship that are equally troublesome—at least as to the news media’s function of getting important information to the public, and to other forms of media as well.

The late, distinguished media scholar C. Edwin Baker identified some of the most troubling sources when he argued that “the greatest threat of censorship in this country comes not from

1. 376 U.S. 254 (1964).

2. Robert A. Sedler, *Self-Censorship and the First Amendment*, 25 NOTRE DAME J.L. ETHICS & PUB. POL’Y 13, 15 (2011).

3. *Id.* at 13–14.

4. *See United States v. Stevens*, 130 S. Ct. 1577 (2010).

5. *See Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

the government, but from advertisers and, more generally, from the failure of free markets to provide either the news and entertainment that we want or that we need.”⁶ In part, demands and pressures from advertisers, as well as other market dynamics, drive media institutions to keep important information from the public that they believe might be too dull or unwelcome.⁷ Of course, much of this problem is attributable to the public’s desire for more entertaining than informing fare, and so presents the classic problem of the chicken and the egg—does media “dumb down” its product because the public demands it, or because it believes that is what primarily sells? This is an intractable problem that will not be easily solved.

Another of the contributing authors, Hannibal Travis, deals with another important source of undesirable media self-censorship. He argues that the government’s undue influence over large media conglomerates has caused substantial censorship by the media of war critics and anti-war viewpoints. Such influence, according to Travis, is created by the government’s power, among other things, to control and grant access to war-related information (sometimes in a preferential way), as well as its power to influence the larger business interests of those conglomerates. It results, he says, in a reluctance by media companies to take or present strong anti-government stances or information that might undermine government war efforts, which in turn results in primarily pro-war information and positions being communicated to the public. In effect, government and big media conglomerates become partners in war. And, Travis argues, such filtering of anti-war content in traditional media channels of television, radio, and newspapers, is now shifting to the Internet by virtue of media conglomerates’ involvement in providing Internet access to customers, as well as their creation and presentation of much content on the Web.

Travis appears to suggest that some ways of addressing these problems include opposing large consolidations of media interests and, as they pertain specifically to the Internet, maintaining “innovation, mobility, and flexibility” to disseminate anti-war information and opinions outside of big media channels.⁸ One might also argue for increased congressional monitoring of exec-

6. C. Edwin Baker, Remarks on Market Threats to Press Freedom at the Angelo State University Symposium: American Values (1998), available at http://www.angelo.edu/events/university_symposium/98_Baker.html.

7. Here I am describing some of Baker’s claims at a high level of generality. See *id.*, for his detailed argument.

8. Hannibal Travis, *Postmodern Censorship of Pacifist Content on Television and the Internet*, 25 NOTRE DAME J.L. ETHICS & PUB. POL’Y 47, 86 (2011).

utive branch relationships with big media companies to ensure that they indeed do not become too symbiotic. But whatever the solution, it is clear that Travis has hit on a substantial problem of undesirable media self-censorship. A person need look no further than the self-confessed failure of established media companies to adequately examine and question the justifications for the Iraq War asserted by the Bush administration in the run-up to that conflict, justifications which later seemed to dissolve in the full light of day.⁹

As to Sedler's argument that "good" forms of media self-censorship are the product of a First Amendment right of silence, I suspect that the final set of contributors on this topic might argue that such decisions are more the product of journalistic codes and ethics rather than constitutional law—particularly since government is typically not attempting to compel media companies to disclose sensitive information such as rape victim names or national security secrets. Indeed, in their article, Clay Calvert and Mirelis Torres explore the ways in which professional journalism ethics, combined with legal standards drawn from privacy torts and Federal Communications Commission broadcast indecency regulations, do and can operate to promote good media decisions about whether or not to publish vivid images of U.S. soldiers or civilians killed in wartime.

Calvert and Torres persuasively argue that such photographs can inform citizens who ultimately must decide whether a war is worth fighting of the true nature of its costs in a much more authentic and realistic way than mere literary accounts of battle. Hence, it is critical to publish such photos absent compelling reasons not to do so, such as to protect victims' families from additional trauma (particularly where less invasive photos exist that can transmit a similar message). The authors usefully propose a multi-factor framework that "takes into account variables from the realms of both [journalistic] ethics and the law,"¹⁰ what they call a "censorship rubric,"¹¹ to assist news media editors in making good decisions about whether or not to publish such death images.

There is no doubt that Calvert and Torres are correct that a picture can often convey the realities of a situation much more

9. See, e.g., From the Editors, *The Times and Iraq*, N.Y. TIMES, May 26, 2004, at A10 (noting that many articles prior to the Iraq War included data that was allowed to be printed without challenge or further verification).

10. Clay Calvert & Mirelis Torres, *Staring Death in the Face During Times of War: When Ethics, Law, and Self-Censorship in the News Media Hide the Morbidity of Authenticity*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 87, 121 (2011).

11. *Id.* at 117.

effectively and powerfully than literary accounts. And they are also undoubtedly right that, whether they want to see such images or not, American citizens must be fully apprised of the consequences of their representatives' decision to wage war—including both the progress of the war and its human toll. The government all too often in our times attempts to conceal these images from the American public, as was evidenced by the Bush administration's policy (continued from prior administrations) barring journalists from photographing the coffins of soldiers killed in Iraq as they arrived back on American soil.¹² When these stark and shocking war images do become available to the media, then, the rubric of Calvert and Torres promises to be a very helpful tool in helping it to weigh both the benefits and costs of disseminating them.

PROBLEMS OF INDIVIDUAL SELF-CENSORSHIP AS TO MEDIA SOURCES AND FORUMS

Next, George Wright takes on a different form of self-censorship, a form which he argues many individuals engage in consciously or unconsciously when they make choices of what websites they will use as sources of ideas and information (such as foxnews.com or msnbc.com), and of which Internet forums they will choose to communicate with others through (such as a particular group of Facebook friends, or a chat room or blog devoted to certain subjects). As Wright and others such as Cass Sunstein have argued, the Internet creates new risks along with its benefits, because users now “pull” the information they seek rather than having that information “pushed” to them as had been the case with more traditional media channels. The risk addressed by these authors is that many Internet users will seek out sources of ideas and information that appear most aligned with their own thinking, and effectively “cancel out” those sources of ideas, views, and information with which they disagree or distrust. Wright describes this phenomenon as “input-side self-censorship,”¹³ referring to decisions by individuals to con-

12. Memorandum from the Dep't of Def. regarding the Public Affairs Guidance—Operation Desert Storm Casualty and Mortuary Affairs (Feb. 6, 1991). See also Press Release, Am. Forces Press Servs., Defense Department to Allow Photographs of Caskets with Family's Permission (Feb. 26, 2009), available at <http://www.defense.gov/news/newsarticle.aspx?id=53250> (announcing reversal of the 1991 policy).

13. R. George Wright, *Self-Censorship and the Constriction of Thought and Discussion Under Modern Communications Technologies*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 123, 125 (2011).

sume information and views from like-minded sources to the exclusion of “other-minded” ones.

As a consequence of this “cyberbalkanization,” Wright contends, not only is public discourse impaired, but so too is an individual’s ability to think broadly and in a fair-minded way. Public discourse is degraded because the more like-minded individuals exchange views together to the exclusion of differing views, the more extreme those views become—resulting in a more polarized and less civic public debate. Less exposure to differing viewpoints and sources of information also impairs the thought processes of individuals, because their thinking becomes narrower, and their minds become less able and willing to appreciate the positions of others who espouse differing views.

To counter this trend, Wright advocates cultivating the pursuit of truth in matters of politics as a civic and personal virtue, a quest that takes priority over and “constrain[s] our substantive political commitments.”¹⁴ Presumably, those who would take such a pursuit seriously would willingly seek out and consider information and ideas that did not fit comfortably into their own worldview—expanding both the reaches of their own thinking and, hopefully, their tolerance for the differing views of others. As examples of role models to emulate in this regard, Wright appropriately points to the philosopher Ludwig Wittgenstein and the scientist Charles Darwin.

Another person that might be included in this group is Justice Oliver Wendel Holmes, Jr., and his immortal defense of freedom of speech as a means of producing a marketplace of competing ideas in which truth eventually emerges to the detriment of those who remain wedded to their “fighting faiths.”¹⁵ Surely Holmes would have supported the cultivation of the virtue Wright proposes, for a marketplace in which groups of participants shopped only with select merchants without considering the wares of others, would hardly produce the benefits of competition that marketplaces are designed to foster. And so, it might be emphasized, the pursuit of truth is not only a civic and personal virtue worth cultivating for its own sake, but also because it lies at the heart of one of the most cherished rights for which this country stands.

14. *Id.* at 141.

15. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

PROBLEMS OF GOVERNMENT CENSORSHIP OF MEDIA

The last group of this edition's contributors addresses the more commonplace censorship problem of government regulation of the media, but in the decidedly non-commonplace contexts of terrorism trials, extreme video game violence, and invasions of privacy in cyberspace. With respect to terrorism trials, Derigan Silver considers the intersection of the Court's decisions that have created a general First Amendment right of the public, including the media, to attend judicial proceedings, with other decisions that have recognized the need to defer to executive branch decisions regarding the withholding of information from the public for national security reasons. Obviously, the trials of alleged terrorists implicate both sets of concerns when the Justice Department argues that aspects of such trials and related records have to be closed to the public in order to protect U.S. national security interests. In such cases, censorship of the media is implicated only insofar as a court agrees to such closure requests and denies the media access to information that the government produces pursuant to such proceedings.

Silver argues that when they are ruling on closure requests in such cases, courts ought to adopt the presumption of access that the Supreme Court has established in the First Amendment right of access cases, rather than the presumption of secrecy or deference that he contends governs cases involving the denial of access to national security information. Consistent with such a presumption of access, he contends, the government should have to demonstrate a compelling need for closure and that its request is narrowly tailored to address that need. Such a presumption of access is all the more appropriate, in Silver's view, given the passage of a recent federal law that mandates certain procedures for judges to follow when classified information is used in federal prosecutions—assisting them with striking the proper balance between security concerns and public access in such proceedings. Further, permitting public and media access in terrorism trials except where truly necessary to protect national security interests will adequately maintain transparency in our judicial proceedings, therefore retaining the public's trust and confidence in the government's efforts to both combat terrorism and try suspected terrorists in a fair manner.

Silver is surely right that transparency in the way the government tries suspected terrorists is just as important in this area of the law as in others. Citizens must have confidence that the government is not only effectively fighting terrorism, but also that the government is doing so in a just and fair way—for instance,

in a way that does not unfairly target persons because of their ethnicity or religion, or that does not target non-serious threats in order to claim victories in the war against terror. Moreover, as the late Louis Henkin and others have frequently argued,¹⁶ government officials routinely over-classify information that does not present serious national security risks, not only because it is an easier way to go but also because knowledge is power, and government officials do not share that eagerly or wish to provide their potential detractors with any more information than they have to.

Silver's presumption of access argument, then, has much force. The challenge for courts will be how to apply what is effectively a strict scrutiny standard of review to closure decisions that also operates to adequately protect true national security secrets. In other words, courts will need to be convinced that such a standard of review can be applied in this area in a way that is not "strict in theory, but fatal in fact."¹⁷ And for that guidance they can look to the Court's affirmative action decisions where that tribunal has been forced to make strict scrutiny review more of a realistic balancing test than the fatal blow to government regulation it normally is in order to preserve some space for valid affirmative action plans.¹⁸

Moving to a more standard form of government censorship than denials of access to government information, Kevin Saunders addresses the constitutionality of restrictions many States have recently been placing on the ability of the video game retailers to sell extremely violent games directly to minors—typically ones where players are encouraged to inflict gratuitous and extreme acts of violence on others (all in a virtual way, of course). The video game industry has been challenging such restrictions as violations of the First Amendment, and lower courts have generally been sustaining such claims. One of these

16. See Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 275–76 (1971) ("Without any doubt . . . Government frequently withholds more and for longer than it has to. Officials . . . tend to resolve doubts in favor of non-disclosure. Some concealment is improperly motivated—to cover up mistakes, to promote private or partisan interests, even to deceive another branch or department of government, or the electorate.").

17. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (citing *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)).

18. See *id.* at 227 (holding that all racial classifications must be analyzed under strict scrutiny); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding under strict scrutiny the University of Michigan Law School's race-based "plus" factor admissions program).

lower court decisions is presently under consideration by the Supreme Court.¹⁹

Drawing from various historical sources, such as the personal correspondence of key members of the founding generation and relevant literature of the day, Saunders makes a persuasive case that the Constitution's framers would have been extremely surprised, and likely upset, to learn that the "freedom of speech" they enshrined into our fundamental guarantees encompasses the right of video game distributors to peddle extreme fare to minors absent the approval of their parents. As he demonstrates, the founding generation was especially concerned with the proper upbringing and education of children in order to develop individuals who would become productive and virtuous citizens of American society. They also recognized, as common sense seems to suggest, that children are highly impressionable and susceptible to deleterious influences up to an age where they can make mature and independent judgments of their own. Hence, Saunders contends, anyone who purports to take originalism seriously as a method of interpreting the Constitution has a heavy burden to shoulder in using the First Amendment as a basis for invalidating State laws regulating the access of minors to video games that promote virtual acts of extreme violence.

However, as Saunders and other observers of the Court surely know, originalism is only one method of interpretation that body utilizes to answer the many constitutional questions that come before it, and typically it does not explain its reasons for utilizing one method versus another in a particular case.²⁰ And under its modern jurisprudence, once the Court decides that First Amendment protections should apply to a given situation, it normally invalidates (pursuant to strict scrutiny) any regulation of expression that seeks to address potential harms caused by its content. Its principal justification for doing this is to ensure that the government is not merely censoring the content

19. See *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), *cert. granted*, 130 S.Ct. 2398 (2010). See also Transcript of Oral Argument, *Schwarzenegger v. Entm't Merch. Ass'n*, No. 08-1448 (Nov. 2, 2010), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1448.pdf.

20. See Barry P. McDonald, *Government Regulation or Other "Abridgements" of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment*, 54 EMORY L.J. 979 (2005).

because it dislikes it under the pretext of addressing harms allegedly caused by it.²¹

One would hope the Court will recognize that when states essentially tell video game retailers they cannot sell their extreme games to minors without the permission of their parents, those governments are not censoring anything. Rather, they are simply directing retailers to have parents buy such games for their children if the latter want them and their parents approve. Perhaps then the Court will also recognize that its modern approach to content-based regulations of speech is simply inadequate to address the problem of minors and extreme video game violence, and that an originalist analysis such as that advocated by Saunders might provide a sounder point of departure for deciding these cases.

Our final contributor, Terence Lau, explores the capacity of Internet communications to invade a person's privacy and harm their reputation in a shorter time, across a wider space, and for a longer duration, than any medium of communication heretofore known. Lau argues that particularly in cases where individuals have not voluntarily "established a presence" on the Internet, and have not contributed to incidents where Internet users invade their privacy or defame them in that medium, remedies that might be provided by existing tort actions or statutory protections are inadequate to provide any real redress. Hence, he advocates a form of new statutory protection called "Zero Net Presence" (ZNP), which gives the injured person a "right to demand [that] a website operator or internet service provider remove and scrub all traces of their name or identity if they wish."²² In other words, instead of making futile attempts to redress their harms by going after anonymous or otherwise unreachable perpetrators of Internet abuse, under Lau's proposal such victims would be able to demand that Internet media operators remove the offending content from their channels of communication. In essence, Lau is advocating the creation of a new form of government-authorized censorship in the form of a statutory right to have Internet media operators excise allegedly damaging content.

Of course, government censorship can take both good and bad forms in ways that parallel Sedler's categories of good and

21. See Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347 (2006).

22. Terence J. Lau, *Towards Zero Net Presence*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 237, 271 (2011).

bad media self-censorship. Many would argue that government restrictions on forms of harmful or “low value” expression that the Court has adjudged to be undeserving of full First Amendment protection, such as libel, obscenity, or threats, constitute good forms of censorship. The same people would likely argue that any restrictions or burdens placed on fully protected expression constitute undesirable forms of it. The challenge for Lau’s proposal would be how to determine on which side of the line the allegedly harmful speech fell before his “ZNP right” could constitutionally be applied, and even then how to get beyond concerns that such a right might be unduly vague or broad, or constitute an unconstitutional prior restraint. But his analogy to certain copyright law procedures, where Internet media operators can be forced to take down allegedly infringing content in some cases, offers some tantalizing possibilities for enforcing, consistent with the First Amendment, some form of ZNP right that seem worthy of further exploration.

In conclusion, this symposium edition of the *Notre Dame Journal of Law, Ethics & Public Policy* provides valuable discussions of difficult problems in the critical area of censorship and the media. I am confident that any serious student of these matters will find much in these contributions that illuminates these problems and offers promising avenues for dealing with them. Hopefully, such insights will ultimately help to foster even more robust and valuable flows of expression within our society.