VERBATIM PROCEEDINGS

# YALE LAW SCHOOL CONFERENCE

## FIRST AMENDMENT -- IN THE SHADOW OF PUBLIC HEALTH

YALE UNIVERSITY
127 WALL STREET
NEW HAVEN, CONNECTICUT 06511

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. . .Verbatim proceedings of a conference re: First Amendment -- In the Shadow of Public Health, held at Yale University, 127 Wall Street, New Haven, Connecticut . . . .

DEAN ROBERT POST: In this panel we shall discuss how the First Amendment might be understood in light of the discussion we have so far had in this conference. Constitutional law is relevant to many of the contexts we have been considering.

Constitutional protections for commercial speech, for example, are at stake in the *Caronia* case as well as in the fantastic *Pom Pomegranate Juice* case. Constitutional protections against compelled speech are at issue in mandated labeling, as for example with regard to cigarette packs. Constitutional protections for professional speech are relevant to attempts to regulate the speech of doctors, which we discussed this morning.

I thought that I might begin the panel by offering a quick sketch of how I understand the general framework of First Amendment doctrine. I shall outline

what First Amendment doctrine might look like if it were to be rendered consistent and coherent.

Of course any such general framework is highly controversial, and I have a very limited amount of time. So I will rely on assertions rather than proofs, and I hope if you object to anything I say we can discuss it during the question and answer period. I shall pay particular attention to the three general kinds of constitutional issues that have come up with respect to the regulation of medicine and public health initiatives: commercial speech, compelled speech, and professional speech.

We cannot understand these topics, however, unless we first ask why we have First Amendment protections in the first place. The answer to this question lies in the distinction drawn by Fred Schauer between First Amendment "coverage," which is when we have a First Amendment question, and First Amendment "protection," which determines whether in any particular case the government may or may not regulate speech. We do not apply distinctive First Amendment doctrines unless we first determine that there is First Amendment coverage.

We can learn a great deal about why we have First Amendment protections from asking when we have First

Amendment coverage.

The First Amendment forbids Congress from abridging "the freedom of speech," so early First Amendment theorists like Thomas Emerson imagined that they could determine the extent of First Amendment coverage by distinguishing speech from conduct. They concluded that no First Amendment issue is raised if the state seeks to regulate conduct rather than speech. But if the state seeks to regulation speech, then we do have First Amendment coverage.

It turns out that it is impossible to distinguish speech from conduct in any useful way. In ordinary language, we use the word "speech" to refer to situations when someone (a "speaker") communicates something (a "message") to someone else (an "audience"). But there are vast stretches of our social life where we communicate in this sense, but where there is no First Amendment coverage.

So consider in this light cases of medical malpractice. You go to your doctor who prescribes laetrile—a product made from apricot pits--in order to treat you cancer. You sue your doctor for malpractice. The doctor does not have any First Amendment defense to your suit. This is because no one imagines that this is a

question of "speech" for purposes of the First Amendment. First Amendment coverage does not extend to cases of medical malpractice.

Or consider a situation in which you buy a car. The car comes with an instruction manual. In ordinary language, we would call the manual "speech" because it communicates a well-defined message to purchasers of the car. But suppose you follow the instruction manual, and as a result of its inaccuracy your car blows up and you are harmed. If you sue for the car manufacturer for damages, there will be no First Amendment defense.

Or consider contracts, which are entirely made up of what in ordinary language we call "speech." We regulate contracts all the time, as for example when we impose rent control. Yet no landlord could challenge a rent control statute under the First Amendment.

The underlying thought here is that we are, as Aristotle long ago observed, speaking animals. Virtually everything we do involves "speech," in the ordinary sense of communication. But if everything is speech, everything is constitutionalized under the First Amendment. And this would be distinctly undesirable. So we can't really define First Amendment coverage by reference to the ordinary language meaning of "speech."

We must therefore take a different tack. We must define what counts as "speech" for purposes of the First Amendment in terms of the values that we want the First Amendment to serve.

Basically over the generations we have seen three different candidates for these values. The first such value is autonomy. We protect speech in order to safeguard the autonomy, the self-expression and self-development, of speakers. At root this is an ethical ideal. The problem with this value is that it has very low explanatory power, because there are many situations where autonomy is at stake and yet where we do not have First Amendment coverage.

So take the example of the doctor. The doctor really believes that Laetrile is a cure for cancer. He has staked his identity on it. It is essential to his self-definition that apricot pits be prescribed. But it turns out that even though the doctor's autonomy is dependent upon his expression, there is still no First Amendment coverage if you sue the doctor for malpractice.

A second value is the marketplace of ideas. At root this value is cognitive. It is a value that turns on our ability to attain truth. This value was first articulated in the famous dissent of Justice Oliver

Wendell Holmes in his dissent in the *Abrams* case in 1919. In my view this value also lacks explanatory value. If you look at those sectors of our society which are truly aimed at developing knowledge, like universities, they do not follow the logic of the marketplace of ideas, but instead the hierarchical practices of academic disciplines.

Or consider again the case of our doctor who prescribes Laetrile. The doctor cannot defend against a suit for malpractice by saying that he was involved in the marketplace of ideas, that his view was, as Holmes said in his *Abrams* dissent, an experiment, as all life is an experiment. The marketplace of ideas is simply irrelevant to the doctor's speech.

But consider the third value that is traditionally advanced to justify First Amendment protections—the value of democracy. On this account we protect speech so that we can govern ourselves. We govern ourselves by being free to participate in the formation of public opinion and by constructing a form of government that is responsive to public opinion. In my view this value, which is a political value, has by far the greatest explanatory value is making sense of the actual contours of First Amendment doctrine.

Consider our doctor and his commitment to laetrile. When you are consulting with the doctor in his office, he is not speaking in order to change public opinion; he is speaking in order to treat his patient.

But if your doctor were now to go on television, on the show of Dr. Oz, and if he were to utter the very same words that he said to you about Laetrile, and if a member of the audience were to rely on his words and suffer the very same injury that you had suffered because of your doctor's incompetence, and if he were to sue the doctor for redress, the doctor would have a First Amendment defense. First Amendment coverage would attach. Why is that? The communication of the exact same message has caused the exact same injury.

What makes the difference is that in the second case the doctor has spoken in public. First Amendment coverage typically attaches when we speak in "public," meaning when we speak through public media, or about public officials or public figures, or about matters of public concern. Why should that be?

The best explanation is offered by the democratic theory of the First Amendment. We govern ourselves by participating in the formation of public opinion, and we want the government to be responsive to

public opinion. Public opinion is formed in the public sphere. When we speak in ways that are constitutionally deemed appropriate for the formation of public opinion, First Amendment coverage attaches. And this is because, as Madison long ago observed, in every free country public opinion is the true sovereign.

So it matters for First Amendment coverage whether or not we are participating in the formation of public opinion. When we are participating in the formation of public opinion, when we speak in what I have elsewhere called "public discourse," the First Amendment regards us the way that Hannah Arendt regarded participants in politics: as equals speaking among equals.

We talk to each other to try to decide together what we think and what we should do. In such circumstances the First Amendment constructs us as autonomous, which means that the First Amendment creates a regime of caveat emptor. Every participant in public discourse is deemed responsible for what they hear and what they decide to do.

To get a concrete sense of what this means, consider an old Second Circuit case called *Winter v. G.P. Putnam's Sons*. The case concerns a book called *The Encyclopedia of Mushrooms*. *The Encyclopedia of Mushrooms*

describes the properties of different mushrooms, which includes which mushrooms are safe to pick and eat. It turns out that that the *Encyclopedia* got it wrong. The plaintiffs relied on the *Encyclopedia* and ate the wrong mushrooms. They became very ill and sued the publisher of the *Encyclopedia.* The question before the court was whether or not there should be First Amendment coverage.

The answer to this question depends on how the *Encyclopedia* ought constitutionally to be characterized. If it classified as an effort to form public opinion, there should be First Amendment coverage. But if it is regarded as analogous to the instruction manual for the car, there ought not to be any First Amendment coverage.

The crucial difference between the two cases is that in the example of the instruction manual, the law chooses to construct the relationship between the speaker and the audience as one of dependence. The law is formulated to protect the audience justifiable reliance on the representations of the speaker. In the agora where we create public opinion, by contrast, the law constructs us as independent of each other. We would read and rely upon the *Encyclopedia* at our own risk.

In *Winters* the Second Circuit concluded

that the *Encyclopedia* was an effort to form public opinion. So it gave the *Encyclopedia*'s publishers a First Amendment defense to liability; it found First Amendment coverage. But in so concluding, the Second Circuit in effect *constructed* the relationship between the *Encyclopedia* and its audience.

First Amendment doctrine uses many techniques to maintain the autonomy of speakers within the agora. One example is the First Amendment doctrine which prohibits the state from compelling speech within public discourse. It holds that the state cannot force persons to speak in public discourse. Speech is protected in public discourse so that persons can preserve the possibility of democratic legitimation, the idea that the state may be rendered responsive to them because they might affect the content of public opinion. But the experience of democratic legitimation can occur only if a speaker is free to establish her own chosen relationship to what she chooses to say. If you force someone to speak, you corrupt their relationship to their own speech. The potential value of democratic legitimation is lost.

A second example concerns the First Amendment doctrine prohibiting the state from regulating speech in a manner that discriminates on the basis of

content. This prohibition means that everyone is equally free to participate in the formation of public opinion, regardless of their point of view. The rule against content discrimination expresses the fundamental equality of democratic citizenship; each of us is equally entitled to make the state responsive to his or her views.

First Amendment rights within public discourse are typically speaker oriented, because the constitutional value of protecting public discourse depends upon the potential of establishing democratic legitimation for speakers. Until the 1970s, the First Amendment focused almost exclusively on speaker rights of this kind.

But 1976 the Court invented commercial speech doctrine. Advertisements for commercial products are not efforts to influence the substance of public opinion. They are efforts to sell products, which is altogether different. Commercial speech does not form part of public discourse. But in 1976 the Court held that commercial advertisements nevertheless merited some form of constitutional protection.

Why? The court offered two rationales in its seminal case of *Virginia Pharmacy*. The first was that the distribution of information was necessary in order to

promote efficient markets. But it can't be that efficient markets are themselves a First Amendment value. The First Amendment cannot be triggered whenever the state regulates speech in ways that impair the efficiency of markets, as for example when it promulgates rent control regulations.

The First Amendment protects the communicative processes by which we decide whether we wish to regulate our economy to promote efficiency or some other value, like justice or professionalism. In order to promote this democratic function, the First Amendment must itself be neutral as between these competing values.

The second rationale for the protection of commercial speech offered by *Virginia Pharmacy* was that commercial speech circulates information that is necessary for citizens to have in order intelligently to participate in the formation of public opinion. This explanation is consistent with the fundamental thrust of First Amendment doctrine. And in subsequent cases, like the canonical decision of *Central Hudson*, the Court is explicit that commercial speech is covered by the First Amendment in order to protect its informational function.

The idea is that participation in democratic self-government requires knowledge and information. The Court conceives commercial speech as a

vehicle for the distribution of this information. But on this account, First Amendment rights involving commercial speech must be focused on audiences rather than on speakers. Commercial speech is protected because of the right of persons *to receive* information. This is very different than First Amendment rights in the context of public discourse, which are focused on the rights of speakers.

The shift from speakers' rights to audience rights has important consequences for First Amendment doctrine. Consider, for example, compelled speech. We routinely compel communications in the context of commercial speech. Commercial speech can be compelled only if it is purely informational, but it can be routinely compelled. The labels of your clothes will read, "Made in China" or "Made in the USA." Food products must disclosure their caloric content, as well as other nutritional information.

We cannot compel speech in the context of public discourse, because, as I have said, doing so will compromise the potential for democratic legitimation. But the constitutional value at issue in commercial speech is the distribution of information, and compelling the disclosure of information may actually enhance that value.

Consider also the rule against content discrimination. If the constitutional value of commercial speech is to provide information to an audience, this value will be served only if the transmitted information is true and not misleading. That is why we can constitutionally devote immense resources to agencies like the FTC to regulate consumer advertising to ensure that it is not false or misleading. The First Amendment prohibits us from sanctioning the political speech because it is misleading, but we routinely regulate commercial speech for this reason.

Information is misleading when it cannot be understood by those who receive it. When commercial speech occurs in contexts where an audience is not capable of receiving it in a rational way, the speech can accordingly be regulated. A simple illustration is that we do not allow lawyers to solicit business through in-person interviews with vulnerable persons, because we imagine the audience as subject to manipulation. But the constitution does prohibit government from forbidding accountants from pursuing clients through in person solicitations. The rationale is that lawyers can overwhelm persons, whereas accountants are mice who cannot distort an audience's ability properly to receive information.

It is always a question, therefore, whether consumers of commercial speech are truly autonomous and capable of evaluating information. This is an important consideration in FDA regulations of drug marketing. In some circumstances, commercial speech doctrine authorizes us to conclude that state interventions are necessary to guarantee the quality of the information being distributed.

I have one minute left, so I will turn very quickly to the topic of professional speech, which we have extensively discussed at this conference. Professional speech is a vehicle for the dissemination of information, just like commercial speech. Doctors provide patients with knowledge as well as information. Malpractice law insures that this transmission happens according to prevailing professional standards. That is why malpractice laws do not trigger First Amendment coverage.

But think what should happen if a state passes laws that require doctors to provide patients with false information, or that prevent doctors from providing patients with true information. We now have an entirely different situation than malpractice laws. We have a situation where state laws begin to infringe on the constitutional value of circulating information and

knowledge.

The interesting question is how the law might determine whether the state is preventing doctors from providing competent advice, or whether it is requiring them to provide inaccurate advice. In some states, doctors may be compelled to tell abortions patients that an abortion will increase their risk of breast cancer. If this advice is incompetent, then we have a First Amendment issue because the informational function of physicians is being compromised. But how can a court know whether the advice is competent or incompetent?

A court would answer this question by hearing the testimony of medical experts. This implies that the limits of the regulation of the speech of medical professionals must be determined at least in part by medical professionals themselves. And this in turn suggests the very deep point that the First Amendment requires a separation between the sphere of political power and the sphere of expert knowledge. The constitutional limits of political power are set at least in part by professional understandings of expert knowledge. These understandings are therefore invested with a form of quasi-constitutional autonomy.

Of course professions are subject to democratic control, but there are also countervailing constitutional considerations. In fact we are facing a classic liberal balance of powers between, on the one hand, the disciplinary construction of knowledge, and, on the other hand, the need for political accountablity.

That's all I have time to say. (Applause -- end of tape.)