

## SYMPOSIUM

### WHAT ARE WE SAYING? VIOLENCE, VULGARITY, LIES . . . AND THE IMPORTANCE OF 21<sup>ST</sup> CENTURY FREE SPEECH

ALBANY LAW SCHOOL  
Dean Alexander Moot Courtroom  
*Thursday, September 27, 2012, 11:00am*

### WELCOME & OPENING REMARKS

*Benjamin P. Pomerance\**

Good morning. Welcome to the *Albany Law Review's* annual fall symposium. I am Benjamin Pomerance, the *Law Review's* Executive Editor for Symposium. It is truly an honor to welcome you to this program which focuses on one of the most important components of the American legal system: the right to freedom of speech.

We are here today essentially to talk about ten words: "Congress shall make no law abridging the freedom of speech."<sup>1</sup> Since 1791, these words have existed within the First Amendment of our federal Constitution. Outwardly, these are very simple words. Yet much like baseball games and horse races, laws and freedoms are not won or lost on paper. And in practice, these ten words have given rise to some of the fiercest debates in our nation's history, battles over what this seemingly straightforward clause actually means.

Free speech is one of those rare areas of law that literally affects everybody. There is not a person among us today who does not

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<sup>1</sup> U.S. CONST. amend. I.

communicate his or her thoughts in some way. Likewise, there is not a person among us who is not a recipient of communications from other people. It is no wonder, then, that we have become so concerned about freedom of speech, both when it is taken away and when it is allowed.

The notion of free speech—and, by extension, its cousin, free expression—tends to be uplifted as a beautiful thing, a fundamental part of a free society, a key ingredient of our democracy, and all of these other truisms . . . until we start looking at speech and expression that we don't like.

What happens when somebody says something so offensive about a particular ethnic group or religious order or gender or sexual orientation that it goes beyond our conception of the farthest bounds of decency? What happens when somebody burns the American flag as a symbol of protest? What happens when somebody lies and profits from those lies? What happens when somebody starts communicating with members of groups that we deem to be a threat to our national security? Are these the types of speech that our First Amendment is meant to protect? And if not, then where and how do we draw the line about what speech is protected and what is not?

Three floors below us, near the cafeteria of this law school, there is a picture of one of our most famous graduates: Robert Jackson, who went on to become one of the finest justices ever to sit on the United States Supreme Court. Below that picture is a quote which seems fitting as a starting point for this symposium: "Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."

Our program today will focus on things that matter much, that touch the heart of the existing order. It will examine some of the most sensitive struggles over free speech and free expression occurring in America today. It will look at what we truly value most out of our First Amendment, and what those values really mean when stretched to their furthest degree. And it will force us to confront what we honestly believe when we proudly say that we live in a land that's free.

Chances are, many of us will differ on these fundamental questions, just as Justice Jackson predicted. There is no easy answer. In a *Yale Law Journal* article published in 1963, the great legal scholar Thomas I. Emerson wrote the following: "No one concerned with freedom of expression in the United States today

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can fail to be alarmed by the unsatisfactory state of First Amendment doctrine. Despite the mounting number of decisions and an even greater volume of comment, no really adequate or comprehensive theory of the First Amendment has been enunciated, much less agreed upon.”<sup>2</sup>

Nearly fifty years later, it seems that we are still in this same situation. In recent years, the Supreme Court has decided multiple highly publicized speech-based cases, holding that the First Amendment protects forms of expression such as protests at military funerals,<sup>3</sup> videos depicting extreme animal cruelty,<sup>4</sup> the sale of violent video games to minors,<sup>5</sup> and lying about receiving military honors.<sup>6</sup>

Other forms of speech, such as non-violent material support to organizations deemed to be national security threats, have recently been pronounced unprotected by the Court.<sup>7</sup> Yet despite this tremendous recent activity in the free speech arena, many commentators agree that there still appears to be no consistently applied doctrine or set of doctrines by which First Amendment free speech cases are judged.

If this is true, then we are in an unenviable position: not knowing what the First Amendment’s protection of free speech truly means in our nation. Fortunately, we are honored today by the presence of seven of the nation’s leading experts and advocates in this important area of law to help shed some light on these questions. And it is now my privilege to introduce one of those experts, Professor Ronald Collins, to open the first portion of today’s symposium.

Professor Collins’ multiple accomplishments can—and should—fill a book. Currently, he is the Harold S. Sheffelman Scholar at University of Washington Law School. His career has taken him from clerking for the great Justice Hans A. Linde on the Oregon Supreme Court to working as a Supreme Court fellow under Chief Justice Warren Burger to serving as a scholar at the First Amendment Center in Washington, D.C. He is the author or co-author of many books, including the groundbreaking First

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<sup>2</sup> Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

<sup>3</sup> See *Snyder v. Phelps*, 131 S.Ct. 1207 (2011).

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

<sup>5</sup> See *Brown v. Ent. Merchs. Ass’n*, 131 S.Ct. 2729 (2011).

<sup>6</sup> See *United States v. Alvarez*, 132 S.Ct. 2537 (2012).

<sup>7</sup> See *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010).

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Amendment works *The Death of Discourse* and *We Must Not Be Afraid to be Free: Stories About Free Speech in America*, and has published an incredible number of articles in publications that include the *Harvard*, *Stanford*, and *Michigan Law Reviews*. I am honored to say that he is also writing a fascinating foreword for our Law Review's symposium section this year.

Professor Collins, the floor is yours.

Thank you for coming, and enjoy.