

# Forbes

## Why Offensive Speech Is Valuable

By Trevor Burrus

March 23, 2015

In the wake of a University of Oklahoma fraternity caught on camera singing an abhorrent song about African Americans, a predictable assortment of critics of free speech have argued that the First Amendment should not protect offensive and racist speech. They are wrong. Offensive speech should not only be protected by the First Amendment, it should be seen as a valuable part of a free society.

In the Atlantic, Boston College law professor Kent Greenfield offered a typical argument against protecting offensive speech: “If the First Amendment has become so bloated, so ham-fisted, that it cannot distinguish between such filth and earnest public debate about race, then it is time we rethink what it means.”

Greenfield disagrees with what he considers the main argument for protecting offensive speech: the problem of demarcation and the slippery slope. That is, “we cannot trust the government to make choices about content on our behalf,” and thus prohibiting offensive speech will lead “down the slippery slope to tyranny.”

That’s one argument against giving government the power to censor, but it is not the only one. It is difficult to define offensive speech, true, but this argument seems to imply that if such a line could be drawn then banning offensive speech would be okay.

Even if offensive speech could be easily defined, it should not be prohibited. In an ideal world, offensive speech would roam freely.

Coincidentally, today the Supreme Court is hearing oral arguments in a case about whether the government can prohibit speech on the theory that it “might be offensive to any member of the public.” That case concerns an application for a personalized license plate by the Texas Sons of

Confederate Veterans. The proposed plate design would have included a Confederate flag. The Texas Department of Motor Vehicles Board voted not to issue the plate.

The Court will first have to decide whether a license plate is government or private speech. In an amicus brief I co-authored in support of the Texas Sons of Confederate Veterans—joined by humorist P.J. O’Rourke, Martin Garbus (one of comedian Lenny Bruce’s lawyers), the Comic Book Legal Defense Fund, and prominent First Amendment scholars—we argue that, if a license plate is private speech, then the government should not be allowed to prohibit a design based on the belief that it “might be offensive to any member of the public.”

Offensive speech contributes to the marketplace of ideas by expanding its borders. If the marketplace of ideas is the area where “acceptable” ideas are freely exchanged, then outside is the “black” marketplace of ideas. There, people talk about things that are not allowed in the “official” marketplace. That sometimes includes conspiracy theories, racial hatemongering, and other pure lunacy, but it also includes things desperately needing a public airing.

For years, if not centuries, the field of sex research was hindered by taboo and puritanical censorship. Bigotry and prejudice towards homosexuality, divergent sexual desires of any sort, women’s sexual health, and sexual dysfunction caused researchers to be relegated to the black marketplace of ideas. In order to get out of the black market, they needed to offend.

By being offensive, comedians, authors, and artists helped bring sex research out of the darkness. By saying forbidden words in jokes and skits, by looking censors in the eyes and saying “cocksucker”—one of the words that famed comic Lenny Bruce was arrested for in 1961 in a San Francisco nightclub—the crass and the boorish opened up avenues of thought and discussion that were previously forbidden. Bruce said, “you break it down by talking about it.” Slowly, conversations about sex were freed from puritanical oversight, sex researchers illuminated a crucial part of human existence, and couples had more fun.

Those comics from the 60s who were “edgy” now seem quaint to our modern sensibilities. But there are always new innovators in the world of offensive speech, and no amount of government regulation will stop that.

People define themselves by being offensive. They express themselves through their willingness to stomp on prevailing sensitivities and, yes, even other’s feelings. Fostering self-expression and self-development is another important reason we have a strong and uncompromising First Amendment. As homosexuals who have “come out” know all too well, expressing something publicly is crucial to defining oneself.

Does this apply to those who hate other races, religions, and ethnicities? Yes. They have as much right to define themselves through speech as anyone. And those who abhor the hateful have a right to shun them, expose them, and call them out. Government prohibitions on hate speech drive the hateful underground, where they can proliferate freely and without pushback from

those who dare not enter. Sunlight, not government, is the best disinfectant. I, for one, would like racists and bigots to speak freely. I want to know who not to invite to my parties.

Government is not as effective as civil society in properly squelching and shaming hateful speech. If the government defines the parameters of acceptable speech, then many people will break those boundaries just because the government told them not to do it. They will explore the hidden, underground world of hate speech just because it is a forbidden fruit. There they will find whole new ways to offend people because offensive people, like water, will always find a way.

In fact, there is no correlation between the strength of a country's hate speech laws and the eradication of hateful views. Greece, for example, has passed laws that try to combat "certain forms and expressions of racism and xenophobia by means of criminal law." Yet according to the Anti-Defamation League, 69 percent of Greeks hold anti-semitic views, compared to just 9 percent of Americans. Just like drug laws, driving hate speech underground will do little to eliminate the habit, and could make the situation worse.

So go forth and offend and be offended. Do it for Lenny Bruce.

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