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INTRODUCTION

CULTURE, LANGUAGE, AND THE FIRST AMENDMENT

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Today, writers, photographers, musicians, entertainers, commentators, and even the average Joe uploading material on Web sites like YouTube test the limits of First Amendment protections of free speech when they author and broadcast thoughts, actions, and reactions in print, over the airwaves, and through the Internet. Increasingly, many people question whether there are limits to what you can say to and about others. Americans value freedom of speech more than other fundamental rights in many ways. But it is the duty of courts to determine when basic constitutional protections must bow to protect the welfare, health, and safety of society, is it not? And as such, what should happen to people who test those limits? Should they be demoted or fired from their jobs in the media if they cross certain lines with their speech?[1] Should entertainers, like comedians, singers, songwriters, and media producers, be fined for foul language and sexually

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* © 2008, Dorothea A. Beane. All rights reserved. Professor of Law, Stetson University College of Law. The Author would like to thank the staff of the *Stetson Law Review* for their willingness to publish this issue. The Author wishes to thank all of the authors who contributed to this Issue. The Author also wishes to express a special thanks to the editors of the *Stetson Law Review* for their patience and diligence in making this issue possible.

1. *See* Reuters, *Imus Fine Ruled out by Radio Watchdog*, Calgary Sun (Alb., Can.) 28 (Apr. 18, 2007) (explaining that the head of the Federal Communications Commission (FCC) told members of the House of Representatives that the FCC does not have the authority to fine fired Don Imus for his comments).

graphic lyrics?[2] Should private citizens who post offensive material on the Internet be held accountable if their postings incite others to commit violent or demeaning acts?[3] How do we acknowledge and protect our fundamental freedom of speech, yet protect children from harmful content which they may easily access through television, radio, and the Internet? Freedom and culture seem to collide when it comes to the discussion of First Amendment protections. The articles in this Issue concern difficulties intertwined in today's culture expressions and fundamental freedoms.

Professor Thomas C. Marks, Jr., in his article *The Decline of American Culture: The Role of the Federal Judiciary*,[4] states the United States Supreme Court has, since the Warren Court, "interpreted the First Amendment's speech and Establishment of Religion clauses [of the Constitution] in ways that are not only seriously incorrect but that had, and continue to have, a major negative role to play in the decline of American culture."[5] Marks focuses on recent circuit and Supreme Court cases involving the attempts of the Federal Communications Commission (FCC) to regulate certain words used on broadcast television and radio.[6] He asks "[w]ho protects the majority from a culture becoming ever more coarse and at times downright foul?"[7] In answering this question, he suggests that the legislature, the courts, and the administrative agencies acting within the confines of the Administrative Procedures Act have this duty,[8] but he also claims that the courts, particularly the United States Supreme Court, have done a very poor job of protecting the majority when interpreting the law.[9] Marks uses the example of the FCC's attempted bans on

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2. *See* Scott Galupo, *The Redefinition of Al Sharpton? After Imus, the Target Is Gansta Rappers*, Wash. Times D1 (Apr. 27, 2007) (describing Al Sharpton's attacks on the hip-hop industry for misogynistic or otherwise offensive rap lyrics).

3. *See Am. Amusement Mach. Assn. v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001) (discussing the concern for the psychological welfare of the more susceptible viewers who are exposed to violence, may be prone to commit violence because of it, and then are subjected to criminal retribution).

4. Thomas C. Marks, Jr., *The Decline of American Culture: The Role of the Federal Judiciary*, 37 Stetson L. Rev. 769 (2008).

5. *Id.* at 2–3.

6. *Id.* at 3.

7. *Id.* at 11.

8. *Id.* at 10–11.

9. *Id.* at 1–3.

certain words, which the Second Circuit Court of Appeals struck down on the basis that the manner used by the FCC violated the Administrative Procedures Act.[10] Marks disagrees with the conclusion of the judges that the FCC's efforts to ban the "F-word," for example, should be doomed by First Amendment protections.[11] He argues that state governments "in the exercise of their sovereign police power to protect . . . public morality . . . have been totally frustrated by judicial interpretation," which he claims is "misinterpretation" of the First Amendment.[12]

Professor Terri Day, in her article Bumfights *and Copycat Crimes . . . Connecting the Dots: Negligent Publication or Protected Speech?*,[13] discusses the various legislative and judicial attempts to enact ordinances or to decide cases which restrict the use and purchase of violent video games and other violent material, such as "bumfight videos," which expose viewers to senseless attacks on homeless people.[14] She states that *Bumfights* has become a cultural symbol[15] and that the production and distribution of these videos have yielded multimillion-dollar profits.[16] But what is the cost to the homeless who are targeted for entertainment purposes and compensated with only a bottle of wine?[17] Day criticizes this new form of cult entertainment and concludes that "bumfight videos" are outside the limits of protective speech.[18] Additionally, she asserts that "[l]egislatively prohibiting these videos or chilling the continued production and distribution of such material will not offend First Amendment principles or open the 'floodgates' to publisher liability suits."[19] Day further contends that if "bumfight videos" are considered protected speech, a restriction on *Bumfights* distribution can survive strict-scrutiny analysis of the constitutional limitations on such "speech."[20] Day

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10. *Id.* at 3.
11. *Id.* at 42.
12. *Id.*
13. Terri Day, Bumfights *and Copycat Crimes . . . Connecting the Dots: Negligent Publication or Protected Speech?* 37 Stetson L. Rev. 825 (2008).
14. *Id.* at 2, 7.
15. *Id.* at 2.
16. *Id.*
17. *Id.* at 1.
18. *Id.* at 7.
19. *Id.*
20. *Id.*

opines that "[f]ew legislative attempts to reduce young people's exposure to violence have survived constitutional challenge,"[21] but every time there is a Columbine-type tragedy,[22] the public debate concerning the effect of violence on television, in movies, and in video games marketed to children of various ages is reinvigorated.[23] Day concludes by asking and answering the following questions: whether violence is "a category of speech undeserving of First Amendment protection";[24] whether *Bumfights* is "entitled to the same constitutional protection as video games, films, and other protected forms of entertainment";[25] and "will 'opening the door' to publisher liability for the harms caused by third-party viewers of *Bumfights* offend principles of tort law."[26]

Professor Jack L. Sammons' article, *Censoring Samba: An Aesthetic Justification for the Protection of Speech*,[27] uses his critique of Professor Stanley Fish's book, *There's No Such Thing as Free Speech, and It's a Good Thing Too*,[28] to frame his work, which uses the example of Brazilian Samba to illustrate the aesthetic value of free speech.[29] Sammons discusses Stanley Fish's argument that there is "no such thing as free speech"[30] and explains that this proposition really means that "*any* justification offered for the protection of speech[ ] . . . will necessarily fail as a *principled* justification."[31] Sammons remarks that "[t]here will always be speech that subverts whatever purpose we attribute to speech and that speech we will not tolerate"[32] and further adds that "what we have is a political determination, a choice between warring political policies, through which we give the name 'free

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21. *Id.* at 6.

22. *Id.* at 20 n. 136.

23. *See id.* at 23 (discussing these concerns, which arose in the case of *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798 (W.D. Ky. 2000)).

24. *Id.* at 7.

25. *Id.* at 14.

26. *Id.* at 20.

27. Jack L. Sammons, *Censoring Samba: An Aesthetic Justification for the Protection of Speech*, 37 Stetson L. Rev. 855 (2008).

28. Stanley Fish, *There's No Such Thing as Free Speech, and It's a Good Thing, Too* (Oxford U. Press 1994).

29. Sammons, *supra* n. 27, at 1 n. 2.

30. *Id.* at 1.

31. *Id.* at 2 (emphasis in original).

32. *Id.*

speech' to whatever speech that serves the winner's purpose."[33] Contrary to Stanley Fish, Sammons argues that there are aesthetic justifications for freedom of speech and that "the more obviously aesthetic speech is, the more freedom it requires and deserves."[34] To illustrate his point, Sammons focuses on Brazil and the "samba" to show how aesthetic justification works in the context of speech and reason for the protection of speech.[35]

Finally, Professor Christine A. Corcos provides analyses of the First Amendment and the authority of the federal regulatory agencies like the FCC in her article *George Carlin, Constitutional Law Scholar*.[36] Corcos uses as her primary model stand-up comedian George Carlin's monologue *Seven Filthy Words*—a topic mentioned in Professor Marks' article—and a variant, *Seven Words You Can Never Say on Television*, introduced first in the 1970s. The delivery of this monologue over the radio resulted in a Supreme Court decision in the case of *FCC v. Pacifica Foundation*[37] in which the Supreme Court upheld the authority of the FCC to regulate indecency on public airwaves.[38] First, Corcos reviews the basis for and history of FCC regulation of language used over the airwaves prior to the *Pacifica* ruling.[39] Next, she discusses in detail the background of the *Pacifica* opinion, which includes a partial reprint of Carlin's monologue.[40] In conclusion, she suggests the abandonment of the *Pacifica* decision due to the evolution of technology, the difference in attitude about speech, and the FCC's difficulties in applying the *Pacifica* indecency policy.[41]

All in all, these articles share a common theme—the difficulty in managing a society that is free enough to express itself without unnecessary governmental interference, yet wise enough to draw its own lines in terms of decency, safety, and protection of vulner-

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33. *Id.*
34. *Id.* at 3 n. 9.
35. *Id.* at 27–28.
36. Christine A. Corcos, *George Carlin, Constitutional Law Scholar*, 37 Stetson L. Rev. 899 (2008).
37. 438 U.S. 726 (1978).
38. Corcos, *supra* n. 36, at 1.
39. *Id.* at 2.
40. *Id.* at 9, 12–15.
41. *Id.* at 30.

able groups who may be harmed by offensive, degrading, or otherwise dangerous expression, which often invites copycat behavior. It really does not matter whether lawmakers target rap groups, media commentators, shock jocks, political satirists, or video-camera operators in their attacks on undesirable expression. The real question is how we balance our rights to free expression and our responsibility for that which we broadcast. The articles that follow discuss the curves and contours of constitutionally protected speech amid the challenges of a rapidly changing culture.