Cultural *Truth* and the First Amendment
Your Truth Better Than Mine?

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Abstract

John Stuart Mill wrote in his treatise *On Liberty* that in the search for truth, some people may be harmed, but seeking the greatest good for the greatest number of people is desirable. What Mill didn't say, however, is who determines what the greatest good is and good for which people. One could argue that high pressure and somewhat misleading advertising to children on Saturday morning cartoons is wrong because it dupes (harms) children, while an opponent might contend the advertising serves the greatest good for the greatest number because it keeps the economy going and employs people.

Postmodernist, poststructuralist and neopragmatic scholars, such as legal feminist scholar Susan H. Williams, have routinely argued that truth is relative, more to some interpretive community, paradigm or culture rather than to individuals. Socially constructed "truth," however, can and does create cross-cultural conflict among sub-cultures because, under any rule of law, one "truth" must be valued over another.

While Williams concedes, for example, that even hate speech has some value because it startles into re-examining values and community, and, therefore, "plays a role in the construction of social reality," she would routinely suppress such speech in a number of public places. This communitarian type of approach collides almost head-on with classic liberal interpretation of the First Amendment, which holds the rights of the individual are to be protected from government interference.

This panelist will examine conflicts arising from the social construction of reality and the freedom of expression outlined under First Amendment jurisprudence, focusing in particular on recent cases involving public displays of artistic, religious and political expression.

Introduction

The First Amendment to the U.S. Constitution states "Congress shall make no law…prohibiting the freedom of speech, or of the press; or the right of the people peaceably to assemble…" Simple in its language as the amendment is, it can

sometimes be difficult to understand when it protects speech with which one disagrees.

Historians concur that the interpretation of the first amendment has been expanded since its drafting more than 200 years ago, most notably during the 20th century when questions about speech freedom first came to be argued before the U.S. Supreme Court. In recent years a number of cases have been brought before the court that turn on the meaning of particular speech in determining whether or not that speech may be regulated. It seems, especially in the past decade, governments and public policy makers have been more willing to create laws banning speech which offends one or another sub-culture, and courts have been called upon to value one culture's meaning over that of another culture. The court must decide what the "meaning" of something is in a society made up of individuals who may each hold separate "meanings" for the same object.

This paper will examine two instances that deal head on with the sub-cultural conflicts resulting from differing interpretations of speech. One case, *Knight Riders of the Ku Klux Klan, et. al. v. City of Cincinnati* (1995), was resolved through the U.S. Court of Appeals for the Sixth Circuit, and the other was resolved through civil discussion of the meaning of a work of art on a state university campus. Both cases involve symbolic speech; both deal with the rights of the speaker as well as the rights of the listener, and both ask for value to be put on the "truth" of one or the other positions.

Before proceeding with those cases, it is important first to inspect the history and benefits of having a public policy that protects speech and to examine the nature of differing "truths."

Benefits of a Public Policy that Protects Free Speech

According to legal historians, the first public defenses of freedom of speech revolved primarily around religious questions and freedoms. John Milton, having been prohibited from printing his tract protesting the state's denial of divorces, authored *Areopagitica* in 1644 that focused on the importance of freeing from licensing those writings that diverged from accepted religious teachings. Most arguments for the next 175 years centered on heresy and blasphemy rather than on political or individual opinion expressions (Garvey & Schauer, 1992). Early in the 1700s, however, a distinct tradition regarding political speech came to the fore with the sedition trial of John Peter Zenger, Cato's letters, and Spinoza's contention that in a free society each may think what s/he likes and say what s/he thinks.

By the time of the drafting of the Bill of Rights the major philosophical paradigm of the Enlightenment in the classical liberal tradition was based on the individual and how the individual can function within a civilized society. Drawing from the concepts surrounding natural law, the framers recognized a need to allow freedom of individual expression within the bounds of a society that protects against one's infringement on another's life, especially when the government

becomes the infringer. Thomas Jefferson repeatedly referred to the tribunal of public opinion which, he said, produces peaceful reform on matters that must otherwise be done by revolution. Along those same lines, James Madison (Federalist Number 10) encouraged the growth of factions with differing to bring about peaceful changes through open discussion of those differences.

These ideas were also articulated in the early 19th century by libertarians such as John Stuart Mill in his ***Essay on Liberty***, and later by Jean Jacques Rousseau when he spoke of the social contract requiring the compromise of certain individual rights for the good of the whole. Earlier, in his discussion of natural law, Locke also discussed the benefits of joining together in community, and the costs in terms of individual liberties. In his travels across America, deToqueville (1835) observed that while this experimental democracy seemed chaotic in practice the protections afforded by the American Constitution helped shield its people from the tyranny of the majority. While deToqueville claimed to be shocked by the way in which media seemed to intrude into all areas of people's lives, he nevertheless was heartened that methods existed by which to learn of opposing perspectives and respond to them.

Against the backdrop of these ideas, the values inherent in the right to freedom of speech emerge. Five of those values articulated most frequently are: ***democracy***, realized only through informed consent of the self-governed; ***checking value***, which helps prevent abuse of power by those to whom it is entrusted; and ***social stability***, consisting of discussion that promotes peaceful revolution about which Thomas Jefferson spoke. Two other values, the ***attainment of truth*** and ***self-fulfillment***, need special attention in the context of this analysis, although all five certainly apply.

At the outset, it is important to note that the people of the United States were not in deToqueville's time a single community - a great melting pot - that had a great deal of common interests outside individual freedoms they sought in coming to this country. They make up perhaps even less of a melting pot today. Although many were European, their cultures and heritage differed in many ways, and their desire to connect in community with others of their cultural origin resulted in communities where language and custom could be comfortably shared. Immigrants from other parts of the world found comfort in communities as well, and Native Americans maintained communities often when they were forced from their place of origin to accommodate the settlers.

Assimilation into a new community of "Americans" is ongoing still, and many Americans still strongly identify with their sub-cultures. What those sub-cultures are based upon, whether it is heritage, geographic locale, political alignment or religious beliefs, is of no consequence for the current discussion. The sub-cultures are obvious even to the casual observer. On any given weekend in the United States, it is easy to find a cultural celebration focusing on a particular heritage. African, Amish, Cherokee, Irish, Dominican, Italian, Asian, Celtic, Native American all share their traditions, interpretations, interests and meanings which represent how

the world is. Superstitions, traditions and behaviors may be based more on those shared interests than on their American heritage. This does not mean to discount the involvement of sub-cultures in the American reality, because certainly, all these sub-cultures also share common interests as Americans.

Wendell Berry, an agricultural and environmental activist and novelist wrote, AA community identifies itself by an understood mutuality of interests, (cited in Jensen, 1998). Major communitarian theorists contend people are integrally related to the communities of language and culture that they create and maintain. Leeper (1999) argues that the recent resurgence in the communitarian movement has occurred in large part because of a distrust in society. This, he says, precludes the concept of community, is accompanied by an ensuing loss of shared meaning, and cultural standards, based on the community of interest and trust, are affected.

Aristotelian communitarianism holds that shared meanings lead to cultural standards through consensus, morality is determined by that with which everyone can agree. This form of communitarianism, in the abstract rarely matches the real world because many times consensus is reached through wearing down the opposition rather than actual agreement. The individual or sub-culture not happy with the consensus then would simply be forced to conform and go along with the standards selected. Coercion is often at play, especially where issues of morality are concerned. This view, then, may well move us away from the evil Leeper calls extreme individualism, but it also may move us toward the tyranny of the majority of which deToqueville spoke. An example of such tyranny was evident shortly after the United States became involved in World War II. While the conventional wisdom and general consensus was that being patriotic was the moral thing to do, some school children, for religious reasons, did not pledge allegiance to the flag. For this offense against the community, the good patriots castrated the children's fathers with whom they lived, worked and shared common interests.

A number of communitarian theorists also are critical of the classical liberal approach of centering policy around the individual because they claim the community is harmed when the individual is not accountable to the community, but only to his/her self-interest. Irresponsibility will always win when pitted against the common interests of the community, so the argument goes, and diversity becomes pluralism rather than unity. This is a rather dark view of human nature. The same type criticism of liberalism can be seen in postmodernism's claim to be about de-differentiation (i.e. unity) as opposed to modernity's era of differentiation (i.e. pluralism) (Wexler, 1990). But in the classical liberal tradition, John Stuart Mill in non-pluralistic fashion railed at the view that all cultural positions are equally acceptable to society, and he argued vigorously that differences should be protected and promoted by the society as a unifying factor. Such toleration hardly seems to pluralize without unity in diversity.

So What is the Truth?

When Milton (1644) argued against the licensing of printing, he centered that argument around the search for truth. When Truth and Falsehood are set to grapple in the marketplace of ideas, Truth, being the stronger, will win. The search for truth, he said, involves the airing of all pertinent ideas from which one may select what is best for that one or that society to hold fast. Mill (1835), in an age of empiricism, expanded that idea asserting that in order to determine what is true, one must first determine what is false, error shedding light on truth, as in the scientific method. Outlining his Principle of Harm, Mill claimed that harm necessarily may come to some, but over the long term, false ideas will be exposed and the greatest good for the greatest number will be served. Discovering what does not ring true or moral helps society change through discussion and peaceful revolution.

Sissela Bok in *Lying* (1978) discusses truth seeking through analyzing falsehood as well. To Kant, (cited in Bok, 1978), truth telling is the only pure universal rule, and allowances should be made only for that about which one does not know. Mill and Milton suggested we get to truth through a marketplace of ideas, and Plato in his *Allegory of the Cave* (1995) suggested truth would come to us as "reality" came to those released from their bondage in the dark. Truth, to Plato, went beyond non-concealment, and "the nature of a thing is disclosed through connection of a particular to a universal" (1968, p. 33). In other words, unity of content has truth lacking for nothing (transcendent to mere appearance), and there exists a correlation of correctness of Being (idea) with truth (Plato, 1968). Descartes' cogito (Anderson, 1968) created a subject-ism evident in his idea that self-certitude of the individual is the foundation of all truth. Hegel characterized truth as the whole that takes place through complete disclosure.

In contrast to Hegel, Heidegger might claim that truth, instead of existing in the whole, lies in the revelation attending the disclosure, in other words, an emergent process. As to Descartes, Heidegger (Anderson, 1968) argued that the consummation of subject-ism is mankind's effort to dominate the earth through control of beings and experiences as objects. The notion of value, he said, is a product of subject-ism and substituting one set of values for another fails to deal with any problem of conflicting interpretations or representations.

The Cartesian principle has also become the object of much criticism by feminist legal scholar Susan Williams (cited in Bunker, 1998) who claims an external and objective reality cannot exist because truth is socially constructed and based solely on perspective. By reducing truth to perspective, it would appear there is no need to protect free speech, however, Williams claims localized truth serves social cohesion. So if one sub-culture perceives the earth as flat, it could rally around that representation and be more closely bound by that belief. Such a suggestion seems counter productive to unity and perhaps even promotes an antagonistic pluralism.

What Does It Mean?

Wittgenstein (Naess, 1965) expressed most adamantly in his picture theory that a picture can depict any reality whose form it has in a way similar to the way the structure of language depicts a particular reality. Meaning, according to Wittgenstein, is independent of truth with the "logical form of the proposition being the same as the inner structure of reality." (p. 91). The only true proposition is that which describes that which is the case (i.e. an existing state of affairs), and a false proposition is that which is not the case, but which might have been the case (insofar as it is not self-contradictory).

Searle (1995) argues the correspondence theory of truth could support the above assertion, however, "Facts don't need statements in order to exist, but statements need facts in order to be true" (p. 218). So, a statement may be ontologically subjective (as in socially created reality) and at the same time be epistemically objective. To use one of Searle's (1995) examples:

Statement 1:	(Discussing the issues of perspective, socially constructed reality and the apparent appeal of postmodernism, Searle (1995) said: "It is somehow satisfying to our will to power p. 528).
Statement 2:	The object is a paperweight. (It is epistemically objective, and based on its function. The statement is observer-related rather than intrinsic and)
Statement 3:	The object is beautiful/ugly. (It is epistemically subjective, not intrinsic, but observer related only) (p. 218).

Discussing the issue of perspective, socially constructed reality and the apparent appeal of postmodernism, Searle (1995) said: "It is somehow satisfying to our will to power to think that we make the world, that reality itself is but a social construct, alterable at will and subject to future changes as we see fit" (p. 158). He claims there is an external reality that exists independently and outside of its representations. However, when different groups represent an external reality differently, where does the truth of that reality lie? The answer would be with neither and with both. To say that only one description is true and another is not true would be in error, he says, because true statements rely on facts.

Legal Scholar Matthew Bunker (1999), addresses a similar issue when he asserts, "This relativism is reductive in that it removes the entire notion of truth is generally conceived in free speech theory and redefines truth as ***nothing but*** what some group or culture happens to agree upon"

A major problem in the metaphysics of truth always has been in somehow accounting for the relationship and orientation of the knower to the known. If philosophers through the ages have been unable to reach a consensus, then how can

constitutional law be used determine truth in the case when truths, based on the relationship of the knower to the known, are in contradiction? In a letter to Bertrand Russell in 1913, Wittgenstein wrote expressing this very type of concern. "It is the *dualism*, positive and negative fact that gives me no peace. For such a dualism can't exist," he brooded (Naess, 1965).

Certainly unaware of the phenomenological and more relativistic approaches suggested by more recent philosophers, but well versed in those of their contemporaries and those of the ancient world, the framers of the Constitution set out to establish a system of laws general enough to address issues of government tyranny against the individual not yet evident, and specific enough to protect the need of the individual to become "all that s/he can be," within those bounds and in their quest for truth and happiness. In the First Amendment the value of self-fulfillment is obvious in all five freedoms it ensures; in the freedom of religion; in the freedom of speech; in the freedom of the press; in the freedom of assembly, and in the freedom to petition for redress.

Legal scholar Thomas Emerson (1963) outlines the value of self-fulfillment as allowing the individual to achieve self-realization, which begins with the development of the mind, and is by its very nature limitless. Justice Louis Brandeis (*Whitney v. California***,** 1927) also spoke of the development of individual faculties and the happiness derived in engaging in speech as a benefit of the First Amendment. According to this value, it follows that we each have the right to align with those whom we wish to align, and to form our own communities, personalities, beliefs and opinions. The right to express them must ensue if they are to have any value to us. Milton (1995) suggested that any form of restraint over expression is the greatest displeasure and indignity to a free and knowing spirit that can be put upon him. Emerson claims that societies generally are set up to promote the welfare of the individual, and the principle of equality holds that every individual is entitled to share in common discussion and decisions that affect him. But he likely would be very cautious in drawing the line about when someone may be prohibited from saying what s/he thinks.

While it is clear that the First Amendment covers expression that may lead to truth, democracy, social change or the checking value, the protection afforded speech that only serves the value of self-fulfillment may not be as great as for speech which does lead to those. For example, works that are pornographic or erotic in nature receive constitutional protection even if they make no political statement, but they are protected only at a level close to those that do make such statements.

The U.S. Supreme Court recognizes First Amendment protection for speech that is symbolic, and applies the same standard on it as for judging the constitutionality of time, place and manner restrictions (i.e. content neutrality). Cases in which the Court has articulated that rationale include: *Tinker v. Des Moines Independent Community School District* (1969) in which the Court upheld the rights of students to wear black arm bands to school in protest of U.S.

involvement in Vietnam; *Cohen v. California* (1971) in which the Court said Mr. Cohen was not responsible for the reaction of people who read the message on his jacket: *Collin v. Smith* (1978) in which the Court refused to hear an appeal of a case challenging the right of American Nazi Party members to hold a parade in a town with a large Jewish population, and *Texas v. Johnson* (1989) in which the Court struck down a statute which prohibited flag desecration.

In the Johnson case, the Court distinguished a symbol from that for which it stands, saying that destroying the symbol does not destroy the true thing that the flag represents. The question of which "truths" were more important, those of Johnson, Smith, Cohen and the Des Moines students or those of the power structure, thus manifests itself before the Court. In our cross-cultural environment, each "community" (e.g. the students, the draft protester, the Nazis and the flag burners) was met with opposition from another "community" (e.g. those who claimed the disrespect of America's symbols or hate in the speech harmed them). Those in the latter community claimed psychological harm and disruption to their good life because of the actions of the first community. What was the Boston Tea Party, if not unpatriotic and disrespectful of the King? What of the freedom riders in the 1960s who defied the orders of governors? ... the activists who regularly practiced civil disobedience and combative speech to try to better society? Many of the appellants in the cases cited above likely believed they were also trying to create a better society. Were they wrong and the opposition right? Is the premise that constitutional protection of free speech only applicable if the general belief is that it is good speech? And isn't "good speech" an epistemically subjective statement? Are we mistaking the effect of a principle for the principle itself and then trying to change the basic principles when the effect is unpleasant?

Mill's Principle of Harm (1859) recognizes that the enjoyment of one's own liberty can result in the infringement of another's liberty or feelings. This is unavoidable, he says, but employing a teleological approach, he projects that in the long term more harm will be done to more people by prohibiting such enjoyment. In other words, the speech must be allowed until the harm to the particular outweighs the harm suppression will do to the general. In terms of free speech, some may feel injured by the speech in which others publicly engage such as those cases mentioned above or a Marilyn Manson tee-shirt at a church picnic; a song making fun of short people, or policy established based on recommendations of the Flat Earth Society.

In the practice of civility, the feelings of harm done to those listeners in disagreement should not be diminished, however, larger societal issues must take precedence because, in the long term, it serves more individuals and communities ***not*** to regulate speech. The greatest good for the greatest number, according to Mill, is to retain speech, whether it has negative or positive values attached to it because there is uncertainty in truth. If truth is uncertain and ill defined, then, increasing

regulation on speech is ill conceived. The regulation of speech may well silence what is true.

The Cases at Hand

Two contrasting cases that occurred in the same major metropolitan area represent the resolution of cultural conflicts about meaning and truth in differing ways.

In *Knight Riders of the Ku Klux Klan, ET. al. v. City of Cincinnati* (1995), the Klan applied for a permit to display a free-standing "Christian Cross" bearing the words "John 3:16" in Cincinnati's downtown Fountain Square for 10 days during the Christmas season. Already displayed on the square were a menorah and a Christmas tree. The public works director denied the application based on a section of the municipal code that prohibited obscenity, defamation, or "fighting words, including, but not limited to, a symbol, object ... which injures a person or group of persons"... .The Klan claimed such denial was in violation of its First Amendment rights. The city argued that because the Klan sponsored the cross, it injured the informed observer and tended to incite an immediate breach of the peace. In essence, the city argued that the Klan's sponsorship controlled the meaning of the cross, and that meaning was not a celebration of Christianity as the Klan claimed it was, nor was it the external reality of two pieces of wood nailed together at right angles.

Fountain Square long has been recognized by both the city and the courts as a public forum, so, any regulation of speech in that location is subject to the highest level of scrutiny by the court. Rather than addressing the question of the constitutionality of the statute, however, the Sixth Circuit Court of Appeals examined whether or not the cross with "John 3:16," a verse from the New Testament of the *Bible*, constituted "fighting words." The fighting words doctrine, established by the U.S. Supreme Court in earlier cases (e.g. *Chaplinsky v. New Hampshire*,1942, or *Texas v. Johnson*, 1989), considers whether the reasonable onlooker would regard the expressive conduct as "a direct personal insult or an invitation to exchange fisticuffs." In the opinion of the Sixth Circuit, the cross did not qualify as fighting words, and "given the circumstances of its display, the message expressed by the cross - be it one of good or evil - is too vague and general to be found likely to incite or produce imminent lawless action" (p. 2).

At a nearby state supported university, a sculpture in the center of campus became the focus of some students, faculty and administrators who claimed the sculpture was racist in nature because it was a tribute to a racist man. The sculpture had been displayed in the same spot for 15 years except for a year when it was used by the Smithsonian Institution in a traveling exhibit about the Hollywood film industry. The subject matter of the sculpture was D.W. Griffith and his cinematographer making the film *Way Down East.* Both men were natives of the university's home state, and both were well recognized in the film industry for elevating film making to an art form. The sculpture had been commissioned to an

internationally known artist with federal arts money under the proviso that the completed product contained people and matter pertinent to that state.

In both of these cases, the "meaning" of the objects (messages) in question varied depending on who was observing them. The cross was still a cross and the sculpture was still a sculpture, but when viewed within the context of sub-cultures, the objects took on very different meanings and the clash of those meanings ended up in court. In the Klan decision (1995), the panel wrote unanimously, "Defendants (i.e. the city, et. al.) do not argue, nor could they, that the cross itself would elicit a violent response. Their argument is that plaintiffs' sponsorship of the cross ... makes such action imminent. We disagree."

So, while the sponsorship provided a meaning other than Christianity to some individuals, to others it did not. To some, the cross may have taken on the meaning of pagan practices, hypocrisy, love, ritualistic brouhaha, sanctity, holiness or any other shared meaning evident within the cultural and cognitive structures of those individuals. Which meaning is the court to value? The courts have made clear that if the First Amendment favors one viewpoint over another, then the right to free expression becomes meaningless to all. The cross is still a cross, regardless of who sponsors it on the public forum of Fountain Square. The principle is the right of using a public forum for speech; the effect in this case was the claimed harm. If we ask the court to prefer one meaning over the other we are confusing the principle with the effect.

The sculpture case prompted a great deal of campus discussion, public meetings and serious consideration before resolution. During the process of this Amore speech approach, people were afforded the opportunity to learn ways in which different cultures perceived meaning. The head of the committee that originally commissioned the sculpture, an artist and art faculty member, said he was confounded by the racist allegations because Griffith's non-professional behaviors were not considered when the decision was made by the artist to produce the sculpture, and because the film depicted in the sculpture did not have the same racist content that other of Griffith's films had. Even though the sculpture is still a sculpture, the university administration opted to dismantle the sculpture, remove it from its central location and re-locate it from the center of campus to a place where it did not create a captive audience.

More than a year later, the sculpture was reassembled and located amidst weeping hemlock trees near the fine arts building. The discussion continues to resurface in the letters section of the campus newspaper. No side of the controversy can really claim victory. To those who found the meaning to be racist, the university still holds the symbol; to those who saw it as art, the university somewhat has obstructed the enjoyment of that art; to those who saw it as recognition of artistic contributions to film, the university diminished the centrality of the film makers' honor in their home state; to those who saw it as honoring a racist, the university diminished that honor only slightly. None of the groups involved in the controversy

commented that truth was served, meanings didn't change across the sub-cultures and communities - one group saying its truth was really true and others making the same claim. Both of them were correct.

Discussion/Conclusion

In examining these cases, Heidegger's criticism of the western world in general and America in particular is brought to mind. He claims the culture "experiences itself sociologically as a subject that establishes its own order and poses its own values as so many objects that it can manipulate" (Richardson, 1968, p. 25). Likely the values that are put on objects, such as the cross and the sculpture, are more closely connected to meaning than they are to truth, and those meanings, while each corresponding to fact are also each incomplete.

Most of those philosophers discussed seem to hint at such a proposition: Heidegger in his elimination of the idea of truth as agreement; Wittgenstein in his questioning of "meaning" as "use" and "understanding" more at truth, and claiming that when individual interests change, forms change and symbols that are retained change their meanings; and Socrates in his discrediting of Protagoras' assumption that man is the measure of all things (Plato, 1952). The questions become do we wish our beliefs in particular meanings to be imposed on others, and, if so, are we ready to have their meanings imposed on us? How can society value individual freedom if meaning keeps changing? If meaning and truth are independent of each other, as Wittgenstein argues (1965), and truth is not solely in the object, but also in the thought of the object, then what can society rely upon to determine what is acceptable in terms of free speech? While the courts are charged with seeking truth, should they be expected to disallow any pertinent meaning that might move society toward a more complete picture of the state of affairs? Does allowing the Nazis to have their parade in Skokie, Illinois, mean the Nazis were right?

The civil option practiced by the university in the sculpture case could be used to address some of these questions because it does provide for more speech, long recognized as a good remedy for bad speech. However, the resolution held few answers in terms of what to do the next time such an issue arises. Thus, it is no resolution at all, just a temporary fix. In the eventuality of the issue resurfacing, what course of action could be taken? Should the perspective that shouts the loudest be the one to have ideas accepted in the marketplace? ... the one with the loudest microphone? ... the one with the fastest computer? ... the one with the biggest bomb? ... the one with the most money?

The resolution of the U.S. Court of Appeals for the Sixth Circuit in the Klan case functioned similarly to the Wittgenstein premise that the only true proposition is that which is the case (i.e., the state of affairs), and the conflicting meanings were only addressed insofar as they related to the disinterested reasonable person who saw a cross at Christmas time. Would the message have been different had the cross

been constructed by the local Women Hating Almighty Omnipotent Universal Church?

Is the court's method preferable to the university's in that it insinuates a preference for neither side of the argument, applying the same First Amendment protections to those whose motive or message is distasteful as to those whose motive or message is in agreement with the most vocal group. Although the university moved the sculpture, people from both sides of the argument claimed the administration was showing a preference for the other side. When taking a "harm done" approach to First Amendment jurisprudence, the court may more readily discern the extent of actual damage than when taking a "speech value" approach, because the values of speech have to do with who is gauging them. When harm is measured based on speech value, rather than on immediate and imminent lawless action, it confounds the separate approaches. Furthermore, the courts are often reflective of the dominant beliefs of the time. The Constitution provides no entitlement to be protected from speech that hurts ones feelings.

Some have suggested (Leeper, 1999) that the courts should consider context, history and perspective in deciding cases, but that is precisely what the court has been doing in such cases. Bobbitt (cited in Bunker, 1998) identifies six frames of constitutional arguments: historical (dealing with original intent); textual (constitutional wording as seen by the reasonable, contemporary person); structural (the relationship among structures the constitution sets up); doctrinal (applying precedent): ethical (moral commitments evident in the constitution); and prudential (cost/benefits balance.) Arguing in only one frame, the prudential, those who argue to changes free speech jurisprudence are making a consequentialist argument, placing effect over principle, when effects change more readily than principles.

Courts, both civil and criminal, are charged with discovering truth, and, in these times, that is not an easy task. The difficulty publicly manifested when the President of the United States claimed a particular "truth" about sex, and a national debate ensued over whose truth was true. The courts deal with it daily. When law schools teach that winning is more important than seeking truth (i.e. what the case is), then we ask the courts to participate in hosting sophistry and concern it with questions that already have been resolved.

While the university's discussion resolution did not have the closure of the court's resolution, it may be desirable as a first course of action because it provides a method to enhance understanding toward a more complete picture of what is, and it promotes tolerance. The marketplace of ideas, however, assumes that all perspectives will be available, and that is a dangerous assumption. The university's discussion was in a controlled setting and the method does not delineate how case should be determined as the court does with precedents. Therefore, the university approach should be used to promote civility, but not legal dicta.

In the end, perhaps the best we can hope for in resolving disputes between meaning and truth is civility and open ears to hear what the meaning around

something is. As the world shrinks and the speed of communication increases exponentially it becomes imperative to examine meaning in all of its circumstances; lying not solely in the speaker, the message or the listener, but in each element and in all elements. If free society and its clashing cultures are to flourish each one as well as each community or group must enjoy those freedoms. That requires tolerance. Under the First Amendment all should be free to place individual, community and cultural meanings in the public purview without fear, and that can be accomplished only when public policy ensures that speech which puts others in identifiable, immediate and imminent danger is all that unconditionally should be blocked from the marketplace.

References

Anderson, John M. (1968). "Truth, process and creature in Heidegger's thought," in Manfred S. Frings (Ed.) *Heidegger and the quest for truth*, Quadrangle Books, Chicago. pp. 28-61.

Bacon, Francis (1980). "Essays, civil and moral," in *The Harvard classics*, Grolier Enterprises, Danbury, Connecticut.

Bok, Sissela (1978). *Lying: Moral choice in public and private life*. Pantheon Books.

Bork, Robert H. (1971). "Neutral principles and some first amendment problems," 47 *Indiana Law Journal*.

Bunker, Matthew D. (1998). "Imperial paradigms: First Amendment theory, legal interdisciplinarity and reductionism," *Communication Law and Policy*, 515-562.

Cohen v. California (1971). 403 U.S. 15.

Collin v. Smith (1978). 578 F. 2d 1197.

Emerson, Thomas I. (1963). "Toward a general theory of the first amendment," 72 Yale Law Journal.

Gandhi, Mahatma (1996). "Selected Political Writings", Dennis Dalton (Ed.), Hackett Publishing, Cambridge.

Garvey, John H. and Schauer, Frederick (1992). *The First Amendment: A reader*, West Publishing Company, St. Paul.

Jensen, Robert (1998*)* "First Amendment potluck", *Communication Law and Policy*,*2*, 563-588.

Knight Riders of the Ku Klux Klan, et. al. v. City of Cincinnati (1995). FED app. 0378P (6th Cir.).

Milton, John (1995). Areopagitica in Steven Knowlton and Patrick Parsons (Ed.) *The Journalist's moral compass*, Praeger Publishers, Westport, Ct. pp. 1-21. (Original work published in 1644).

Naess, Arne (1965). *Four Modern Philosophers: Carnap, Wittgenstein, Heidegger and Satre*, translated by Alastair Hannay, University of Chicago Press, Chicago.

Plato (1995). The allegory of the cave, in Steven Knowlton and Patrick Parsons (Ed.) *The Journalist's moral compass*, Praeger Publishers, Westport, Ct. pp. 90-95.

Plato (1962). "Doctrine of truth," translated by J. Barlow in *Philosophy in the Twentieth Century*. W. Barnett and H. Aiken (Eds.), Random House, New York. pp. 251-270.

Plato (1952). *Theaetetus.* translated by Benjamin Jowett in The Great Books University of Chicago Press, Chicago.

Richardson, W. J. (1968). "Introduction and commentary," in Manfred S. Frings (Ed.) *Heidegger and the quest for truth*, Quadrangle Books, Chicago. pp. 1-27.

Ricoeur, Paul (1968). "The critique of subjectivity and cogito in the philosophy of Heidegger," in Manfred S. Frings (Ed.) *Heidegger and the quest for truth*, Quadrangle Books, Chicago. pp. 62-75.

Searle, John R. (1995). The construction of social reality..Simon and Schuster; New York.

Texas v. Johnson (1989). 491 U.S. 397.

Tinker v. Des Moines Independent School District (1969). 393 U.S. 503.

Toqueville, A. de (1969) *Democracy in America*. New York: Harper & Row (Original work published in 1835)

Turner, Bryan S. (1990). "Periodization and politics in the postmodern", in Bryan S. Turner (Ed.) *Theories of modernity and postmodernity*, Sage, Newbury Park.

Wexler, Philip (1990) "Citizenship in the semiotic society", in Bryan S. Turner (Ed.) *Theories of modernity and postmodernity*, Sage, Newbury Park.

Whitney v. California (1927). 274 U.S. 357.