

Correspondence

To the Editor:

I am writing in response to a recent Note published by the *Journal, Group Vilification Reconsidered*,¹ which in my opinion is utterly misguided. The Note is a parody of legal scholarship. It is properly footnoted, relies upon social science references, and attempts to be analytical, at least in the trivial sense of dividing everything into three categories. Additionally, the Note is in at least one important respect factually misleading: although its origin is obviously the Skokie episode,² the Note carefully fails to mention that the “group-vilifying” speech it addresses never, in fact, took place. Speculation on why that was so might have led the notewriter to a broader view of the “proper purpose”³ (his words) of the First Amendment.

More important, however, are the shabby or simply erroneous analytical premises of the Note. Relying on a few social science studies apparently chosen at random, which are hardly sufficient basis on which to construct the argument that follows, the Note concludes that group vilification “generally enjoys a greater measure of persuasiveness than does ordinary group libel.”⁴ But who could be convinced by such a statement, at least upon the basis of the evidence presented, and why should courts or legislatures proceed to act upon this sort of conclusion? Similarly, the conclusions in the next paragraph are thought by the author to flow directly from the evidence he cites, yet the most cursory examination suggests that we are being presented with opinion, not fact.

Especially astonishing is the assumption that the First Amendment protects only speech that does not “[bypass] the conscious faculties of its hearer”⁵ The notewriter’s theory of the mind, as well as of the political process, is quaintly eighteenth century. It assumes that everyone operates rationally and makes political decisions on the basis of rational calculations from factual speech. We know, however, that such is not so, and both our law and culture assume just the opposite. The Supreme Court’s opinion in *Cohen v. California*,⁶ for example, is devastating to the author’s premises. The very artifacts of our culture—advertising, for instance—are witness to the fact that information in our society is transmitted both to the “conscious faculties of the average person” as well as through what I suppose the notewriter would call “unconscious faculties” (and the rest of us, simple human feeling). We are not yet “advanced” enough, so far as I am aware, to have abandoned First Amendment protection for speech that operates metaphorically or arouses feeling and passion, outrage and anger, hatred

1. Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1979).

2. See *id.* at 308 n.2.

3. *Id.* at 332.

4. *Id.* at 313.

5. *Id.* at 317-18.

6. 403 U.S. 15 (1971).

Correspondence

and shame. Under the Note's meager First Amendment, Daniel Webster presumably could have been prevented from engaging in his well-known rhetorical flourishes, because delivery of his speeches, as opposed to their printing, had appeal beyond the "conscious faculties" of his audience. As an antidote to this nonsense, I recommend Carl Schorske's recent book, *Fin de Siecle Vienna*.⁷ It describes how politics in the early part of the century challenged the nice liberal assumptions that the notewriter thinks are embedded in the Constitution, as if they were Spencer's *Social Statics*.

One of the most disturbing upshots of the attempts by major Jewish organizations to suppress the First Amendment rights of Nazis in Skokie were charges by various black groups that those Jewish organizations so exercised about free speech rights accorded racists had not seemed particularly interested in William Shockley's anti-black speech. The two illustrations at the end of the Note suggest that those criticisms were not just whistled Dixie. Simple analysis shows that Shockley's view that black intellectual and social deficiencies are "racially genetic in origin" is as susceptible of verification as is the statement that "the Protocols of Zion are true." Moreover, consider the statements that "[i]f believed, [Shockley's] speech could easily have injured the reputation of blacks as a group . . ."⁸ What does this mean, really? The statement is simply innocent of the purposes for which the First Amendment was adopted and of the hopes and fears that the Founders had for our democracy.

The fact is that Shockley's false statement of facts (which I take them to be) eventually will result in scholarly attempts to disprove him—which, in the end, will do more for the reputation of blacks than the suppression of Shockley ever could. Similarly, the Nazis' loud expression of prejudices generally repressed by our culture provokes discussion in public schools, churches, and newspapers that exposes and undoes such prejudice far more effectively than would the self-censorship, or official censorship, proposed by this Note. Its "solution," on the contrary, would allow prejudice to fester unattended beneath the body-politic.

I hope it is clear that I am not proposing a political test for publication in the *Journal*. But there is more to legal scholarship than the manipulation of legal jargon and the forms of citation or than the ability to cite a social science article when a statement of fact looks too general or an unfootnoted paragraph too sparse.

Very truly yours,
Charles S. Sims
New York, New York

7. C. SCHORSKE, *FIN DE SIECLE VIENNA* (1980).

8. 89 YALE L.J. at 330.

The author of the Note replies:

In essence, Mr. Sims makes two objections to my analysis. First, he asserts that the empirical data that I present regarding the nature and effects of group vilification¹ afford inadequate grounds for legislation. Second, he challenges my interpretation of the First Amendment's proper scope. The first criticism shows that Mr. Sims misconceives current law. The second reveals that he understands neither current law nor my argument from it.

Mr. Sims asks "why . . . courts or legislatures [should] proceed to act" on the basis of my empirical data. The question itself betrays a confusion between the adequacy of empirical data for the purpose of legislative action on the one hand, and for the purpose of judicial review on the other. It is plain that legislatures must often enact laws on the basis of uncertain or controversial hypotheses of human nature or social realities.² And it is equally plain that such laws are constitutionally valid.³ This is so even in the First Amendment area, where the Supreme Court has recognized that social-science studies of the nature and effect of obscene speech, even if controverted by other studies, are quite sufficient to sustain a legislative proscription of obscenity as a crime.⁴ Mr. Sims seems to want empirical data to be definitive before allowing legislatures to regulate any kind of speech. That position is not only contrary to current law, but it is undesirable as well. It would prevent a legislature from enacting laws until fresh psychological or sociological research conclusively disproved existing and fashionable theories. It would therefore freeze the law in its current state, perhaps forever.⁵ Thus it is Mr. Sims, and not I, who seeks to embed his assumptions in the Constitution.

Mr. Sims then disputes my analysis of the proper scope of First Amendment rights. But at the outset he misstates that analysis, by ignoring one-half of it. The Note repeatedly asserts that in order for speech to be unprotected under its analysis, that speech must not only bypass "the conscious faculties of its hearer," but also must threaten "serious harm to some substantial public interest."⁶ This limitation would of course result in the protection of Daniel Webster's rhetoric. Quite apart from this misstatement, Mr. Sims' criticism reveals serious misconceptions about current First Amendment law. He appears to assume, for example, that advertising enjoys the same constitutional protection as other speech. That is simply

1. See Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308, 311 nn.16 & 17, 312-13 nn.19-22, 314 n.26 (1979).

2. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61-62 (1973) (citing cases involving commercial, securities, antitrust, and environmental regulation).

3. See *Ginsberg v. New York*, 390 U.S. 629, 642-43 (1968) ("We do not demand of legislatures 'scientifically certain criteria of legislation.'") (quoting *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911)).

4. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60-61 (1973).

5. On a sensitive and highly controverted subject such as the nature and effects of obscenity or group vilification, it is quite possible that social-science research will never become so conclusive as Mr. Sims demands.

6. Note, *supra* note 1, at 317-18; see *id.* at 318, 322-23, 325, 330, 331-32 (repeating assertion).

Correspondence

untrue.⁷ Further, Mr. Sims finds *Cohen v. California*⁸ to be “devastating” to my analysis. In fact, *Cohen* buttresses my interpretation. Justice Harlan’s opinion recognizes that Cohen’s expression did not threaten serious harm to any substantial public interest.⁹ Harlan then concluded that the expression must be protected.¹⁰ *Cohen* therefore supports the objective accuracy of the “serious harm” element of my analysis: while *Chaplinsky*, *Feiner*, and *Roth* show that seriously harmful speech need not be protected,¹¹ *Cohen* establishes that speech falling short of “serious harm” must be protected.¹² Thus it is Mr. Sims, and not I, who lacks support in the case law.

Even without these misconceptions and misstatements, Mr. Sims’ critique would have little force, because it is internally inconsistent. He asserts that widespread ventilation of the Nazis’ group-vilifying speech will somehow lead to the exposure and undoing of racial and religious prejudice. This assertion—the “marketplace of ideas” hypothesis—assumes a single, common currency of discourse. It supposes that human behavior is uniformly the product of “ideas,” that “good ideas” will inevitably drive “bad” ones “out of business,” and that human behavior will consequently improve. But Mr. Sims also recognizes “the fact that information in our society is transmitted both to the ‘conscious [’ and] ‘unconscious faculties.’” That is precisely my point. And if that is so, how can Mr. Sims adhere to the marketplace-of-ideas view? If some opinions and habits of thought are learned unconsciously, what makes Mr. Sims so sure that reason alone can root them out? In professing his faith in an “invisible hand” in political affairs, it is Mr. Sims, and not I, who reveals an eighteenth-century theory of the mind: he imagines that reasonable anti-prejudice argumentation necessarily has the power, by itself, to dislodge reflex hatreds nurtured in the unconscious for millenia. Twentieth-century psychology, not to mention twentieth-century history, proves him wrong.

—Mark S. Campisano

7. *See id.* at 322 n.59 (citing cases on “commercial speech”). Obviously, advertising can be prohibited if it is false, or even only “deceptive and misleading.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-73 (1976). Advertising is thus much less protected by the First Amendment than other speech is.

8. 403 U.S. 15 (1971).

9. *Id.* at 19-20 (distinguishing instant case from *Roth v. United States*, 354 U.S. 476 (1957) (obscenity), *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (“fighting words”), and *Feiner v. New York*, 340 U.S. 315 (1951) (incitement to riot)).

10. 403 U.S. at 26.

11. *See Note, supra* note 1, at 315-18.

12. *See id.* at 321-22 nn.58 & 59 (citing similar decisions).

*The Editors wish to dedicate this issue to the memory of
Professor Fred Rodell of the Yale Law School.*



FRED RODELL (1907-1980)