THE TROUBLING RESURGENCE OF THE 'HECKLER'S VETO'

By Jan LaRue, Chief Counsel

Character assassination too often replaces compelling argument to rebut disfavored expression, especially Christian expression, in the public square. And when aided by government suppression, the First Amendment is the ultimate victim.

Heckle means to "harass and try to disconcert with questions, challenges, or gibes." A heckler is someone apparently incapable of articulating an intelligent argument using facts and logic when facing someone with whom he disagrees. Quite often, scurrilous name-calling and imputing malicious motives to opponents are thrown in for good measure.

Hecklers often turn to government to silence politically disfavored speech by means of the "Heckler's Veto." When a government official is complicit in suppressing protected speech, it undermines the First Amendment by silencing the very political discourse the Amendment is meant to protect.

The Supreme Court has rejected the "Heckler's Veto," by which "governmental grants of power to private actors" allow "a single, private actor to unilaterally silence a speaker even as to willing listeners." *Hill v. Colorado*, 530 U.S. 703, 735 (2000).

A. The best antidote to tyranny is free and spirited debate, not suppression of speech.

The first one to plead his cause seems right, until his neighbor comes and examines him.
Proverbs 18:17

Supreme Court Justice Louis D. Brandeis wrote in *Whitney v. California*, 274 U.S. 357 (1927):

> [The Founding Fathers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. *Id*. at 375.

Justice William O. Douglas wrote in *Terminiello v. Chicago*, 337 U.S. 1 (1949):

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky v. New Hampshire* [falsely yelling fire in a crowded theater], is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. … [T]here is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups. *Id*. at 4.

B. The Heckler's Veto—don't pass go—go directly to jail.

A small group of 11 Christians, representing the group "Repent America," preached the Bible to a crowd of people attending the homosexual "OutFest" event October 10, 2004. They displayed banners with Biblical messages. After a confrontation with a group called the "Pink Angels," described by protesters as "a militant mob of homosexuals," police arrested the 11 Christians and took them into custody.

After a preliminary hearing in December, a judge ordered four of the adult Christians to stand trial on three felonies and five misdemeanor charges. If convicted, they face a maximum of 47 years in prison. A fifth juvenile will stand trial in the juvenile justice system facing the same eight counts. The Philadelphia city prosecutor, Charles Ehrlich, attacked the Christians as "hateful" and referred to preaching the Bible as "fighting words"; the judge agreed. The American Family Association's Center for Law and Policy is representing the defendants.

WorldNetDaily.com reported that an article in the *Philadelphia Gay News*, published just days before the street festival, quoted homosexual organizers who were planning to block Christians from access to the event. They would by carrying large signs alongside the Christians to surround them and block their access to OutFest participants.

The experience of the Philadelphia 11 is not an isolated one.

On May 17, 2004, an Alabama court acquitted a street preacher, Matthew Bourgault, head of Consuming Fire Ministries, who had been charged with disorderly conduct for proclaiming the Gospel in public. Joe Murray, an attorney with the American Family Association Center for Law & Policy who represented Bourgault, said he got in trouble primarily for the content of his message. During his trial testimony, a police official characterized Bourgault's message in very hostile and anti-Christian terms. "He basically told the court that the basic message of salvation and repentance is abusive and obscene," Murray says.

Before they could get one of their trademark 10-foot wooden crosses fastened together, two men were arrested by Dayton, Tennessee, police officers on charges of disorderly conduct at the "Gay Day" gathering. According to *The Tennessean*, on May 9, 2004, Brian Charles O'Connell, 46, of Crystal River, Florida, and his friend Michael Joseph Siemer, 41, of Chattanooga, were each freed after posting $500 bond at the Rhea County Jail. They were charged with disorderly conduct, interfering with a special event and refusing to disperse after

police asked them to leave, according to jail officials. Dayton Police Chief Kenneth Walker said, "They wanted to go down to protest, and we told them they couldn't."

In June 2002, a federal district court concluded that Kansas City, Missouri, authorities acted properly when police arrested pro-life demonstrators who were peacefully assembled on public property at a Kansas City intersection. Police objected to the pro-life signs, calling them "offensive." The American Center for Law and Justice (ACLJ) convinced the court to drop the loitering charges against the demonstrators and, in March 2002, filed a federal civil rights lawsuit against the Kansas City Police Department for their actions.

The U.S. Court of Appeals for the Eighth Circuit affirmed the lower court's decision in July 2004 in *Frye v. Kansas City Police Department*, 375 F.3d 785 (8th Cir. 2004). *But see World Wide St. Preachers' Fellowship v. City of Owensboro*, 342 F. Supp. 2d 634 (W.D. Ky. 2004); *Grove v. City of York*, 342 F. Supp. 2d 291 (M.D. Pa. 2004).

Judge Arlen C. Beam wrote, "I dissent because the Constitution does not allow a small group of passersby to censor, through their complaints, the content of a peaceful, stationary protest. The First Amendment knows no heckler's veto, … even in an abortion case." *Id*. at 792.

The ACLJ is asking the Supreme Court to review and reverse the 8th Circuit's decision.

C. The Heckler's Veto invokes "Wall of Separation" to silence religious expression in the public square.

The U.S. Constitution has no such wall. It is a legal fiction created by the Supreme Court in reference to the Establishment Clause, and denounced by Chief Justice William H. Rehnquist in *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985). "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."

Religious speech has the same First Amendment protection as secular speech, according to the Supreme Court. "Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review Board v. Pinette*, 515 U.S. 753, 760 (1995).

The Rev. Dr. Michael Newdow, the California atheist, is suing again to get "under God" removed from the Pledge of Allegiance. When the Supreme Court rejected Newdow's first attempt to remove "under God" from the Pledge due to his lack of standing to represent his daughter, Chief Justice Rehnquist characterized Newdow's effort as a "heckler's veto":

> To give the parent of such a child a sort of "heckler's veto" over a patriotic ceremony willingly participated in by other students, simply because the Pledge of Allegiance contains the descriptive phrase "under God," is an unwarranted extension of the Establishment Clause, an extension which would have the unfortunate effect of prohibiting a commendable patriotic observance. *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2320 (2004).

On January 14, a federal judge denied Newdow a preliminary injunction in a second suit. *Newdow v. Bush*, No. 04-2208 (JDB), 2005 U.S. Dist. LEXIS 481, at *1 (D.D.C. Jan. 14, 2005). Newdow sought to prevent members of the clergy from praying at President Bush's inauguration

on January 20. Newdow claims that prayers like those offered at the 2001 inauguration make him feel like a "second-class citizen."

Newdow's complaint says "acknowledgments of God … remind him of … September 11, 2001, when a fanatic and his religious followers turned four of our airplanes into bombs, murdering 3,000 of our citizens … all in the name of their God."

Why is it that the easily "offended" fail to recognize a real offense, even when they are the offenders? Anybody who finds a moral equivalency between prayer at presidential inaugurals and bloodthirsty terrorists hiding behind religion has good reason to feel second-class.

A federal judge ruled last December 15 that the town of Bay Harbor Islands, Florida, must allow a resident to display Christian decorations alongside a public Jewish holiday display, as a result of a suit filed by the Thomas More Law Center December 2. The suit charges that for the past several years during the Jewish holiday of Hanukkah the town of Bay Harbor Islands has adorned the lampposts lining its main street with Jewish religious symbols, menorahs and stars of David, and has allowed a Jewish synagogue to display its 14-foot menorah on Causeway Island, the most prominent public location at the entrance of the town. Yet, town officials have denied every request by Sandra Snowden, a Christian resident, to display a Nativity scene purchased with her own money in a similar manner during the Christmas season.

D. The Heckler's Veto is the new "Grinch" stealing Christmas and other private religious expression in public schools.

Parents and their children who were victimized by Plano, Texas, Independent School District 's (ISD) unconstitutional censorship policy won a temporary restraining order last December 15 in federal district court. Liberty Legal Institute of Plano represents the parents and children.

The Civil Rights Division of the U.S. Department of Justice also wrote the ISD to say it was investigating its "alleged refusal to permit students to distribute religious messages during school parties and on school property."

Under ISD's policy, a 3rd-grade boy was denied his right to pass out goody bags, including candy canes with religious messages, to friends at their "winter" party, while secular gifts from other students were permitted. Parents were even told they could not hand out such messages to other parents at the party. A young girl was prohibited from passing out pencils with "Jesus" written on them at a class birthday party, while other gifts with secular messages were permitted.

ISD even sent a letter home requesting that parents not send their children to school with anything red or green this holiday season. All cups, plates, napkins and icing must be white or the children will violate the policy.

The ISD's lawyer said, "This area is predominantly white, and it's predominantly Christian. Frankly, it's pretty conservative Christian. We have to be careful, though, that those students who are Hindu or Islamic or Jewish don't have their rights trampled on." The lawyer didn't explain why trampling on the rights of Christians is acceptable.

The parents of an elementary school pupil who was told not to distribute invitations asking classmates to join a Bible club sued the school district in federal court, claiming their right to religious freedom had been violated. The lawsuit, filed December 15, says the Gilpin County, Colorado, RE-1 School District violated constitutional rights protecting free speech and

religion. Robert and Patricia Unruh say the school barred their daughter from distributing the invitations solely on the basis of their religious content.

The West Bend, Wisconsin, Joint School District made an 11th-hour decision last December 13, which averted a federal lawsuit scheduled to be filed the next day. The district had refused to allow five high school students to distribute Christmas cards containing the story of the religious origins of the candy cane. Liberty Counsel in Orlando, Florida, represented the students.

The Stafford Township, New Jersey, School District had refused to distribute fliers publicizing Child Evangelism Fellowship's (CEF's) "Good News Club" meetings because of the meetings' religious content, despite its willingness to distribute informational fliers for numerous other community groups. The Christian Legal Society's Center for Law & Religious Freedom filed suit on behalf of CEF. A federal district court in New Jersey found in its favor, but the school district appealed the decision to the U.S. Court of Appeals for the Third Circuit, which affirmed the district court decision. *Child Evangelism Fellowship of N.J., Inc. v. Stafford Township School District*, 386 F.3d 515 (3rd Cir. 2004). *See Rusk v. Crestview Local School District*, 379 F.3d 418 (6th Cir. 2004); *Hills v. Scottsdale Unified School District*, 329 F.3d 1044 (9th Cir. 2004).

E. The Heckler's Veto targets pro-life speech.

The New York Department of Motor Vehicles (DMV) excluded a pro-adoption group from its specialty license plate program. The DMV rejected The Children First Foundation's design of a crayon drawing of a yellow sun behind the faces of two smiling children. The DMV claimed a significant segment of the population would consider the design "patently offensive" because it also included the words "Choose Life." The Alliance Defense Fund filed suit on behalf of the plaintiffs in federal court last August.

What "significant segment of the population" prefers aborting children over adoption, other than the abortion industry and its allies? They have sued every state that has enacted a specialty license plate program that allows pro-life organizations to participate.

The Board of Education in Lansing, New York, voted last December 16 to end an abstinence-based education program because critics complained that "nontraditional families" might be "offended by the program's emphasis on marriage." Apparently, the only place the "offended" hear about marriage is in this program.

Too bad the board isn't more offended by fornication-based sex-ed programs that result in increased numbers of teen-age pregnancies, abortions, sexually transmitted diseases and school dropouts.

In June 2004, the Connecticut Civil Liberties Union (CCLU) threatened the Windsor Locks School District with a lawsuit if the school allowed a pastor to speak about homosexuality to the students, even though a pro-homosexual group called "Stonewall Speakers" was allowed to do so. The CCLU claimed that the pastor's type of presentation is best given at a church, and if presented during the school day, it would violate the gay student's right to equal protection. The school district will continue to exclude the pastor—so much for viewpoint neutrality and equal protection.

F. The Heckler's Veto targets Intelligent Design.

As a result of a suit filed by three parents of students, a federal judge ruled that a small sticker placed on a school textbook violates the Establishment Clause of the U.S. and Georgia Constitutions. The sticker reads: "This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered."

Despite the fact that *Webster's Dictionary*, which is probably in the school library, defines evolution as a theory, the judge said:

> The case law is clear that a governmental action or message that coincides with the beliefs of certain religions does not, without more, invalidate the action or message. … However, in light of the sequence of events that led to the Sticker's adoption, the Sticker communicates to those who endorse evolution that they are political outsiders, while the Sticker communicates to the Christian fundamentalists and creationists who pushed for a disclaimer that they are political insiders. *Selman v. Cobb County*, NO 1 02-CV-2325-CC, 2005 U.S. Dist. LEXIS 432, at *66 (N.D. Ga. Jan. 13, 2005).

Open-mindedness, critical thinking and careful study are supposed to be the hallmarks of a scientist and should be for a judge as well.

If a 33-word sticker tells those who believe in evolution that they are political outsiders, doesn't an entire textbook tell those who don't believe in evolution that they are political outsiders? And why is that constitutionally permissible?

G. Universities and colleges impose the Heckler's Veto in the form of oppressive and unconstitutional speech codes.

Universities, which have historically stood as bastions of free speech, have enacted draconian speech codes primarily at the insistence of homosexual activists. These codes generally punish speech that offends any group based on race, gender, ethnicity, religion or sexual orientation.

The Foundation for Individual Rights in Education (FIRE) has been on the forefront opposing the speech codes. Its Web site, http://www.thefire.org/index.php/topic/11, lists scores of lawsuits against colleges and universities across the country for free speech violations. A FIRE press release, January 14, 2005, provides an alarming example:

> Florida's Indian River Community College (IRCC) is engaging in a campaign of repression against a Christian student group for attempting to show Mel Gibson's *The Passion of the Christ* on campus. The college banned the Christian Student Fellowship from showing the film despite the fact that the college has hosted a live performance entitled "F**king for Jesus" that describes simulated sex with "the risen Christ." When the group complained to the college president, administrators pulled group leaders out of class and demanded an apology. IRCC also unlawfully requires that school officials attend every meeting of student organizations.

Does anyone think college officials would permit a sexually offensive performance mocking Allah and then demand an apology from offended Moslems?

A stamp commemorating the 75th anniversary of the American Bar Association issued August 24, 1953, in Boston, Massachusetts, depicts figures from the Supreme Courtroom wall representing "Wisdom, Justice, Divine Inspiration and Truth."

These are the things you shall do: Speak each man the truth to his neighbor; Give judgment in your gates for truth, justice, and peace. -- Zechariah 8:16

Justices Brandeis and Douglas would find that government's complicity in the "Heckler's Veto" to suppress protected expression is the ultimate "noxious" and "serious substantive evil." And they would be right.