

March 15, 2012

Memo in Opposition to Legislative Bill 948

The members of Media Coalition believe that Legislative Bill 948 violates the First Amendment and they have asked me to explain why. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Nebraska: publishers, booksellers and librarians as well as manufacturers and retailers of sound recordings, films, videos and video games.

L.B. 948 would make it a crime to use an electronic communication device to contact another person communicate using indecent, obscene, lewd or profane language or to suggest a lewd or lascivious act with the intent to “annoy,” “offend,” “harass” or “terrify.” The legislation offers no definitions for “annoy,” “offend,” “harass” or “terrify” either in the statute or by reference. “Lewd” and “profane” are also not defined. “Electronic or digital device” is defined only as any wired or wireless communication device and multimedia storage device. “

Government may criminalize speech that rises to the level of harassment or intimidation and many states have laws that do so but, this legislation reaches a much greater range of speech. Under this legislation, the communication does not need to be one to one, repetitive or unwanted. There is no requirement that the recipient or subject of the speech actually feel offended, annoyed or scared. It is unclear if the communication must be intended to offend or annoy a specific person or if a general intent to do so is sufficient. L.H.B. 948 is likely unconstitutional even if it were limited to direct contact by personal email but it is much broader. It applies to listserves, twitter accounts and chat rooms and could apply to web sites, blogs, and other Internet communication a person can subscribe to for updates or new content.

There are numerous recent examples of speech that was intended to be provocative that could be criminal under L.B. 948. When a Danish newspaper posted pictures of Muhammad, they were intended to be offensive to Muslims to make a point about religion but this could be a crime if a Muslim in Arizona viewed the pictures online and considered them profane. Some Arizona residents may consider Rush Limbaugh’s recent comments about a Georgetown law student lewd. He could be prosecuted if he intended his comments to be offensive. Similarly, much general content available in the media uses racy or profane language and is intended to offend, annoy or even terrify. Bill Maher’s stand up routines and Jon Stewart’s nightly program, Ann Coulter’s books discussing liberals and Christopher Hitchens’ writing expressing his distaste for religion or Mother Theresa, Stephen King’s novels or the *Halloween* films all could be subject to this legislation. Even common banter online about sports between rival fans frequently is meant to offend or annoy and often done using salty and profane language.

While protecting people from harassment is a worthy goal, legislators cannot do so by criminalizing speech protected by the Constitution. All speech is presumptively protected by the First Amendment against content-based regulation, subject only to specific historic exceptions. *R.A.V.*, 505 U.S. 377, 382; *Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). As the Court recently explained:

From 1791 to the present, . . . [the First Amendment has] “permitted restrictions upon the content of speech in a few limited areas.” [These] “historic and traditional categories long familiar to the bar[]” [] includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct . . .

United States v. Stevens, 130 S. Ct. 1577, 1584 (2010). See also *R.A.V.*, 505 U.S. at 382-83; *Free Speech Coalition v. Ashcroft*, 535 U.S. 234, 245-46 (2002).

There is no historic exception to First Amendment protection for speech simply because it annoys, offends or even terrifies regardless of whether it is lewd or lascivious. As the Court said in *Texas v. Johnson*, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” 491 U.S. 397, 414. See also *Street v. New York*, 394 U. S. 576, 592 (1969) (“It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers”); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (struck down a statute which limited speech which “arouses anger, alarm or resentment in others”); *Free Speech Coalition v. Ashcroft*, 535 U.S. at 245 (2002) (“It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities.”); *FCC v. Pacifica Foundation*, 438 U. S. 726, 745 (1978) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it”); *Carey v. Population Services Int’l*, 431 U. S. 678, 701 (1977) (“[T]he fact that protected speech may be offensive to some does not justify its suppression”).

In three recent First Amendment cases, the Court has emphasized that it is reluctant, if not unwilling, to expand the categories of unprotected speech to include different kinds of offensive or distasteful communication beyond the historic exceptions. In *Brown v. Entertainment Merchs. Ass’n*, 131 S. Ct. 2729 (2011), the Court declined to craft an exception for the sale of patently offensive violent video games to minors. In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court declined to create an exception for outrageous and upsetting speech in the vicinity of a private military funeral. And in *United States v. Stevens*, the Court declined to fashion a new First Amendment exception for depictions of actual animal cruelty.

Nor is there an exception to the First Amendment for speech that is profane or lewd or that suggests a lewd or lascivious act. Many would consider the speech of the Westboro Baptist Church at issue in *Snyder* to be profane, but the Court found it to be protected. 131 S. Ct. 1207 (2011). In *Sable Communications of California v. FCC*, 492 U.S. 119 (1989), the Court struck down a restriction on indecent but not obscene speech on commercial telephone communication. There is a historic exception for obscene speech which may be banned if it meets a specific narrow definition for obscenity enunciated by the Court in *Miller v. California*. 413 U.S. 15 (1973). In *Miller*, the Supreme Court created a three-part test that defined obscene material as descriptions or depictions of sexual conduct or lascivious nudity when, taken as a whole,

- i. Predominantly appeals to the prurient, shameful or morbid interest in sex;
- ii. Is patently offensive by prevailing community standards; and
- iii. Lacks serious literary artistic, political or scientific value.

Lewd or lascivious speech may be banned to the extent it also meets this definition of obscenity (or if it is broadcast on television or radio and meets the FCC's indecency standard). Otherwise, such speech is fully protected.

To the extent that harassment can be considered an existing category of unprotected speech, the bill is still unconstitutionally vague. In certain narrow, well-defined instances, speech may rise to the level of coercion, threats, intimidation, or persistent harassment and amount to a crime. L.B. 948 does not define many of its terms adequately to distinguish between protected speech and the traditional narrow crime of harassment. This vagueness in the legislation will have a significant chilling effect on protected speech as the bill provides criminal sanctions for a single violation. As noted above, a substantial amount of speech in the media could be subject to this legislation but speakers have little guidance to determine what speech is protected and what is subject to prosecution and must either risk a criminal prosecution or self-censor their speech. This vagueness is impermissible in a law limiting First Amendment guarantees. See *Baggett v. Bullitt*, 370 U.S. 360 (1964).

It may be that L.B. 948 is not intended to criminalize speech in the media but only what legitimately rises to the level of harassment; however an unconstitutional statute is not cured by a narrower intent or a promise by legislators or prosecutors that the statute will be used in such a limited fashion. As Chief Justice Roberts wrote, in *United States v. Stevens*, "We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." 130 S.Ct. at 1591 (2010).

Passage of this unconstitutionally overbroad and vague bill could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs' attorneys' fees.

If you would like to discuss further our position on this bill, please contact me at 212-587-4025 #3 or at horowitz@mediacoalition.org. We would be happy for the opportunity to work with the legislature to address the concerns raised in this memo.

We ask you to protect the First Amendment rights of all the people of Nebraska and reject or amend L.B. 948.

Respectfully submitted,

/s/ David Horowitz

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