

Memo in Opposition to Section 6 of Senate Bill 184

The members of Media Coalition believe that Section 6 of Senate Bill 184 plainly violates the First Amendment and that the existing law this legislation is meant to amend may also be unconstitutional. The trade associations that comprise Media Coalition have many members throughout the country, including Wisconsin: publishers, booksellers and librarians, makers and retailers of recordings, films, home video and video games.

Section 6 of S.B. 184 would make it a crime to post a message electronically using obscene, lewd or profane language or to suggest a lewd or lascivious act if done with intent to “annoy,” “offend,” or “harass.” The legislation offers no definitions for “annoy,” “offend” or “harass.” “Lewd” and “profane” are not defined in the statute or by reference. “Lewd” is generally understood to mean lusty or sexual in nature and “profane” is generally defined as disrespectful or irreverent about religion or religious practices.

Government may criminalize speech that rises to the level of harassment and many states have laws that do so, but this legislation takes a law originally meant to address irritating phone calls and applies it to communication on web sites, blogs, listserves and other Internet communication. S.B. 184 is not limited to a one to one conversation between two specific people. The communication does not need to be repetitive or even unwanted. There is no requirement that the recipient or subject of the speech actually feel offended, annoyed or scared. Nor does the legislation make clear that the communication must be intended to offend or annoy the reader, the subject or even any specific person. There is not even a requirement that any person has to actually view, hear or read the communication.

Speech protected by the First Amendment is often intended to offend, annoy or scare but could be prosecuted under this law. A Danish newspaper posted pictures of Muhammad that were intended to be offensive to make a point about religious tolerance. If a Muslim in Wisconsin considers the images profane and is offended, the paper could be prosecuted. Some Wisconsin residents may consider Rush Limbaugh’s 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 standup routines and Jon Stewart’s nightly comedy program,

Ann Coulter's books criticizing liberals and Christopher Hitchens' expressions of disdain for religion. Even common taunting about sports between rival fans done online is frequently meant to offend or annoy and is 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 with limited exceptions for specific historic exceptions. 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; *Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Free Speech Coalition v. Ashcroft*, 535 U.S. 234, 245-46 (2002).

There is no historic exception to First Amendment protection for speech solely because it annoys or offends 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 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 *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. 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. And, in *United States v. Stevens*, the Court declined to fashion a new First Amendment exception for depictions of actual animal cruelty. 130 S. Ct. 1577

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 but only if it meets a specific narrow definition 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 meets this definition of obscenity (or meets the FCC's indecency standard for television or radio). Otherwise, it is fully protected by the constitution.

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. S.B. 184 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 S.B. 184 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).

We believe it is important to add that it is that the existing law 947.0125 (3)(a) likely also violates the First Amendment. As explained above, speech that is intended to offend or annoy conveyed using lewd or profane language is still protected by the Constitution even in direct or one to one communication. It is possible such speech could be criminalized if it meets a narrow, specific definition of harassment but this law would apply to a single email rather than a pattern of behavior.

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. In a recent case brought by members of Media Coalition, the state agreed to pay fees of \$350,000.

If you would like to discuss our concerns further, I would appreciate that opportunity and can be contacted at 212-587-4025 #3 or horowitz@mediacoalition.org. Again, we ask you to protect the First Amendment rights of the people of Wisconsin and withdraw or amend S.B. 184.

Respectfully submitted,

A handwritten signature in black ink that reads "David Horowitz". The signature is written in a cursive style with a long horizontal flourish extending to the right.

David Horowitz
Executive Director
Media Coalition, Inc.
October 16, 2013