CIVIL LIBERTIES *By Harvey A. Silverglate*

Let's hear it for parody!

POLITICAL cartoonists and satirists, the Supreme Court warned in a unanimous 1988 decision protecting an ugly *Hustler* magazine satire of Reverend Jerry Falwell, would be endangered if we viewed their work as subject to tort doctrines that punish "outrageous" speech intended to cause emotional injury. 108 S. Ct. 876. Recent attempts to classify offensive words as "verbal assault" rather than free speech and to view parody as violative of intellectual property rights endangers unpopular speech.

Consider a letter sent in early April to a Web site that carried a satire of the widely broadcast Mastercard "priceless" ad ("There are some things money can't buy. For everything else there's Mastercard"). Adopting a Columbine school tragedy theme, it was "pretty sick and offensive" in the view even of the Web host but was still legitimate satire. The host received a "cease and desist" letter from Mastercard's lawyers, demanding the satire be removed because it violated Mastercard's trademarks and copyright.

Resorting to intellectual property law to squelch satire is, hardly unique nowadays. Also in April, a federal district court in Atlanta enjoined publication of Alice Randall's parodic sequel to Margaret Mitchell's *Gone With the Wind*, titled *The Wind Done Gone*. The Mitchell Estate successfully argued that Ms. Randall's work plagiarized the original epic. The judge indicated that Ms. Randall could have expressed criticism of slavery and racism without using extensive portions of Mitchell's work. Said publisher Houghton Mifflin: "Today's ruling, if allowed to stand, will have a chilling effect on all those who seek to use free expression and parody to explode myths and provoke new thinking."

Widespread sensitivity

Parody is under assault by criminal statutes as well. Last month, FBI agents visited Web programmer Karl Mueller about his Web site feature "Trench Coat Mafia," another parody of the repressive response to Columbine. Ironically, the parody of police overreaction provoked its own overreaction. Mr. Mueller told Declan McCullagh of *Wired News* that one of the agents accused him of "promoting" school shootings.

In academia, the University of Pittsburgh last month ordered freshman Matt Schiros to take down a personal Web site that asked site visitors to rate pictured faces according to "how black" they looked, using offensive characterizations for gradations of hue. The student, who was not using university computers, claimed he was engaging in a study of campus reactions to unpopular views about race to show the university's racial double standard.

The administration deemed it research involving "human subjects" that must be approved by the school's institutional review board. It partially backed down, however, upon receipt of a letter from the American Civil Liberties Union while still warning that "violations of Federal and University research policies that protect human subjects... will not be permitted."

Corporations, FBI agents and university administrators are not the only would-be censors who fail to appreciate satire, parody, irony and other verbal attacks on sacred cows. In March a student columnist penned "The Invasion," a sharply satiric column in *The Harvard Crimson* criticizing Harvard's Asian-American students for adhering to group stereotypes and engaging in self-segregation. The author, himself Asian-American, was attacked as racist.

A mere 13 years ago, the Supreme Court dealt with Rev. Falwell's attack on *Hustler*'s parody of a Campari Liqueur ad. It featured a photograph captioned "Jerry Falwell talks about his first time," a supposed "interview," as Chief Justice Rehnquist described it, disclosing Rev. Falwell's " 'first time' during a drunken incestuous rendezvous with his mother in an outhouse." The court reversed a judgment for "intentional infliction of emotional distress," reasoning that the very purpose of parody and satire is to inflict distress.

Continued tradition

Six years later, the court cautioned on the use of intellectual property law to squelch satire and parody when it ruled that the rap music group 2 Live Crew had not plagiarized Roy Orbison's song "Oh, Pretty Woman" by using lines and verses in a bawdy version.

Each generation has to fight the First Amendment war all over again. With today's twin obsessions for overprotecting intellectual property rights and ridding public discourse of offensive speech and ideas, vigilance seems appropriate.

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LAW AND LAUGHTER

"You are charged with crossing state lines to have sexual relations with a digital image."

ABA damages black law schools

By George B. Shepherd Special to The National Law Journal

EMBARRASSED BY THE scarcity of African-American lawyers, the American Bar Association (ABA) now sponsors many diversity initiatives. Most recently, successful attacks on affirmative action have led the ABA to suggest that law schools admit more blacks by deemphasizing the Law School Admission Test (LSAT). But it was the ABA that excluded blacks from the profession in the first place, and it did it with the LSAT and accreditation.

It is no accident that accreditation harms black law schools and black students. During the 1920s and 1930s, the ABA, elite law schools, the courts and state governments intentionally used restrictive bar exams and accreditation to reduce the number of new lawyers who were competing with existing lawyers. In doing this, they specifically focused on excluding blacks and other minorities from the profession.

Since then, collaborating with state governments and courts, the association has perpetuated two barriers—the bar exam and accreditation—that, as a severe unintended side effect, have prevented most blacks from entering the legal profession.

Most states grant licenses only to students who graduate from ABA-accredited law schools. The ABA's accreditation standards generally approve law schools that serve white students, but reject law schools that would serve blacks. The racist impact of ABA accreditation takes two forms: academic racism and financial racism.

Academic racism

If affirmative action were totally eliminated, accredited law schools would admit fewer than 2,000 blacks each year. Accreditation inflicts academic racism because the ABA generally denies accreditation to any school for which the average LSAT score is below 143. The average LSAT score for blacks is 142, compared to 152 for whites. The cut-off effectively permits whites to enter law school but filters out blacks. It permits accreditation of law schools that serve whites with LSAT scores that are far below average but shuts down any school that would serve average blacks.

Similarly discriminatory is the ABA standard that denies accreditation to schools with students with undergraduate grade averages below B-minus. The average black applicant received a B-minus average, compared to a B-plus for whites.

Financial racism

Accreditation requirements governing such amenities as libraries more than double law schools' costs. To survive, all law schools except taxpayer-subsidized state schools or private schools with large endowments must pass the costs along to their students by raising tuition—to more than $20,000. Without accreditation, the less-endowed law schools could prosper with tuition of less than $10,000. Given the disparity between white and black incomes, these standards effectively shut black students out.

Affirmative action has cured only a modest part of the accreditation system's discrimination. Without affirmative action, the system would deny admittance to any law school to more than 78% of black applicants. With affirmative action, the system still rejects more than 54% of blacks, compared to only 25% of whites.

Business and accounting provide reassuring examples of professions without mandatory accreditation or qualifying exams. In these professions, a greater diversity of services is available than in law, with cheaper prices and no increase in incompetence or fraud. Even lawyers with low LSAT scores could readily complete many simpler legal tasks. The ABA system denies consumers H&R Block-level lawyers.

The ABA's programs to deemphasize the LSAT in admissions indicate some recognition of the injustice of excluding people from law school based on discriminatory factors. However, the association needs to come to grips with the fact that its use of the LSAT destroys law schools that would serve blacks.

Without the ABA system, a whole new group of law schools would emerge. Like the historically black colleges that many surveys indicate provide the best college education for blacks, many of the new law schools would serve large numbers of African-Americans. Even without affirmative action, blacks could enter the legal profession.

Ironically, it is more difficult for most blacks to attend law school at this time than it was in 1920, before the civil rights movement eliminated direct racist discrimination. If accreditation continues and challenges to affirmative action succeed, black lawyers will become even rarer.

Mr. Shepherd, a professor at Emory University School of Law, has completed a study of ABA accreditation.