CIVIL LIBERTIES *By Harvey A. Silverglate*

Prior restraint in California

PROVING AUGUST to be a safe time to release shocking news, the Supreme Court of California issued an astonishing opinion on Aug. 2. By 4-3, the court approved an injunction against offensive speech uttered by a supervisory worker: a classic "prior restraint" for no more compelling reason than that racist epithets in the workplace create "an abusive working environment" that effects "a change in the terms and conditions of employment."

To the majority in *Aguilar v. Avis Rent-a-Car System*, 1999 WL 557001 (Cal.), this flowed naturally from the U.S. Supreme Court's earlier pronouncements allowing government to require employers to enforce federal civil rights laws (in this case, Title VII of the 1964 Civil Rights Act) forbidding sex or race discrimination resulting from creation of a "hostile work environment."

It was an insignificant legal advance, reasoned the California court, to issue an injunction against racist epithets pursuant to the state legislative equivalent, the Fair Employment and Housing Act.

In the modern era of constitutional litigation, appellate courts have refused to uphold injunctions not only against racist speech (*Near v. Minnesota*, 283 U.S. 697 [1931]), but even in a case in which the government argued the protection of national security in seeking in 1971 to bar publication of the Pentagon Papers (*New York Times Co. v. U.S.*, 403 U.S. 713 [1971]). Skokie, Ill., was prohibited in 1977 from enjoining American Nazis from marching, despite the town's large population of Jewish Holocaust survivors (*National Socialist Party v. Skokie*, 432 U.S. 43 [1977]). A Vietnam War protester was allowed to sport a jacket—in a courthouse no less—displaying the slogan "Fuck the Draft" (*Cohen v. California*, 403 U.S. 15 [1971]).

Mr. Silverglate is a bimonthly NLJ columnist and a partner at the Boston firm of Silverglate & Good.

Tactics of evasion

More to the point, oblique attempts to evade First Amendment protections in the name of "expanding civil rights" have in recent years been turned back by a unanimous U.S. Supreme Court.

In the 1980s, Rev. Jerry Falwell sued Hustler magazine and its publisher, Larry Flynt, for a parody demeaning Mr. Falwell's sex life. Mr. Falwell tried to evade the First Amendment barrier to libel by suing for "intentional infliction of emotional distress." He lost 9-0 when the Supreme Court, in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), reminded him that such speech is especially protected precisely because it is "calculated to injure the feelings of the subject."

An Indianapolis ordinance that created a civil rights cause of action allowing women to sue pornographers because they further the "subordination" of women likewise foundered because that "civil rights" measure was merely censorship by another name. *Hudnut v. American Booksellers Association*, 475 U.S. 1001 (1986).

More recently, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 116 S. Ct. 2338 (1995), the Supreme Court unanimously reversed an effort by the Supreme Judicial Court of Massachusetts to declare Boston's privately sponsored St. Patrick's Day Parade a "public accommodation" in which gays and lesbians must be allowed to march under their own, identifiable banners. In these cases, the court's left wing embraced the view that calling a law a civil rights measure doesn't trump the First Amendment (Justice David Souter wrote *Hurley*, and Chief Justice William H. Rehnquist penned *Hustler*).

Yet here was the California Supreme Court claiming not to be breaking new ground in enjoining offensive speech in the workplace, and the event appeared not to have been noticed by either The New York Times (which won its own prior-restraint battle when it published the Pentagon Papers) or the Wall Street Journal (the nation's premier publication monitoring employers' rights and obligations). It was as though a giant oak had fallen in the forest but no one was there to hear.

The battle over whether to permit censorship in the name of preventing a hostile work environment has been raging for some 15 years, and both sides, advocates of civil liberties and advocates of "inclusion" and "multiculturalism," have been expecting a showdown. That showdown came in this little-noticed California case.

If *Avis* obtains U.S. Supreme Court review, the high court may resolve the momentous question of whether this latest oblique assault on the First Amendment in the name of civil rights should fare any better than earlier efforts.