

Review

KINDLY INQUISITORS, The New Attack on Free Thought

Jonathan Rauch. Chicago, IL: The University of Chicago Press, 1993, 2012. 196pp.

Jeremy Harris Lipschultz *

George F. Will's forward to the 2013 edition of this book provides important focus to the problems arising when even one person is "offended" by free speech (xiii). From campus speech codes to legal and social theory aimed at balancing the First Amendment against other rights, Will flatly rejects the liberal movement toward "sensitivity," "inclusiveness," "multiculturalism" and other values that attempt to limit expression:

What is needed is a book explaining why the usual, and intended, result of this practice is a finding that those objectives... are more worthy than the objective of maintaining a liberal regime of protected expression. What is needed, more than ever, is *this* book. (xiv)

It has been twenty years since the first edition of *KINDLY INQUISITORS*, yet conflicts persist. The U.S. Supreme Court thirty years before Rauch in *New York Times v. Sullivan* (1964) and its progeny pressed ahead.

Justice William Brennan Jr. was a leading advocate in constitutionalizing libel law and articulating broad First Amendment rights for political and some other forms of speech. In *Sullivan*, now a half century ago, the court's opinion struck to the core of our concern here:

Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues

* **Jeremy Harris Lipschultz** is Isaacson professor in the School of Communication and UNO Social Media Lab, University of Nebraska at Omaha. He is author of *Social Media Communication* (Routledge, 2015), *Broadcast and Internet Indecency, Defining Free Speech* (Routledge, 2008), *Free Expression in the Age of the Internet* (Westview Press, 2000), and other books focused on media and the First Amendment.

should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. (376 U.S. 270)

Unfortunately, the modern Supreme Court is less enthusiastic when speech is less political and less public. Still, the Internet age ushered in boundless possibilities for the free exchange of ideas and even a lack of civility. Beginning with *Reno v. ACLU* (1997) the U.S. Supreme Court again sided with free expression by declaring website operators publishers—a move that offered the online world newspaper-style First Amendment rights of opinion.

The philosophical debate here about open societies, education and elitism may seem detached from what has now emerged as an age of social media in which every online user has publication rights. Still, the global threats remain—from concerns about racist speech to the campus speech codes debated two decades ago. Most college students today have access to social network sites (SNS) that offer wide-open computer-mediated communication (CMC) within a campus community and across others. The First Amendment, if it means anything, prohibits prior restraint of speech before publication. It is the potential for subsequent punishment that gives rise to concerns. The most recent iteration of these are social media policies, first developed by large corporations and organizations, and now spilling into campus administration thinking.

Rauch, like Will, sees political enemies active among “the old-fashion authoritarians, but also the newer ones, the egalitarians and humanitarians” influencing policy and law:

This book tries to defend the morality, rather than the legality, of a knowledge-producing social system which often causes real suffering to real people. It tries to defend the liberal intellectual system against a rising anti-critical ideology. (4)

His development of the phrase “liberal science” in defense of the system assumes “many Americans are dozing through the current attack” (5). My sense is that awareness, though, rises and falls within the larger context of events. From 9/11 and anti-terrorism legislation to disclosure of National Security Agency (NSA) PRISM spying program, the country has room to debate freedom. Our mainstream media, unfortunately, rarely provide a public forum for exploring these difficult issues, but social media spaces alert and awaken those interested in freedom.

Rauch is correct in understanding that calls for fairness and decency, as well as attempts to define art, are an attack on the liberal system. Still, more recent laws have focused on fighting child pornography rather than the larger porn industry. A criticism may be made that a more appropriate legal focus would be on the production of content that harms children instead. Yet, few would reasonably argue for an absolute First Amendment right.

In this sense, the introductory concern about balancing of rights misses important legal developments since this book first appeared. The courts have begun to consider intermediate and even strict scrutiny legal models that place a heavy burden on government when the desire is to restrict speech. These approaches require a showing of substantial government interest within narrowly tailored restrictions. While not widely adopted, they offer us optimism about our course away from the early-1990s.

Enter epistemology and Plato's views about knowledge:

The subject of epistemology is the nature and limits of human knowledge. Or, as Senator Howard Baker did not quite ask during the Watergate hearings, "What can one know and when can one know it?"

The problem of what knowledge is and how to find it is, of course, a serious question for philosophers, who for centuries have been debating just what we are entitled to claim we know—though unfortunately most people have trouble understanding what the philosophers are saying.

(35)

In Rauch's view, society must engage in the discovery of knowledge. He and Plato might have quite a discussion about how to sort opinion from fact on FOX News, CNN, MSNBC and the other politically charged news channels. Rauch yearns for the type of knowledge that can be "validated, truth tested, in some satisfactory way" (39). This can be difficult in the complex sciences offering indications but not definitive evidence on everything from global warming and climate change to causes of cancer. As my dissertation adviser enjoyed saying: "if you want certainty, go to the religion department."

So, we are left to a form of skepticism that allows for empirical conclusions, but only if open to future revision based upon new evidence. Here, then, is a system comprised of two simple rules:

- The system may not fix the outcome in advance or for good (no final say).
- The system may not distinguish between participants (no personal authority) (49).

Rauch's liberal science owes much to modern social and physical science research. While not reaching for objectivity and all of its problems, liberal science draws close to Stephen Hawking, the physicist who concedes that his black holes might "not exist" (52). Liberal science asks that we lighten up, accept "incompleteness" and "verbal outrages" (86).

Rauch's "enemies" of liberal science are fundamentalists, humanitarians and others seeking to exercise political powers of censorship. Authoritarianism, even aimed at preventing harassment, may run amok. If our universities cannot be open to rigorous inquiry and argument, where would this occur? As the University of Chicago President Robert J. Zimmer recently noted to incoming undergraduates, the aim of such argument is greater clarity. Readers might wonder about rapid technological change in the two decades since this book.

The 2013 edition of *KINDLY INQUISITORS* fortunately comes with an afterword in which Rauch defends his arguments and resists most new examples. He does offer the Apple App Store and pressure to remove controversial software as "timeless" (165). And, Rauch suggests new attacks are now old: "Two decades on, the regulation of speech deemed hateful or assaultive or harassing has spread internationally and dug in domestically" (166). He is particularly worried about universities and workplaces subject to potential liabilities for supporting hostile environments. I suspect his concerns might also extend to the more recent ouster of a professional basketball owner over his surreptitiously recorded remarks that were out of touch with the current times. From racism and gender discrimination to sports team names and logos, public opinion and mass media coverage challenge insensitivity.

There is, of course, an entirely opposite narrative. It can be argued that free speech is exercised in the service of progressive social change. While politically incorrect speech might pay a social and economic price for its exercise, the debate continues within liberal democracies. If we believe in the power of a marketplace of ideas to advance the best ones over time, then we must accept that faulty thinking is indeed part of a process. Rauch's liberal science seems all too idealistic and philosophical, and not connected

enough with the real-world intricacies of negotiating a debate that allows for disagreement and also promotes respect for one another.

This book is worth a second look twenty years later. It will no doubt lead the reader to reflect upon the nature of social and political change within a technologically networked society. This remains a thoughtful look at the challenging nature of protecting individual freedom and building a better society.