
Freedom of Speech: *Missouri Knights of the Ku Klux Klan v. Kansas City*

“Congress shall make no law abridging the freedom of speech.”

Q: Are black genes as good as white genes?

A: Not when it comes to intelligence. Not when it comes to building society. The blacks are very emotional people and they don't reason. This is why for thousands of years the blacks had nothing in Africa except the mud hut. They're eating their brothers. They live worse than the caveman did.

THESE ARE THE WORDS OF DENNIS Mahon, a former hydraulic mechanic for Trans World Airlines, and Imperial Dragon of the Missouri Knights of the Ku Klux Klan. Mahon ignited a national controversy in August 1987, when he and Exalted Cyclops J. Allan Moran requested air time on Kansas City's public access cable television channel in an exercise of their First Amendment right to free speech. Channel 20, the public access channel, was available to all on a first-come, first-serve basis, free of any editorial control from the cable company. Mahon and Moran planned to air weekly episodes of "Race and Reason," a program produced by Tom Metzger, former

Klansman and present leader of the White Aryan Resistance (WAR). "Race and Reason" had been on cable television for five years, reaching over fifty cities nationwide.

But in Kansas City, a community attempting to address problematic race relations, local leaders and the cable company did not simply accept the claim to a First Amendment right. In their judgment, racist diatribes were more than people should have to endure, particularly in their own homes, on their own televisions, and on a public access channel they paid a monthly fee to support. Some black ministers and politicians found it hard to believe that the First Amendment, which had protected them and their leaders throughout the civil rights movement, would now require them to be exposed to Klan propaganda.

Mahon and his fellow Klansmen marched in full Klan regalia to the cable company, American Cablevision, to present their formal request. At first the request was denied because company regulations required that programming on channel 20 be produced locally. The Klan was undeterred. Instead of airing "Race and Reason," it agreed to produce a local show. The program would be called "Klansas City Kable." Its host would be Imperial Dragon Dennis Mahon. American Cablevision then said its regulations required that at least six Klan members receive training in video production. The Klan was happy to oblige.

According to Mahon, a majority of "Klansas City Kable" shows would deal with racial issues. Other episodes would expose government and corporate bureaucracy. "Our show is based on the white working class," he says. "We are going to expose the filthy rich for what they are and most of them are white." There were also plans to interview black nationalists and black separatists, "who do not believe in racial interaction." According to Mahon, "They are just like Klansmen except they're black. Basically we get along with those men very, very well. In fact, we're all for them getting self-determination back in Africa."

But in Kansas City, the cable company studio is located in a neighborhood that is 95 percent black. American Cablevision was concerned that violence would occur. It was also afraid that many viewers would cancel their subscriptions. The sight of Klansmen marching to the studio in their robes was disturbing to many residents. And the idea of them marching into his living room on public access TV was intolerable to Reverend Emmanuel

Cleaver, pastor of the Saint James-Paseo United Methodist Church and a member of the Kansas City Council.

Reverend Cleaver grew up in Waxahachie, Texas. At the time, in the early 1960s, many communities in the South were still completely segregated and black social life centered around the church. In 1964, when he was fifteen, Cleaver led his first civil rights march to desegregate three downtown movie theaters, though it was not until he had graduated from college that Cleaver saw a movie in his own home town. In 1968, he moved to Kansas City, where he received his master of divinity degree, became a pastor, a board member of the local chapter of the American Civil Liberties Union (ACLU), a national vice-president of Reverend Martin Luther King, Jr.'s Southern Christian Leadership Conference, and in 1979, a member of the city council. One year later his family was awakened by the sound of shattering glass. A Molotov cocktail had been thrown through one of their windows, and outside a cross burned on their lawn. Though the FBI investigated the incident, no one was ever charged.

As in many big cities in the 1980s, race relations in Kansas City remained tense. The Kansas City School District is among the most segregated in the country. According to Cleaver, there have been racially motivated cross burnings and graffiti, black homeowners have been run out of white neighborhoods, and after a period of relative dormancy, the Ku Klux Klan has been trying for a comeback in the area.

According to Dennis Mahon, its principal state organizer, the Klan has become more sophisticated in its recruiting techniques. It now exploits a full range of media options in an exercise of its First Amendment rights. The Klan's newsletter is mailed to about five hundred recipients, each of whom is responsible for photocopying and distributing ten copies. Call-in telephone numbers with answering machines deliver the Klan's "racialist" message and seek contributions. Klan members appear on radio talk shows and, more important, are beginning to use television to spread their views and recruit new members.

Reverend Cleaver, however, did not see "Klansas City Kable" as an exercise in free speech. "My problem is that I never saw this as a First Amendment issue. I saw this as a terrorist organization attempting to use the airwaves to create an atmosphere where terror could thrive. I felt that they were trying to plant the seeds

of racial intolerance in a community where the problems already existed, and I felt that those seeds in many instances would germinate and would blossom. I don't believe that we should restrict people in terms of their First Amendment rights, as long as that right does not interfere with the right of other groups to exist. These are terrorists, they're murderers. History—recorded history—in this country will show that they have killed thousands of my people. Thousands.”

On the Supreme Court, the struggle between the fear of violence provoked by speech and the promise of the First Amendment produced perhaps the most famous principle in all of constitutional law: the “clear and present danger” test. The idea that government cannot punish speech unless it creates a clear and present danger was originally developed by Supreme Court Justices Oliver Wendell Holmes and Louis Brandeis at the time of World War I. Although the rhetoric was always ringing in support of the right to speak freely, in practice it proved difficult for the Court to determine when the danger was “clear” enough, how remote it could be and yet still be considered “present,” and exactly how perilous the “danger” had to be to justify suppressing speech.

Perhaps because free speech is so vital to American public life, free speech decisions often reflect larger social changes. In the early cases brought under the Espionage Act of 1917, the Supreme Court construed freedom of speech quite narrowly. Such men as labor leader Eugene Debs were jailed for opposing World War I and advocating socialism. Debs, who had run for president four times on the Socialist ticket, addressed an outdoor rally in Chicago on a Sunday afternoon in June 1918. He had just come from visiting a local jail where three “loyal comrades” were imprisoned for obstructing the draft. Debs said he was proud of his comrades and went on to criticize capitalist plutocrats, praise the working man, and prophesy the ultimate triumph of the Socialist crusade. He exhorted the crowd, “You need to know you are fit for something better than slavery and cannon fodder.”

Debs was convicted of causing and inciting insubordination, disloyalty, mutiny, refusal of duty in the military forces and obstructing the recruitment service of the United States. At his trial, he addressed the jury himself. “I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would

oppose the war if I stood alone.” Debs was found guilty and sentenced to two concurrent ten-year prison terms. The Supreme Court upheld the conviction and the sentence. As one First Amendment scholar has written, “It is somewhat as though George McGovern had been sent to prison for his criticism of the [Vietnam] war.”

Then, during the 1950s, faced with a number of cases involving the Communist party, the Supreme Court struggled to distinguish advocacy of organized violent action, which is within the government's power to prohibit, from advocacy of belief, which is not. In a 1951 case, the Court upheld the convictions of Communist party leaders for participating in a conspiracy to advocate the overthrow of the government. Six years later, the Court reversed the convictions of fourteen second-string party leaders, finding their teaching of Communist party doctrine, though it included advocacy of the overthrow of the U.S. government, to be more like advocacy of belief. (In other words, the danger it presented was not clear and present enough to justify suppression.)

In 1969, the Supreme Court reformulated the clear and present danger test. By this time, society generally, and the Supreme Court in particular, were prepared not only to tolerate, but to protect speech that would have astounded the justices who upheld Eugene Debs's conviction. In *Brandenburg v. Ohio*, the Court held that government can restrict speech only when it advocates the use of violence directed toward inciting imminent and likely lawless action.

Under the *Brandenburg* standard, unless Reverend Cleaver could show that “Klansas City Kable” would trigger violence that was both imminent and likely, not just hypothetically possible, he could not keep it off the air, no matter how offensive it would be to channel 20's viewers. Because the cable studio's neighbors had said they would fight to prevent the Klan from marching to the studio, Cleaver thought he could show that violence was likely. And Mahon, though often conciliatory when speaking to the media, did not rule out violence either. “We will go to war to have our show on the air. We will kill and we will take a chance of getting killed for freedom of speech. We are going to have our show on the air whether they like it or not.”

But because no episodes of “Klansas City Kable” were available, and no air date had been set, Cleaver and his allies on the

city council were not sure they could prove violence was imminent. In that case, they could not keep the Klan from exercising its constitutional right to speak. They decided to invoke another constitutional principle instead.

In addition to speech, the First Amendment protects writing, demonstrating, parading, leafletting, and certain forms of symbolic expression (such as wearing black armbands in school to protest a war). Confronted with cases where local governments have tried to restrict, or accommodate, these various kinds of speech, the Supreme Court has developed the principle that government can place reasonable regulations on when, where, and how speakers may express themselves. Under the Constitution, however, these regulations must not be motivated by an effort to restrict the *content* of what the speaker has to say. In legal terms, the right of free speech is subject to "reasonable time, manner, and place" regulations, as long as these regulations are "content-neutral." Therefore, a city government may require a parade permit or limit the ability to demonstrate in certain places in order to protect public safety, but the restrictions must apply evenhandedly to all speakers, regardless of the message they wish to convey.

So when the Village of Skokie, Illinois, home to thousands of Holocaust survivors, refused to issue a permit to Nazis to parade in front of the village hall, a federal court held that the town officials had violated the Nazis' right to free speech. Their refusal to allow the parade was not motivated by a fear of imminent, likely violence, but was content-based discrimination, prohibited by the First Amendment. The court wrote, "Any shock effect must be attributed to the content of the ideas expressed. Public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."

The context in which the speech is delivered may affect the application of these principles. Speech is most protected (that is, speakers are most free to say what they like) in streets, parks, and public places, which have "immemorally been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." These places are called public forums. Once established, a public forum cannot be eliminated by the government in order to silence speech. In essence, it belongs

to the people. According to Stephen Revar, the ACLU attorney who represented the Klan, "The public access channel today is what the speaker's soap box was two hundred years ago. It is the poor person's forum. It is one of the few ways in which someone with little means can reach a wide audience in today's technological age."

At the other end of the spectrum is private property. The right to exclude others from one's property is a basic organizing principle of U.S. society, and homeowners are free to forbid speech in their house or demonstrations in their front yard. Reverend Cleaver and the cable company argued that the public access channel was the private property of American Cablevision, not a public forum.

After consulting with the city's law department, Reverend Cleaver and his allies on the city council proposed a resolution eliminating the public access channel altogether. Many believed that the resolution was motivated by Cleaver's desire to keep the Klan from reaching a large television audience. But because the resolution would keep all producers of public access programming, not just the Klan, off the air, Cleaver was satisfied it was evenhanded, content-neutral, and would pass the First Amendment test.

Thus the Kansas City dispute raised the question: Is a public access channel the "soap box of the future," a public forum where speakers enjoy broad First Amendment protection? Or is it more like private property, where the cable company owner has control? The Klan's request was bringing the faded parchment of the First Amendment into the electronic age.

On June 16, 1988, the city council of Kansas City passed Resolution 62655 authorizing American Cablevision to drop the public access channel. The vote was nine to two.

One of the two votes against the resolution was cast by Joanne Collins, a native Kansas Citian who had served on the city council for sixteen years. A fifty-four-year-old grandmother married to a former schoolteacher, Collins got a lot of attention for her vote because she is black. Collins says, "I hate some of the things [the Klan] has done, I hate some of the things that they say, but I don't hate the person. . . . I come from a philosophy that you learn by education and you don't withhold information. . . . I have learned from even the most negative person, and because I

don't agree with him doesn't mean that he shouldn't be heard, or I shouldn't listen. I believe right will always prevail."

Collins's remarks echo the classic defense of free speech that dates back to John Milton, a belief in the importance of dialogue and faith in the power of reason and truth to emerge victorious. As Milton wrote in 1644, "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worst, in a free and open encounter?"

In this century, Justice Holmes shifted the metaphor from the battlefield to the marketplace: "When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

This model of the "marketplace of ideas" gives rise to the theory that the proper response to offensive speech is not to prohibit it, but to combat it with counterspeech. Those who follow Holmes's view believe that the strength of the First Amendment depends on a shared idealism and respect for the principle of free speech itself, if not for the views it permits to be expressed. When the voices of hate and intolerance grow louder, when the Klan holds rallies in Georgia and skinheads camp out in California, the most effective rebuttal, in this view, is to see them outnumbered by those who abhor racism and believe in peaceful pluralism.

As Justice Brandeis wrote in his famous defense of free speech: "Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and in its government the deliberative forces should prevail over the arbitrary . . . they knew . . . that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."

According to the theory of counterspeech, the proper remedy

for "Klansas City Kable" was for Reverend Cleaver and others to organize their own TV show exposing the errors of the Klan's views. The audience would decide for themselves to reject the Klan's message, and they would do so based on an informed debate that presented both sides of the issue. The rejection of the Klan, the theory goes, would therefore be more secure and long-lasting.

Reverend Cleaver, however, disputes this solution. He is not convinced that counterspeech is effective, and he feels society does not have time to wait for truth to prevail in the marketplace. Instead, Cleaver says, "We have a responsibility to challenge those who would annihilate us. We may lose in court every day. But I don't think we can sit passively and watch people who would like us to be dead receive a prominent spot on television."

On the other hand, Stephen Pevar says, "Free speech has to mean free speech. It's free speech for unpopular views as well as popular views. We can't possibly make distinctions between acceptable speech [and nonacceptable speech] and remain a free country. The same test that would prevent the Klan from appearing on cable TV would have prevented Martin Luther King, Jr., from speaking in Alabama." Listening to offensive speech is one of those times, Pevar adds, "when we just have to nod our head and say, 'That's the price we pay for liberty.'"

Yet a question remains: Why should we tolerate and grant free speech rights to people who, were they in power, would deny free speech to others? By Mahon's own admission, a nation run by the Klan would not protect free speech as we know it under the First Amendment. Assuming black people do not return to Africa, Mahon would like to establish a white nation in five states in the Northwest. All present residents of the area who did not wish to become citizens of such a nation would be paid to leave. Mahon says that in this new nation free speech will be allowed only as long as the speaker agrees with the government. "First of all, we'd have a Constitution because it will be a white nation. They can say what they want to say, but we will not allow treason against the white race. We will pay them to leave. We will not tolerate that. If somebody starts yelling at the white race, somebody else is gonna knock their block off."

To Pevar, the answer lies in the fact that U.S. society strives to stay true to democratic ideals, to be different from such a total-

itarian regime. "If you don't give them free speech," he says, "then the era that you're afraid of has already arrived. You've created it."

According to Pevar, Mahon's talk is exactly what the First Amendment protects, precisely because it is talk, not action. If it were action, and a crime were committed, then the perpetrator would be prosecuted in the criminal justice system. Referring to the Supreme Court's test, which allows speech to be suppressed only when it creates the danger of imminent likely violence, Pevar says, "There is a difference between speech and action. It's a fundamental difference and it's a constitutional difference. The Constitution guarantees free speech, it doesn't guarantee free killing. So [the Klan] can talk about killing all they want to and that is constitutionally protected."

But today when public debate is often angry, and racial issues continue to divide communities like Kansas City, some, like Reverend Cleaver, question such a system. "I don't believe that the Framers of the Bill of Rights ever intended the First Amendment to be so ubiquitous that it tolerated everything. Because if they really believed that, then the First Amendment could be used to dismantle everything they put together," he says. "I think that, like the Bible, like life, like love, the First Amendment is flawed. The older this nation becomes, the more mature this nation becomes, the more comfortable we are going to become in realizing that we do need to develop some exceptions. It's not something I think will damage or destroy America. In fact, it may save America."

When the city council voted to authorize the elimination of the public access channel, Pevar filed suit in federal district court on behalf of the Klan: *Missouri Knights of the Ku Klux Klan v. Kansas City*. The suit alleged that the city had discriminated against the Klan on the basis of the content of its speech, that the public access channel was a public forum that the city had no right to eliminate, and that in doing so the city violated not only the First Amendment rights of the Klan and other producers, but also those of viewers who have a right to watch uncensored programs.

The city tried to have the lawsuit dismissed. It claimed that the resolution dropping the channel was content-neutral, that the public access channel was not a public forum but the cable com-

pany's private property, and that the Klan was not deprived of its right to free speech. The city argued that the Klan, like any other speaker, was not entitled to its first choice of a means by which to spread its message. The city pointed out that the Klan could still solicit over the telephone, hold rallies, distribute leaflets, appear on radio or TV talk shows when invited, or march down "Main Street."

On May 26, 1989, the district court ruled against the city on all counts. It found that if the Klan succeeded in proving its allegations, it could win at trial and therefore should be given an opportunity to try. A trial date was set for September.

In June, the U.S. Supreme Court decided two cases that made the city even more pessimistic about its chances of prevailing. The Court held that burning the American flag in political protest and certain telephone Dial-a-Porn services were protected by the First Amendment. If the First Amendment was broad enough to protect those forms of offensive speech, the city's lawyers concluded, it could also protect the Klan's television program. After all, race relations are a subject of vital public debate in the United States and of crucial political significance. As such, they lie close to the core of the First Amendment.

The city council also knew that its lawyers estimated they had completed less than a quarter of the amount of work necessary to prepare for trial, yet had already amassed a large legal fee. The Klan's ACLU lawyers had accrued expenses of a hundred thousand dollars. If the city lost at trial, it could be liable for the ACLU's expenses as well as its own. Kansas City was in the midst of a budget crisis; there was a freeze on hiring and it was an election year.

The city offered to settle. It suggested an open-microphone format where anyone could come in and talk for fifteen minutes at a time. The Klan rejected the offer. Pevar set forth two conditions for any settlement: the public access channel had to be reinstated, and the city had to develop new regulations to ensure that the free speech rights of all public access producers would be protected.

The vote to reinstate the public access channel came before the city council on July 13, 1989. Reverend Cleaver moved for a public hearing on the issue. The motion failed. But Kansas Citizens demanded to be heard. A group of ministers, both black and

white, gathered at the railing separating the public area of the council chamber from the council members' desks. They asked repeatedly to be allowed to speak. Finally, the mayor agreed to allow them ten minutes. In a series of emotional speeches, each minister preached as if to a huge congregation.

A half hour later, the mayor called for order and a vote. The ministers kept speaking. The mayor called for the room to be cleared. The ministers and their followers began to sing an old spiritual with new words:

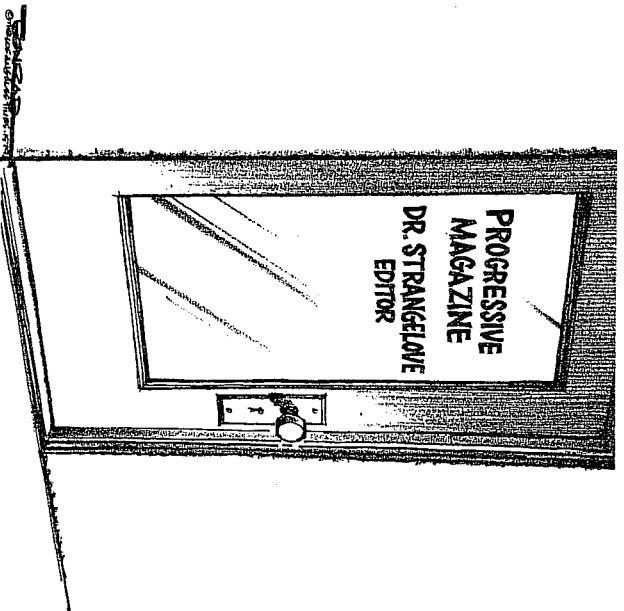
Keep the Klan off TV.
We shall not be moved.
Like a tree that grows by the water
We shall not be moved.

The mayor banged his gavel and again called for a roll call. The ministers were joined by others who, hearing what was happening in the council chamber, began to crowd the room. The chorus launched into "We Shall Overcome," then "The Star Spangled Banner," followed by "God Bless America." The singing was interrupted by a prayer asking God to touch the council members and make them understand that they should vote against the public access channel. An attempt was made to clear the room. It did not work. The mayor, now visibly impatient, again called for a vote. The ministers refused to leave; they began to pray. During the entire roll call and vote by the thirteen council members the ministers sang and then quietly recited the Lord's Prayer. "Our father Who art in heaven . . . hallowed be Thy name . . . forgive us our trespasses, as we forgive those who trespass against us." The vote was announced by the mayor: seven to three. The public access channel was to be resurrected with new guidelines protecting free speech.

The first episode of "Kansas City Kable" aired April 3, 1990.



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