

IS IT A MAN’S WORLD? RECONCEPTUALIZING THE RIGHT TO BE HEARD IN THE AFTERMATH OF THE CHARLOTTESVILLE TRAGEDY

Camille Gear Rich[†]

SYNOPSIS¹

This forthcoming Essay draws upon the racial conflict spurred by the “Unite the Right” rally in Charlottesville, Virginia, to explore the unspoken relationship between gender, protest, and violence in contemporary American society. It posits that the anemic response from the ACLU and government to the threat posed by the Unite the Right rally in Charlottesville stems from various gendered limitations in traditional First Amendment analysis. Armed with insights from masculinity studies, feminist legal theory, and Critical Race Theory, the Essay highlights some of these limitations. It aims to prompt more searching inquiry into the ways gender constructs inform seemingly gender-neutral areas of First Amendment law.

The Essay identifies two problems revealed by the responses to the Charlottesville events. First, it posits that our free speech jurisprudence was, as a matter of history, created in a “man’s world” with limited female participation. As a consequence, First Amendment doctrine encodes certain gendered cultural assumptions that assume a close relationship between passionate political protest and violence. This standard appeared to have required Charlottesville officials to protect protestors’ speech up to and until it constituted a call for immediate violence, or amounted to a concrete threat of tangible harm. This approach, in effect, subsidizes the interests of a specific identity construct called “protest masculinity,” which sociologists have recognized as a threat to minority communities and society more generally. The Essay argues that free speech doctrine focused on incitement and “true threats” of violence as the primary threats to democracy fails to adequately credit the harms inflicted by other forms of political intimidation.

[†] Professor of Law and Sociology, U.S.C. Gould School of Law.

1. Essay forthcoming.

Second, the essay shows that our traditional doctrinal focus on individual rights—rather than community concerns—is masculine-gendered, and has tangible consequences for the quality of American political debate. It argues that First Amendment law needs more nuanced constructs that can accommodate the various fiduciary duties government officials have to local residents, stemming from captive audience considerations, including being used as props, foils, or forced witnesses to intentionally demeaning and traumatizing public speech. It emphasizes the need for a doctrine that permits a historically contextualized inquiry into targeted attempts at intimidation, as this approach would far better subsidize the expression of free speech interests that are valuable to democracy.

The Essay concludes by examining areas of First Amendment doctrine that could be reimagined with more sensitivity to the risks posed by hidden masculinity norms. It shows that existing underdetermined and underdeveloped First Amendment doctrinal concepts can be interpreted to address fiduciary and communitarian interests. More broadly, the Essay claims that the time has come for First Amendment scholars to face the hidden gender norms in our doctrine, and to raise questions about how these standards compromise political debate. Once these norms are revealed, scholars can have far richer conversations about how First Amendment doctrine can be improved to ensure full participation by a broader range of speakers.